Federal Court  Cour fédérale

Date: 20210210

Docket: T-696-19

Citation: 2021 FC 134

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 10, 2021

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JUSTIN GERMA

Applicant

and

ATTORNEY GENERAL OF CANADA

Defendant

JUDGMENT AND REASONS

[1] The applicant, Justin Germa, is an inmate in a federal institution. He is seeking to obtain the judicial review of a decision made on February 20, 2019, by the Parole Board of Canada (the "Board"), a federal agency under the *Corrections and Conditional Release Act* (SC 1992, c. 20). The decision for which a judicial review is being sought is one delivered by the Board's Appeal Division acting on an appeal from a trial decision (October 16, 2018) that revoked the statutory

release of the applicant. The Appeal Division confirmed this decision because the applicant had failed to cite reasons justifying intervention. The decision of October 16, 2018, provides certain context that may assist in better understanding the situation.

I. The facts

[2] There does not appear to be any doubt that the applicant is Aboriginal. Reference is made to this fact by both levels of the Board. But there is also no dispute that the applicant did not learn that he was Aboriginal until 2016 while he was serving a sentence in a penitentiary and met his biological father there.

[3] There is no need to describe in detail the events leading up to revocation of the statutory release. Suffice it to say that the applicant, who is now in his forties (he was born on May 9, 1977), is currently serving his fourth penitentiary sentence, a sentence of 12 years and four months ending in August 2021. He also had numerous convictions as a young offender. The applicant alleges that the Board had not adequately considered his Aboriginal status and that it used actuarial tools inappropriately as part of a psychological assessment contrary to the precedent set in *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165.

II. The decisions

[4] In his memorandum, the applicant cites paragraphs from the trial decision as relevant to the dispute from his viewpoint. First, the paragraphs relating to what the Board designated as the particular circumstances of Aboriginal offenders:

The Board also took into account the particular circumstances of aboriginal offenders, historical and systemic factors.

[TRANSLATION]

La Commission a également tenu compte des circonstances particulières des contrevenants autochtones, notamment des facteurs historiques et systémiques.

(Board decision, at page 2/7)

[…]

Your file indicates that, in 2016, after reconnecting with your biological father who was incarcerated in the same institution as you, you found out that you have Aboriginal roots. As you had been separated from him at a very young age, you were not aware of your family history. Therefore, it seems that you are fourth-generation MicMac. According to your caseworkers. you [*sic*] never lived in an urban community or a reserve and were also not raised as an Aboriginal. You were not impacted by the residential school system nor the sixties Aboriginal scoop.

According to information on file, during your last incarceration, you participated in ceremonies and circles in the brotherhood. However, after a couple of participation [*sic*] you told the Native Elder that you felt that you were not connected to the culture and had no interest in pursuing your involvement. You were not involved in a healing plan.

[TRANSLATION]

[…]

Il est indiqué dans votre dossier que c’est en 2016 que vous avez appris que vous aviez des racines autochtones, après avoir repris contact avec votre père biologique qui était incarcéré dans le même établissement que vous. Comme vous étiez très jeune lorsque vous avez été séparé de votre père, vous ne connaissiez pas votre histoire familiale. Il semble donc que vous soyez Mi’kmaq de quatrième génération. Selon vos travailleurs sociaux, vous n’avez jamais vécu dans une communauté urbaine ou une réserve, et vous n’avez pas été élevé non plus dans la culture autochtone. Vous n’avez pas fait l’expérience des pensionnats indiens et n’avez pas été touché par la rafle des années 1960 visant les enfants autochtones.

