

CANADA / JUDGMENT

Reyat v. Canada (Attorney General)

2007 FC 562

COURT

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T-1041-06 Citation: 2007 FC 562 Ottawa, Ontario, May 29, 2007 PRESENT: The Honourable Madam
Justice Snider BETWEEN:INDERJIT SINGH REYAT Applicant and THE ATTORNEY GENERAL OF
CANADA Respondent REASONS FOR ORDER AND ORDER

1. Introduction

- [1] The Applicant, Inderjit Singh Reyat, seeks to set aside a decision of the Appeal Division of the National Parole Board (Appeal Division) dated May 29, 2006. In that decision, the Appeal Division affirmed a decision of a panel of the National Parole Board (the Board) to detain the Applicant until the end of his sentence (referred to as the warrant expiry date).
- [2] The facts of this particular application begin on February 10, 2003, when the Applicant entered a guilty plea to the charge of manslaughter in connection with the incident commonly referred to as the Air India bombing. In 1991, the Applicant had been convicted and served a ten year sentence for manslaughter related to the explosion at Narita Airport in Japan that killed two baggage handlers. For his part in the Air India bombing, the Applicant was sentenced to five years incarceration.
- [3] Under s. 127 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (the CCRA), the Applicant was eligible for statutory release in June 2006. Following a recommendation by the Institutional Detention Review Board that his detention be continued, the case was referred to the Board for a detention review. In a decision dated March 13, 2006, the Board was satisfied that, if released, the Applicant is likely to commit an offence causing death or serious harm to another person prior to the expiration of his sentence and concluded that the Applicant was to “be held in confinement until the expiration, according to law, of the sentence being served at the time of the Order or until such time as the National Parole Board otherwise so directs”.

- [4] The Applicant's appeal to the Appeal Division was denied. The Appeal Division concluded that: [T]he Appeal Division is satisfied that the Board conducted a fair risk assessment. In our view, the Board's conclusion to detain you is reasonable, supported by relevant, reliable and persuasive information and is consistent with the detention criteria set out in law and Board policy. The Board's decision is the least restrictive determination consistent with the protection of society.
- [5] In this case, the Appeal Division affirmed the decision of the Board. In the circumstances of this application for judicial review, it follows that this Court is, in effect, reviewing the Board's decision (*Ngo v. Canada (Attorney General)*, 2005 FC 49, 268 F.T.R. 64, [2005] F.C.J. No. 71 at para. 8 (F.C.) (QL); *Ng v. Canada*, 2003 FCT 781, 236 F.T.R. 129, [2003] F.C.J. No. 1018 at para. 15 (F.C.T.D.) (QL)).

2. Issues

- [6] The only issue in this application is whether the Board (and, thus, the Appeal Division) erred in determining that the Applicant is likely, if released, to commit an offence causing the death of or serious harm to another person (CCRA, s. 130(3)(a)). The Applicant raises three related issues specific to the Board's decision in this case: Did the Board err by making its decision without evidence before it that the Applicant was likely to re-offend? Did the Board make an error of fact by concluding that "a pattern of persistent, violent behaviour has been established"? Did the Board err by relying on a finding that the Applicant was not credible?
- [7] I will discuss each of these alleged errors in the analysis section that follows.

3. Analysis 3.1 Statutory scheme

- [8] Let me begin by reviewing the task before the Board and the Appeal Division. Under the provisions of the CCRA, the Applicant was entitled to be released on his "statutory release date". That is, the CCRA provides that the Applicant was subject to statutory release on "the day on which the offender completes two thirds of the sentence" (CCRA, s. 127(3)). A statutory release is not automatic, however. Every case of statutory release must be reviewed (CCRA, s. 129). Where there is an opinion that "there are reasonable grounds to believe that the offender is likely to commit an offence causing death or serious harm to another person before the expiration of the offender's sentence", the matter is referred to the Board for a hearing (in this case, under s. 129(2) of the CCRA). The Board, under the provisions of s. 130, conducts a detention review. The Board has a number of options open to it; the one of relevance to this application is set out in s. 130(3)(a). Under this provision the Board may order that the offender not be released until the expiration of his sentence where the Board is satisfied that the offender is likely, if released, to commit an offence causing the death of or serious harm to another person. In s. 132(1) of the CCRA, the Board is directed to take into consideration any factor that is relevant, including the following:
- (a) a pattern of persistent violent behaviour established on the basis of any evidence, in particular,

