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FEDERAL COURT
COUR FÉDÉRALE
23-SEP-2022
Jonathan Macena
Ottawa, ONT
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COURT FILE NO. T-1952-22

FEDERAL COURT

BETWEEN

NABIL BENHSAIEN

APPLICANT

AND

ATTORNEY GENERAL OF CANADA

RESPONDENT

APPLICATION UNDER S.18.1 OF THE FEDERAL COURTS ACT

RULE 301

COURT SEAL

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the court at a time and place to be fixed by the judicial administrator. Unless the court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard in Ottawa.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the federal courts rules and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the federal courts rules, information concerning the local offices of the court and other necessary information may be obtained on request to the administrator of this court in Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date:

Issued by:.....

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(registry office)

Address of the local office:

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TO:

The attorney general of Canada: 284 Wellington St., Ottawa, Ontario, K1A 0H8.

The appeal division of parole board of Canada: 410 Laurier avenue west, 7th floor, Ottawa Ontario, K1A 0R1.

Parole board of Canada: 100-516 O'connor DR, Kingston ON, K7P 1N3.

APPLICATION

This is an application for judicial review in respect of appeal division of Parole board of Canada.

Decision in respect of which the judicial review is sought:
Decision to affirm the order to detain me pursuant to S.130(3)(a) of the corrections and conditional release Act which took place on the 31st of January 2022. This decision was first communicated to me on the 8th of February 2022.

The applicant makes application for:
To, pursuant to S.18.1(3)(b) of the federal courts Act, set aside and refer back for determination in accordance with such directions as the federal court considers appropriate the decision to affirm the order to detain me pursuant to S.130(3)(a) of the corrections and conditional release Act with costs.

The grounds for the application are:
The appeal division of parole board (the appeal division) based its decision to affirm the order to detain me until the expiry of my warrant pursuant to S.130(3)(a) of the corrections and conditional release Act (CCRA), that parole board of Canada (the board) made, on an erroneous finding of fact that was made without regard for the material before it and made this decision understanding and applying that the board pursuant to paragraph 107(1)(a) of the CCRA has exclusive jurisdiction and absolute discretion to review and decide the case of an offender referred to it pursuant to S.129 of the CCRA. As such, the appeal division based its foregoing decision on an erroneous finding of fact that was made without regard for the material before it and erred in law in making this decision. Thus, the grounds set out under S.18.1(4)(d) and S.18.1(4)(c) of the federal courts Act are grounds for review of the decision of the appeal division to affirm the order to detain me pursuant to S.130(3)(a) of the CCRA.
The appeal division on the 31st of January, 2022 decided to affirm the order to detain me, the board made pursuant to paragraph 130(3)(a) of the CCRA holding that the board, in my case, exercised its authority pursuant to the CCRA. The appeal division explained indicating that when a case is referred to the board by correctional services Canada in accordance with subparagraph 129(2)(a)(i) of the CCRA, the board may

order the detention of an offender, where the board is satisfied that the offender is likely, if released, to commit an offence causing death or serious harm to another person before the expiry of their sentence. The appeal division further explained indicating that the board must conduct a risk assessment in accordance with the detention criteria set out in subsection 132(1) of the CCRA and in accordance with policy 6.1 of the decision-making policy manual for board members.

