September 2021

Decision in Art. 78 proceeding - Ciaprazi, Roberto (2016-07-26)

[*1]

Matter of Ciaprazi v Evans
2016 NY Slip Op 51119(U) [52 Misc 3d 1212(A)]
Decided on July 26, 2016
Supreme Court, Dutchess County
Pagones, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 26, 2016

Supreme Court, Dutchess County

In the Matter of the Application of Roberto Ciaprazi (DIN No.96A5408), Petitioner,

against

Andrea Evans, CHAIRPERSON, NEW YORK STATE DIVISION OF PAROLE, Respondent.

0910/2016

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James D. Pagones, J.

In this Article 78 proceeding, the petitioner requests in the first instance a judgment annulling the respondent's determination, dated December 21, 2015. That decision denied petitioner's request for parole and directed a twenty-four (24) month hold. The petitioner then seeks a judgment granting him conditional parole for deportation only (CPDO) so as to be [*2]released to the custody of the United States Department of Homeland Security for deportation. Alternatively, petitioner asks for a *de novo* hearing. The application is resolved as follows.

The record indicates that petitioner was convicted of the following crimes: one count each of kidnapping 1st degree (PL §135.25), an A-1 felony, burglary 1st degree (PL §140.30), a B felony, robbery 1st degree (PL §160.15), a B felony, robbery 2nd degree (PL §160.10), a C felony, and grand larceny 2nd degree (PL §155.40), a C felony. He was sentenced on June 7, 1996 to 20 years to life on the kidnapping charge, 5 to 15 years on the burglary and robbery 1 charges, and 3 to 9 years on the robbery 2 and grand larceny 2 charges. The last four (4) charges run concurrently with each other and consecutively with the kidnapping charge.

The petitioner was 23 at the time he committed the crimes. He is a Romanian national. He was in the United States for less than one year on a visitor's visa when the crimes were committed.On January 16, 1998, an Immigration Judge signed an order authorizing the Immigration and Naturalization Service to remove the petitioner from the United States and return him to Romania. (Petition, Ex. 1; Answer and Return, Ex. 12). The United States Department of Homeland Security, through its Immigration and Customs Enforcement

unit, informed the petitioner in a letter, dated January 20, 2016, that the 1998 deportation order remained in effect and that it was the unit's intention to take him into custody for the purpose of deporting him once he is paroled from New York State Department of Corrections custody. The unit further acknowledged that it is within the sole discretion of the New York State Division of Parole to authorize a CPDO. (Petition, Ex. 29). By letter to the petitioner, dated February 17, 2016, the unit reaffirmed its intention to take him into custody for the purpose of deportation once a CPDO was approved. (Petition, Ex. 30).

The record indicates that the petitioner made productive use of his time in prison by completing all available programs, pursuing a higher education in various fields of study, becoming fluent in several languages, working in the law library, and gaining 8 years of experience as a paralegal and law clerk. (Petition, Ex. 26). Many certificates, memoranda, Dean's List acknowledgments and letters of commendation attest to his positive achievements. (*Id.*, Ex. 37).

The petitioner's disciplinary history consists of nineteen (19) Tier 2 and two (2) Tier 3 infractions, with the last ticket in 2012. (Answer and Return, Ex. 3, pg. 2). The petitioner explained that the vast majority of his disciplinary tickets occurred early on during his incarceration. (Transcript at 9).

The petitioner's overall COMPAS Instrument (Petition, Ex. 6; Answer and Return, Ex. 11) is positive. The COMPAS Recommended Supervision according to the Probation Clarification Matrix is Status 4. According to the matrix, "minimum supervision" is recommended for the petitioner. It is the lowest level of supervision.

The transcript of the petitioner's parole hearing reveals that one of the commissioners attempted to engage the petitioner in a hypothetical discussion of where he would live in New York if he was released. Petitioner aptly responded by stating ICE would take him into custody for the purpose of deportation. (Petition, Ex. 2 at 7; Answer and Return, Ex. 4 at 7). The transcript also reveals there was a brief discussion of letters/documents of support for petitioner's release. A review of Exhibit 38 attached to the petition indicates that approximately twenty (20) letters of support, including five (5) from Corrections Officers, and two petitions, one containing [*3]approximately 142 signatures, and the second containing 56 signatures, urge support of a favorable decision to release the petitioner on parole. The transcript also reveals a passing acknowledgment of petitioner's institutional achievements, employment prospects in Romania, confirmation that he will probably be deported based upon an existing final order, and the expectation that he will reside, at least initially, with his mother who was planning on returning to Romania, at the time of the parole hearing.

