Federal Court  Cour fédérale

Date: 20120227

Docket: T-343-11

Citation: 2012 FC 268

Ottawa, Ontario, February 27, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

PETER COLLINS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the National Parole Board (the Board) – Appeal Division, dated January 20, 2011. The Appeal Division upheld the determination to deny full parole primarily because the Applicant would be deported to the United Kingdom (UK) where he would not be subject to supervision.

[2] For the following reasons, this application is dismissed.

I. Background

[3] The Applicant, Peter Collins, is currently serving a life sentence for first degree murder at Bath Institution. His eligibility date for full parole was October 14, 2008.

[4] The Applicant is a citizen of the UK. Should he be released from prison on day parole, full parole, or an unescorted temporary absence; he will be deported back to the UK.

A. *Decision of the Board*

[5] Following a hearing on June 11, 2010, the Board reached the decision to deny day or full parole to the Applicant.

[6] The Board acknowledged the Applicant's institutional performance had not been problematic for a number of years. He was involved with the harm reduction movement and HIV/AIDS awareness. He had also derived benefit from programs completed during incarceration.

[7] The Board considered the Applicant's efforts to create a framework of support in the UK. This included a letter indicating that he would reside with his aunt and be supported by a Circle of Support and Accountability on arrival. There was also information that the support group in

England believed he would be eligible to be subject to a Violent Offender Order or Acceptable Behaviour Contract.

[8] However, the Board found that these arrangements, although well-intentioned, did not provide statutory supervision. He would not be the subject of a license in the UK and the National Probation Service indicated in the previous year that they would not provide any sort of supervision or support for him.

[9] The Board also expressed concern that the Applicant continued to be assessed as a moderate risk for re-offending. It referred to an underlying issue of what the psychiatrist called argumentativeness, or attitude toward authority that had coloured his relationship with staff of Correctional Service of Canada for many years.

[10] The Board concluded:

> The primary difficulty that you face is your deportation status, in addition to the assessment of your risk. However, the Board notes that you have the ability to request a transfer to the United Kingdom and refuse to do so and the Board's assessment of your risk, in the absence of supervision, remains a valid concern.
>
> To briefly summarize, while the Board understands that your assessed risk has likely reduced from what it had been, you are still assessed as posing a moderate risk for re-offending violently. The plan that you have proposed for full parole, if deported to England, does not provide the level of supervision required to meet that risk, and as a consequence, the Board has concluded that your risk remains undue.

B. *Decision of the Board's Appeal Division*

[11] The Appeal Division upheld the Board's decision to deny day and full parole. It found no breach of the duty to act fairly or to ensure an impartial hearing as all relevant information, both positive and negative, was carefully assessed and weighed.

[12] The Appeal Division was also satisfied that the Board conducted a fair risk assessment in accordance with the criteria set out in the *Corrections and Conditional Release Act*, SC 1992, c 20 (*CCRA*) and reached decisions that were "reasonable and well supported."

[13] More specifically, the Board was found to have appropriately advised the Applicant that should a conditional release be granted, an immigration bail hearing was required and if bail was denied, he would be deported to England and not subject to any mandatory supervision.

[14] The Appeal Division stressed that the Board assesses an offender's risk on parole based on the decision-making criteria set out in section 102 of the *CCRA*, regardless of whether an offender is released in Canada or deportable to another country. The protection of society is the paramount consideration in the determination of any case under paragraph 101(a) of the *CCRA*, no matter where an offender intends to reside.

[15] The Board was found to have conducted a fair assessment and considered the positive aspects of the Applicant's case. The Appeal Division stated "the Board could not ignore the fact that despite all your accomplishments (e.g. programming/counselling, peer counselling and

HIV/AIDS work, escorted temporary absences (ETA's), compliant behaviour), you continued to be assessed as a moderate risk for reoffending violently."

[16] The Board was also able to consider and weigh the fact that there would be no mandatory supervision or an insufficient level of supervision in the foreign country to adequately manage and monitor an offender's level of risk. In reaching this conclusion, the Appeal Division relied on the determinations of this Court in *Scott v Canada (Attorney General)*, 2010 FC 496, [2010] FCJ no 595 and *Pashkurlatov v Canada (Attorney General)*, 2008 FC 153, [2008] FCJ no 192.

