Federal Court  Cour fédérale

Date: 20130117

Docket: T-86-12

Citation: 2013 FC 38

Ottawa, Ontario, January 17, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

DANIEL CHRISTIE

Applicant

and

THE ATTORNEY GENERAL OF CANADA
and
THE NATIONAL PAROLE BOARD

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Christie [applicant] seeks judicial review of a decision of the National Parole Board Appeal Division [Appeal Division] upholding the revocation of the applicant's day parole by the National Parole Board [Board] pursuant to paragraph 107(1)(*b*) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA]. The applicant finds both the Appeal Division and the Board's decisions to be unreasonable and unfair in their interpretation of the applicant's parole condition not to associate with persons involved in criminal activities, and in their assessment of the evidence.

[2] At the beginning of the hearing before the Court, I was informed by counsel for the applicant that the applicant was recently granted day parole again. Although the present application for judicial review may seem moot, the applicant insisted upon exhausting his recourses and upon arguing his case.

[3] For the reasons that follow, I find that none of the grounds of review raised by the applicant justify the Court's intervention in the circumstances.

Background

[4] The applicant is a 42 year old federal inmate serving, since October 2007, a sentence of six years of imprisonment for drug trafficking and firearms offences. His warrant expiry date is October 1, 2013.

[5] The applicant previously served another six year federal sentence from July 1998 to May 2005, for being involved in import/export of narcotics (cocaine). In October 2000, he was granted full parole but that parole was revoked a year later, in December 2001, as a result of deteriorating behaviour and an additional conviction for possession of stolen property. The applicant eventually earned regular day parole which was followed by a statutory release and then warrant expiry in May of 2005, i.e. 18 months prior to the incurrence of the current index offences.

[6] Upon recommendation of his case management team and a review of his progress since his incarceration in October of 2007, the applicant was released on day parole on August 30, 2012, subject however to certain statutory (section 161 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR]) and special conditions (section 133 of the CCRA). The Board's day parole release decision dated August 11, 2010, included special conditions involving full financial disclosure, seeking and maintaining either legitimate employment or academic pursuits, and regular psychological counseling. Of greater importance to this case, the decision also provided for the following non-association condition:

> "Day Parole – Pre-Release Must avoid certain persons
> Not to associate with any person you know to be involved in criminal activity or have reason to believe is involved in criminal activity."

[7] Shortly after his release, on September 21, 2010, the applicant's Parole Officer issued a warrant of apprehension and suspension as a result of two incidents that he determined to constitute breaches of the applicant's non-association condition.

[8] The first of these concerned two emails dated September 16, 2010, that the applicant sent to a parolee he had met in prison. The applicant has attached a copy of the emails to his affidavit and states that the sole purpose of contacting his friend was to seek help and advice for his fiancée who, at that time, lived in the United States and was seeking a job in Canada. According to the evidence on file, the applicant's friend responded to his email advising that he was not in a position to offer any help. The applicant then sent another email, reiterating that his friend could contact him any time by email or by phone and added his phone number.

[9] The second incident involved a voice message that the applicant left on or about the same date for another parolee whom he had known before going to prison. The applicant states that the purpose of this call was to seek assistance for his fiancée in establishing her credit rating. He states that the message was brief and that the person contacted did not return his call.

[10] In an Assessment for Decision [AD] completed on October 20, 2010 after a meeting with the applicant, the Parole Officer noted that it was a major concern that both parolees the applicant had tried to contact were serving sentences for drug-trafficking and fraud-related offences similar to those of the applicant.

[11] The Parole Officer also stated that the applicant gave contradictory answers when questioned as to why he contacted the two offenders, knowing that they had been involved in criminal activities. It is worth quoting the relevant portions of the AD which read as follows:

> In response to why he contacted [X] and [Y] the offender advised that he was asking them to assist his girlfriend in establishing contacts in Ontario, as she was planning to relocate from the USA. [The applicant] was questioned how he felt introducing his girlfriend, that does not have a criminal record to two federal parolees, was assisting her. Eventually, he was able to admit that it did not seem wise now, in hindsight. However, this writer greatly questions his sincerity.
>
> [The applicant] advised that he had called and left a message for [X] once and has emailed [Y] once. First the offender advised that he did not feel this breached his association condition as he was not meeting with these offenders face to face and then stated that he must have misunderstood the term "associate". The misunderstanding of "associate" is the same reasoning he provided to a different Parole Officer in 2000 and therefore seems extremely unbelievable. Additionally, his current Parole Officer reviewed this condition with him fully the day he was released and [the applicant] had presented

> as being seemingly compliant by requesting his Parole Officer's approval of several friends and family members.
>
> Later during the interview [the applicant] attempted to minimize his actions by advising that he had not heard from either of these offenders. [The applicant] was advised that he would not be given credit for these two offenders abiding by their non association conditions and was reminded that he had instigated the contact and therefore failed to abide by the conditions of release. Eventually, [the applicant] acknowledged that he had heard back from [Y] once but did not respond. Contact with [Y]'s Parole Officer, who discussed this matter with [Y] directly, noted that [the applicant] did email him asking if he could assist his girlfriend. [Y] advised that he responded advising he was not in a position to assist and [the applicant] responded yet again, though briefly (a detail that [the applicant] did not disclose during the post suspension interview).

[12] The AD concluded with a recommendation to uphold the revocation. As a result of the parole suspension the applicant returned to custody as of September 21, 2010.

Impugned decision of the Board

[13] A post-suspension hearing was held before the Board on December 14, 2010, in presence of the applicant and his assistant.

[14] In the post-hearing decision, the Board noted that the applicant's behaviour while on conditional release mirrored his behaviour when he was released in 2000. In 2000 this led to his being suspended on three occasions before having his parole revoked and being recommitted to custody.

[15] The Board also noted that during the initial interview conducted by the applicant's Parole Officer immediately following his release on day parole, all special conditions imposed by the Board were reviewed by the applicant. The applicant then indicated to the Parole Officer that he understood the said conditions and signed the initial interview checklist acknowledging that the content of the document had been fully explained to him.

[16] Furthermore, the Board stated that the applicant had read the Board's releasing decision which included the non-association condition and explicitly emphasized the rationale for this condition by noting *i*) that the applicant re-offended about 18 month after he achieved warrant expiry on his first sentence, and *ii*) that he re-established past criminal associations in the subculture without regard to the consequences and re-entered an offence cycle quickly after release.

[17] The Board rejected the argument put forward by the applicant's assistant that the wording of the non-association condition was too broad and had caused confusion in the applicant's mind since it differed from the wording of the non-association condition that was imposed on him in 2000. In fact, the applicant's assistant stated that it was his and the applicant's belief that the non-association condition related to the current status of associates and whether they were currently and actively involved in criminal activity.

[18] For the sake of clarity and comparison, the previous non-association condition reads as follows:

> "Full Parole – Pre-Release Must avoid certain persons
> 1. Whom you know to have a criminal record, or for whom you have reason to believe that he/she has a criminal record including known drug users/traffickers. 2. No contact, directly or indirectly, with [an individual named in the decision]"

[19] The Board rejected the applicant's argument and concluded that a lack of transparency and deception were key elements in his failure to abide by the imposed condition; a point which the applicant admitted during the hearing. As a result, the applicant's day parole was revoked considering the paramount objective of protection of the society.

[20] In February 2011, the applicant appealed the matter before the Appeal Division, arguing that the revocation of his day parole was unreasonable in that the Board speculated as to why the condition was imposed and the behaviour it was intended to prevent. The applicant argued that the non-association clause being worded in the present tense meant that it was directed at ascertaining the current activities of the associates to determine whether they were involved in criminal activity at that time, and he argued that this was not the case of the individuals he had contacted.

[21] The applicant further argued that the non-association clause was void for vagueness because it was written in a misleading manner and would be arbitrary and discriminatory if given the broad interpretation suggested by the Parole Officer.