> Selon les renseignements inscrits à votre dossier, lors de votre dernière incarcération, vous avez participé à des cérémonies et à des cercles de la fraternité autochtone. Cependant, après quelques participations, vous avez dit à l'aîné autochtone que vous ne vous sentiez pas lié à cette culture et que vous ne souhaitiez plus poursuivre votre participation. Vous n'avez pas suivi de plan de guérison.
>
> (Board decision, at page 3/7)
>
> […]
>
> In its decision, the Board has taken into account that after reconnecting with your biological father in the institution in 2016, you learned that you were an aboriginal. You never lived in an urban community or a reserve. You were not impacted by the residential school system or 60s aboriginal scoop. You were initially involved in various cultural activities in the penitentiary, before deciding that you did not feel connected with that culture and reduced your cultural activities. You have never participated in the healing plan.
>
> [TRANSLATION]
>
> […]
>
> Dans sa décision, la Commission a tenu compte du fait que vous avez appris que vous étiez autochtone en 2016, après avoir repris contact avec votre père biologique au pénitencier. Vous n'avez jamais vécu dans une communauté urbaine ou une réserve. Vous n'avez pas fait l'expérience des pensionnats indiens et n'avez pas été touché par la rafle des années 1960 visant les enfants autochtones. Vous avez au départ participé à diverses activités culturelles au pénitencier, mais vous avez ensuite réduit vos activités culturelles après avoir constaté que vous ne ressentiez pas de lien avec cette culture. Vous n'avez jamais participé au plan de guérison.
>
> (Board decision, at page 7/7)

Regarding the "actuarial tools", the applicant cites the following paragraph:

> The Statistical Information on Recidivism (SIR) for your case suggests that one out of every three offenders with similar characteristics as yours will not commit an indictable offence

> within three years of release. The risk for public safety is considered high.
>
> [TRANSLATION]
>
> Selon l'échelle d'information statistique sur la récidive (ISR), un contrevenant sur trois présentant des caractéristiques comparables aux vôtres ne commettra pas d'infraction punissable par mise en accusation au cours des trois années suivant sa libération. Le risque pour la sécurité publique est considéré comme élevé.
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> (Board decision, at pages 3–4/7)

With respect to the Appeal Division, the paragraph from its decision cited by the applicant is as follows:

> The Appeal Division finds that the Board demonstrated that it was aware of its obligation in your case as described in Twins v. The Attorney General of Canada 2016 FC 537 (Twins), in B.. [*sic*] v. Gladue, [1999] 1 SCR 688 (Gladue), and in Board policy, to consider the systemic and background factors which may have played a part in bringing you in interaction with the criminal justice system. in [*sic*] your case, the Appeal Division finds that the Board's decision demonstrates that it had weighed and considered that in 2016, after reconnecting with your biological father who was incarcerated in the same institution as you, you found out that you have Aboriginal roots. As you had been separated from him at a very young age, you were not aware of your family history. The Boad [*sic*] noted that you are fourth-generation MicMac. According to your caseworkers, you never lived in an urban community or a reserve and were not raised as an Aboriginal. You were not impacted by the residential school system nor the sixties Aboriginal scoop. The Board also considered that according to information on file, during your last incarceration, you participated in ceremonies and circles in the brotherhood. However, after a couple of activities, you told the Native Elder that you felt that you were not connected to the culture and had no interest in pursuing your involvement, [*sic*] You were not involved in a healing plan.
>
> [TRANSLATION]
>
> La section d'appel juge que la Commission a démontré qu'elle connaissait les obligations qu'elle avait à votre égard, et qui sont

> décrites dans la décision *Twins c (Procureur général)*, 2016 CF 537 (Twins), dans l'arrêt *R. c Gladue*, [1999] 1 RCS 688 (Gladue) ainsi que dans la politique de la Commission, à savoir qu'elle doit tenir compte des facteurs systémiques et historiques qui pourraient avoir contribué à vos démêlés avec la justice; plus précisément, la section d'appel conclut que la décision de la Commission montre que cette dernière a tenu compte du fait que vous avez appris que vous aviez des racines autochtones en 2016, après avoir repris contact avec votre père biologique qui était incarcéré dans le même établissement que vous. Comme vous étiez très jeune lorsque vous avez été séparé de votre père, vous ne connaissiez pas votre histoire familiale. La Commission a mentionné que vous êtes Mi'kmaq de quatrième génération. Selon vos travailleurs sociaux, vous n'avez jamais vécu dans une communauté urbaine ou une réserve, et vous n'avez pas été élevé dans la culture autochtone. Vous n'avez pas fait l'expérience des pensionnats indiens et n'avez pas été touché par la rafle des années 1960 visant les enfants autochtones. La Commission a également tenu compte du fait que, selon les renseignements inscrits à votre dossier, vous avez participé à des cérémonies et à des cercles de la fraternité autochtone lors de votre dernière incarcération. Cependant, après quelques participations, vous avez dit à l'aîné autochtone que vous ne sentiez aucun lien avec la culture et que vous ne souhaitiez plus poursuivre votre participation. Vous n'avez pas suivi de plan de guérison.
>
> (Appeal Division decision, at pages 3–4/5)

