Federal Court of Appeal | Cour d'appel fédérale

Date: 20170705

Docket: A-132-16

Citation: 2017 FCA 145

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

SIMON JAMES ELLIOTT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on June 21, 2017.

Judgment delivered at Ottawa, Ontario, on July 5 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DAWSON J.A.
WEBB J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20170705

Docket: A-132-16

Citation: 2017 FCA 145

CORAM: **DAWSON J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

SIMON JAMES ELLIOTT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from the Order of the Federal Court, (cited as 2016 FC 281), *per* Bell J., dismissing the appellant's motion for leave to extend the period of time within which to file a notice of application for judicial review. The Court also dismissed the appellant's appeal of the Order of Prothonotary Lafrenière (as he then was) rejecting leave to file additional materials, and granted the appellant's two motions for waiver of particular filing fees.

[2] By way of background, the appellant had been convicted of *Criminal Code*, R.S.C., 1985, c. C-46, offences and was sentenced to a term of imprisonment to be served in a federal penitentiary. On his arrival at Edmonton Institution, a Criminal Profile Report was prepared and dated May 26, 2011 by the Intake Parole Officer assigned to Mr. Elliott (the 2011 Report). (I note that the report is incorrectly identified in the Crown's affidavit as March 26, 2011.) A Criminal Profile Report includes, *inter alia*, the inmate's criminal record, the circumstances of the conviction, any previous institutional or community supervision history and the level of risk presented by the inmate.

[3] In the course of reviewing the circumstances surrounding the conviction, the officer concluded that the appellant had caused "serious psychological harm" to a victim. It is this report, dated May 26, 2011, and this particular statement in the report, that the appellant seeks to set aside if granted leave to commence judicial review. Although the report included this statement, in the Detention Criteria section of the report it was noted that the condition of subparagraph 129(2)(*a*)(i) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, which permits detention of an inmate beyond the statutory release date, was "not met at this time."

[4] On the appellant's transfer to Stony Mountain Institution, a Detention Pre-screening #2 Recommendation was made in anticipation of the appellant's forthcoming statutory release date. The recommendation reviewed the impugned allegation and found that there were no victim impact statements to support the assessment of serious psychological harm. Corrections Canada officials recommended that there was no basis to continue the detention of the appellant beyond

his statutory release date. The appellant became eligible for statutory release on September 19, 2016.

[5] In considering the motion, the Federal Court identified the applicable test governing extensions of time as that set forth by this Court in *Canada (Attorney General) v. Larkman*, 2012 FCA 204 [*Larkman*] – the existence of a continuing intention to pursue the application, the potential merit of the application, whether the Crown has been prejudiced by the delay and a reasonable explanation for the delay.

[6] As this is an appeal from a discretionary decision, this Court will only intervene in the case of an error of law or upon identification of a palpable and overriding error in the assessment of the evidence: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215. Based on the record before the Court at the time the motion was heard, I see no error in the Court's consideration and application of the relevant criteria articulated in *Larkman*.

[7] The appellant contends that the judge erred in finding that there was no reasonable explanation for the delay in seeking judicial review of the 2011 Report. The appellant argues that the explanation for the delay is set forth in supplementary affidavit material which the Prothonotary refused leave to file. However, the Prothonotary's decision was confirmed on appeal by the Federal Court, and was not raised as a ground of appeal in the appellant's notice of appeal to this Court.

[8] The appellant also included additional facts in his affidavit filed in this Court in relation to his motion for a waiver of the filing fee. These additional facts, including assertions as to when the appellant first learned of the impugned statement in the Criminal Profile Report, were not properly before the Court as there was no motion under Rule 351 for the admission of new evidence.

[9] The Crown has asked that this appeal be dismissed on the basis that, on December 17, 2015, the finding of serious harm was removed from the 2011 Report, rendering the appeal moot. I cannot accept this argument. The appellant contends, and the Crown concedes, that the statement still exists in the Offender Management System. As the appellant is once again an inmate, he says that he runs the risk that the statement will re-surface at the time of detention review prior to his statutory release date, and will result in him being held until warrant expiry. The Crown does not dispute the possibility of this scenario, and thus effectively concedes that the mootness objection is without merit.

[10] It is apparent, based on submissions of the parties before the Court, that there was an additional reason why the motion for leave to extend should fail. The appellant had an adequate alternative remedy, the existence of which constitutes a bar to a successful judicial review application.

[11] The *Corrections and Conditional Release Act*, subsections 24 (1) and (2) provide:

24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and	24 (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à

complete as possible.	jour, exacts et complets.
(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,	(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.
(a) the offender may request the Service to correct that information; and	
(b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.	

[12] The appellant unsuccessfully grieved the inclusion of the offending phrase in the 2011 Report to the Commissioner of Corrections. He did not judicially review the denial of his grievance, although that option was open to him: *Charalambous v. Canada (Attorney General)*, 2016 FCA 177. Although this point was not identified by the Crown in either its written or oral submissions to the Court, the legislation has provided the appellant with an alternate remedy which is to be exhausted prior to having recourse to judicial review. Although the time for judicial review of the denial of the grievance would appear to be past, given that the appellant was pursuing the same remedy through a different means, it is open to him to seek leave to extend the period of time within which to file an application for judicial review of the denial of his grievance.

[13] In this regard I note that no objection was taken by the Crown, before us or in the Federal Court, as to whether the Criminal Profile Report was a "decision or order" within the scope of

section 2 of the *Federal Courts Act*, (R.S.C., 1985, c. F-7). As the point was not argued, I do not wish these reasons to be taken as having answered that question, one way or another.

[14] I cannot conclude these reasons without a comment on the affidavit filed by the Crown in response to the motion. While Rule 81 of the *Federal Courts Rules* allows affidavits on information and belief in motions, there are nevertheless requirements and standards that must be met. They were not met in this case.

[15] The affidavit was sworn by a paralegal in the Department of Justice who had no personal knowledge of the matter in question. The affiant did not depose that her evidence was on information and belief. The affiant, improperly, claimed personal knowledge of all facts, incorrectly identified a critical date of particular concern to the appellant and testified that the appellant had received the Criminal Profile Report when she had no personal knowledge to that effect. The question when the appellant received the Criminal Profile Report was a critical fact in respect of the question of the extent of any delay. The Crown made no effort to explain why the Intake Parole Officer could not testify. The affidavit falls short of the requirements of the jurisprudence under Rule 81.

[16] I would dismiss the appeal without costs.

"Donald J. Rennie"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT, DATED MARCH 7, 2016, DOCKET NO. T-2049-15

DOCKET:	A-132-16
STYLE OF CAUSE:	SIMON JAMES ELLIOTT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 21, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	DAWSON J.A. WEBB J.A.
DATED:	JULY 5 2017

APPEARANCES:

Simon James Elliott	THE APPELLANT
Beth Tait	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT