

Date: 20090123

Docket: T-1651-07

Citation: 2009 FC 73

Ottawa, Ontario, January 23, 2009

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PATRICK EDWARDS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Patrick Edwards (the applicant) of the decision by the National Parole Board (NPB) – Appeal Division (the Appeal Division) dismissing the applicant’s appeal of the NPB – Trial Division’s (the Board) conclusion that the applicant caused serious harm to the victim of his offences.

[2] The applicant is serving a ten year, fifty day sentence for attempted murder, two counts of assault with a weapon, forcible confinement and three counts of uttering threats. The victim of these offences was the applicant's former girlfriend.

[3] The applicant, as an offender, was entitled to statutory release after serving two thirds of his sentence for the offences. The statutory release date was October 30, 2007. In March 2007, the Correctional Service of Canada (CSC) determined the applicant's offences caused serious harm to his victim based on an analysis provided by the Case Management Team dealing with the applicant. The CSC referred the applicant's case to the Board pursuant to section 129(2)(a)(i) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, (CCRA).

[4] The Board provided notice to the applicant and conducted a review of his case. The Board concluded that the applicant did not meet the criteria for detention and thus was eligible for statutory release. However, the Board did find that the applicant was serving a sentence for a Schedule 1 offence and that the offence caused serious harm to the victim. The Board ordered, pursuant to section 130(4) of the CCRA, that in the event that his statutory release was revoked the applicant would not be entitled to statutory release. This condition is sometimes termed a "one chance" release. The Board also imposed a number of conditions on the applicant's statutory release including a residency condition.

[5] Because of the residency condition, the applicant could not reside with his brother, a member of the Ontario Provincial Police, who had offered to take him in.

[6] The applicant appealed the Board's decision to the Appeal Division which affirmed the decision and denied the appeal.

THE DECISION UNDER REVIEW

[7] The Appeal Division in its decision concluded that:

We found that the referral to the Board was made within the required timeframes set out in law, and that upon consideration of the referral, the Board accepted it as it concluded that a sufficient case was made in order to conduct the necessary review. In that regard, we remind you that the Board is mandated by the Corrections and Conditional Release Act and Board policy to form an opinion as to whether your offending caused serious harm. As noted in the Board's Reasons for Decision and discussed during the hearing, and also noted by the judge in the Reasons for Sentence, you terrorized the victim and her family over a period of several months through your actions. The nature of your offences, the file information, and the victim impact statement are in our view sufficient to conclude that your offences caused serious harm to the victim. We are satisfied that the Board had the jurisdiction to review your case for detention.

STANDARD OF REVIEW

[8] The Federal Court of Appeal considered the standard of review which the Appeal Division would apply in respect of an appeal from the Board in *Cartier v. AG*, 2002 FCA 384. Justice Décary considered the nature of such an appeal. He noted that the Appeal Division hears appeals but on grounds akin to judicial review. He stated:

- a. The Appeal Division is a hybrid. It hears the offender's "appeal" and s. 147(4)(d) authorizes it to reverse, cancel or vary the decision made by the Commission against him. That is a power associated with an appeal. However, the grounds of appeal listed in s. 147(1) are essentially those associated with judicial review and s. 147(4) uses the phrase "on the completion of a review" (my emphasis). What is more, s. 147(5)(a) considerably reduces the Appeal Board's power of intervention, and at the same time significantly reinforces the status of the Commission's decision, when it requires the Appeal Division to be "satisfied" before rendering a decision "that results in the immediate release of an offender" that:

the decision appealed from cannot reasonably be supported in law, under the applicable policies of the Board, or on the basis of the information available to the Board in its review of the case ...

- b. Section 147(5)(a) is troubling, to the extent that it imposes a standard of review which for all practical purposes applies only when the Appeal Division, pursuant to s. 147(4)(d), reverses the Board's decision and permits the offender to be released. What standard should be applied when, as in the case at bar, the Appeal Division affirms the Board's decision pursuant to s. 147(4)(a)?
- c. Section 147(5)(a) appears to indicate that Parliament intended to give priority to the Board's decision, in short to deny statutory release once that decision can reasonably be supported in law and fact. The Board is entitled to err, if the error is reasonable. The Appeal Division only intervenes if the error of law or fact is unreasonable. I would be inclined to think that an error of law by the Board as to the extent to which it must be "satisfied" of the risk of release – an error which is alleged in the case at bar – is an unreasonable error by definition as it affects the Board's very function.
- d. If the applicable standard of review is that of reasonableness when the Appeal Division reverses the Board's decision, it seems unlikely that Parliament intended the standard to be different when the Appeal Division affirms it. I feel that, though awkwardly, Parliament in s. 147(5)(a) was only ensuring that the Appeal Division would at all times be guided by the standard of reasonableness.
- e. The unaccustomed situation in which the Appeal Division finds itself means caution is necessary in applying the usual rules of administrative law. The judge in theory has an application for judicial review from the Appeal Division's before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful. (underlining added)

[9] Accordingly, for the Board's decision to be lawful, it must be reasonably supported by law and fact.