- (i) the number of offences committed by the offender causing physical or psychological harm,
 - (ii) the seriousness of the offence for which the sentence is being served, (iii) reliable information demonstrating that the offender has had difficulties controlling violent or sexual impulses to the point of endangering the safety of any other person, (iv) the use of a weapon in the commission of any offence by the offender,
 - (v) explicit threats of violence made by the offender, (vi) behaviour of a brutal nature associated with the commission of any offence by the offender, and (vii) a substantial degree of indifference on the part of the offender as to the consequences to other persons of the offender's behaviour;
 - (b) medical, psychiatric or psychological evidence of such likelihood owing to a physical or mental illness or disorder of the offender;
 - (c) reliable information compelling the conclusion that the offender is planning to commit an offence causing the death of or serious harm to another person before the expiration of the offender's sentence according to law; and
 - (d) the availability of supervision programs that would offer adequate protection to the public from the risk the offender might otherwise present until the expiration of the offender's sentence according to law.
- a) un comportement violent persistant, attesté par divers éléments, en particulier :
- (i) le nombre d'infractions antérieures ayant causé un dommage corporel ou moral, (ii) la gravité de l'infraction pour laquelle le délinquant purge une peine d'emprisonnement, (iii) l'existence de renseignements sûrs établissant que le délinquant a eu des difficultés à maîtriser ses impulsions violentes ou sexuelles au point de mettre en danger la sécurité d'autrui, (iv) l'utilisation d'armes lors de la perpétration des infractions,
 - (v) les menaces explicites de recours à la violence, (vi) le degré de brutalité dans la perpétration des infractions, (vii) un degré élevé d'indifférence quant aux conséquences de ses actes sur autrui;
 - b) les rapports de médecins, de psychiatres ou de psychologues indiquant que, par suite d'une maladie physique ou mentale ou de troubles mentaux, il présente un tel risque;
 - c) l'existence de renseignements sûrs obligeant à conclure qu'il projette de commettre, avant l'expiration légale de sa peine, une infraction de nature à causer la mort ou un dommage grave à une autre personne;
 - d) l'existence de programmes de surveillance de nature à protéger suffisamment le public contre le risque que présenterait le délinquant jusqu'à l'expiration légale de sa peine.

- [9] The Appeal Division's mandate in this case is set out in s. 147 of the CCRA. The grounds upon which an appeal of the Board's decision may be brought are set out in s. 147(1): 147.1 (1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,
- (a) failed to observe a principle of fundamental justice;
 - (b) made an error of law;
 - (c) breached or failed to apply a policy adopted pursuant to subsection 151(2);
 - (d) based its decision on erroneous or incomplete information; or
 - (e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.
- 147.1 (1) Le délinquant visé par une décision de la Commission peut interjeter appel auprès de la Section d'appel pour l'un ou plusieurs des motifs suivants :
- a) la Commission a violé un principe de justice fondamentale;
 - b) elle a commis une erreur de droit en rendant sa décision;
 - c) elle a contrevenu aux directives établies aux termes du paragraphe 151(2) ou ne les a pas appliquées;
 - d) elle a fondé sa décision sur des renseignements erronés ou incomplets;
 - e) elle a agi sans compétence, outrepassé celle-ci ou omis de l'exercer.
- [10] Finally, I note that Parliament has established principles to guide those persons and bodies responsible for granting parole. These are set out in s. 101 of the CCRA:
101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are
- (a) that the protection of society be the paramount consideration in the determination of any case;
 - (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 assessments provided by correctional authorities, and information obtained from victims and the offender;
 - (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;
 - (d) that parole boards make the least restrictive determination consistent with the protection of society;