[22] Finally, the applicant relied on excerpts from the hearing transcripts to argue that the decision to uphold the revocation was made prior to the conclusion of the hearing and that the Board was biased against him. More specifically, the applicant took issue with:

- the Board's statement at the beginning of the hearing that it was going to be "a very focused hearing. Pretty short and sweet, actually";
- the Board's direct affirmation that the applicant "had contact with persons you knew or ought to have known were involved in criminal activity because they are federal offenders"; and,
- the Board member's statement with respect to the non-association condition that "I think you knew exactly what we intended – or you should have asked", or that "the Board is very satisfied that the condition is clear and you should have asked – you should have known better."

[23] However, since the applicant abandoned that last argument at the hearing before me, I will not discuss it further in the reasons that follow.

Decision of the Appeal Division

[24] On June 28, 2011, upon reviewing the applicant's file and submissions and listening to the audio recording of the hearing, the Appeal Division affirmed the Board's decision.

[25] The Appeal Division found that the Board considered the relevant factors and the proper risk criteria in reaching its conclusion.

[26] With respect to the allegation that the Board's decision was unreasonable and speculative on the meaning of the non-association condition, the Appeal Division stated that the issue is not only whether the offender's behaviour constituted a breach of the condition but also whether this behaviour had rendered undue the risk of release into the community (section 135 of the CCRA). Accordingly, the Appeal Division found that the Board conducted a proper risk assessment based on both *i*) the applicant's contacts with negative peers, which was a primary risk factor and deemed to be a violation of the special condition, and *ii*) the applicant's deceptive behaviour and lack of transparency with his Parole Officer.

[27] The Appeal Division further referred to *i*) the testimony of the applicant's Parole Officer during the hearing, where she stated that she thoroughly reviewed the special conditions with the applicant upon his release to ensure that he understood clearly which types of association were permitted and which ones were not, and *ii*) the Parole Officer's AD, where she indicated that the applicant's current behaviour was "incredibly similar" to his behaviour on his prior release from federal sentence, when he contacted federal offenders without revealing the nature and extent of those contacts. It was therefore concluded that the Board had reasons to question the applicant's credibility, considering that he did seek the parole supervisor's approval in some cases and not in others.

Issues

[28] The applicant has raised the following issues in his application for judicial review:

1) Was the decision of the Board, as confirmed by the Appeal Division, reasonable?

2) Was the applicant's post-suspension hearing fair (bias argument abandoned)?

Standard of Review

[29] Section 107 of the CCRA gives "exclusive jurisdiction" and "absolute discretion" to the Board to terminate or revoke parole or to cancel a decision to revoke parole. Under paragraph 147(4)(*d*) the Appeal Division is authorized to reverse, cancel or vary the decision made by the Board. However, paragraph 147(5)(*a*) significantly reduces the Appeal Division's authority of intervention – thus reinforcing the Board's discretion – and explicitly imposes the reasonableness standard of review when the Appeal Division reverses a decision of the Board and this "results in the immediate release of an offender."

[30] In *Cartier v Canada (Attorney General of Canada)*, 2002 FCA 384 [*Cartier*], the Federal Court of Appeal characterized the Appeal Division as a "hybrid" statutory creature, having both the characteristics of an appellate board and those of a reviewing tribunal. While the powers exercised by the Appeal Division are closely associated with the jurisdiction exercised on appeal, the grounds for appeal, as enumerated in subsection 147(1) of the CCRA, are limited and more akin to those for judicial review.

[31] Both the Federal Court of Appeal and this Court have consistently held that the unaccustomed situation in which the Appeal Division finds itself implies that although the reviewing court has an application for judicial review of the Appeal Division's decision before it, when the latter has affirmed the Board's decision, the Court is ultimately required to ensure that the Board's decision was lawful. The jurisprudence also establishes that the applicable standard of

review is that of reasonableness whether the Appeal Division reversed or confirmed the Board's decision (*Cartier*, above, at paras 6-10; *Aney v Canada (Attorney General)*, 2005 FC 182 at para 29; *Ngo v Canada (Attorney General of Canada)*, 2005 FC 49 at paras 7-8; *Rootenberg v Canada (Attorney General)*, 2012 FC 1289 at paras 28-29).