[10] The Supreme Court of Canada held in *Dunsmuir v. New Brunswick*, 2008 SCC 9, that there are only two standards of review: correctness and reasonableness. On determining an appropriate standard of review Justice Bastarache and Justice LeBel wrote:

[57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means

that the analysis required is already deemed to have been performed and need not be repeated.

[11] Keeping in mind the Federal Court of Appeal's analysis in *Cartier*, I must determine whether the Appeal Division properly found the Board's decision to be lawful, that is reasonably supported by law and fact.

ISSUE

[12] The issue before this Court is whether the decision of the Board in the finding that the applicant caused serious harm to his victim in the commission of his offences is reasonable in law and reasonable on the facts the Board is entitled to consider.

STATUTORY PROVISIONS

[13] Section 130 (1) of the CCRA is set out in its entirety in Annex A; however, the portions of relevance are as follows:

130. (1) **Where the case of an offender is referred to the Board by the Service** pursuant to subsection 129(2) or referred to the Chairperson of the Board by the Commissioner pursuant to subsection 129(3) or (3.1), **the Board shall**, subject to subsections 129(5), (6) and (7), at the times and in the manner prescribed by the regulations,

...

(b) **review the case,**

and the Board shall cause all

130. (1) Sous réserve des paragraphes 129(5), (6) et (7), **la Commission** informe le détenu du renvoi et du prochain examen de son cas — **déferé en application des paragraphes 129(2), (3) ou (3.1) — et procède, selon les modalités réglementaires, à cet examen ainsi qu'à toutes les enquêtes qu'elle juge nécessaires à cet égard.**

such inquiries to be conducted in connection with the review as it considers necessary.

...

Decision of Board

(3) On completion of the review of the case of an offender referred to in subsection (1), the Board may order that the offender not be released from imprisonment before the expiration of the offender's sentence according to law, except as provided by subsection (5), where the Board is satisfied

...

Special order by Board

(4) Where the Board is not satisfied as provided in subsection (3) but is satisfied that

(a) at the time the case was referred to it, the offender was serving a sentence that included a sentence for an offence set out in Schedule I or II, or for an offence set out in Schedule I or II that is punishable under section 130 of the *National Defence Act*, and

(b) in the case of an offence set out in Schedule I or an offence set out in Schedule I that is punishable under section 130 of the *National Defence Act*, the commission of the offence caused the death of, or serious harm to, another person or the offence was a sexual offence

...

Ordonnance de la Commission

(3) Au terme de l'examen, la Commission peut, par ordonnance, interdire la mise en liberté du délinquant avant l'expiration légale de sa peine autrement qu'en conformité avec le paragraphe (5) si elle est convaincue :

Ordonnance de la Commission

(4) Quand elle n'a pas cette conviction, la Commission peut ordonner qu'en cas de révocation la libération d'office ne puisse être renouvelée avant l'expiration légale de la peine que purge le délinquant si, par ailleurs, elle est convaincue, à la fois :

a) qu'au moment où le dossier lui est déféré le délinquant purgeait une peine d'emprisonnement comprenant une peine infligée pour une infraction visée à l'annexe I ou II, ou mentionnée à l'une ou l'autre de celles-ci et qui est punissable en vertu de l'article 130 de la *Loi sur la défense nationale*;

b) que l'infraction — si elle relève de l'annexe I, ou y est mentionnée et est punissable en vertu de l'article 130 de la

involving a child,

it may order that if the statutory release is later revoked, the offender is not entitled to be released again on statutory release before the expiration of the offender's sentence according to law.

Loi sur la défense nationale
— **a causé la mort ou un dommage grave à une autre personne** ou est une infraction d'ordre sexuel commise à l'égard d'un enfant.

ANALYSIS

[14] The applicant submits that the evidence before the Board did not establish that he had caused serious harm to the victim of his offence.

[15] Section 99 of the CCRA defines 'serious harm' for the purposes of Part II of the CCRA as "severe physical injury or severe psychological damage". The Commissioner's Directive for Assessing Serious Harm No. 705 - 8 (Commissioner's Directive) issued by the Commissioner of CSC provides guidelines for determining whether physical injury and or psychological damage was incurred in the commission of an offence.

