
CANADA / JUDGMENT

Mapara v. Ferndale Institution (Warden)

2011 BCSC 106

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Supreme Court of British Columbia

DECIDED

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2011 BCSC 106 Mapara v. Ferndale Institution (Warden)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mapara v. Ferndale Institution (Warden),

2011 BCSC 106

Date: 20110128

Docket: S103052

Registry: Vancouver

Between:

Sameer Mapara and Michael Spidel

Petitioners

And

Bill Thompson, Warden of Ferndale Institution

Respondent

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for the Petitioners:

J.M. Peters

Counsel for the Respondent:

B. Sokhansanj

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 12, October 14 and 15, 2010

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2011

Introduction

[1] These proceedings are by way of a petition seeking:

- 1) a writ of habeas corpus for the release of the petitioners on the basis that the continued deprivation of their liberty is unlawful;
- 2) referral of the petitioners for a hearing of their applications for escorted temporary absence ("ETA") before the National Parole Board ("NPB");
- 3) a declaration that neither psychological nor psychiatric assessments are required prior to an inmate's application for ETA;
- 4) in the alternative, an order to immediately provide the petitioners with the psychiatric and psychological assessments necessary in order to obtain a hearing of their applications for ETA before the NPB; and
- 5) the costs of this application.

Factual Background

- [2] The petitioners, Mr. Mapara and Mr. Spidel, are inmates serving life sentences for murder.
- [3] Mr. Mapara has been incarcerated since February 6, 2001, following the appeal of his conviction for first degree murder. He is not eligible for full parole until December 14, 2027.
- [4] Mr. Spidel has been incarcerated since November 18, 2005, following the appeal of his conviction for second degree murder. He is not eligible for parole until May 26, 2015.
- [5] The petitioners have brought this application for habeas corpus on the basis that they have suffered a deprivation of liberty because they have been deprived of the right to have the NPB hear their applications for ETA. Mr. Mapara's application was refused in September 2008. Mr. Spidel's was refused in November 2008.

- [6] When this petition was filed on April 30, 2010, one of the grounds alleged to have resulted in a deprivation of liberty was the respondent's requirement that the petitioners obtain a psychiatric assessment before their applications for ETA would be referred to the NPB. Both petitioners were told that they should not expect psychiatric assessments until their parole eligibility date.
- [7] Since that time, both petitioners were moved up the queue and psychiatric assessments have been completed. It appears that Mr. Mapara and Mr. Spidel were transferred from Ferndale to the Pacific Institute Regional Treatment Centre on July 12, 2010, and assessments were completed in response to the commencement of this petition. Mr. Mapara was moved from 169th on the wait list for assessments and Mr. Spidel from being 50th on the list.
- [8] Also, by the second day that this matter was heard, October 14, 2010, Mr. Spidel had been transferred from Ferndale Institution to Mission Institution.
- [9] The alleged treatment of the petitioners by the respondent in respect of their applications for ETA is the only common ground of the petitions filed by each petitioner.
- [10] Ferndale Institution is described as a minimum security federal prison which concentrates on pre-release preparation of inmates. Ferndale provides various programs to inmates which replicate community standards in various areas. Among its goals is to prepare low risk, long-term offenders for their earliest possible release.
- [11] Mr. Spidel applied for an ETA for family contact so that he might meet his parental obligations to his six year old son, to provide community service and for personal development.
- [12] Mr. Mapara applied for an ETA for family contact and to meet his parental responsibilities to his four children aged 9, 11, 14 and 15. He also seeks an ETA for personal development and to participate in the Ismaili faith, which is not available to him within the programs at Ferndale.
- [13] The respondent's response to the applications by Mr. Mapara and Mr. Spidel was that an ETA was not feasible until they each had a psychiatric assessment in accordance with the Correctional Service of Canada ("CSC") policy directive 712-1. Psychiatric assessments were scheduled in accordance with what is called a "Centralized Process." The Centralized Process involves inmates being placed on a list for assessment according to the scheduled date of their NPB hearing. In the absence of a scheduled hearing, the inmate's full parole eligibility date is utilized. The result is that an applicant's position on the wait list for psychiatric assessment is moved downward whenever another prisoner's parole date is more proximate.
- [14] As indicated, the psychiatric assessments have now been completed.

