Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. S. v. Minister of Employment and Social Development*, 2018 SST 815

Tribunal File Number: AD-18-472

BETWEEN:

D. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: ~~August 17, 2018~~

CORRIGENDUM DATE: August 28, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] This case is about the scope of the Social Security Tribunal's discretion to hear—or refuse to hear—constitutional arguments under the *Social Security Tribunal Regulations* (Regulations).

[3] The Appellant, D. S., was receiving the Old Age Security (OAS) pension and Guaranteed Income Supplement (Supplement) when he began serving a prison sentence in August 2013. In September 2013, the Respondent, the Minister of Employment and Social Development (Minister), informed the Appellant that his OAS pension and Supplement had been suspended following the enactment of an amendment to the *Old Age Security Act* (OASA).

[4] In June 2014, the Appellant appealed the suspensions to the General Division of the Social Security Tribunal, arguing for his benefits to be reinstated on compassionate grounds. In April 2015, he further argued that the suspension of his benefits violated his rights under the *Canadian Charter of Rights and Freedoms* (Charter).

[5] In a letter dated September 28, 2015, the General Division advised the Appellant of its intention to summarily dismiss his appeal because: (i) s. 5(3) of the OASA stipulates that the OAS pension and GIS are no longer payable to persons who are incarcerated and (ii) the Appellant had not met the conditions, set out in s. 20(1)(*a*) of the Regulations, required to raise a Charter argument. The Appellant responded by way of a handwritten note dated October 8, 2015.

[6] On June 27, 2016, the General Division issued an interlocutory decision finding that the Appellant had complied with s. 20(1)(*a*) of the Regulations. It declared that the appeal would proceed as a constitutional appeal and ordered the Appellant to file submissions and supporting evidence on or before September 1, 2016. The General Division advised the Appellant that

failure to do so could result in the appeal proceeding as a regular appeal, in which case he would not be allowed to raise constitutional arguments.

[7] On October 5, 2016, the Appellant informed the General Division that he would not be submitting any further documentation in respect to his constitutional challenge. He explained that he had no access to a computer because he was being held in a segregation unit. In another letter that the Tribunal received on October 11, 2016, the Appellant discussed his health issues and reiterated that he was being held in segregation. On October 12, 2016, the General Division asked the Appellant to clarify whether he was seeking an extension to file his Charter record or confirming his intention to not file any further material.

[8] On November 15, 2016, the General Division sent a follow-up letter to the Appellant, requesting that he respond by December 1, 2016. On December 5, 2016, the General Division issued another interlocutory decision, this one declaring that because the Appellant had not filed a Charter record, his appeal would proceed as a regular appeal, and the Appellant would no longer be permitted to raise his constitutional challenge.

[9] After reviewing the evidence and submissions, the General Division summarily dismissed the appeal on January 24, 2017, finding undisputed evidence that the Appellant had been incarcerated as of August 2013. As a result, the General Division agreed with the Respondent that it had no option but to suspend payment of the Appellant's OAS pension and Supplement effective September 2013, in accordance with s. 5(3) of the OASA. The General Division also determined that it lacked the authority to exempt the Appellant from the law on compassionate grounds.

[10] On February 7, 2017, the Appellant appealed the summary dismissal to the Tribunal's Appeal Division, alleging that the General Division had unfairly denied him an opportunity to challenge the constitutionality of s. 5(3) of the OASA. He argued that because he was 75 years old, in poor health, and segregated in a maximum-security prison, it was difficult for him to file a Charter record.

[11] In my decision of September 29, 2017, I found that the Appellant had met the essential requirements of s. 20(1)(*a*) of the OASA, and I allowed the appeal on the ground that the

General Division had erred in law and fact by barring the Charter challenge. I also found that the General Division did not apply the proper test in summarily dismissing the Appellant's appeal.

[12] The Minister then applied for judicial review at the Federal Court ~~of Appeal~~. In a judgment dated July 20, 2018, the Honourable Justice Ann Marie McDonald found my decision unreasonable. She allowed the application and ordered the matter returned to the Appeal Division for redetermination.