Part of the basis on which the appeal division decided to affirm the order to detain me is that the board, based on the psychological and psychiatric assessments on file, found that there is medical, psychiatric or psychological evidence of the foregoing likelihood (as per S.132(1)(b) of the CCRA). There is documentary evidence that the appeal division didn't address and that out of which it is reasonable to conclude that the basis on which the board concluded that there is medical, psychiatric or psychological evidence of the foregoing likelihood excluded a part that the psychological and psychiatric assessments on file include. The board under medical, psychiatric or psychological evidence of the foregoing likelihood (as per S.132(1)(b) of the CCRA) indicated that a psychological risk assessment was completed in 2020 and featured actuarial measures on the basis of which I was assessed in the moderate range of risk of general recidivism and in the moderate to high risk of violent recidivism when all variables are considered. The board went on to mention that the clinician suggested that my risk may be higher if my belief system broadens to the delusional realm and that I displayed some evidence of thought disorder merely bordering on the delusional. Nonetheless, unlike the basis the appeal division identified as that on which the board concluded that there is medical, psychiatric or psychological evidence of the foregoing likelihood (i.e. the psychiatric and psychological assessments on file), and particularly the report of the psychiatric and psychological assessment completed in 2020, the board under medical, psychiatric or psychological evidence of the foregoing likelihood didn't mention or implicate and thereby factored out that the moderate to high range of risk of violent recidivism was obtained applying the VRAG-R and corresponds to only a 45% probability of violent recidivism in 5 years of opportunity and to 69% probability in 12 years of opportunity. Such probability and periods are pertinent in the results of actuarial risk assessment. Thus, the appeal division didn't analyse documentary

evidence that directly contradicts its findings and thereby based its decision to affirm the detention order against me on an erroneous finding of fact that it made without regard to evidence. See Gengeswaran V. Canada (Minister of citizenship and immigration)1999, see Cepeda-Gutierrez V. Canada (Min of citizenship and immigration)1998 and see in Jack V. Canada(Min of immigration and refugees and citizenship) 2018.

In summary the appeal division didn't address a piece of documentary evidence that directly contradict its findings and thereby made an erroneous finding of fact without regards to the evidence and made reasonableness the standard of review in this case. Assessing whether the decision to affirm the order to detain me meets the requirements of justification, intelligibility and transparency is as follows. See Dunsmuir V. New Brunswick, [2008] 1S.C.R. 190.

Being neglecting that assessing me in the high moderate range of violent recidivism corresponds to only a 45 % probability of violent recidivism in 5 years of opportunity, what it is that made one of the findings of fact the appeal division based its decision on erroneous is something that implies that there is evidence that rather negates that I'm likely to, if released, commit an offence causing serious harm to another before expiry of my warrant and is something that makes the diagnoses the board acknowledged under psychiatric and psychological evidence of the foregoing likelihood the only other piece of psychiatric/psychological evidence in the record before the appeal division that is relevant to the foregoing likelihood. These diagnoses amount to a significance of a mere tendency to act in certain ways and can't interfere with evidence of much less than 45% probability of violent recidivism. However, these diagnoses, if coupled with certain pattern of persistent violent behaviour and insufficiency of supervision, might form a basis on which a finding of the forgoing likelihood may rest (S.132(1) of the CCRA). The foregoing diagnoses and, with the exception of difficulties controlling my violent impulses, the considerations on which the appeal division found that the board found that I demonstrated a pattern of persistent violent behaviour as well as any reasons that may supplement the reasons why the appeal division so found and held that the board considered that there is insufficient supervision programs are all contained in the account of evidence on which the court established that there is a reasonable possibility of eventual control of the risk I pose to the community pursuant to S.753.1(1) of the