[16] The applicant submits section 99 of the CCRA defines serious harm as "severe physical injury or severe psychological damage" and that a finding the victim was terrified is not determinative as to whether the victim suffered severe harm as defined.

[17] The applicant submits that the evidence before the Board, that the applicant's offences caused any of the characteristics or signs of severe psychological harm to the victim as described in the Commissioner's Directive.

The following lists identify offence and victim characteristics identified in the mental health literature as being commonly associated with psychological disorders resulting from sexual and non-sexual victimization. The presence of each of these characteristics increased the probability that a victim of a criminal offence suffered severe psychological damage. It should be noted that the research literature indicates that sexual offences are more likely to cause severe psychological damage than non-sexual offences.

Offence characteristics

- sexual offence
- if a sexual offence, penetration was involved
- brutality (e.g., serious physical injury, torture)
- victim held captive
- repeated offences against victim
- long duration

Victim characteristics

- prior mental health or adjustment problems
- prior criminal victimization
- female
- 50 years old or older

Other factors

- prior positive relationship or relationship of trust with offender (e.g., parent abuses child, assault by marriage partner)
- no social support for victim provided (e.g., family disbelieves child sexual abuse victim, victim isolated from friends, family, services)

[18] The applicant says the Board's conclusion of serious harm is speculation as there was no evidentiary basis for a finding of severe psychological harm or physical damage.

[19] Notwithstanding the applicant's submissions, the Board is not limited to rules of evidence.

In *Mooring v. Canada*, [1996] S.C.J. No. 10, the Supreme Court held the Board is not limited to rules of evidence but is required to consider all relevant information. The Court stated at para. 26 and 29:

26...Clearly then, the Parole Board does not hear and assess evidence, but instead acts on information. The Parole Board acts in an inquisitorial capacity without contending parties – the state’s interests are not represented by counsel, and the parolee is not faced with a formal “case to meet”. ...

29 Like the basic structure and function of the Parole Board, the language of the Board’s enabling statute makes it clear that the board lacks the ability or jurisdiction to exclude relevant evidence. The language of the Corrections and Conditional Release Act confers on the Board a broad inclusionary mandate. Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account “all available information that is relevant to a case”... (Underlining added)

[20] Contrary to the applicant’s assertion, there was an abundance of reliable information before the NPB documenting the brutal and prolonged manner in which the applicant terrorized his victim that amply supported the Board’s conclusion that he had caused her serious harm in the commission of his offences.

[21] The CSC provided to the Board an Assessment for Decision that included a detailed account of the abuse suffered by the victim at the hands of the applicant. The Assessment for Decision provided a description of the applicant’s stabbing of the victim, in addition to his later attempt to shoot her, taken from the case summary provided by Peel Regional Police detective:

Edwards prevented her from exiting the car and handcuffed her to the seat adjuster (he used two sets of handcuffs, one on each hand). He then pulled out a large knife from a leather sheath and superficially stabbed [the victim] in the leg stating that if she screamed or cried she would “get more”. He then stated that he was going to take her back to his house and have sex with her. [The victim] asked Edwards if he was “crazy” to which he replied “you haven’t seen anything yet.”

[22] In support of its finding that the applicant had caused the victim serious harm, the NPB noted the physical and psychological elements of the applicant’s offences:

Your index offences, which took place over a number of hours, are described in file information as psychologically terrorizing and physically assaultive. The victim reports that she was sexually assaulted while both hands were handcuffed to the car and her mouth was covered by duct tape. She also reports that she was stuffed into the trunk of your car for an unknown length of time. This behaviour on your part can only be described as brutal.

[23] The Appeal Division noted that the Reasons for Sentence, the information on file and the victim impact statement all showed that the applicant terrorized his victim and her family over a period of months. This evidence and information was before the Board when it rendered its decision.

[24] I find the Board decided on the basis of relevant information before it which it was in law reasonably entitled to consider. I further find that the information before the Board was sufficient basis for the Board to reasonably that the applicant caused the victim serious harm.

[25] I conclude that the Board decided lawfully in that it considered information it was in law reasonably entitled to consider and that information was sufficient for it to reasonably decide as it did.

CONCLUSION

[26] The applicant has failed to demonstrate any basis to interfere with the Board's decision. In this respect, the application for judicial review of the Appeal Division decision to uphold the Board's decision does not succeed. The application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.
2. Costs are awarded to the Respondent.