I note that the Appeal Division did not make reference to an actuarial tool. This is not surprising. The written submissions to the Appeal Division do not mention it; relying on *R v Gladue*, [1999] 1 SCR 688 and *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, two sentencing decisions, the applicant argues on appeal that based on Aboriginal origins, [TRANSLATION] "the Board members have a duty to frame their interpretation of the facts against the mandate of rehabilitation, which is to facilitate the rehabilitation of offenders and their reintegration into the community with a view to protecting society" (Submissions made on behalf of Mr. Germa to Appeal Division, Exhibit R-8, affidavit from J. Germa, July 18, 2019, at page 4 of 5). The Appeal Division also indicated this at the end of its decision:

> […] With respect to your ASH [Aboriginal Social History], the Appeal Division finds that it was reasonable for the Board to find that your release plan that did not fit your needs given your criminal history and your current behaviour. With the exception of the community program, you had not identified any culturally specific interventions that could respond to your specific needs as an Aboriginal offender. The Board had recently implemented an alternative to reincarceration when cancelling a suspension with a reprimand, but to no avail as you were unable to modify your conduct in the community. At the conclusion of its analysis, the Appeal Division finds that it was reasonable to conclude that your risk had become undue, and to revoke your statutory release.
>
> [TRANSLATION]
>
> […] À l'égard de vos antécédents sociaux autochtones, la section d'appel conclut qu'il était raisonnable pour la Commission de juger que votre plan de libération conditionnelle ne répondait pas à vos besoins, compte tenu de vos antécédents criminels et de votre comportement actuel. À l'exception du programme communautaire, vous n'avez indiqué aucune intervention propre à la culture qui pourrait satisfaire à vos besoins précis en tant que contrevenant autochtone. La Commission a récemment mis en place une solution de rechange à la réincarcération, qui consiste à annuler une suspension en y ajoutant une réprimande; cette mesure ne peut toutefois pas s'appliquer dans votre cas, car vous avez été incapable de modifier votre conduite dans la communauté. La section d'appel conclut son analyse en jugeant qu'il était raisonnable de conclure que le risque que vous présentez était devenu inacceptable et de révoquer votre libération d'office.

III. Mootness of application for judicial review

[5] The problem posed in relation to Mr. Germa is that his situation has changed significantly since the decision for which he has applied for judicial review (the Appeal Division decision of February 20, 2019). In fact, the parties agree that the application for judicial review is manifestly moot.

[6] Following the decision (or decisions) subject to the application for judicial review, three Board decisions were delivered in Mr. Germa's case. On October 4, 2019, an application for day parole and full parole was denied. The decision refers to incidents, including disciplinary offences, requiring intervention. On January 21, 2020, the Appeal Division confirmed the decision of October 4, 2019. Finally, a third decision was handed down on July 29, 2020, setting certain statutory release conditions. The offender was released this past August.

[7] Counsel for the applicant informed the Court that the applicant's situation had changed again recently. At the hearing on December 17, 2020, where the Court required additional notes from the parties on the Court's exercise of discretion to hear the application for judicial review despite its mootness, the applicant was under statutory release. This has since been once again suspended. The reasons for withdrawal of the applicant's statutory release were not shared. He must be heard within 90 days of the suspension: the date was not disclosed to the Court.

[8] I note that the applicant's Aboriginal identity was noted in all three decisions delivered since February 20, 2019.

IV. Should judicial discretion be exercised?

[9] At the hearing this past December 17, it became apparent to the Court that the question as to mootness had arisen to the point that the parties had to be heard on what they thought they could achieve with an application for judicial review of this nature. On one hand, the applicant's situation is somewhat unique in that he discovered his Aboriginal identity only in his late thirties. On the other, the facts giving rise to his application for judicial review have changed

significantly. The question is then to determine the remedy that could be sought. In other words, is the applicant seeking to transform his judicial review into some form of reference on how Aboriginals are to be treated under the parole system for offenders? If some form of reference, should it be considered despite the apparently unique situation of this applicant? Would it be appropriate to proceed with such a reference in the circumstances, without having a complete factual record?