[32] Accordingly, in this case I shall review the Board's decision under the standard of reasonableness. My assessment is limited to "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]), having in mind that "there might be more than one reasonable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

Analysis

[33] The applicant submits that the revocation decision is unreasonable in two respects: first, in its erroneous interpretation of the non-association condition which constitutes an error of law following *Franchi v Canada (Attorney General)*, 2011 FCA 136 [*Franchi (FCA)*]; and second, in its erroneous conclusion that the applicant was at undue risk to re-offend. With respect, I disagree with both of these propositions.

[34] The applicant maintains that a "plain reading" of the non-association condition suggests that the focus of the condition is the current conduct of an associate rather than his/her criminal record. More precisely, the applicant is of the view that by misinterpreting the non-association condition, the Board ignored two essential facts: *i*) that there was no evidence of current criminal conduct by the individuals whom the applicant contacted, and *ii*) that the applicant had no criminally-oriented intent in doing so. According to the applicant, had the Board considered this evidence, there would have been no basis upon which it could be concluded the applicant was at undue risk to re-offend.

[35] As the Appeal Division correctly mentioned in its reasons, the Board's reasons are clear that the applicant's failure to comply with his condition was the primary risk factor or an indication thereof. As I read the impugned reasons, the applicant's breach of the special condition, in the circumstances of his past and present conduct of non-compliance with special conditions of release, was at the heart of the decision under review. It is in fact clear to the reader that the Board did turn its mind to the applicant's intent, the assessment of which falls within its expertise.

[36] Comparing the two non-association conditions that were imposed on the applicant respectively in 2000 and 2010 –as reproduced below–, one can agree that the 2010 condition could have been written in more explicit terms so as to expressly include past and current criminal behaviour of the associates.

Pre-release day parole condition, dated August 11, 2010	Pre-release full parole condition, dated October 2, 2000
"Must avoid certain persons	*"Must avoid certain persons*

Not to associate with any person you know to be involved in criminal activity or have reason to believe is involved in criminal activity."	*1. Whom you know to have a criminal record, or for whom you have reason to believe that he/she has a criminal record including known drug users/traffickers. 2. No contact, directly or indirectly, with [an individual named in the decision]"*

[37] However, the Board's interpretation of parole conditions is a question of law subject to the standard of reasonableness (*Franchi (FCA)*, above, at para 25). For the reasons stated below, the applicant failed to satisfy me that the broader interpretation given by the Board, and confirmed by the Appeal Division, does not fall, in light of all the evidence before the Board, within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

[38] The applicant rightfully points out that according to the *National Parole Board Policy Manual*, Vol. 1, 16.1, 2010-09 [Manual], special conditions must be stated clearly and explicitly using wording that specifies their rationale so that there be no misinterpretation or misunderstanding. The relevant excerpts read as follows:

27. Board members will indicate in their decision and reasons the duration of special conditions and the rationale behind the imposition of that duration, where appropriate.	27. Les commissaires indiqueront dans l'exposé de leur décision et de ses motifs la durée de l'application des conditions spéciales et la justification de cette durée, s'il y a lieu.
28. Each condition will be stated <u>in such a way so that there can be no misinterpretation or misunderstanding</u>. Wording	28. Chacune des conditions doit être rédigée <u>de manière à éviter qu'elle ne soit mal interprétée ou mal comprise</u>. Une expression telle que «à la

such as "at the discretion of the parole officer" is inappropriate as it delegates to the parole officer the authority to impose the condition.	discrétion de l'agent de libération conditionnelle » ne convient pas, étant donné qu'elle délègue à l'agent de libération conditionnelle le pouvoir d'imposer la condition.
29. Board members will also specify why the special conditions are considered reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.	29. Les commissaires doivent également expliquer pourquoi les conditions spéciales sont considérées comme raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

[emphasis added/je souligne]

[39] There are in fact sound equity and policy reasons behind a strict requirement that parole conditions be drafted in the most clear and explicit terms.

