
CANADA / JUDGMENT

Gosselin v. Canada (Attorney General)

2006 FC 3

COURT

Federal Court

DECIDED

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Gosselin v. Canada (Attorney General)

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Decision Content

Date: 20060105 Docket: T-705-05

Citation: 2006 FC 3

Ottawa, Ontario, January 5, 2006

PRESENT: THE HONOURABLE MR. JUSTICE SIMON NOËL

BETWEEN:

RENÉ-LUC GOSSELIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

- [1] On April 22, 2005, the applicant, René-Luc Gosselin, applied to the Federal Court for a judicial review of a decision of the Appeal Division of the National Parole Board (“Appeal Division”) dated April 1, 2005. In that decision, the Appeal Division dismissed the applicant’s appeal, in which he challenged the only special condition imposed on him for his conditional release (other than the mandatory automatic conditions), a non-association condition, which reads as follows:

[translation] Prohibited from having any contact and/or any non-fortuitous communication with any person whom he knows or whom he has reason to believe has a criminal record (within the meaning of the interpretation stated by NPB on February 4, 1991) or to be directly or indirectly involved with the drug underworld.

- [2] The applicant had mistakenly identified the members of the Appeal Division of the Board as respondents. Leave was granted to amend, and the style of cause names the Attorney General of Canada as the respondent, and not the members of the Appeal Division of the Board.

FACTS

- [3] The applicant was arrested on June 7, 2000 and sentenced to a term of imprisonment of nine years for conspiring to import/export cocaine and possession of a firearm.
- [4] On October 10, 2003, on an accelerated review, the National Parole Board (“NPB”) ordered the applicant released on day parole (see section 99 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (“CCRA”); this is a conditional release scheme that requires an inmate to return to the place where he or she is incarcerated every night), thereby imposing on him the applicable automatic conditions (see subsection 133(2) CCRA and section 161 of the Corrections and Conditional Release Regulations) and also the special non-association condition.
- [5] On August 23, 2004, the NPB ordered that the applicant be released on conditional release under the same conditions. On October 15, 2004, the applicant filed an appeal from that decision. On April 1, 2005, the Appeal Division dismissed his appeal. The applicant seeks the judicial review of the August 23, 2004 appeal which sought to annul the non-association condition of that decision of the Appeal Division.
- [6] The applicant asks the Federal Court to:
- (1) Allow the application for judicial review;
 - (2) Declare the contested condition of release to be contrary to sections 1 and 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11 (“Charter”).

ISSUES

[7] The questions raised in this case are as follows:

- (1) Should the fresh evidence presented by the applicant be admitted?
- (2) Did the Appeal Division err when it dismissed the applicant's appeal of the August 23, 2004 decision?
- (3) Does the non-association condition violate section 1 or section 7 of the Charter?

CONCLUSIONS

[8] This application for judicial review is dismissed. The Appeal Division did not err and the non-association condition does not violate sections 1 and 7 of the Charter.

ANALYSIS

1. Fresh Evidence

[9] The applicant presented fresh evidence that was not in the record before the NPB or the Appeal Division. That evidence consists of:

- an excerpt from a 2001 Correctional Services of Canada document containing statistics and facts regarding the Canadian prison system (Exhibit P-16);
- an undated article from Police Photo weekly (the applicant later stated in his supplementary memorandum that the article was dated November 5, 2004) (Exhibit P-17);
- an article from La Presse newspaper dated November 10, 2002 (Exhibit P-18); and
- an article from the Journal de Montréal dated March 26, 2005 (Exhibit P-19).

The respondent contended that those exhibits are not admissible on the ground that they were available at the time the decisions of both the NPB (August 23, 2004) and Appeal Division (April 1, 2005) were made. At the hearing, the applicant sought leave of the Court to file a supplementary memorandum of argument for leave to file these exhibits. The Court granted leave, and the respondent was accordingly entitled to file a reply, which he did.