[17] The Appeal Division summarized its determination regarding the Applicant's parole decision as follows:

> It is clear from the Board's written reasons that the Board appropriately focussed upon the crucial issue of whether granting you parole would constitute an undue risk to society pursuant to the criteria set out in CCRA. In essence, the Board's refusal to grant your parole was based on your very serious and violent index offence for the First Degree Murder of a police officer for which you are serving a life sentence, your assessed moderate risk to reoffend violently and the fact that your proposed release plans in England did not provide for a sufficient level of supervision required to manage that risk.
>
> […]
>
> The Board's decisions to deny day and full parole are the least restrictive determinations consistent with the protection of society.

II. Relevant Provisions

[18] Sections 100-102 of the *CCRA* establish the purpose and principles guiding the Board in parole determinations by stating:

Purpose of conditional release	Objet
100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.	**100.** La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.
Principles guiding parole boards	Principes
101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are	**101.** La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :
(a) that the protection of society be the paramount consideration in the determination of any case;	*a)* la protection de la société est le critère déterminant dans tous les cas;
(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and	*b)* elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des

assessments provided by correctional authorities, and information obtained from victims and the offender;

victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

Criteria for granting parole	Critères
102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,	**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.
(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.	

[19] Section 128 addresses immigration status and its implications for parole:

Continuation of sentence	Présomption
128. (1) An offender who is released on parole, statutory release or unescorted temporary absence continues, while entitled to be at large, to serve the sentence until its expiration according to law.	**128.** (1) Le délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte continue, tant qu'il a le droit d'être en liberté, de purger sa peine d'emprisonnement jusqu'à l'expiration légale de celle-ci.
[…]	[…]
Deeming	Cas particulier
(3) Despite subsection (1), for the purposes of paragraph 50(b) of *the Immigration and Refugee Protection Act* and section 40 of the *Extradition*	(3) Pour l'application de l'alinéa 50b) de la *Loi sur l'immigration et la protection des réfugiés* et de l'article 40 de la *Loi sur l'extradition,* la peine

Act, the sentence of an offender who has been released on parole, statutory release or an unescorted temporary absence is deemed to be completed unless the parole or statutory release has been suspended, terminated or revoked or the unescorted temporary absence is suspended or cancelled or the offender has returned to Canada before the expiration of the sentence according to law.	d'emprisonnement du délinquant qui bénéficie d'une libération conditionnelle d'office ou d'une permission de sortir sans escorte est, par dérogation au paragraphe (1), réputée être purgée sauf s'il y a eu révocation, suspension ou cessation de la libération ou de la permission de sortir sans escorte ou si le délinquant est revenu au Canada avant son expiration légale.
Removal order	Mesure de renvoi
(4) Despite this Act or the *Prisons and Reformatories Act*, an offender against whom a removal order has been made under the *Immigration and Refugee Protection Act* is ineligible for day parole or an unescorted temporary absence until the offender is eligible for full parole.	(4) Malgré la présente loi ou la *Loi sur les prisons et les maisons de correction*, l'admissibilité à la libération conditionnelle totale de quiconque est visé par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés* est préalable à l'admissibilité à la semi-liberté ou à l'absence temporaire sans escorte.

[20] Subsection 50(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ensures that a removal order made in respect of a foreign national who has been sentenced to a term of imprisonment in Canada is stayed until that person's sentence is completed.

III. Issue

[21] The sole issue raised by this application is as follows:

Did the Board and Appeal Division err in finding that the term "society" within sections 100-102 of the *CCRA* was intended to include societies outside of Canada?

IV. Standard of Review

[22] The Board and Appeal Division have recognized expertise in matters related to the administration of the *CCRA* (see for example *Sychuk v Canada (Attorney General)*, 2009 FC 105, [2009] FCJ no 136 at para 45; *Bouchard v Canada (National Parole Board)*, 2008 FC 248, [2008] FCJ no 307 at para 37). The reasonableness standard has therefore been applied to questions of fact, mixed fact and law and statutory interpretation arising in this context (see *Scott*, above at para 32).