[10] In my view, the Court's residual discretion to hear the application for judicial review despite the fact that it is moot should not be exercised in this case.

[11] The landmark decision in this regard is, of course, *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. A case becomes moot when the decision to be made can no longer have any practical effect on the rights of the parties, for example, because events have occurred such that a live controversy no longer exists:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> (*Borowski*, at page 353)

[Emphasis added.]

[12] A great deal has happened since the decision subject to application for judicial review in February 2019. The live controversy that may have then existed, based on the record then before the Court, is no longer; the *substratum* of the dispute no longer exists. In fact, the issue has become abstract, and the dispute cannot lead to any decision resolving it. As indicated above, the parties agree that this dispute has become moot.

[13] I hasten to add that the time taken to conclude this case is not merely a reflection of the current pandemic. Extensions of time have been requested and obtained on the applicant's behalf at various stages of the process. The applicant's case consequently was not filed with the Court until February 3, 2020. The Board's subsequent decisions of October 4, 2019, and January 21, 2020, had already been delivered, with the result that the applicant conceded in as early as February 2020 that his proceeding had become moot. This mootness became increasingly apparent during the course of 2020.

[14] A court may nonetheless elect to address a moot issue "if the circumstances warrant" (*Borowski*, at page 353). The Supreme Court has identified three criteria for exercising this discretion judicially:

a) Does an adversarial context still exist?
b) Are there concerns for judicial economy?
c) What is the Court's true role in terms of its law-making function?

It is to be noted regarding these criteria that the Supreme Court itself considers that "more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases." (*Borowski*, at page 359).

A. *Applicant's arguments*

[15] To begin, the applicant states that he is seeking a judicial review of two decisions, those of October 16, 2018, and February 20, 2019. Although the possibility of this is doubtful (rule 302 *Federal Courts Rules*, SOR/98-106; *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332), this question does not really have any impact on the decision as to whether to exercise discretion apart from pondering what the remedy would consist of in this case: the appeal related strictly to Aboriginal identity, whereas the decision of October 16 also concerned actuarial tools to which reference was allegedly made unreasonably at the trial level. As a result, it is not at all certain that the question concerning the use of actuarial tools, which was hardly touched upon in the decision of October 16, 2018, is validly before the Court, since this question was not raised in the written submissions made to the Appeal Division, which did not address it in its decision.

[16] The applicant presents three arguments. First, he contends that any decision made by the Court would have [TRANSLATION] "incidental effects", the action now being moot, on future Board decisions concerning the case of Mr. Germa, who is a changed person. The reason for this is unclear. He argues further that judicial economy weighs in his favour, since there is a risk that a similar situation could recur. Finally, Mr. Germa argues that the matters in dispute are important, justifying the hearing of the case, because he asserts that these questions go beyond

his particular case. The applicant does not explain how the considerations—apart from judicial economy—meet the criteria set out in *Borowski*.

B. *Respondent's arguments*

[17] The respondent focused more closely on the three criteria. Essentially, he considers that the applicant is seeking a form of reference even though the impugned decision no longer has any effect between the parties. Any adversarial context between the parties has come to an end. It is in fact a judicial review of a specific decision related to specific circumstances which no longer exist given the evolution of the file. A legal debate is not disposed of in a vacuum.

[18] Judicial resources would be used more effectively where a decision may have real effects; moreover, there is a strong likelihood that the question raised in this case will be raised. The respondent states [TRANSLATION] "that it would be ill advised to allocate additional resources to a moot question when it might be answered more effectively in other cases in accordance with the Court's jurisdictional function" (respondent's submissions, at paragraph 25).

[19] This leads the respondent to address the jurisdictional function. He argues that the role of a reviewing court is to confirm the legality of an administrative decision. It is hazardous to speculate on the reasons the Board might provide in future decisions.

C. *Discussion*

[20] I was not convinced by the applicant that judicial discretion should be exercised in his favour.