“Leonard S. Mandamin”

Judge

Annex A

130. (1) Where the case of an offender is referred to the Board by the Service pursuant to subsection 129(2) or referred to the Chairperson of the Board by the Commissioner pursuant to subsection 129(3) or (3.1), the Board shall, subject to subsections 129(5), (6) and (7), at the times and in the manner prescribed by the regulations,

(a) inform the offender of the referral and review, and

(b) review the case,

and the Board shall cause all such inquiries to be conducted in connection with the review as it considers necessary.

Detention pending review

(2) An offender referred to in subsection (1) is not entitled to be released on statutory release before the Board renders its decision under this section in relation to the offender.

Decision of Board

(3) On completion of the review of the case of an offender referred to in subsection (1), the Board may order that the offender not be released from imprisonment before the expiration of the offender's sentence according to law, except as provided by subsection (5), where the Board is satisfied

(a) in the case of an offender serving a sentence that includes a sentence for an

130. (1) Sous réserve des paragraphes 129(5), (6) et (7), la Commission informe le détenu du renvoi et du prochain examen de son cas — déferé en application des paragraphes 129(2), (3) ou (3.1) — et procède, selon les modalités réglementaires, à cet examen ainsi qu'à toutes les enquêtes qu'elle juge nécessaires à cet égard.

Détention

(2) Le délinquant dont le cas est examiné aux termes du paragraphe (1) ne peut être libéré d'office tant que la Commission n'a pas rendu sa décision à son égard.

Ordonnance de la Commission

(3) Au terme de l'examen, la Commission peut, par ordonnance, interdire la mise en liberté du délinquant avant l'expiration légale de sa peine autrement qu'en conformité avec le paragraphe (5) si elle est convaincue :

a) dans le cas où la peine d'emprisonnement comprend une peine infligée pour une infraction visée à l'annexe I, ou qui y est mentionnée et qui est punissable en vertu de l'article 130 de la *Loi sur la défense nationale*, que le délinquant commettra, s'il est mis en liberté avant l'expiration légale de sa peine, soit une infraction causant la mort ou un dommage grave à une autre

offence set out in Schedule I, or for an offence set out in Schedule I that is punishable under section 130 of the *National Defence Act*, that the offender is likely, if released, to commit an offence causing the death of or serious harm to another person or a sexual offence involving a child before the expiration of the offender's sentence according to law,

(b) in the case of an offender serving a sentence that includes a sentence for an offence set out in Schedule II, or for an offence set out in Schedule II that is punishable under section 130 of the *National Defence Act*, that the offender is likely, if released, to commit a serious drug offence before the expiration of the offender's sentence according to law,

(c) in the case of an offender whose case was referred to the Chairperson of the Board pursuant to subsection 129(3) or (3.1), that the offender is likely, if released, to commit an offence causing the death of or serious harm to another person, a sexual offence involving a child or a serious drug offence before the expiration of the offender's sentence according to law.

When order takes effect

(3.1) An order made under subsection (3) takes effect on the day on which it is made.

Effect of order where additional

personne, soit une infraction d'ordre sexuel à l'égard d'un enfant;

b) dans le cas où la peine comprend une peine infligée pour une infraction visée à l'annexe II, ou qui y est mentionnée et qui est punissable en vertu de l'article 130 de la *Loi sur la défense nationale*, qu'il commettra, s'il est mis en liberté avant l'expiration légale de sa peine, une infraction désignée en matière de drogue;

c) en cas de renvoi au titre du paragraphe 129(3) ou (3.1), qu'il commettra, s'il est mis en liberté avant l'expiration légale de sa peine, l'une ou l'autre de ces infractions.

Prise d'effet de l'ordonnance

(3.1) L'ordonnance — rendue aux termes du paragraphe (3) — visant à interdire la mise en liberté du délinquant prend effet à la date de son prononcé.

Peine supplémentaire

(3.2) Si le délinquant assujetti à une ordonnance — rendue aux termes du paragraphe (3) — visant à interdire sa mise en liberté avant l'expiration légale de sa peine est condamné à une peine supplémentaire qui entraîne une augmentation de la durée de la peine d'emprisonnement prévue au paragraphe 139(1) :

a) l'ordonnance fait l'objet d'un examen par la Commission selon les modalités réglementaires de

sentence

(3.2) Where, before the expiration of a sentence in respect of which an order under subsection (3) has been made, an offender receives an additional sentence and the date of the expiration of the sentence that includes the additional sentence as provided by subsection 139(1) is later than the date of the expiration of the sentence that the offender was serving before the additional sentence was imposed,

(a) the Board shall review the order at the time and in the manner prescribed by the regulations where, as a result of the additional sentence, the statutory release date has already passed or is within nine months after the day on which the offender received the additional sentence; and

(b) the order is cancelled where, as a result of the additional sentence, the statutory release date is nine months or more after the day on which the offender received the additional sentence.