[23] In considering reasonableness, this Court should only intervene where the decision does not accord with the principles of justification, transparency and intelligibility or falls outside the range of possible, acceptable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47)

V. Analysis

[24] The effect of granting this application would be to reject the decision of Justice Paul Crampton in *Scott*, above, where he previously held that the term "society" in the *CCRA* must be

read to include any society outside Canada. The Applicant has not persuaded me of the merits of adopting that approach.

[25] *Scott*, above, also involved a UK citizen serving a life sentence in Canada. His parole was likewise denied because he continued to pose a risk and would be subject to insufficient supervision on return to his country of nationality. On judicial review, the Applicant unsuccessfully challenged the interpretation of "society" in the *CCRA* as extending beyond Canada's borders.

[26] Justice Crampton noted at para 43 that since Parliament chose to insert the word "society" in various sections of the *CCRA* while employing the words "Canadian society" in other instances, this was indicative of an intention not to limit "society" as used in the *CCRA* to Canada. In support of this interpretation, he referred to Canada's international obligations at para 44:

> [44] To ignore the interests of a foreign society in determining when to deport an offender believed to pose a significant risk to reoffend for murder or any other serious crime, and under what circumstances, would result in an extreme form of international beggar-thy-neighbour policy. Such a policy would be incompatible with nations' interest in promoting harmonious relations with each other, if not their moral obligations towards each other.

[27] As a consequence, Justice Crampton found at paras 46-50 that the Board should "consider whether a foreign offender's release plan sufficiently mitigates the risk to the foreign society to warrant removing the offender to that society." The fact that an offender "may not be subject to any ongoing state or other effective supervision or monitoring" constitutes information that is relevant to a case.

[28] This reasoning also expanded on previous jurisprudence. In *Pashkurlatov*, above at paras 9-10, the Court highlighted that "[t]he Board is mandated to exercise caution in releasing persons before their sentence is served or the period for statutory release had been reached" and "[i]t would seem incongruous that a foreign prisoner could obtain parole without any regard for later supervision upon deportation while a Canadian prisoner would have to be subject to supervision." Although not central to his final determination and left to be resolved in future cases, Justice Frederick Gibson in *Ng v Canada (Attorney General)*, 2003 FCT 781, [2003] FCJ no 1018 at paras 21-26 implied the term "society" in the *CCRA* could include "society at large" as opposed to a narrower conception of "Canadian society."

[29] The Applicant asks the Court to reconsider this line of reasoning based primarily on the decision in *Capra v Canada (Attorney General)*, 2008 FC 1212, [2008] FCJ no 1519 where an offender asserted *Canadian Charter and Rights of Freedoms* (*Charter*) violations in relation to subsection 128(4) of the *CCRA*. He suggests that the interpretation adopted in *Capra* creates a clear distinction between Canadian and non-Canadian societies and recognized the potential for differential treatment of foreign offenders.

[30] However, I am inclined to agree with the Respondent's position that this interpretation of *Capra* is incorrect and of limited assistance to the Applicant. The Court in *Capra* did not find any *Charter* violations and, even if these violations occurred, subsection 128(4) of the *CCRA* was considered a reasonable limit prescribed by law that could be demonstrably justified under section 1. The Court explicitly recognized at para 42 that the "fundamental purpose of the scheme

created by CCRA s. 128(3)—(7) is to ensure the circumstances of impending removal are factored into how an offender's sentence is served."

[31] To the extent that any distinction was referred to it was in relation to those foreign nationals facing a deportation order, a concern that was found to be a necessary consequence of a valid deportation scheme. Justice James Russell stated at para 102 of *Capra*, above:

> [102] The removal order is part of a constitutionally valid deportation scheme that does not offend the Charter. This constitutionally valid differential treatment of the Applicant has to be taken into account in sentencing. Subsection 128(4) is Parliament's attempt to deal with the adjustments to sentencing that are required as a result of the valid constitutional distinction that is made between the Applicant as a foreign national subject to removal and Canadian offenders and foreign national offenders who are not subject to removal. The change in the form of the sentence is a response to, and is consequential upon, a valid deportation scheme. This is why, I believe, the Respondent sees it as part of that deportation scheme. As I have already pointed out, that is a position I cannot accept because of my view of the jurisprudence as to what qualifies as a deportation scheme under section 6 of the Charter. However, I think it is accurate to say that the differential treatment embodied in subsection 128(4) of CCRA is a necessary consequence of a valid deportation scheme. Once a removal order enters the picture, it is difficult to see how foreign offenders could be treated in the same way as their Canadian equivalents. […]

[32] He further noted at para 108 that "[t]he impact is negligible, in my view, because the offender has no right of access to Canadian society."