Legislative Scheme

[15] The Corrections and Conditional Release Act, S.C. 1992, c. 20 [CCRA], provides for ETAs in s. 17. Section 17(1) provides:

17. (1) Where, in the opinion of the institutional head,
- (a) an inmate will not, by reoffending, present an undue risk to society during an absence authorized under this section,
 - (b) it is desirable for the inmate to be absent from penitentiary, escorted by a staff member or other person authorized by the institutional head, for medical, administrative, community service, family contact, personal development for rehabilitative purposes, or compassionate reasons, including parental responsibilities,
 - (c) the inmate's behaviour while under sentence does not preclude authorizing the absence, and
 - (d) a structured plan for the absence has been prepared,

the absence may, subject to section 746.1 of the Criminal Code, subsection 140.3(2) of the National Defence Act and subsection 15(2) of the Crimes Against Humanity and War Crimes Act, be authorized by the institutional head

- (e) for an unlimited period for medical reasons, or
- (f) for reasons other than medical,
- (i) for a period not exceeding five days, or
- (ii) with the Commissioner's approval, for a period exceeding five days but not exceeding fifteen days.

[16] The "institutional head" is defined in relation to a penitentiary as the person who is normally in charge of the penitentiary.

[17] Commissioner's Directive 710-3, entitled "Temporary Absences and Work Releases", states the policy objectives of ETAs and Commissioner's Directive 712-1, entitled "Pre-Release Decision Making", establishes the requirement for psychiatric assessments before any type of conditional release.

[18] The effect of s. 746.1 of the Criminal Code is that an inmate who is serving a term of life imprisonment and is more than three years away from his parole eligibility date is not eligible (with some exceptions that do not apply here) for an ETA without the approval of the NPB.

[19] The principles that guide the CSC are set out in s. 4 of the CCRA and include:

- 1) that the protection of society be the paramount consideration in the corrections process; and

- 2) the sentence of an offender be carried out having regard to various things including the release policies of the NPB.

[20] The NPB Policy Manual, entitled "Psychological and Psychiatric Assessments", states at para. 2.3:

A new psychiatric assessment is required for offenders with a life minimum or indeterminate sentence when they first apply for any type of conditional release other than a medical or compassionate escorted temporary absence.

Petitioners' Position

- [21] The petitioners argue that their application by way of habeas corpus is necessary to seek the assistance of the court in applying the rule of law to the respondent and thereby to the policies and procedures of the CSC which continue to deprive the petitioners of their liberty.
- [22] The original position of the petitioners was that they had been wrongfully deprived of their liberty by the respondent's requirement that psychiatric assessments be conducted prior to forwarding their application for ETA to the NPB. Now that the assessments have been completed, they say that the question remains: were psychiatric assessments ever necessary at all before the applications for ETA could be forwarded by the respondent to the NPB? In essence, the petitioners say the deprivation of liberty arises from the non-referral of their applications to the NPB.
- [23] They submit that the jurisprudence establishes that prisoners may choose to challenge a decision affecting their residual liberty either in a provincial superior court by way of habeas corpus or in the Federal Court by way of judicial review.
- [24] Regarding mootness, the petitioners say the two-step approach described by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353, should be followed. Addressing these steps, the petitioners say that a "live controversy" remains and that a "tangible and concrete" dispute has not disappeared. The petition seeks the following forms of substantive relief:
 - 1) release of the petitioners as the continued deprivation of their liberty is unlawful;
 - 2) the referral forthwith of the petitioners for a hearing of their applications for ETA by the NPB;
 - 3) a declaration that neither psychological nor psychiatric assessments are required prior to an inmate's application for ETA;
 - 4) in the alternative, immediately provide the petitioners with the psychiatric and psychological assessments necessary in order to obtain a hearing of their applications before the NPB.

