

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190212

Docket: A-4-18

Citation: 2019 FCA 31

**CORAM: BOIVIN J.A.
GLEASON J.A.
RIVOALEN J.A.**

BETWEEN:

DAVID MARSHALL

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 8, 2019.

Judgment delivered at Ottawa, Ontario, on February 12, 2019.

REASONS FOR JUDGMENT BY:

RIVOALEN J.A.

CONCURRED IN BY:

**BOIVIN J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

RIVOALEN J.A.

[1] The appellant, David Marshall, appeals from the Order of the Federal Court rendered by Bell J. (the Judge) dated December 7, 2017 (2017 FC 1125). The Judge dismissed the appellant's motion in which he sought, on his own behalf and on behalf of two unnamed individuals, an order quashing three administrative decisions made by Correctional Service Canada.

[2] At the outset of the appeal, we allowed the appellant's motion under Rule 351 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules) requesting leave to present two discrete documents as evidence on a question of fact. The motion was unopposed. The documents consisted of two letters, the first being a covering letter sent to the registrar of the Federal Court dated October 31, 2017, enclosing the motion materials and payment of the filing fee. The second was a letter to the appellant from counsel for the respondent dated January 3, 2019, sent by overnight courier, enclosing the Joint Book of Authorities.

[3] The following facts provide context to these reasons. In 2017, Correctional Service Canada conducted a security intelligence operation for a period of four months and concluded that the appellant and two other inmates had been involved in an attempt to defraud another inmate of a significant amount of money. On September 12, 2017, Correctional Service Canada issued decisions restricting access to telephone and computer use by the appellant and the two other inmates for a period of six months. On September 28, 2017, the appellant, on his own behalf and on behalf of two unnamed individuals, filed a grievance of the decisions.

[4] At no time did the appellant file an application for judicial review of the decisions. Rather, on November 27, 2017, he filed a motion to quash the decisions, or in the alternative, a motion for an injunction. His motion also requested directions from the Court and an order that the Court dispense with compliance of the Rules. The motion and supporting materials were filed more than thirty days after the decisions were communicated to the appellant, but the appellant's materials contained no evidence to explain the delay in filing the motion record.

[5] The Judge dismissed the appellant's motion for lack of jurisdiction, finding that no originating document had been filed and the required time do so had expired (Rules 61, 62 and 63 of the Rules). He also concluded that even if the materials filed could be considered an originating motion, their filing was untimely. The Judge ordered costs against the appellant in the amount of \$1,020.

[6] In this appeal, this Court must apply the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). Legal determinations made by the Judge are reviewable for correctness whereas findings of fact, mixed fact and law from which a legal issue cannot be extricated and exercises of discretion are reviewable only if they disclose a palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79.

[7] The appellant offered three points in his submissions. He briefly touched upon the question of procedural fairness, as he alleges that the Judge had indicated that the oral argument on the motion was to be confined to the jurisdictional issues raised by the respondent but that, contrary to this indication, the Judge heard submissions on the merits of the appellant's case. The appellant secondly argued that the Federal Court had jurisdiction to hear his motion and he relied on his paperwork as being sufficient. He finally argued that any delays occasioned in the late filing of his motion were outside of his control, as he had prepared his paperwork within the time frame allowed but the cheque required for the payment of the filing fees was both late in being processed and issued due to circumstances beyond his control. However, once again, there was no evidence before us to support this contention.

[8] The respondent took the position that the Judge had committed no errors and asked that the appeal be dismissed with costs in the amount of \$1,825.

[9] I have carefully reviewed the transcript of the hearing before the Judge and he did not proceed as the appellant alleges. There was no violation of procedural fairness. The first of the appellant's arguments is therefore without merit.

[10] As concerns his second and third arguments, in light of the record before the Judge, he cannot be said to have made any reviewable error. He applied the correct legal principles and did not commit a palpable and overriding error in their application.

[11] For these reasons, I would dismiss the appeal, but without costs.

"Marianne Rivoalen"

J.A.

"I agree.

Richard Boivin J.A."

"I agree.

Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-4-18

STYLE OF CAUSE:

DAVID MARSHALL v. THE
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING:

OTTAWA, ONTARIO

DATE OF HEARING:

FEBRUARY 8, 2019

REASONS FOR JUDGMENT BY:

RIVOALEN J.A.

CONCURRED IN BY:

BOIVIN J.A.
GLEASON J.A.

DATED:

FEBRUARY 12, 2019

APPEARANCES:

David Marshall

SELF-REPRESENTED

Sharah Jiwan

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT
THE ATTORNEY GENERAL OF
CANADA