[40] The applicant relies on Justice Harrington's decision in *Franchi v Canada (Attorney General)*, 2010 FC 1179 at para 21 [*Franchi (FC)*] (reversed on facts in *Franchi (FCA)*, above). In that case, the Court held that a special condition must "state clearly and unequivocally what should and should not be done" and therefore the requirement to "report immediately any change in [the parolee's] financial situation" was in contradiction with the discretionary condition that required the parolee to provide full financial disclosure "upon request."

[41] Although *Franchi (FC)* was reversed on factual determinations, I am of the view that the principal take-away from Justice Harrington's decision remains good law. In light of the jurisprudence of the Supreme Court in *Roncarelli v Duplessis*, [1959] SCR 121 and *CUPE v Ontario (Minister of Labour)*, 2003 1 SCR 539, when the wording of a parole condition is open to interpretation, there are limits to the Board's "absolute discretion" to terminate or revoke parole and to cancel a decision to grant parole under section 107 of the CCRA.

[42] I agree with the applicant that his non-association condition could have been drafted in more specific terms. In fact, had not been for the evidence before the Board, I would have agreed with the applicant that the Board's decision was unreasonable when it found that he had violated the 2010 non-association condition, as worded.

[43] It is not for this Court to substitute its own assessment of the evidence to that of the Board on judicial review. Suffice it to note that there was ample evidence on the record to support the conclusion that the applicant understood the meaning and extent of the non-association condition to include the contact he had made with former inmates or parolees; including the applicant's own admission of this fact.

[44] The applicant's alleged non-awareness of the extent of the non-association condition was not the only reason he provided for his conduct during the post-suspension interview. The Parole Officer stated that during this meeting the applicant gave different contradictory reasons to justify his breach of the special condition, including the fact that he had not met with the individuals he had contacted in person, that he must have misunderstood the meaning of the term "associate", that he

had not heard back from either of the offenders (a fact that he later admitted to be untrue about one of them), and that he would comply with his condition going forward.

[45] As the Board noted at page 3 of its reasons, the applicant confirmed that he reviewed and indicated that he understood the meaning of the special conditions of his day-parole during the post-release interview with his Parole Officer. He signed the initial interview checklist and acknowledged that the conditions had been fully explained to him and that he understood them. The Board reasonably found that if the applicant was unsure as to the nature of the condition, he should have asked for further clarification. In fact, the applicant had requested that his Parole Officer conduct several verifications on people he intended to contact when his day parole was granted, including a relative who was a former inmate.

[46] The Parole Officer's statements during the Board hearing – to which the Appeal Division referred in its reasons – further convince the reader that there was little room for misunderstanding with respect to the meaning and importance of the non-association condition. In the Parole Officer's words:

> "It's common practice to review decision sheet during the initial intake so he knew what the Board had to say and why those conditions were imposed and also in reviewing the non-association condition I always beat that to death. No direct, no indirect, no snail-mail, no jail-mail, no text messaging, no calls, anything. So I think that was more than clear."

[47] In addition, I note that the terms of the decision granting day parole to the applicant contain an indication of the rationale behind the imposition of the non-association condition, stating that the risk to re-offend in the applicant's case was closely linked, among other factors, to "the exploitation of criminal opportunities to traffic in drugs and weapons through negative association"; hence the patent relevance of the associates' criminal record.

[48] Considering all of these reasons, I conclude that the Board did not err in its assessment of the risk associated with the applicant's breach of his non-association condition.

[49] For all these reasons, this application for judicial review is hereby dismissed. Costs shall follow the event.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review is dismissed, with costs.

« Jocelyne Gagné »

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-86-12**
STYLE OF CAUSE:	**Daniel Christie v ACG and The National Parole Board**
PLACE OF HEARING:	Ottawa, Ontario
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