[10] The applicant argued that he did not submit Exhibit P-16 to the NPB because he assumed that the content of the document was already known to the NPB. With respect to Exhibits P-17 and P-19, he submitted that it would have been physically impossible to submit them, because they did not exist when the appeal was filed. With respect to Exhibit P-18, the applicant wanted it to be admitted notwithstanding the date it was published, because he had misplaced it for some time and then found it in time for filing his application for judicial review. He also said that, in his view, all of these exhibits were matters of which the NFB and the Appeal Division could take judicial notice.

- [11] The respondent submitted that all of the documents were available when the Appeal Division made its decision, and that the documents in question should have been submitted to the Appeal Division. He argued that the documents were not matters of which the Appeal Division could take judicial notice, and said that even if such were the case, this would not relieve the applicant of the duty to allege the material facts and relate them to his arguments of law.
- [12] As a general rule, at the judicial review stage, only the evidence on which the decision of which review is sought was based may be considered (see *Smith v. Canada*, 2001 FCA 86, [2001] F.C.J. No. 450). In *Chopra v. Canada (Treasury Board)* [1999] F.C.J. No. 835, at paragraph 5, Mr. Justice Dubé wrote:

These decisions [with respect to the rule that fresh evidence is inadmissible in applications for judicial review] are premised on the notion that the purpose of judicial review is not to determine whether or not the decision of the Tribunal in question was correct in absolute terms but rather to determine whether or not the Tribunal was correct based on the record before it.

- [13] As an exception, the Court may take notice of documents that did not exist at the time the application for judicial review was made, where there are issues of procedural fairness or jurisdiction (see *Ontario Association of Architects v. Association of Architectural Technologists of Ontario*, [2003] 1 F.C. 331, 2002 FCA 218). Because there are no issues of procedural fairness or jurisdiction in this case, the general rule should be followed. This is not an appeal: the date on which the evidence became available has no effect on the admissibility of the evidence.
- [14] Leave will therefore not be granted to present fresh evidence. Nonetheless, even had the evidence been admitted, it would not have changed my findings on the merits.

2. Judicial Review

(a) Standard of Review

- [15] In determining the applicable standard of review, the two leading cases are *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 and *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.R. 19. In the second case, the pragmatic and functional approach was updated, so that it is now the leading authority in this respect, although the analysis provided in *Pushpanathan v. Canada*, *supra*, was more detailed.
- [16] It will be useful to review the factors that must be considered in determining the applicable standard of review. In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, *supra*, Chief Justice McLachlin wrote, at paragraph 26:

In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the

question — law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. . . . The virtue of the pragmatic and functional approach lies in its capacity to draw out the information that may be relevant to the issue of curial deference.

[17] The applicant seeks the judicial review of the decisions of both the NPB and the Appeal Division. As the Federal Court of Appeal stated in *Cartier v. Attorney General of Canada*, [2003] 2 F.C. 217, 2002 F.C.J. No. 384, at paragraph 10:

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 decision 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.

[18] Applying the pragmatic and functional approach, I conclude as follows.

[19] First, the Corrections and Conditional Release Act does not provide for any privative clause or right of appeal. However, in *Pushpanathan v. Canada*, supra, Mr. Justice Bastarache wrote, at paragraph 30: "The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard."

[20] The relative expertise of the NPB and the Appeal Division, as compared to the Federal Court, invites a certain degree of deference. Under subsection 105(1) of the Corrections and Conditional Release Act, the members of the NFB and the Appeal Division are selected so as to ensure they represent society as a whole. They hear a large number of cases every year, and they consequently have a more thorough understanding of what constitutes a reasonable or necessary condition, within the meaning of subsection 133(3) CCRA. Subsection 133(3) reads as follows:

- (3) The releasing authority may impose any conditions on the parole, statutory release or unescorted temporary absence of an offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.
- (3) L'autorité compétente peut imposer au délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte les conditions qu'elle juge raisonnables et nécessaires pour protéger la société et favoriser la réinsertion sociale du délinquant.

What special conditions should or should not be imposed on an offender is therefore clearly a matter within the expertise of those bodies.