In denying parole, the respondent stated as its reasons the following:

> "This panel has concluded that your release to supervision is not compatible with the welfare of society and, therefore, parole is denied. This finding is made following a personal interview, record review and deliberation.
>
> Of significant concern is your receipt of multiple disciplinary violations during this term.
>
> Positive factors considered include your receipt of a limited credit time allowance certificate, programming and document submissions.
>
> In addition, your instant offenses involved a series of illegal actions over a period of time which placed a young victim in great danger.
>
> Required statutory factors have been considered, including your risk to the community, rehabilitation efforts, and your needs for successful community reintegration. To grant your release at this time would so deprecate the seriousness of your offense as to undermine respect for the law.
>
> (All commissioners concur.)" (Transcript at 11-12)

"...New York has given no guarantee to a convicted defendant that he will be considered for parole...at any particular time." (*Russo v. NYS Board of Parole*, 50 NY2d 69, 75 [1980].) It is within the board's inherent discretion to release an inmate. (*Tarter v. State of New York*, 68 NY2d 511, 517 [1986].) It is well settled that the decisions of the New York State Board of Parole are discretionary, and when made in accordance with the law, are not judicially reviewable. (*Matter of Rhoden v. New York State Division of Parole*, 270 AD2d 550, 551 [3d Dept. 2000], lv to app dismissed 95 NY2d 898 [2000]; *Matter of Hall v. New York State Executive Department, Division of Parole*, 188 AD2d 791 [3d Dept. 1992].)

In order to set aside the respondent's decision, the petitioner bears the heavy burden of establishing that it was the result of "irrationality bordering on impropriety." (*Matter of Silman v. Travis*, 95 NY2d 470, 476 [2000]; *Phillips v. Dennison*, 41 AD3d 17, 21 [1st Dept. 2007], appeal dismissed 9 NY3d 956 [2007].)

The petitioner has met his burden, thereby permitting judicial intervention. (*Silman v. Travis*, *supra*.)

"Facts do not cease to exist because they are ignored." (Aldous Huxley). A plain and fair reading of the respondent's decision to deny parole leads to the inescapable conclusion that it is a [*4]simple regurgitation of standard boilerplate parole board denial language. For example, the phrases "release to supervision is not compatible with the welfare of society", "your risk to the community", and "your needs for successful community reintegration" are self-contradictory. The petitioner is subject to an extant final order of deportation to Romania. He has absolutely no right or expectation that release or parole means reassimilating into American society. His only option is a CPDO.The respondent placed significant emphasis on the multiple disciplinary violations charged against the petitioner as one reason to deny parole. The board failed, however, to make a distinction between tickets issued when the petitioner was much younger and immature versus the last ticket he received in 2012. Of much more import is the fact that petitioner's incarceration for the past twenty plus years has had a positive effect on him as evidenced by his program achievements, developing linguistic skills, letters of support from corrections officers and educational advancements. In other words, petitioner was a good steward of his time to develop himself with respect to skills as well as insight and maturity. (*Matter of Hawkins v. New York State Department of Corrections and Community Supervision*, 140 AD3d 34 [3d Dept. 2016].) It is also worthy to note that petitioner has taken full responsibility for the acts he committed in concert with another 25 years ago which lead to his arrest, conviction and incarceration.

It is settled that the Board of Parole is required to review and consider certain statutory factors. (*Matter of Dolan v. New York State Board of Parole*, 122 AD3d 1058, 1058 [3d Dept. 2014].) One of the factors is petitioner's immediate deportation upon release from incarceration pursuant to a CPDO. The record in this matter reveals that Romania is ready to receive him and provide services to enable him to integrate back into Romanian society. Noticeably absent from the respondent's decision was any mention of the deportation factor.

A review of the record as set forth above "reveals irrationality bordering on impropriety', a degree of arbitrary and capricious conduct permitting judicial intervention." (*Matter of Hawkins v. New York State Department of Corrections and Community Supervision*, *supra*.)

The respondent's determination, dated December 21, 2015, is annulled. The petition is granted to the extent that the respondent New York State Board of Parole is directed to issue a CPDO to the petitioner for prompt deportation pursuant to the final order of deportation, dated January 16, 1998, issued by the Hon. Mitchell A. Levinsky, Immigration Judge. The petition is in all other respects denied.

On this application, the Court considered the order to show cause supported by a verified petition with thirty-eight (38) exhibits, answer and return with twelve (12) exhibits and reply affidavit with one (1) exhibit.

The Attorney General is directed to retrieve exhibits 2, 3 and 11 submitted for *in camera* review within ten (10) days from the date of this decision and judgment and retain the same through the appellate process.

The foregoing constitutes the decision and judgment of the Court.

Dated: July 26, 2016
Poughkeepsie, New York
ENTER
HON. JAMES D. PAGONES, A.J.S.C.

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