criminal code. Therefore, given S.107(1)(d) of the CCRA, in order for the decision of the appeal division to affirm the order to detain me the board made to be justified, the board finding that I'm likely, if released, to commit an offence causing serious harm to another before expiry of my warrant must not be inconsistent with the sentencing court and it can be if the basis on which it finds same with the exception of the parts that are inconsistent with fact(s) that may be and were established pursuant to the code is contained in the basis on which the court established that there is a reasonable possibility of eventual control of the risk I pose to the community pursuant to S.753.1(1) of the code. The only thing that the board based finding that I'm likely, if released, to commit an offence causing serious harm to another before expiry of my warrant on that the court didn't base its finding that there is a reasonable possibility of eventual control of the risk I pose to the community on is the difficulty controlling my violent impulses and the board must not have found such fact as that I have difficulty controlling my violent impulses. The board based finding that I have difficulty controlling my violent impulses on that my criminal offending and in particular the index offending reflects that I have difficulty controlling my violent impulses while same is inconsistent with fact(s) that may be and were made pursuant to the criminal code. The sentencing court finds fact to be that the index offences were committed out of a cognitive distortion as opposed to impulsivity as it was required under S.753(1) of the code to consider psychiatric assessment(s) and other evidence to determine whether the evidence establishes a pattern of repetitive behaviour and a likelihood to re-offend while committing the offences that form such pattern can imply that this pattern doesn't signify a likelihood to re-offend if the offences are committed out of a cognitive distortion and the perpetrator does admit same. Therefore, the board may not establish such fact as that my index offences reflect that I have difficulties controlling my violent impulses and by extension that I have difficulty controlling my violent impulses. As such, the basis on which the board may find that I'm likely to commit an offence causing serious harm to another if released before expiry of my warrant must not consist of that I have difficulties controlling my violent impulses and is contained in the account of evidence on which the sentencing court established that there is a reasonable possibility of eventual control of the risk I pose to the community. Also, the finding of the board that I'm likely to, if

released, commit an offence causing serious harm to another before expiry of my warrant is inconsistent with the finding of the court that there is a reasonable possibility of eventual control of the risk I pose to the community and affirming the order to detain me the board made can't be justified.
Thus, the court may grant the appropriate remedy.

Moreover, the appeal division also affirms the order to detain me, the board made pursuant to paragraph 130(3)(a) of the CCRA holding that pursuant to paragraph 107(1)(a) of the CCRA, the board has exclusive jurisdiction and absolute discretion to review and decide the case of an offender referred to it pursuant to section 129. Contrary to the understanding of the appeal division, under paragraph 107(1)(a) of the CCRA, the board has no such jurisdiction and discretion and the exclusive jurisdiction and absolute discretion to review and decide the case of an offender referred to it pursuant to S.129 of the CCRA the board has under S.107(1)(d) of the CCRA is subject to the criminal code. As such, it seems that the board may not make findings of fact that are inconsistent with fact(s) that may be and were made pursuant to the criminal code. For these reasons the appeal division appears to have made an error of law and for the following reasons this error of law appears to be resulting in a miscarriage of justice and must not result in withholding the appropriate remedy pursuant to S.18.1(5) of the federal courts Act.
As one of the reasons why the appeal division decided to affirm the order to detain me the board made against me, the appeal division indicated that the board reasonably found that I demonstrated a pattern of persistent violent behaviour (as per S.132(1)(a) of the CCRA) considering on the basis of file information and information I provided during the hearing, that I lack victim empathy, that I have committed violent offences with the use of a weapon, that the criteria for serious harm is met, that the nature of my index offences is both severe and brutal and that I have difficulty controlling my violent impulses. Under a pattern of persistent violent behaviour, the board indicated that my criminal offending and in particular the index offending reflects that I have difficulty controlling my violent impulses. As such, it seems that the board based finding that I have difficulty controlling my violent impulses on that my criminal offending and in

particular the index offending reflects that I have difficulty controlling my violent impulses while same is inconsistent with fact(s) that may be and were made pursuant to the criminal code. The sentencing court, on the other hand, finds fact to be that the index offences were committed out of a cognitive distortion as opposed to impulsivity as it was required under S.753(1) of the code to consider psychiatric assessment(s) and other evidence to determine whether the evidence establishes a pattern of repetitive behaviour and a likelihood to re-offend while committing the offences that form such pattern can imply that this pattern doesn't signify a likelihood to re-offend if the offences are committed out of a cognitive distortion and the perpetrator does admit same. Therefore, the board may not establish such fact as that my index offences reflect that I have difficulties controlling my violent impulses and by extension that I have difficulty controlling my violent impulses. As such, the basis on which the board may find that I'm likely to, if released, commit an offence causing serious harm to another before expiry of my warrant must not consist of that I have difficulties controlling my violent impulses and is contained in the account of evidence on which the sentencing court established that there is a reasonable possibility of eventual control of the risk I pose to the community. Thus, the finding of the board that I'm likely to, if released, commit an offence causing serious harm to another before expiry of my warrant is inconsistent with the finding of the court that there is a reasonable possibility of eventual control of the risk I pose to the community and this finding of the board constitutes a miscarriage of justice by virtue of S.107(1)(d) of the CCRA.

