Federal Court  Cour fédérale

Date: 20220210

Docket: T-1041-21

Citation: 2022 FC 182

Ottawa, Ontario, February 10, 2022

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

JOHN CHAIF

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] John Chaif seeks judicial review of a decision of the Appeal Division [Appeal Division] of the Parole Board of Canada [Board] to refuse his request for day parole or full parole.

[2] The Board did not sufficiently explain its determination that Mr. Chaif would pose an undue risk to public safety for the requested day parole, when it had previously determined that

he would not pose an undue risk for the unescorted temporary absences [UTAs] it approved six months earlier. The application for judicial review is therefore allowed.

II. Background

[3] Mr. Chaif is 65 years old. He is serving an aggregate life sentence for first degree murder (sentenced in 1983), robbery (sentenced in 1990), and five counts of use of a firearm while committing a criminal offence (sentenced in 1990). He is currently incarcerated at Beaver Creek Institution, a minimum security facility. He has been at Beaver Creek since November 2016.

[4] Mr. Chaif became eligible for day parole on August 8, 2012, and for full parole on August 9, 2015.

[5] The Board previously authorized two compassionate escorted temporary absences [ETAs], the first for Mr. Chaif to attend his father's funeral in September 2015 and the second for him to attend his brother's funeral in July 2016. In July 2017, the Board granted Mr. Chaif a seven day personal development UTA to reside at a community residential facility [CRF].

[6] Mr. Chaif completed the UTA largely without incident, although he exceeded the time allocated for him to travel to the CRF by three hours because he stopped along the way to shop and to eat. Mr. Chaif says he informed the CRF of the delay, and they expressed no concern.

[7] Mr. Chaif appeared before the Board in March 2020 and was granted three 72-hour UTAs over a one-year period to reside at a CRF. However, due to the COVID-19 pandemic and the suspension of temporary absences, he was unable to complete the UTAs. Beginning in May 2018, Mr. Chaif was regularly granted ETAs to attend church until these too were suspended due to the pandemic.

[8] Mr. Chaif applied for day and full parole on May 11, 2020. His hearing took place on September 1, 2020.

[9] The Board noted a number of factors that favoured Mr. Chaif's release on day parole: a sustained minimum security designation; a low public safety risk rating; one year of incident-free institutional behaviour; and a low actuarial risk of recidivism. However, the Board expressed concern about Mr. Chaif's refusal to accept responsibility or accountability for his criminal behaviour, and his tendency to externalize blame for his actions. The Board concluded that the most appropriate course would be for Mr. Chaif to complete his previously-approved UTAs in order to build credibility.

[10] The Board denied Mr. Chaif's application for day parole or full parole on September 1, 2020. He appealed to the Appeal Division. On February 2, 2021, the Appeal Division affirmed the Board's decision to deny him parole.

III. Issues

[11] Mr. Chaif challenges the Board's and the Appeal Division's decisions to deny him parole on four grounds:

A. The Board did not sufficiently explain why granting Mr. Chaif day parole would present an undue risk to society.

B. The Board ignored evidence suggesting that Mr. Chaif presented a lower risk in September 2020 than he did when the UTAs were authorized six months earlier.

C. The Board failed to comply with the statutory requirement that it consider whether Mr. Chaif's release on day parole would facilitate his reintegration into society.

D. The Board failed to comply with the statutory requirement that it make the least restrictive determination that was consistent with the protection of society.

[12] Mr. Chaif also challenges the procedural fairness of his hearing before the Board, and argues that the approach of one Board member raised a reasonable apprehension of bias. In the same vein, he alleges that the Board member improperly fettered his discretion by treating Mr. Chaif's completion of the previously-authorized UTAs as a precondition to day parole or full parole. As will be seen in the analysis below, these arguments are best considered in the context of whether the decisions of the Board and Appeal Division were reasonable.

IV. Analysis

[13] The decisions of the Board and the Appeal Division are subject to review by this Court against the standard of reasonableness. Before a decision can be set aside, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100). Any shortcomings or flaws relied on by the party challenging the decision must be sufficiently central or significant to render the decision unreasonable.

[14] In *Yassin v Canada (Attorney General),* 2020 FC 237 [*Yassin*], Justice Henry Brown observed that jurisprudence prior to *Vavilov* instructed the Court to afford considerable deference to administrative decisions respecting parole. He found this approach to be "aligned in principle" with the proposition in *Vavilov* that reasonableness review requires the Court to give respectful attention to a decision-maker's demonstrated expertise (*Yassin* at paras 22-23, citing *Vavilov* at para 93).

[15] Judicial review of a decision by the Appeal Division affirming a decision of the Board requires the Court to ensure that both decisions are lawful (*Timm v Canada (Attorney General),* 2021 FC 775 at para 8, citing *Cartier v Canada (Attorney General),* 2002 FCA 384 at para 10).