[33] In *Scott*, above at para 48, Justice Crampton expressly rejected any implications arising from *Capra*, above and found the conclusions reached generally supported his views. He stated:

> [48] Mr. Scott submits that his position is supported that Justice Russell's use of the term "Canadian society" in *Capra*, above. However, that case concerned an offender who had been granted

> refugee status and who, therefore, was not subject to being removed from Canada unless the Minister of Citizenship and Immigration issued an opinion that he constituted a danger to the public in Canada. The focus of that case was upon whether subsection 128(4) of the CCRA violated the *Charter* by discriminating against the offender on basis of his citizenship. Accordingly, the issue of whether the term "society" as it appears in the CCRA contemplates "Canadian society" or "society at large" was not directly addressed. In this context, Justice Russell's references to the protection of Canadian society were entirely appropriate and do not appear to have been intended to support in any way the position advanced by Mr. Scott. Indeed, Justice Russell's conclusion that "[t]he fundamental purpose of the scheme created by CCRA s. 128(3) - (7) is to ensure the circumstances of impending removal are factored into how an offender's sentence is served" is entirely consistent with my view that Parliament intended to give the Board jurisdiction to consider the elements of an offender's release plan abroad in determining whether to grant full parole to the offender (*Capra*, above, at paragraphs 42 and 72).

[34] These comments are equally true of the Applicant's case. Any earlier conclusions in *Capra*, above, do not warrant a reconsideration of the overall reasoning in *Scott*. In considering a foreign offender's release, "society" as referred to section 100-102 necessarily requires reference to any society outside Canada that would be impacted or provide insufficient supervision.

[35] Contrary to the Applicant's assertions, this interpretation of "society" is consistent with the *Interpretation Act*, RSC 1985, c I-21 that requires a "large and liberal construction and interpretation" of the term. It is also reflective of the principles of statutory interpretation that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (see for example the reference in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 26). As the Respondent notes, "society" in its ordinary sense is not restricted to Canada and is distinguished from the use of the term "Canadian society" in other legislative

enactments. *Scott* and *Capra*, above, agree that the intention of Parliament was to take into account the concerns of foreign countries.

[36] While the Applicant does not advance a *Charter* claim, he further asserts that the interpretation of "society" by the Court and as subsequently adopted by the Board's Appeal Division discriminates against foreign offenders by making it more difficult for them to obtain parole. Subsection 101(b) of the *CCRA* is nonetheless clear that the Board "take into consideration all available information that is relevant to a case." The risk posed by the offender and the effectiveness of any release plan are assessed on their merits. Where a foreign national offender is subject to a deportation order, its impact must be taken into account in this assessment.

[37] Failure to do so would ignore that offenders such as the Applicant would be removed to their country of nationality where they were would not be subjected to mandatory supervision or other conditions. Not only would this be an unfair advantage for the offender, it could pose an ongoing risk to the receiving state.

[38] For these reasons, I am not prepared to disregard the holding in *Scott*, above, that "society" in sections 100-102 of the *CCRA* includes those outside of Canada. It was appropriate for the Appeal Division to refer to the case in making its determination regarding the Applicant. He continues to pose a moderate risk of re-offending violently and if deported to the UK, despite his detailed plans, would not be subject to mandatory supervision. Having considered all relevant factors, it was within the range of possible, acceptable outcomes to conclude that granting parole would pose an undue risk to "society", even though the society at issue was in the UK.

VI. Conclusion

[39] The Board and Appeal Division reasonably relied on the jurisprudence of this Court in considering that the term “society” was not confined to Canada to determine that since the Applicant would be deported to the UK without mandatory supervision and continued to pose a risk; parole should be denied. The primary consideration remains the protection of society. I see no reason to depart from the conclusion in *Scott*, above, and impose a narrower construction of that term.

[40] Accordingly, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-343-11**
STYLE OF CAUSE:	**COLLINS v. AGC**
PLACE OF HEARING:	**OTTAWA**
DATE OF HEARING:	**JANUARY 18, 2012**
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