- [25] As a result of this petition, the alternative relief in 4) has been addressed by the respondent. The petitioners have received psychiatric assessments. However, the petitioners say an adversarial relationship between the petitioners and the respondent prevails with regard to the remaining and majority of the relief sought.
- [26] The petitioners argue further that the denial of psychiatric assessments has resulted in long-term deprivations of their liberty. Accordingly, the petitioners seek their unconditional release as their continued incarceration is not warranted given the length of their incarceration, their record for non-violence, their age, their health and the lack of any indication that they represent a danger to themselves or anyone else. The lack of justification for psychiatric assessments, it is submitted, is an important factor for the Court to consider in determining the appropriate relief in this case.
- [27] The petitioners say that the failure of the respondent to ground his ETA referral decision on Part 1 of the CCRA gives rise to an issue of public importance that warrants the attention of the Court.
- [28] As to the standard of review applicable to the respondent, the petitioners say that based on *Ennis v. Canada (Attorney General)*, 2003 FCT 461, decisions regarding the internal management of the penitentiary system will not likely be interfered with unless there are formal defects, a breach of natural justice, excess of jurisdiction or a finding of fact made in an irrational or vexatious manner. They submit that the respondent's interpretation of the CCRA and his application of the unwritten centralized process meet the criterion for review described in that decision.
- [29] In particular, the petitioners argue that the respondent's requirement for a psychiatric report before an application for ETA is forwarded to the NPB is inconsistent with the statutory structure of the CCRA. Commissioner's Directive 710-3, entitled "Temporary Absences and Work Releases", does not make any reference to the necessity for a psychiatric assessment. Commissioner's Directive 712-1, entitled "Pre-Release Decision Making," does refer to the requirement of a psychiatric assessment when an offender who is serving a life sentence first applies for any type of conditional release, other than a medical or compassionate escorted temporary absence. However, the petitioners say that ETAs are governed by s. 17 in Part I of the CCRA and not Part II of the CCRA which addresses conditional releases. It is submitted that the respondent has misapplied CD 712-1 by requiring a psychiatric assessment as a condition precedent to forwarding their applications for ETA to the NPB. They are effectively arguing that an ETA is not a "conditional release" that would trigger either Part II of the CCRA or CD 712-1.
- [30] The petitioners argue that since their return to Ferndale Institution after their psychiatric assessments, they have suffered reprisals which affect their liberty interests in contrast to the respondent's treatment of other inmates.

- [31] Thus, the petitioners say, they have been denied their statutory right to ETAs resulting in a significant deprivation in their liberty, namely access to their community and the experiences enjoyed by inmates who are granted ETAs.
- [32] The petitioners submit that the respondent was in error in applying CD 712-1 to their request for ETAs and compounded that error by applying the Centralized Process and therefore his actions were ultra vires and void for want of jurisdiction.
- [33] They described their continued detention, in the face of their statutory entitlements, as depriving them of a residual liberty interest recognized by s. 7 of the Charter and which may be remedied by way of habeas corpus. They also say that the deprivation of liberty has been arbitrary and offends s. 9 of the Charter.
- [34] In summary, the petitioners say that they are subject to a continuing and current deprivation of liberty as a result of the respondent's:
- 1) misapplication of CD 712-1;
 - 2) implementation of a Centralized Process which deprived the petitioners of a means to comply with the Commissioner's Directive;
 - 3) failure to forward their applications for ETA to the NPB; and
 - 4) reprisals implemented upon the return of the petitioners to Ferndale following their assessments.
- [35] The petitioners also allege bad faith on the part of the respondent. They cite the following four examples of bad faith demonstrated by the respondent towards them:
- 1) In administering the centralized process, the respondent's duplicity in revealing to the petitioners that they will not obtain an assessment before their full parole eligibility dates lacks procedural fairness and fails to uphold the respondent's statutory duties;
 - 2) The respondent's deceitful and disingenuous approach to "corrective actions" and the years of providing misinformation to the petitioners;
 - 3) The respondent only arranged the transfer of the petitioners for psychiatric assessment after they filed and served this petition - in effect an admission that the centralized process lacks any justification, regulatory or statutory support; and
 - 4) The respondent's efforts at reprisal directed to the petitioners further underlies the bad faith which continues to plague their incarceration.
- [36] The petitioners have referred to the following cases in their written argument in support of their position:
- a) May v. Ferndale Institution, [2005] 3 S.C.R. 809;
 - b) Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342;