A. *The Board did not sufficiently explain why granting Mr. Chaif day parole would present an undue risk to society*.

[16] The *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] provides in s 102:

102 The Board or a provincial parole board may grant parole to an offender if, in its opinion, **(a)** the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and **(b)** the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.	**102** La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

[17] Mr. Chaif argues that the Board's reasons fail to explain why granting him day parole would present an undue risk to society, when just six months earlier the Board determined that granting him three UTAs would not present an undue risk. The terms of Mr. Chaif's 72-hour UTAs were as follows:

(a) he would reside at the St. Leonard's Community Residential Facility in Windsor;

(b) he would volunteer at the Ojibway Nature Center, local churches, and the halfway house on projects including park clean-up and graffiti removal;

(c) public transportation would be used;

(d) the following conditions would be imposed:

(i) no direct or indirect contact with Margo Clinker;

(ii) immediately report all relationships with females; and

(iii) no association with any person involved in criminal activity.

[18] The only differences between the terms of the approved UTAs and those of the proposed day parole were that:

(a) the day parole would be of longer duration;

(b) the day parole would involve less unsupervised travel; and

(c) the day parole application included a description of the activities (church, college, family visits and woodworking) with which Mr. Chaif would occupy his time.

[19] Furthermore, Mr. Chaif maintains that there were several new positive factors that had reduced his risk to society since the UTAs were approved:

(a) he provided 16 new letters from community members who pledged to support him upon his release;

(b) the Windsor Police supported his request for day parole, even though they had not been supportive of the UTAs that were granted previously;

(c) he was willing to be subject to GPS monitoring at his own expense;

(d) an additional six months had passed with no institutional infractions;

(e) the requested day parole would involve only one trip from Gravenhurst to Windsor, rather than six 12-hour, unsupervised trips on public transit entailed by the previously-approved UTAs; and

(f) he was willing to comply with an additional condition requested by his Case Management Team to have no direct or indirect contact with any member of his victim's family.

[20] According to Mr. Chaif, during the hearing of his parole application, one of the Board members made comments that indicated he considered completion of the previously-authorized UTAs to be a "necessary step" before any other form of conditional release could be granted. Mr. Chaif says these comments demonstrate the Board applied the wrong test, and approached the hearing with a closed mind.

[21] In support of his application for judicial review, Mr. Chaif submitted an audio recording of the parole hearing together with an automatically-generated transcript. The parties agree that,

while it may contain some errors, the transcript is a reasonably accurate account of what transpired.

[22] One of the Board members began the hearing with the following observation:

> Okay, so, Mr. Chaif, we met with you back in March. And at that time, even though there were concerns that were presented, and even though you didn't have support from the community assessment team, the CAT, we agreed to authorize your UTAs […]
>
> Now, Mr. Chaif, by no fault of your own, your UTAs did not occur, with the whole COVID pandemic and so forth. Everything has been put on hold. [...]
>
> But again, you understand clearly our decision making at that time and your agreement. You understood clearly why the UTAs were fundamentally important for you in terms of moving forward and progressing towards other forms of conditional release.

[23] Shortly thereafter, the Board member said the following:

> So my question to you right off the bat is what's changed, then? What's changed? You, yourself, agreed that the UTAs, were a necessary step for you before moving forward to other forms of conditional release. What has changed, sir?

[24] In brief oral reasons delivered at the conclusion of the hearing, the Board member again referred to the uncompleted UTAs as the principal reason for denying Mr. Chaif day parole:

> […] we believe that the unescorted temporary absences are going to be a necessary, but a very positive step for you, sir, to work towards other forms of conditional release. We still maintain that position, sir, that we want to see the completion of the UTAs.

[25] This consideration also featured prominently in the Board's written reasons for its decision:

> […] The authorization of your three 72 hours UTAs is evidence that the Board recognizes your efforts and is supportive of conditional release in a measured manner. As indicated, the approved UTAs are there for you to establish credibility. The Board holds that this remains the case. Until such time that you have successfully completed a number of UTAs without issue or incident, the Board believes that day or full parole release is premature and that your risk will not be assumable. […]

[26] An outcome that might appear reasonable will not be reasonable in law if the basis upon which it was made is not justified; it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified by way of those reasons (*Vavilov* at para 86).

[27] It is clear that the Board believed Mr. Chaif's requested day parole presented a higher risk to society than the 72-hour UTAs it had approved previously. However, it is unclear from the Board's reasons why it considered this to be the case. The proposed terms of the two forms of release were virtually identical, and the proposed day parole included additional safeguards such as the possibility of GPS monitoring and further restriction on Mr. Chaif's contact with members of his victim's family. There is nothing in the Board's reasons to indicate that these additional safeguards were considered.

