



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *B. J. v. Minister of Employment and Social Development*, 2018 SST 562

Tribunal File Number: AD-16-802

BETWEEN:

B. J.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 24, 2018

DECISION AND REASONS

DECISION

[1] The appeal of the decision of the General Division of the Social Security Tribunal of Canada dated November 18, 2015, is dismissed.

OVERVIEW

[2] The Appellant, B. J., had been receiving an Old Age Security (OAS) pension since 2007. He was incarcerated in 2010 and conditionally released in March 2014. His OAS pension was suspended for the majority of his incarceration. He submits that he was eligible for parole as of December 2011, and he requests (retroactive) payment of his pension and the Guaranteed Income Supplement for the period during which he argues that he was illegally detained.

[3] The Respondent, the Minister of Employment and Social Development, rejected this request because the *Old Age Security Act* (OAS Act) provides that the OAS pension cannot be paid during any period during which a person is incarcerated in a federal penitentiary.

[4] The Appellant appealed the Respondent's decision to the Tribunal on the basis of a Supreme Court of Canada¹ decision that invalidated the *Abolition of Early Parole Act* (Abolition Act).

[5] The General Division of the Tribunal found that eligibility for parole was not the same as release from imprisonment and that the Appellant had been incarcerated in a federal penitentiary from January 2011 to March 2014. The OAS Act provides for a suspension of the OAS pension during this period, and the General Division summarily dismissed the appeal.

[6] The Appellant submits that the General Division erred in law in making its decision, particularly by overlooking that the Appellant had been illegally incarcerated for 22 months too many under *Whaling*.

¹ *Canada (Attorney General) v. Whaling*, 2014 CSC 20.

[7] The appeal must be dismissed because an OAS pension is suspended while a person is incarcerated in a federal penitentiary, and the Guaranteed Income Supplement cannot be paid if the claimant cannot receive the OAS pension.

ISSUE

[8] Did the General Division err in its analysis of the impact of *Whaling* on the Appellant's situation?

ANALYSIS

[9] The General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.² Following a summary dismissal by the General Division, an appeal may be brought to the Appeal Division without seeking leave to appeal.³

[10] The only grounds of appeal are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.⁴

Did the General Division err in its analysis of the impact of *Whaling* on the Appellant's situation?

[11] The Appellant argues that the General Division committed an error of law by failing to recognize the impact of *Whaling* on his incarceration. His lawyer submits that under *Whaling*, the last 22 months of the Appellant's incarceration were illegal.

[12] The Abolition Act provides for the possibility of applying for parole when one-sixth of a sentence of incarceration has been served. This legislation entered into force after the Appellant had been sentenced. It was overturned in 2014 by the Supreme Court of Canada's *Whaling* decision.

² *Department of Employment and Social Development Act* (DESDA), s.53(1).

³ DESDA, s. 56(2).

⁴ DESDA, s.58.

[13] The Appellant was then able to obtain parole under the old regime. He claims to have been illegally held for a period in excess of one-sixth of his sentence.

General Division Decision

[14] The General Division notified the Appellant of its intention to dismiss the appeal summarily. The Appellant's response did not add anything to the evidence on file.

[15] The issues before the General Division were the following: a) was the Appellant incarcerated in a federal penitentiary; b) should he have received an OAS pension during his incarceration; and c) should he have received the Guaranteed Income Supplement during this period?

[16] The General Division found that the Appellant was incarcerated in a federal penitentiary until March 2014 and that the evidence in this respect was unambiguous (in other words, there was no contradictory evidence).

[17] The General Division then found that the legislation is clear and that the Respondent had to suspend payment of the Appellant's OAS pension and could not pay him the Guaranteed Income Supplement during his incarceration.

[18] The OAS Act provides that the OAS pension cannot be paid during any period in which a person is incarcerated in a federal penitentiary.⁵ It also states that the Guaranteed Income Supplement cannot be paid if the claimant cannot receive the OAS pension.⁶

[19] I find that the General Division was correct. The Appellant could not receive either the OAS pension or the Guaranteed Income Supplement during the period of incarceration in a federal penitentiary.

[20] In this situation, the General Division decided on the record to summarily dismiss the appeal.

⁵ *Old Age Security Act*, s. 5(3).

⁶ *Idem*, s. 11(7)(b).

Summary Dismissal: Legal Test

[21] I note that the determination of whether to summarily dismiss is a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed.⁷ The question to be asked for summary dismissal is as follows: is it plain and obvious on the record that the appeal is clearly bound to fail?

[22] The question is not whether the appeal must be dismissed after considering the facts, the case law, and the parties' arguments. Rather, it must be determined whether the appeal is destined to fail regardless of the evidence or arguments that might be submitted at a hearing.

[23] I find that this appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. There was, quite simply, no convincing evidence or argument that could be presented.

[24] Firstly, the Tribunal does not have the authority to decide on criminal matters. The General Division simply does not have the authority to decide whether the Appellant had been illegally detained.

[25] Secondly, the Appellant was incarcerated in 2010 under a law that was validly adopted by Parliament. Furthermore, he was incarcerated until March 2014. These facts are uncontested.

[26] The Abolition Act entered into force in 2011 and was repealed in 2014. Laws must be applied fully, provided that they have not been repealed.⁸ The Abolition Act applied during the Application's incarceration.

[27] Thirdly, the repeal of the Abolition Act in 2014 did not lead to the Appellant's release or his right to release. It resulted in prisoners in the same situation as the Appellant being now eligible for the accelerated release process. Eligibility for parole is not the same as the right to release from imprisonment.

[28] The Appellant may not be satisfied with the General Division's decision and conclusion

⁷ *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147; *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.

⁸ *Mackin v. New Brunswick (Minister of Finance)*, 2002 CSC 13, at para. 79.

that he was not entitled to an OAS pension and the Guaranteed Income Supplement while he was incarcerated, but the General Division did not base its decision on an erroneous finding of fact and it did not ignore evidence before it.

[29] In addition, for the above-mentioned reasons, I find that the General Division did not err in law in making its decision.

CONCLUSION

[30] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division