- c) Woodhouse v. Canada (Correctional Service), 2010 BCSC 754;
- d) Trang v. Alberta (Edmonton Remand Centre), 2002 ABQB 1042;
- e) Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190;
- f) Ennis v. Canada (Attorney General), 2003 FCT 461;
- g) ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140;
- h) Bonamy v. Correction Service Canada (Commissioner), 2000 SKQB 385;
- i) Regina v. Miller, [1985] 2 S.C.R. 613;
- j) Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27;
- k) Regina v. Gamble, [1988] 2 S.C.R. 595;
- l) Parker v. Canada (Solicitor General), [1990] O.J. No. 815;
- m) Regina v. Clay, [2003] 3 S.C.R. 735;
- n) Regina v. Heywood, [1994] 3 S.C.R. 761;
- o) Regina v. Neve (1999), 137 C.C.C. (3d) 97 (Alta C.A.);
- p) Re: B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486;
- q) R. v. Lyons, [1987] 2 S.C.R. 309;
- r) Regina v. Luxton, [1990] 2 S.C.R. 711;
- s) Regina v. Hufsky, [1988] 1 S.C.R. 621;
- t) Lord v. Coulter, 2007 BCSC 1758;
- u) Gallichon v. Canada (Commissioner of Corrections) (1995), 101 C.C.C. (3d) 414 (Ont.C.A.);
- v) Idziak v. Canada (Minister of Justice), [1992] 3 S.C.R. 631;
- w) Solosky v. The Queen, [1980] 1 S.C.R. 821;
- x) Vukelich v. Mission Institution, 2005 BCCA 75;

Respondent's Position

- [37] The respondent submits that an ETA is a temporary absence from a penitentiary during which the inmate is under escort by a member of the CSC or other person. Unlike hearings regarding day parole or full parole referred to in ss. 122 and 123 of the CCRA, an inmate does not have a right to an ETA. The wording of s. 17 gives the institutional head discretion to authorize an ETA if the conditions of that section are satisfied.

- [38] As provided in s. 17(1), the institutional head (who in this case is the respondent) is required to consider risk for the purposes of determining whether to authorize an ETA. The CCRA also mandates that the institutional head consider the protection of society in determining the appropriate conditions for an ETA, if it is authorized.
- [39] In the case of ETAs, the NPB Policy Manual states that a psychiatric risk assessment is required for offenders with a life minimum or indeterminate sentence when they first apply for any type of conditional release, other than a medical or compassionate escorted temporary absence. A psychiatric risk assessment is an expert, holistic and detailed evaluation by a forensic psychiatrist of the level of risk posed by an offender, including an assessment of mental health.
- [40] The institutional head is required under the CCRA to conduct a meaningful assessment of risk and to be satisfied that the risk is not undue and that appropriate conditions are imposed before authorizing an ETA and referring it to the NPB. The institutional head is also mandated by the legislation to consider the policies of the NPB, particularly those relating to the meaningful assessment of risk.
- [41] The respondent says that the petition should be dismissed because the subject matter of the petition is beyond the scope of habeas corpus. Habeas corpus does not lie with respect to decisions by the respondent regarding the scheduling of psychiatric assessments or the alleged misapplication of Commissioner's Directive 712-1, because there has been no deprivation of liberty. The petitioners are not subject to a more restrictive form of confinement than they were before their ETA applications were refused. Habeas corpus is available only for the purpose of restoring an applicant to the level of liberty he or she had before the unlawful deprivation occurred. If a remedy other than such release is sought, this Court's habeas corpus jurisdiction is not engaged.
- [42] Furthermore, the respondent submits, because the sole remedy available in habeas corpus is either full release or release to a former level of confinement, habeas corpus does not lie to challenge all conditions of confinement or all restrictions on one's privileges while serving a criminal sentence. The petitioners must establish that the decision in issue has resulted in a deprivation of liberty, that is, in a substantial change to the restrictive conditions of his or her confinement.
- [43] The respondent also argues that the relief sought in paras. (b) to (d) of the petition are all in the nature of declarations and orders for mandamus against a federal tribunal. These remedies are not available in a habeas corpus proceeding in a superior court of a province. The respondent notes, however, that the petitioners may still seek a remedy by way of judicial review in the Federal Court.
- [44] As to the petitioners' claim for relief in para. (a) of the petition, which is described by them in their written argument as an order for their unconditional release, there is no basis for such relief in this case. The petitioners were not imprisoned as a result of the decisions refusing their applications for ETAs. They are in prison as a result of their convictions for,