[13] No leave to appeal is necessary in the case of an appeal brought under s. 53(3) of the *Department of Employment and Social Development Act* (DESDA) because there is an appeal as of right when the matter deals with a summary dismissal from the General Division. In view of the requirement under the Regulations to proceed as informally and as quickly as circumstances, fairness, and natural justice permit, I have decided to dispense with an oral hearing and proceed on the basis of the documentary record.

[14] Having reviewed the record though the lens of the Federal Court ~~of Appeal~~'s reasons for judgment, I have concluded that I must dismiss this appeal.

ISSUES

[15] According to s. 58(1) of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division grants leave to appeal,[1] but the Appeal Division must first be satisfied that the appeal has a reasonable chance of success.[2]

[16] The issues before me are as follows:

Issue 1: Did the General Division inappropriately bar the Appellant from raising constitutional issues?

Issue 2: Did the General Division apply the correct test for summary dismissal?

[1] DESDA, ss. 56(1) and 58(3).
[2] *Ibid*. at s. 58(2).

ANALYSIS

Issue 1: Did the General Division inappropriately bar the Appellant from raising constitutional issues?

[17] Section 20 of the Regulations govern the conditions under which a claimant can make a Charter argument:

> 20(1) If the constitutional validity, applicability or operability of any provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act* or the regulations made under any of those Acts is to be put at issue before the Tribunal, the party raising the issue must
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> (a) file a notice with the Tribunal that
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> (i) sets out the provision that is at issue, and
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> (ii) contains any submissions in support of the issue that is raised;
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> (b) at least 10 days before the date set for the hearing of the appeal or application, serve notice of that issue on the persons referred to in subsection 57(1) of the *Federal Courts Act* and file a copy of the notice and proof of service with the Tribunal.
>
> 20(2) If the proof of service required by paragraph (1)(b) has not been filed in accordance with that paragraph, the Tribunal may, on its own initiative or on the request of a party, adjourn or postpone the hearing.
>
> 20(3) If a notice is filed under paragraph (1)(a), the time limits for filing documents or submissions set out in these Regulations do not apply and the Tribunal may direct the parties to file documents or submissions within the time limits it establishes.

[18] On September 28, 2015, the General Division sent the Appellant a notice of intention to summarily dismiss the Appellant's appeal, citing s. 5(3) of the OASA. Soon after, the Appellant replied in a handwritten note:

> 1. Income Security Programs – OAS/CPP has violated the appellant's Charter of Rights as applicable to a Canadian senior citizen (age 74) as specified under Section 6 of The Charter of Rights re: right to a "defence." The IS programs/OAS has blockaded this right by ceasing

> payment of my old age pension in September 2013. Request reinstatement retroactively immediately for legal expenses.
>
> 2. All submissions in support of above appeal under Charter are on file e.g. Social Security Tribunal Canada file GP-14-2571.

[19] Paragraph 20(1)(*a*) of the Regulations provides that if the constitutional validity, applicability, or operability of any provision of the OASA is to be put at issue before the Tribunal, the party raising the issue must file a notice with the Tribunal that (i) sets out the provision that is at issue, and (ii) contains any submissions in support of the issue that is raised. In June 2016, the General Division issued its first interlocutory decision, finding that, although the Appellant did not specifically identify the provision of the OASA alleged to violate his constitutional rights, he did assert that the suspension of his OAS benefits breached s. 6 of the Charter. Accordingly, the General Division ordered the appeal to proceed as a special Charter appeal and asked for additional submissions.

[20] In December 2016, the General Division issued a second interlocutory order reversing the first because the Appellant had not filed additional submissions as previously requested. The General Division therefore refused to consider the Appellant's Charter argument and decided the appeal purely on the basis of whether the Appellant was subject to s. 5(3) of the OASA.

[21] Although I previously found the General Division's actions contradictory, the Federal Court ~~of Appeal~~ has made it clear that, even after a claimant has fulfilled the requirements of s. 20(1) of the Regulations, the General Division is within its authority to demand additional submissions and to revoke the claimant's permission to pursue a Charter argument if it finds those submissions insufficient:[3]

> [43] Section 20 appears under the heading "Constitutional Issues" in the SSTRs which indicates that each provision is a part of the framework governing constitutional challenges. Section 20 envisions a two-step process: (1) the applicant files a notice under s. 20(1)(a) and (2) the GD can accept further submissions within its own timelines. The second step is distinct from the first.
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> [44] Here the AD failed to consider this second step. It concluded that the GD did not have authority to require a record, because once a

[3] *Canada (Attorney General) v. Stewart*, 2018 FC 768.

