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

[TRANSLATION]

Citation: L. R. v Minister of Employment and Social Development, 2019 SST 523

Tribunal File Number: AD-19-254

BETWEEN:

L. R.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: May 30, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal the interlocutory decision given by the General Division of the Social Security Tribunal of Canada on January 15, 2019, is refused.

OVERVIEW

[2] The Applicant claims he is entitled to an Old Age Security pension (OAS pension). The Respondent, the Minister of Employment and Social Development, maintains that it was required to suspend the Applicant's OAS pension in light of his incarceration.

[3] The Applicant raised a constitutional question to the General Division. The General Division asked the Applicant to satisfy the conditions stated in section 20(1)(a) of the *Social Security Tribunal Regulations* (SST Regulations). In response, the Applicant filed submissions. The General Division determined that the Applicant's notice of constitutional question did not satisfy all the conditions and informed him, through an interlocutory decision, that the appeal would be heard as an ordinary appeal.

[4] The Applicant appealed the General Division's decision. In his application for leave to appeal, he maintained, among other arguments, that the procedure stated in the SST Regulations imposes conditions on applicants but not on the Minister.

[5] The appeal does not have a reasonable chance of success because the Appeal Division should not rule on an interlocutory decision absent exceptional circumstances.

ISSUE

[6] Should the Appeal Division rule on an interlocutory decision?

ANALYSIS

[7] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted.[1]

[8] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there a ground of appeal on which the Applicant might succeed?[2]

[9] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error. The only reviewable errors are the following:[4] 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.

Should the Appeal Division rule on an interlocutory decision?

[10] The Appeal Division should not rule on an interlocutory decision absent exceptional circumstances. There are no exceptional circumstances making it possible to interfere with this case.

[11] The Tribunal's Appeal Division has decided on the issue of whether it should accept an appeal of an interlocutory decision of the General Division. The following two lines of reasoning must be considered:

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[1] *Department of Employment and Social Development Act* (DESDA), ss 56(1) and 58(3).
[2] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Murphy v Canada (Attorney General)*, 2016 FC 1208 at para 36; *Glover v Canada (Attorney General)*, 2017 FC 363 at para 22.
[3] DESDA, s 58(2).
[4] DESDA, s 58(1).

a) There should be no immediate appeal of an interlocutory decision except in exceptional circumstances.[5]

b) Case law has not determined that an interlocutory decision of the Tribunal cannot be appealed to the General Division.[6]

[12] The Federal Court of Appeal noted the following in *Canada (Attorney General) v Bri-Chem Supply Ltd.*:[7] "while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is good reason."

[13] This decision inevitably departs from one of the Appeal Division's earlier decisions and one of the lines of reasoning (noted in paragraph 11 above).

[14] I am adopting the first line of reasoning for the following reasons.

[15] *Noel v Canada (Attorney General)*[8] dealt with a request seeking as relief that a Federal Court of Appeal prothonotary order be declared null and void. The prothonotary order (stay order) was an interlocutory decision. The decision on an application for judicial review was about a Tribunal file.

[16] In *Noel*, the Federal Court cited the following passage from *Canada (Border Services Agency) v C.B. Powell Limited*:[9]

> Administrative law judgments and textbooks [have established that] absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way,

[5] *AN v Minister of Employment and Social Development*, 2015 SSTAD 280 (CanLII) and *WF v Canada Employment Insurance Commission*, 2016 CanLII 99732.
[6] *Minister of Employment and Social Development v PF*, 2017 CanLII 55643 (SST).
[7] *Canada (Attorney General) v Bri-Chem Supply Ltd.*, 2016 FCA 257.
[8] *Noel v Canada (Attorney General)*, 2015 FC 1375.
[9] *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61.

> absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[17] According to that case law, absent exceptional circumstances, the Appeal Division should not interfere with cases of interlocutory orders of the General Division until after they are completed or until the effective remedies available to the parties are exhausted. The Federal Court's reasoning in *Noel* applies: it is not until the process (of appeal to the General Division) is completed or offers no other effective remedy that the case should be put to the Appeal Division.