respectively, first degree murder without eligibility for parole for 25 years, and second degree murder without eligibility for parole for 10 years. These convictions were upheld on appeal. It is well established that federally incarcerated inmates are, by definition, subject to a deprivation of liberty. This underlying deprivation of liberty cannot be challenged on an application for habeas corpus because that would invite collateral attacks on conviction and sentence. Thus, the remedies sought by the petitioners are not available in habeas corpus.

[45] The respondent also says that this petition should be dismissed because it is moot.

Analysis

[46] In view of the conclusions that I have reached, it is not necessary to refer to the other arguments of the respondent. I will first discuss whether or not the subject matter of this petition is beyond the scope of habeas corpus. I will do so on the basis that Mr. Spidel's status is the same as that of Mr. Mapara and then I will deal separately with the effect of Mr. Spidel's changed status.

[47] Habeas corpus is an extraordinary procedural remedy. In *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 at para. 21, the Supreme Court of Canada referred to R.J. Sharpe, *The Law of Habeas Corpus* (2nd Ed., 1989) at p. 23, where it is described this way:

The writ [of habeas corpus] is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses upon the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released.

[Emphasis in original.]

[48] The Supreme Court in *May* described the following test in relation to habeas corpus at para. 74:

A successful application for habeas corpus requires two elements: (1) a deprivation of liberty and (2) that the deprivation be unlawful. The onus of making out a deprivation of liberty rests on the applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority.

[49] Habeas corpus is also extraordinary because it represents an exception to the rule that prerogative relief in respect of the decisions or actions of federal boards, commissions or tribunals (it is noted that, by definition in the CCRA, the respondent is included within that group) is within the exclusive jurisdiction of the Federal Court of Canada. Unlike the remedies of declaratory relief, certiorari and mandamus directed to federal entities, which are within the exclusive jurisdiction of the Federal Court, pursuant to s. 18 of the Federal Courts Act, R.S.C. 1985, c.F-7, habeas corpus remains available in provincial superior courts.

[50] In *R. v. Miller*, [1985] 2 S.C.R. 613, the Supreme Court dealt with administrative confinement in penal institutions. It decided that a provincial superior court has jurisdiction to issue certiorari in aid of habeas corpus notwithstanding s. 18 of the Federal Court Act. In *Idziak*, at para. 39, the Court held that the wording of the Federal Court Act was indicative of Parliament's intent not to remove the jurisdiction of provincial superior courts to hear an application for habeas corpus to review the validity of a detention imposed by a federal authority.

[51] While *Le Dain J.* in *Miller* says that habeas corpus is available to challenge a form of detention that is distinct and separate from that imposed in the general inmate population, he goes on to say at para. 35:

I do not say that habeas corpus should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.

[52] In *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, the Supreme Court considered an application for habeas corpus made by an inmate whose application for parole had been denied. The Court determined that when an inmate has applied for parole but is refused, he has not suffered a deprivation of liberty within the meaning of habeas corpus because he is not subjected to a more restrictive form of confinement than he was before. He is not seeking to have something that was taken away from him restored, but is seeking the conferral of a new right or privilege.

[53] In *Dumas*, *Lamer J.* said, at para. 11,

Habeas corpus is available to challenge an unlawful deprivation of liberty. In the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty. In this case, as was pointed out in the lower courts, there was no challenge to the validity of the initial deprivation of liberty. In addition, there was no substantial change in the conditions of detention, because the appellant was never actually released on parole. If the appellant had been released on parole and then reincarcerated pursuant to a decision of the NPB, there would have been a substantial change which could have been challenged by way of habeas corpus

[54] Further, at para. 12:

The continuation of an initially valid deprivation of liberty can be challenged by way of habeas corpus only if it becomes unlawful. In the context of parole, the continued detention of an inmate will only become unlawful if he has acquired the status of a parolee. An inmate acquires that status as of the moment the decision to grant him parole takes effect.

- [55] In *Lord v. Coulter*, 2009 BCCA 62, the Court of Appeal relied on *Dumas* to dismiss Mr. Lord's application for habeas corpus relief. Mr. Lord asserted that he had been deprived of liberty because he had been denied parole and also denied access to certain rehabilitative programs as a result of his refusal to admit guilt for his offence. The Court of Appeal dismissed Mr. Lord's appeal, and relied on *Dumas* and *Miller* to uphold the chambers judge's finding that Mr. Lord's assertions did not engage the Court's habeas corpus jurisdiction.
- [56] I agree with the respondent's submission that the same reasoning applies to the case at bar. Even if the petitioners were entitled to ETAs, which because of the wording of s. 17 of the CCRA they are not, the non-referral of their applications to the NPB does not render their initially valid deprivation of liberty unlawful. In my view, the respondent acted within its statutory authority in requiring the petitioners to undergo psychiatric assessments. It appears that the use of the Centralized Process in prioritizing psychiatric assessments is a method of allocating scarce resources to those who require them and I am not satisfied that this process was a method by which the respondent sought to restrict the petitioners' access to ETAs.
- [57] In my view, the petitioners have not established any change in the restrictive conditions of their confinement as a result of the decisions refusing their ETA applications.
- [58] Insofar as the petitioners' argument purports to raise a new allegation that they have faced "reprisals" since filing their petition and that such reprisals comprise a "deprivation of liberty," I accept the respondent's submission that this assertion is not supported by the evidence.
- [59] Mr. Mapara remains in exactly the same position as he was prior to the refusal of his application for an ETA, namely, an inmate in the general population of a minimum security federal institution. If Mr. Spidel had remained at Ferndale Institution, the same comment would apply to him.
- [60] I have therefore concluded that in the circumstances of this case there has been no deprivation of liberty engaging this Court's habeas corpus jurisdiction.
- [61] Mr. Spidel's status has changed and he is now lodged in Mission Institution, a medium security federal prison. In my view, Mr. Spidel is no longer subject to the respondent's authority as he is no longer an inmate at Ferndale Institution. While he may wish to apply for a remedy in respect of his transfer, and I express no opinion as to the merits of such an application, his petition before this Court, directed as it is to the warden of Ferndale Institution, has become moot.
- [62] While no more is required to dismiss the petition before me, I wish to add that I would also accept the respondent's submissions that the petition, insofar as it is grounded on the failure of the respondent to provide them access to psychiatric assessments, is also moot.

[63] Although this Court has the discretion to hear a matter that is moot, considering the principles articulated in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, I am not satisfied that the petitioners have established a basis for the Court to hear this petition.

[64] I also note that it remains open for Mr. Mapara and Mr. Spidel to request an ETA at any time. They have each received ETAs in the past and, in the appropriate circumstances, I would expect that they will receive them again in the future. I presume that their having obtained psychiatric assessments should, in and by itself, now not be a barrier to a referral of their applications, should they decide to make them, to the NPB.

[65] The petition is dismissed without costs.

"Bowden J."

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