> notice is filed under s. 20(1)(a) with minimal submissions, the challenge is procedurally valid. But the AD did not consider s. 20(3), which gives discretion to the GD to change time limits and to "direct the parties" to file documents and submissions. There is nothing limiting the GD's discretion in this regard.

[22] The Federal Court of Appeal also found this approach consistent with direction from the Supreme Court of Canada, which, in *Mackay v. Manitoba*,[4] held that Charter issues cannot be decided in a factual vacuum:

> [46] […] Here the lack of a *Charter* record inhibited the ability of the GD to consider the case properly. D. S.'s submissions lacked particularity. He relied on section 6 of the *Charter* which refers to mobility rights, but he referred to a right to a defense. Further he was given ample opportunity to provide a *Charter* record to specify the challenged legislative provisions.

[23] On this issue, the General Division did not err in law. It had the power to demand additional Charter submissions from the Appellant and, when it did not get them, it was entitled to withdraw the appeal's special status and hear it as a regular appeal.

Issue 2: Did the General Division apply the correct test for summary dismissal?

[24] Without recourse to a Charter argument, the Appellant's appeal became, as the Federal Court of Appeal put it, a "straightforward exercise" in the application of s. 5(3) of the OASA to the facts of his case. The General Division disposed of the Appellant's appeal by invoking s. 53(1) of the DESDA, which allows it to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success. In its decision of January 24, 2017, the General Division wrote:

> [17] In the present appeal, the Appellant was incarcerated in August 2013. This is not disputed. The Respondent suspended payment of his OAS pension and GIS effective September 2013. The Tribunal finds that this was done in accordance with subsection 5(3) of the OASA.
>
> [18] The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal is required to interpret and apply the provisions as they are set out in the

[4] *Mackay v. Manitoba*, [1989] 2 SCR 357.

> OASA. For these reasons, it cannot exempt the Appellant from the law on compassionate grounds.
>
> [19] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

[25] The decision to summarily dismiss an appeal relies on 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. The Federal Court of Appeal has considered the question of summary dismissal in the context of its own legislative framework and determined that the threshold for summary dismissal is very high.[5] The question to be asked is whether it is plain and obvious on the record that the appeal is bound to fail. 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.

[26] In this case, s. 5(3) of the OASA, which took effect on January 1, 2011, is clear:

> No pension may be paid in respect of a period of incarceration—exclusive of the first month of that period—to a person who is subject to a sentence of imprisonment
>
> (a) that is to be served in a penitentiary by virtue of any Act of Parliament; or
>
> (b) that exceeds 90 days and is to be served in a prison, as defined in subsection 2(1) of the *Prisons and Reformatories Act*, if the government of the province in which the prison is located has entered into an agreement under section 41 of the *Department of Employment and Social Development Act*.

[27] The Appellant's situation was similarly unambiguous. The facts indicate that he was incarcerated in a federal penitentiary when his OAS pension was suspended in September 2013. The General Division saw no arguable case for the Appellant's appeal, and I see no reason to interfere with its reasoning.

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[5] *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.

Distilled to its essence, the Appellant's argument is that it is unfair to deny prisoners government benefits. While the Appellant may not agree with its analysis, the General Division was bound to follow s. 5(3) of the OASA, and so am I. Unfortunately, I have no discretion to simply order what I think is right and can exercise only such jurisdiction as is granted to me by the Appeal Division's enabling statute. Support for this position may be found in *Canada v. Tucker*,[6] among many other cases, which has held that an administrative tribunal is not a court but rather a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

CONCLUSION

[28] The General Division was within its authority to bar the Appellant from raising a constitutional issue. In the absence of a Charter argument, the General Division correctly found that the Appellant had no arguable case on appeal, thereby warranting summary dismissal.

[29] The appeal is dismissed.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVE:	D. S., self-represented

[6] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.