[28] The Respondent notes that the Board emphasized the seriousness and gravity of Mr. Chaif's offences, in addition to his "lack of accountability, insight and transparency regarding

[his] criminality and institutional behaviour." However, these circumstances were also present when the Board granted Mr. Chaif the 72-hour UTAs.

[29] Counsel for the Respondent suggested that a longer period of conditional release inherently presents additional risks. For example, Mr. Chaif will have a greater opportunity to form connections with individuals involved in crime. If this was the nature of the Board's concern, it is not apparent from the reasons.

[30] In *Farrier v Canada (Attorney General)*, 2020 FCA 25, the Federal Court of Appeal (*per* Gauthier JA) confirmed that it is no longer open to a reviewing court to uphold an administrative decision based on reasons that could have been provided even if they may be supported by the record (at paras 12-14):

> Before *Vavilov* I would probably have found, as did the Federal Court, that, in light of the presumption that the decision-maker considered all of the arguments and the case law before it and after having read the record, the decision was reasonable. […]
>
> In *Vavilov*, the Supreme Court clearly indicated that when an administrative decision-maker must make a reasoned decision in writing (this is the case here; see paragraph 143(2)(a) and subsection 146(1) of the Act), the assessment of the reasonableness of the decision must include an assessment of its justification and transparency. As the Supreme Court pointed out, the reasons given by the administrative decision-maker must not be assessed against a standard of perfection. The administrative decision-maker cannot be expected to refer to all of the arguments or details the reviewing judge would have preferred. "Administrative justice" will not always look like "judicial justice" (*Vavilov* at paragraphs 91 to 98).
>
> The sufficiency of reasons is assessed by taking into account the context, including the record, the submissions of the parties, practices and past decisions of the decision-maker (*Vavilov* at paragraph 94). However, the Supreme Court noted the principle

> that the exercise of the Appeal Division's power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it (*Vavilov* at paragraph 95).

[31] As the Supreme Court of Canada held in *Vavilov*, even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion (*Vavilov* at para 96). The importance of justifying the consequences of a decision is heightened where, as here, the decision affects a person's liberty (*Vavilov* at paras 133-135).

[32] In the present case, the Board did not sufficiently explain its determination that Mr. Chaif would pose an undue risk to public safety for the requested day parole, when it had previously determined that he would not pose an undue risk for the UTAs it approved six months earlier. The matter must be returned to the Board for redetermination.

B. *The Board ignored evidence, failed to consider whether Mr. Chaif's release on parole would facilitate his reintegration into society, and failed to make the least restrictive determination that was consistent with the protection of society*

[33] The remainder of Mr. Chaif's arguments may be dealt with briefly.

[34] The Board must include in its reasons an overview of the offender's representations, whether made in writing or during the hearing (Parole Board of Canada, *Decision-Making Policy*

Manual for Board Members (April 13, 2021) 2nd ed, No 19, "2.1 Assessment for Pre-Release Decisions" at para 17(g)). While guidelines, such as policy manuals, are not binding, they may nevertheless assist in assessing whether a decision resulted from an unreasonable exercise of power (*Latimer v Canada (Attorney General)*, 2014 FC 886 at para 34).

[35] In its redetermination of Mr. Chaif's request for day parole or full parole, it will be incumbent on the Board to meaningfully grapple with all of Mr. Chaif's representations, including (a) his willingness to be subject to GPS monitoring at his own expense; (b) the support of the Windsor Police for the requested day parole; (c) the reduced travel necessitated by day parole compared to the previously-authorized UTAs; and (d) the proposed further restriction on Mr. Chaif's contact with members of his victim's family.

[36] The CCRA imposes upon the Board a duty to consider whether an offender's release on parole would facilitate his reintegration into society, and to make the least restrictive determination that is consistent with the protection of society (CCRA, ss 100 and 101(c)). It is not enough for the Board to simply state its conclusions respecting these statutory requirements. The Board's conclusions must be supported by reasons that exhibit the requisite degree of justification, intelligibility and transparency.

V. Conclusion

[37] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the Board for redetermination.

[38] If the parties are unable to agree upon costs, Mr. Chaif may make written submissions respecting costs, not exceeding five (5) pages, within fourteen (14) days of the date of these Reasons for Judgment. The Respondent may make written submissions in reply, not exceeding five (5) pages, within fourteen (14) days thereafter.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the Parole Board of Canada for redetermination.

2. If the parties are unable to agree upon costs, Mr. Chaif may make written submissions respecting costs, not exceeding five (5) pages, within fourteen (14) days of the date of this Judgment. The Respondent may make written submissions in reply, not exceeding five (5) pages, within fourteen (14) days thereafter.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1041-21
STYLE OF CAUSE:	JOHN CHAIF v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE BETWEEN OTTAWA AND TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 24, 2022
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	FEBRUARY 10, 2022

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