[21] Although the facts giving rise to the application for judicial review have disappeared and there is no longer any debate to be had in their regard, the applicant wants his case to continue regardless. Strictly speaking, there is no longer any dispute to determine; that said, it can be inferred that the parties would be interested in debating the questions raised if the Court were to decide in favour of the applicant. However, the problem in this case is not so much the lack of an adversary to debate a proposition. It is instead the fact that the factual framework providing the context in which an adversarial debate might take place no longer exists. The tangible aspect of the dispute has disappeared. But this consideration falls more within the scope of the decision to determine whether a live controversy continues to exist, which constitutes the first step of the *Borowski* analysis. Importing what constitutes a fundamental element of the first step (live controversy) into the first criterion of the second step (adversarial context) could create a vicious cycle. Moreover, the criterion becomes meaningless if it can be met simply by finding an adversary.

[22] The applicant has failed to address this first criterion, choosing instead to trust that a decision in this case will have impact on future decisions. In my view, the respondent is not entirely wrong in asserting that the applicant is no longer seeking to enter into an adversarial debate based on the facts of a case but rather to transform the entire proceeding into a reference

before this Court. It appears to me that an analogy can be made with constitutional disputes without any factual basis. In *Mackay v Manitoba*, [1989] 2 SCR 357, the Supreme Court stated that "*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions" (at page 361). Essentially, a judicial review is not a reference where a party is seeking more general pronouncements. I would conclude from this that the criterion is, at best, neutral.

[23] The question of judicial resources clearly favours the respondent. The applicant argues that questions of this nature will continue to arise and may fail to be determined. The reason for this is unclear. In fact, the same could be said concerning any dispute that has become moot. If other cases arose, this suggests instead that the question may be explored where the facts provide a context and a decision must be made to dispose of a real dispute. If, for example, the respondent had amended the parole conditions the day before the hearing to avoid a judgment, one might find reason to address the judicial review despite its moot nature. But no such circumstance is involved here. The delay in coming before this Court, which may have led to a change in the substance of the case due to the passage of time, must be attributed largely to the applicant himself, who had to obtain extensions of time on three occasions. *Borowski*, at page 361, reads as follows:

> The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. <u>It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.</u>
>
> [Emphasis added.]

The observation is all the more pertinent in the circumstance at hand, where the Court is being asked to express an opinion, almost *ex cathedra*, in the absence of facts giving rise to the dispute, an often perilous undertaking. The appropriate remedy must also be identified. Inspecting the matter more closely, it looks very much like a reference concerning Aboriginal identity in the highly specific situation of a person who learned of his own only recently. This was raised in the two decisions, but in the context of the danger the applicant potentially posed, a context that has changed.

[24] It is also important to consider the true role of a court of law in terms of its law-making function, which constitutes the third criterion in evaluating the exercise of judicial discretion. Rather than debate this criterion directly, the applicant falls back on what he considers the importance of the matters in dispute.

[25] As the Supreme Court states in *Borowski*, "[i]n considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role" (at page 363). Meanwhile, the role of a reviewing court is to dispose of a judicial review in consideration of the factual record placed before it based on two possible standards of review: reasonableness or correctness. It makes its determination based on the facts and the law, which most often requires the reasonableness standard, even for questions of law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 25 [*Vavilov*]). In the present case, the applicant invokes correctness, arguing that he is one of the exceptions recognized in *Vavilov*. It is not at all clear that he is correct. If it is necessary to interpret the law based on the facts of a case, then this will be in the context of the facts of the case giving rise

thereto. To me, this appears particularly applicable in cases with highly particular, even unique, facts. Seeking generalizations under the auspices of an application for judicial review that, strictly speaking, no longer exists does not seem appropriate. It is based on a comprehensive case that an informed decision can be made as to an appropriate remedy. Such is no longer the case here.

[26] This is not what the applicant is seeking in the matter at hand. He wants to refer to this Court a moot question not originating in facts giving rise to an administrative decision in a context that is highly specific, if not unique. This leads to a significant departure from the traditional role played by a reviewing court.

[27] I consequently conclude that judicial discretion should not be exercised to hear the application for judicial review despite its mootness. I arrive at this conclusion in consideration of judicial economy and the divergence between a court's traditional role and what is being sought.

JUDGMENT in T-696-19

THE COURT ORDERS that:

1. The application for judicial review is denied because it has become moot.

2. No costs are awarded.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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