Board's powers on review

(3.3) The Board shall, on completing a review under paragraph (3.2)(a)

(a) confirm the order to prevent the release of the offender until the expiration of the sentence in respect of which the order was made; or

(b) amend the order to prevent the release of the

temps et autres lorsque, en raison de la peine supplémentaire, la date de la libération d'office est déjà passée ou tombe dans la période de neuf mois qui suit;

b) l'ordonnance est annulée lorsque la date de la libération d'office est postérieure d'au moins neuf mois à celle de la condamnation.

Décision

(3.3) Au terme de l'examen prévu à l'alinéa (3.2)a), la Commission :

a) soit confirme l'ordonnance et interdit la mise en liberté du délinquant avant l'expiration légale de la peine visée par l'ordonnance;

b) soit modifie l'ordonnance et interdit la mise en liberté du délinquant avant l'expiration légale de sa peine déterminée conformément au paragraphe 139(1).

Maintien en détention

(3.4) Le délinquant visé par une ordonnance qui fait l'objet de l'examen prévu à l'alinéa (3.2)a) ne peut être libéré d'office tant que la Commission n'a pas rendu de décision aux termes du paragraphe (3.3).

Ordonnance de la Commission

(4) Quand elle n'a pas cette conviction, la Commission peut ordonner qu'en cas de révocation la libération d'office ne puisse être renouvelée avant l'expiration légale de la peine que purge le délinquant si, par ailleurs, elle est

offender until the expiration of the sentence that includes the additional sentence as provided by subsection 139(1).

Detention pending review

(3.4) An offender in respect of whom an order, that is subject to review under paragraph (3.2)(a), has been made is not entitled to be released on statutory release before the Board renders its decision under subsection (3.3) in relation to the order.

Special order by Board

(4) Where the Board is not satisfied as provided in subsection (3) but is satisfied that

(a) at the time the case was referred to it, the offender was serving a sentence that included a sentence for an offence set out in Schedule I or II, or for an offence set out in Schedule I or II that is punishable under section 130 of the *National Defence Act*, and

(b) in the case of an offence set out in Schedule I or an offence set out in Schedule I that is punishable under section 130 of the *National Defence Act*, the commission of the offence caused the death of, or serious harm to, another person or the offence was a sexual offence involving a child,

it may order that if the statutory release is later revoked, the offender is not entitled to be released again on statutory

convaincue, à la fois :

a) qu'au moment où le dossier lui est déféré le délinquant purgeait une peine d'emprisonnement comprenant une peine infligée pour une infraction visée à l'annexe I ou II, ou mentionnée à l'une ou l'autre de celles-ci et qui est punissable en vertu de l'article 130 de la *Loi sur la défense nationale*;

b) que l'infraction — si elle relève de l'annexe I, ou y est mentionnée et est punissable en vertu de l'article 130 de la *Loi sur la défense nationale* — a causé la mort ou un dommage grave à une autre personne ou est une infraction d'ordre sexuel commise à l'égard d'un enfant.

Sortie avec escorte

(5) Seule la permission de sortir avec escorte pour raisons médicales prévue par la partie I peut être accordée au délinquant dont la Commission a interdit, conformément au paragraphe (3) ou à l'alinéa (3.3)b), la mise en liberté avant l'expiration légale de sa peine.

Non-renouvellement de la libération d'office

(6) Lorsque le délinquant assujéti à une ordonnance rendue en vertu du paragraphe (3) ou de l'alinéa (3.3)b) — visant à interdire sa mise en liberté — bénéficie de la libération d'office aux termes de l'alinéa 131(3)a), celle-ci ne peut, en cas de révocation, être renouvelée avant l'expiration

release before the expiration of the offender's sentence according to law.

Order not to be released

(5) An offender who is in custody pursuant to an order made under subsection (3) or amended under paragraph (3.3)(b) is not eligible to be released from imprisonment under this Act except on a temporary absence with escort for medical purposes under Part I.

Where order for release revoked

(6) Where an offender is ordered under subsection (3) or paragraph (3.3)(b) not to be released and is subsequently released pursuant to an order made under subparagraph 131(3)(a)(ii) or (iii) and the statutory release is later revoked, the offender is not entitled to be released again on statutory release before the expiration of the offender's sentence according to law.

(7) [Repealed, 1995, c. 42, s. 45]

légale de sa peine.

(7) [Abrogé, 1995, ch. 42, art. 45]

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1651-07

STYLE OF CAUSE: PATRICK EDWARDS
v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 4, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN J.

DATED: JANUARY 23, 2009

APPEARANCES:

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