

NOVA SCOTIA COURT OF APPEAL

Citation: *Cain v. Canada (Attorney General)*, 2020 NSCA 73

Date: 20201106

Docket: CA 491059

Registry: Halifax

Between:

Percy Cain

Appellant

v.

Attorney General of Canada, Northeast Nova Scotia Correctional Facility

Respondents

Judge: Bryson, J.A.

Motion Heard: November 4, 2020, in Halifax, Nova Scotia in Chambers

Held: Motion granted

Counsel: Percy Cain, appellant in person
Mary Anne MacDonald, for the respondent Attorney General
of Canada
Edward A. Gores, Q.C., for the respondent Attorney General
of Nova Scotia
Caroline McInnes, Registrar, Court of Appeal

Decision:

[1] The Registrar of the Court of Appeal has brought a motion to dismiss Mr. Cain’s appeal of Justice Scott Norton’s August 9, 2019 dismissal of his *habeas corpus* application.

[2] Mr. Cain is incarcerated at the Northeast Nova Scotia Correctional Facility in Pictou. He claimed that he had been “illegally held in segregation”, and that a correctional officer’s false evidence had been relied upon to place him in segregation for 17 days, which evidence was also accepted by Justice Norton.

[3] Mr. Cain filed a Notice of Appeal on August 14, 2019. Nothing more was done by Mr. Cain to advance his appeal. No transcript of Justice Norton’s decision has been ordered. No Certificate of Readiness has been filed. No motion for directions has been pursued. An appeal should be perfected by doing these things within 80 days of filing the appeal. If not, the Registrar is obliged to move to dismiss the appeal (*Rule* 90.43).

[4] Sixteen months have now passed. Once the Registrar has shown non-compliance with the Rules, the burden shifts to Mr. Cain to demonstrate a good reason for his default (*Islam v. Sevgur*, 2011 NSCA 114). The Court may order perfection of the appeal, set it down, or dismiss it. In *Sevgur*, Saunders, J., describes some of the factors informing exercise of discretion:

[36] The approach I take in such matters is this. Once the Registrar shows that the rules for perfecting an appeal have been breached, and that proper notice of her intended motion has been given, the defaulting appellant must satisfy me, on a balance of probabilities, that the Registrar's motions ought to be denied. To make the case I would expect the appellant to produce evidence that it would not be in the interests of justice to dismiss the appeal for non-compliance. While in no way intended to constitute a complete list, some of the factors I would consider important are the following:

- (i) whether there is a good reason for the appellant's default, sufficient to excuse the failure.
- (ii) whether the grounds of appeal raise legitimate, arguable issues.
- (iii) whether the appeal is taken in good faith and not to delay or deny the respondent's success at trial.

- (iv) whether the appellant has the willingness and ability to comply with future deadlines and requirements under the Rules.
- (v) prejudice to the appellant if the Registrar's motion to dismiss the appeal were granted.
- (vi) prejudice to the respondent if the Registrar's motion to dismiss were denied.
- (vii) the Court's finite time and resources, coupled with the deleterious impact of delay on the public purse, which require that appeals be perfected and heard expeditiously.
- (viii) whether there are any procedural or substantive impediments that prevent the appellant from resuscitating his stalled appeal.

Sevgur has been frequently applied by our Court in motions like this.

[5] Mr. Cain explains that he has lost much of his sight, in his words “since June”. He adds that he did not have “notice” of the requirements for pursuing an appeal, although he completed a six page Notice of Appeal which contemplated such a motion and includes four handwritten pages of detail.

[6] Mr. Cain is no longer in segregation. The alleged wrong of which he complains is long past. When confronted with this he protested that he was left without a remedy “no harm no foul”. Mr. Cain may have a remedy, but at the moment it is not a writ of *habeas corpus*. Moreover, Mr. Cain has not pursued his appeal. It is not a question of inadequate effort; there has been no effort.

[7] Keeping in mind the considerations in *Sevgur*, Mr. Cain has not met the burden on him of explaining his procedural defaults, providing any assurance that they will be remedied, nor what the possible merits are now. In sum, Mr. Cain has failed to show that it is not in the interests of justice to dismiss the appeal.

[8] The Registrar's motion to dismiss the appeal is granted, the appeal is dismissed.

Bryson, J.A.