- (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
 - (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.
101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent :
- a) la protection de la société est le critère déterminant dans tous les cas;
 - 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 victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;
 - 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) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;
 - 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) 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.
- [11] In discussing these principles, Justice Décary of the Federal Court of Appeal stressed the importance of the protection of society in *Cartier v. Canada (Attorney General)*, 300 N.R. 362, [2003] 2 F.C. 317 at paras. 13 and 19: [W]hether parole or statutory release is in question, when the time comes for the Board to exercise its discretion it is the overriding interests of society which must take precedence over the offender's interests. . . . The proposition that in the event of ambiguity the Act should be interpreted in the offender's favour is correct in so far as it means that once society's protection is guaranteed the Board should, in a given case, choose the solution which is less injurious to the offender's freedom. However, it is incorrect insofar as the Act has to ensure at the outset that society is protected: if there is any ambiguity in that regard, it will operate in favour of the public interest rather than in the interests of the offender. I understand from s. 101(a) of the Act that Parliament's intention was to make the "protection of society" test the "paramount consideration". This concern to give priority to the protection of society is also expressed in s. 101(d), according to which

"parole boards [shall] make the least restrictive determination consistent with the protection of society".

- [12] This is the statutory context in which the Board and the Appeal Division made their decisions that the Applicant should not be released before his warrant expiry date. This is also the context in which I must review their decisions. 3.2 Standard of Review
- [13] The parties are agreed that, overall, the standard of review to be applied to the decision of the Appeal Division is that of reasonableness simpliciter (Cartier, above at para. 9). However, the Respondent submits that the overarching issue in this proceeding involves the weighing of the evidence before the Board and the Appeal Division; the question should be determined on a standard of patent unreasonableness (Scott v. Canada (Attorney General), 2003 FC 1215, 58 W.C.B. (2d) 605, [2003] F.C.J. No. 1541 at para. 15 (F.C.) (QL)). It is unnecessary to make a final determination on the question of standard of review since, for the reasons below, I am satisfied that, regardless of which of the two standards is applied, there is no basis to intervene in the decision. 3.3 Analysis of the Decision and Alleged Errors
- [14] Overall, the decision of the Board is detailed and well-reasoned. The Board did not fail to consider any of the factors set out in s. 132(1) or any of the evidence before it. In its decision, the Board explains each of its findings. Similarly, the decision of the Appeal Division shows that it considered all of the submissions of the Applicant in coming to its conclusion that the Board's decision should be affirmed.
- [15] Before me, the Applicant acknowledges that, in reaching its decision, the Board did not ignore any evidence before it. Further, the Applicant does not argue that the Board (or the Appeal Division) applied the wrong legal test. Rather, the Applicant submits that the Board had no evidence before it upon which to conclude that the Applicant is likely to commit an offence causing the death or serious harm to another person prior to the expiration of his sentence. Further, the Applicant asserts that the Board made one factual error upon which, at least in part, it based its decision. Thus, the Applicant points to three areas where the Board allegedly erred in its assessment of the evidence before it. The Board erred in concluding that there was a pattern of violent behaviour; The Board ignored the psychiatric report of Dr. De Freitas where she concluded that the Applicant was not likely to cause death of serious harm to others; and The Board erred by relying on its lack of credibility finding.
- [16] I will consider each of these areas of alleged errors. 3.3.1 The "pattern" of violence
- [17] In its decision, the Board concluded that "a pattern of persistent, violent behaviour has been established". The Appeal Division, in its review, found no error in that conclusion.