[21] The purpose of the Act, as set out in section 100 CCRA, is as follows:

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.

The specific provision that allows the NPB to impose special conditions of release on an offender is subsection 133(3) CCRA (see above). That subsection appears to give the releasing authority a very broad discretion, by using the phrase “conditions . . . that it considers reasonable and necessary”. In *Normandin v. Canada*, 2004 FC 1404, [2004] F.C.J. No. 1701, aff'd 2005 FCA 345, [2005] F.C.J. No. 1768, the issue was whether the NPB had the power to impose a special residency condition on a dangerous offender under subsection 134.1(2) CCRA. Madam Justice Tremblay-Lamer used the pragmatic and functional approach in order to determine what standard of review applied. She wrote, at paragraph 19:

There is no doubt that Parliament intended the NPB to use its expertise in taking the appropriate decisions to protect society while facilitating the reintegration of the offender into the community.

That decision was recently approved by the Federal Court of Appeal. Mr. Justice Létourneau wrote, at paragraph 46:

One can therefore see from these provisions Parliament's intention to rely on the expertise and experience of the Board in order, to the degree possible, to protect society while facilitating the successful reinsertion and integration into society of the offender.

I agree with the Federal Court of Appeal and the Federal Court, per Madam Justice Tremblay-Lamer. Parliament intended to give the NPB and the Appeal Division broad latitude to decide what special conditions of release should be applied to an offender, having regard to the circumstances.

- [22] The final point is that the issue here is a question of mixed fact and law (*Deacon v. Canada* (Attorney General), 2005 FC 1489, [2005] F.C.J. No. 1827, at paragraph 93). However, the “fact” component is more important than the “law” component, because the NPB and the Appeal Division are not required to do a thorough analysis of the applicable statutory provisions in order to decide whether a particular condition should be imposed on an offender, the only criteria being whether conditions are necessary and whether they are reasonable. The nature of the question therefore suggests that judicial deference is appropriate.

- [23] Having considered all of these factors, I conclude that the applicable standard of review is that of the reasonable decision. The nature of the issue, the expertise involved and the purpose of the Act all lead me to accord deference in applying that standard.
- (b) Did the NPB and the Appeal Division err when they dismissed the applicant's appeal from the decision of August 23, 2004?
- [24] On reading the NPB decision of August 24, 2004, and the decision of the Appeal Division of April 1, 2005, I find that neither decision contains any error that would support a finding that the decision was unreasonable. The decisions were clearly based on the facts of the case, and there are no grounds for review.
- [25] The imposition of special conditions in this case was based on the following grounds, as set out in the decisions of the NPB and the Appeal Division:
- The applicant was sentenced to a term of imprisonment of nine years for conspiring to import/export 50 kilograms of cocaine and possession of a firearm;
 - As stated in the sentence pronounced by Mr. Justice William B. Digby of the Provincial Court of Nova Scotia on October 19, 2001, at page 26, the applicant was not a mere courier, and he had in fact been involved in the drug underworld for a long time;
 - The applicant committed these crimes in association with criminal individuals and maintained relationships with them (and/or acted under their influence);
 - The applicant had a record for possession of firearms and theft;
 - The record clearly shows that the applicant [translation] "... had very little to say about anything relating to his offence" and that his attitude was one of "... denying responsibility and engaging in rationalization, minimization and justification" and he demonstrated a "... lack of openness" (see respondent's record, at pages 7, 9, 21, 23, 24, 53, 54, 70, 71 and 72). In short, the applicant has not demonstrated that his remorse for his crime is complete and unequivocal.
- [26] Each of these elements is logically and directly linked with the non-association condition. Contrary to the applicant's argument, the non-association condition is neither excessive nor vague, and it was not imposed in bad faith. In fact, the Interpretation given by the NPB on February 4, 1991 (applicant's record, at page 57: "Interpretation"), which was duly signed by the applicant, is flexible enough to allow the applicant to maintain interpersonal relationships for lawful purposes. With respect to social contacts, fortuitous meetings (encounters that happen by chance or that are unforeseen) are not a violation of the condition unless the other person is someone whom the applicant [translation] "knows" or "has reason to believe" "to have a criminal record ... or to be directly or indirectly involved with drugs". With respect to contacts at work, the applicant may work in places where there are other people who have criminal records, as long as the business is legal. While the Interpretation does provide that, as a general rule, the applicant may work only in a