[18] Exceptional circumstances that justify considering an interlocutory application are rare.[10] The Appeal Division found, where the General Division ordered an appeal related to a constitutional question, despite the claimant's reluctance, that there were exceptional circumstances making it possible to interfere.[11] That is not so in this case.

[19] For the reasons stated above, I find that, absent exceptional circumstances, the Appeal Division should not interfere in a case of an interlocutory order of the General Division until after the General Division case is completed or until the effective remedies available to the parties are exhausted.

[20] In the case before the General Division, remedies are available to the Applicant: the Applicant may attempt to file a further notice of constitutional question in accordance with section 20(1)(a) of the SST Regulations. Furthermore, the General Division has not yet given its decision on the file. As a result, the General Division case has not been completed, and all effective remedies available to the parties at the General Division have not been exhausted.

[21] I find that there are no exceptional circumstances making it possible to interfere with this case. While the superior courts may not prohibit the Appeal Division from ruling on an interlocutory decision of the General Division, there are no exceptional circumstances in this case making it possible to interfere.

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[10] *Minister of Employment and Social Development v SR*, 2018 SST 239 (CanLII).
[11] *Ibid*.

[22] I note that the Applicant filed documents before the Appeal Division.[12] He also filed a number of documents before the General Division. These documents are a bit puzzling and difficult to understand. One of the Applicant's arguments seems to be that he should not be required to comply with sections 20(1)(a) or 20(1)(b) (that the Attorney General of Canada and the attorneys general of all provinces must receive a notice stating the constitutional question) of the SST Regulations. He insists that the Minister has failed to prove that the laws are in compliance with the Charter. He also maintains that the Tribunal should suspend all laws and case law relating to the suspension of his OAS pension.

[23] In a case from the Tribunal, the Federal Court recently stated the following: "The Tribunal does not have to 'prove' to the applicant that [the statutory provisions] are in compliance with the Constitution of Canada. The constitutionality of the statutory and regulatory provisions at issue must be assumed here."[13]

[24] That applies to this case. The constitutionality of the OAS provisions and the SST Regulations must be assumed. If the Applicant wants to challenge the constitutionality of the provisions, he must follow the stated procedure.

[25] The Applicant raised the constitutional validity, applicability, or operability of a provision of the OAS Act: he is challenging the measures that provide for the suspension of his OAS pension during his incarceration and refers to the Charter.[14] He must meet the requirements of sections 20(1)(a) and 20(1)(b) of the SST regulations to present a constitutional question to the General Division.

[26] The General Division is not obliged to provide the Applicant with legal assistance[15] concerning his notice of constitutional question. However, the General Division did not state which condition of section 20(1)(a) of the SST Regulations was not met. Section 20(1) of the SST Regulations does not impose an unduly high burden on claimants who seek to challenge the

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[12] AD1: leave to appeal; AD1B: letter from the Applicant to the Tribunal, dated April 16, 2019.
[13] *Langlois v Canada (Attorney General)*, 2018 FC 1108.
[14] GD4: letter from the Applicant to the Tribunal, dated October 23, 2018, and GD5: letter from the Applicant's representative, dated January 23, 2019.
[15] *Papouchine v Canada (Attorney General)*, 2018 FC 1138.

constitutionality of some aspect of benefits-conferring legislation.[16] It might be useful for the General Division to specify which condition has not be met and to give the Applicant an opportunity to correct his notice of constitutional question. I also note that the Minister suggested that the General Division [translation] "hold a pre-hearing conference to discuss the steps of a constitutional challenge and agree on how [the case] will proceed"[17] at the General Division. The General Division must complete its appeal process as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.[18]

[27] When the appeal process at the General Division is completed and the effective remedies at the General Division are exhausted, the Applicant can proceed to the Appeal Division, if he deems it necessary.

CONCLUSION

[28] Leave to appeal is refused.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	L. R., self-represented

[16] *RS v Minister of Employment and Social Development*, 2017 CanLII 84970 (SST).
[17] GD5: letter from the Respondent's representative, dated January 23, 2019.
[18] SST Regulations, s 3(1)(a).