- [18] The Applicant submits that the Board erred in its statement that the two convictions of the Applicant “constitutes a pattern of persistent violent behaviour”. In fact, the Applicant argues, both his manslaughter conviction in 1991 for the explosion at Narita Airport and his conviction for his role in the Air India bombing relate to the same transaction by the Applicant. Specifically, he asserts that he only once purchased materials for the making of the bombs used in both instances. Thus, he argues, there is no “pattern”.
- [19] Pursuant to s. 132(1)(a), the Board is required to consider whether there was a “pattern of persistent violent behaviour” (s. 132(1)(a)). The provision continues by listing the types of evidence that the Board should take into account in establishing a “pattern”. Included in that list is “the number of offences committed by the offender” (s. 132(1)(a)(i)). While it may be true that the Applicant made only one purchase of materials used to make explosive devices, it is undisputed that he was convicted of two separate offences. In addition, as noted by the Board and the Appeal Division, the Applicant’s record also include a weapons offence (possession of an unregistered 357 magnum handgun) that was unrelated to the manslaughter convictions. On this evidence, it was not unreasonable for the Board to conclude that there was a “pattern of persistent violent behaviour”. 3.3.2 The psychiatric reports
- [20] As noted above, Dr. De Freitas concluded that the Applicant was not likely to cause death or serious harm. A second report, entitled, “Pre-parole Psychiatric Assessment”, was prepared by Dr. Dickey. The Applicant points out that, in this report, Dr. Dickey did not express an opinion that the Applicant was likely to re-offend. In light of this evidence, the Applicant submits that the Board erred in its assessment. I do not agree.
- [21] The Board is not bound by the psychiatric reports; rather, the Board must bring its own expertise to bear on the assessments. The Federal Court of Appeal has stated that the expert opinions, although relevant and important, cannot, in most cases, be determinative (*Condo v. Canada (Attorney General)*, 2005 FCA 391, 67 W.C.B. (2d) 847, [2005] F.C.J. No. 1951 at para. 42 (F.C.A.) (QL)). They are a factor to be considered with all other relevant factors (*Condo*, above at para. 42).
- [22] In this case, it is important to read the reports carefully. Although Dr. De Freitas concluded that the Applicant was unlikely to re-offend, she also acknowledged difficulties in assessing risk in “this type of violence”. In contrast to Dr. De Freitas’ conclusion, Dr. Dickey expressed the view that: All that one can say from a psychiatric perspective is that his current presentation does not engender confidence in his abstaining from well organized behaviour or involvement associated with very bad trouble, be it directly or indirectly and this, in turn, being related to serious victim impact.
- [23] The Board’s decision demonstrates that the Board carefully reviewed the psychiatric reports. However, the Board concluded that it “can put little weight on such assessments in determining the risk in your specific area”. Given the content of those reports, this statement is not unreasonable. 3.3.3 Credibility

- [24] The Board found that, during his testimony in the hearing before the Board, the Applicant had provided “answers to questions . . . that are at variance with statements that you have made, or have been ascribed to you on previous occasions”. The Board stated that: The Board finds these discrepancies to be relevant to our decision, as they have led the Board to conclude that you have been evasive and contradictory in your statements today and that as a consequence, you have very little credibility.
- [25] The Applicant argues that the Board cannot rely on a lack of credibility when there is no other evidence capable of supporting a conclusion that the Applicant is likely to commit an offence, relying on *D.W. v. The Queen*, [1991] 1 S.C.R. 742 at 757, 122 N.R. 277, 63 C.C.C. (3d) 397. The Applicant interprets the conclusion of the majority of the Supreme Court as “even if the accused is disbelieved in total but there is reasonable doubt on the accepted evidence, an acquittal should ensue”. As applied to this application, the Applicant asserts that, even if the Board did not believe him, the remaining evidence does not support a finding that he is likely to re-offend. Thus, argues the Applicant, his credibility should not be a relevant factor.
- [26] The main problem with this argument is that the Board is not conducting a criminal trial. In the context of administering the parole and statutory release provisions of the CCRA, the Board is applying a statutory scheme with the protection of society being the paramount consideration (CCRA, s. 101; *Ngo*, above at paras. 22 - 24 and should not import criminal standards into their hearings (*Ngo*, above; *Giroux v. Canada (National Parole Board)*, 89 F.T.R. 307 at 313 - 314, 51 A.C.W.S. (3d) 1057, [1994] F.C.J. No. 1750 (F.C.T.D.) (QL)).
- [27] In undertaking its review, it appears to me that the Applicant’s credibility is very relevant to the Board’s assessment of the likelihood that the Applicant may commit another offence that could cause death or serious harm. Reliance on credibility does not, as asserted by the Applicant, reverse the onus. Rather, the Board is merely examining credibility as a factor in its decision making. It is entitled to do so.

4. Conclusion

- [28] In summary, I can see no error that requires the intervention of the Court. A review of the decision of the Board shows that the Board considered all of the relevant factors as required under the CCRA, did not ignore any evidence before it, did not take irrelevant considerations into account and explained – in a logical and thoughtful manner – the reasons for its conclusions. In rejecting the appeal of the Board’s decision, the Appeal Division was similarly reasonable. In other words, the decisions of the Board and the Appeal Division can withstand a somewhat probing examination. Accordingly, the Application for Judicial Review will be dismissed with costs to the Respondent. ORDER This Court orders that:
1. The application for judicial review is dismissed with costs to the Respondent. “Judith A. Snider”

Judge FEDERAL COURT NAMES OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-1041-06
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