business which has more than 50 employees, the NPB may grant an exemption. In this case, the condition has created no problems for the applicant in terms of work. He is a taxi driver and his parole officer knows this. With respect to family contacts, the Interpretation allows the applicant to continue to see members of his family, in the broad sense. In short, the applicant's social, work and family life is not jeopardized by the non-association condition. It seems to me that, in the circumstances, having regard to the objectives of reintegration into society and protection of the public, this condition, as worded, is neither excessive nor vague. There is nothing in the record that supports the argument regarding bad faith. Accordingly, it is my opinion that the NPB and the Appeal Division committed no error on the basis of which I could characterize the imposition of the non-association condition on the applicant in either of the two decisions as unreasonable. I therefore find that there are no grounds for review of the Appeal Division decision.

3. Constitutional Issues

[27] The applicant argued that the condition imposed on him violated section 7 of the Charter. That section reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[28] The applicant is serving the rest of his term of imprisonment in the form of parole with a non-association condition, which prohibits him from communicating with certain persons: individuals whom he knows, or whom he has reason to believe, to have a criminal record or to be directly or indirectly involved with drugs. The first issue is whether this condition deprives him of liberty. If so, the question then is whether the violation of that right is in accordance with the principles of fundamental justice. If the violation of the right to liberty is in accordance with the principles of fundamental justice, section 7 is not violated (*Pearlman v. Manitoba Law Society Judicial Committee*, (1991) 2 S.C.R. 869). On the other hand, if the deprivation occurred in contravention of the principles of fundamental justice, then the question becomes whether the deprivation may be justified under section 1 of the Charter.

[29] Generally speaking, the Supreme Court has interpreted the right to liberty guaranteed by section 7 of the Charter generously. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; 2000 SCC 44, at paragraph 49, Mr. Justice Bastarache wrote :

The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices.

[30] In this case, the Court need not determine whether the deprivation of the applicant's liberty is sufficiently serious to trigger the application of the Charter, because the non-association condition was, in any event, imposed in accordance with the principles of fundamental justice. Mr. Justice Dubé so found in *Bryntwick v. Canada* (National Parole Board), [1987] 2 F.C. 184, [1986] F.C.J. No. 815, at paragraph 31, in a challenge to a similar non-association condition:

I cannot find, in this instance, that the condition imposed upon the petitioner was not in accordance with the principles of fundamental justice. To be sure, the condition represents a further incursion upon his freedom, but it was imposed in accordance with the basic tenets of our legal system.

[31] The applicant's file was assessed on its merits and the decision to impose a special non-association condition was made in accordance with the principles of fundamental justice. The applicant's argument based on section 7 of the Charter is therefore rejected.

[32] For these reasons, the application for judicial review is dismissed and the constitutional arguments of the applicant are rejected. Leave to introduce fresh evidence is also denied, but I would add that even if it had been admitted, it would not have changed my findings on the merits.

[33] The parties are invited to make submissions on costs. I suggest that they communicate with each other to discuss this. I will await the outcome of those discussions before disposing of the question of costs.

ORDER

THIS COURT ORDERS THAT:

- The style of cause be amended to name the Attorney General of Canada as the respondent;
- leave to introduce fresh evidence be denied;
- leave for the applicant to file a supplementary memorandum regarding Exhibits P-16, P-17, P-18 and P-19 and for the respondent to file a reply be granted;
- the application for judicial review be dismissed;
- the parties have 10 days to file submission on costs.

"Simon Noël"

Judge

Certified true translation

François Brunet, LLB, BCL

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-705-05

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DATED: January 5, 2006

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