As the standard of review in cases of errors of law is correctness, the court is to undertake its own analysis of the matter and is, for the following reasons, to replace the affirmation of the order to detain me the appeal division made by a direction to find that the detention pursuant to S.130(3) of the CCRA must not be warranted in this case. See Dunsmuir V. New Brunswick, [2008] 1S.C.R. 190.

The convictions upon which the warrant in issue was issued are convictions of aggravated assaults and assaults with a weapon and are convictions of offences listed in schedule I of the CCRA. As such, I was correctly referred to the board under S.129(2)(a)(i) of the CCRA. The board is to order the detention of an offender referred to it under S.129(2)(a)(i) of the CCRA pursuant to S.130(3)(a) of the CCRA should it find

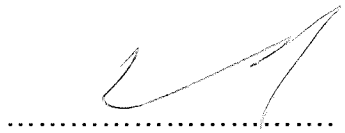
that the offender ,if released, will likely commit an offence causing serious harm to another before expiry of the warrant. For the purpose of the determination of the case of an offender referred to the board under S.129 of the CCRA, S.132 (1) of the CCRA requires the board to take into account any factors that are relevant in determining the likelihood of the commission of an offence causing serious harm before expiry of the warrant including those listed under S.132(1)(a)-(d) of the CCRA. Finally, the board pursuant to S.107(1)(d) of the CCRA has exclusive jurisdiction and absolute discretion to review and decide the case of an offender referred to it pursuant to S.129.
The court on application to declare me a dangerous offender (D.O.) established that I meet the D.O. criteria under S.753(1)(a)(i)-(ii) of the code and then decided not to impose an indeterminate sentence on me pursuant to S.753(4)(a) of the code as the court believed evidence specific to me of that I can be rehabilitated within a determinate period of time. The sentencing court under "Finding" indicated that I'm in need of therapy and the court seems to find that I was going to have completed this therapy and become manageable in the community by my statutory release date. Further, the sentencing court upon an analysis of risk, indicated that I require program to learn skills to cope with stressors I believed justified the index offences. For these reasons and to accord S.107(1)(d) of the CCRA, the board may not find fact to be that I, if released, will likely commit an offence causing serious harm to another before expiry of my warrant unless the board may find fact to be that I have criminogenic(s) other than these stressors that are relentlessly out of control and that are linked to a pattern of persistent violent behaviour resulting in serious harm -R.V.Lyons- or unless there is an appraisal of risk of violent recidivism that the court didn't consider and that signifies that I, if released, will likely commit an offence causing serious harm to another before expiry of my warrant. As that the index offences reflect difficulties controlling my violent impulses implicates an error of law, there is no fact or evidence of that the index offences are linked to more criminogenic(s) than just the foregoing stressors or of that the pattern of violent persistent behaviour resulting in serious harm is not limited to the index offences. In addition, the only appraisal of risk of violent recidivism that is in evidence and that the court didn't consider rather suggests that I'm unlikely to, if released, commit an offence causing serious harm to another before the expiry of my warrant.

For these reasons, the federal court should set aside the decision of the appeal division to affirm the order to detain me and refer back for determination in accordance with the finding of the sentencing court that I became manageable in the community by my statutory release date.

This application will be supported by the following materials:

1. A recording of my detention hearing;
2. Reasons for decision to detain me;
3. Reasons to uphold parole board decision to detain me;
4. The reasons for sentence (R.V.Benhsaien [2018] ONSC3672); and
5. The reports of the psychiatric assessments completed in 2015, 2016 and 2020; and
6. The repot upon completion of ICPM.

The 23rdth of September 2022.



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(Signature of applicant)

Nabil Benhsaien

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