



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *JN v Minister of Employment and Social Development*, 2020 SST 861

Tribunal File Number: GP-18-796

BETWEEN:

**J. N.**

Appellant

and

**Minister of Employment and Social Development**

Minister

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Antoinette Cardillo

DATE OF DECISION: May 29, 2020

## DECISION

I find that the Appellant is not eligible for Old Age Security (OAS) benefits during the period of his incarceration in a federal penitentiary under section 5(3) of the *Old Act Security Act* (OAS Act).

## OVERVIEW

[1] The Minister received the Appellant's application for the OAS pension on August 11, 2015.<sup>1</sup> The Minister approved the application with benefits starting in June 2016. On May 5, 2016,<sup>2</sup> the Minister informed the Appellant that his benefits would be suspended in June 2016 because Correctional Services Canada had informed the Minister that the Appellant was incarcerated.<sup>3</sup> The Appellant requested a reconsideration of the decision. The Minister upheld its decision on reconsideration.<sup>4</sup> The Appellant appealed the reconsideration decision to the Social Security Tribunal.

[2] The OAS Act was amended so that, as of January 1, 2011, the OAS pension, Guaranteed Income Supplement, and Allowance are no longer payable during periods of incarceration. Section 5(3) of the OAS Act states that 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*.

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<sup>1</sup> GD2-3.

<sup>2</sup> GD2-18.

<sup>3</sup> GD2-20.

<sup>4</sup> GD2-7.

## ANALYSIS

### i. Constitutional Challenge

[3] The Appellant raised constitutional questions on May 12, 2016,<sup>5</sup> when he disputed the Minister's May 5, 2016, decision to suspend his OAS benefits because he was incarcerated.

[4] In an interlocutory decision dated December 5, 2016, a Tribunal member determined that the Appellant had met the necessary criteria to pursue a constitutional appeal under section 20(1)(a) of the *Social Security Tribunal Regulations*. However, the interlocutory decision indicated that, if the requirements listed in the decision were not met, the appeal could be treated as a regular appeal, and the Appellant would not be allowed to raise the constitutional challenge during the proceeding.

[5] On December 19, 2016,<sup>6</sup> the Appellant filed a notice of withdrawal of his constitutional challenge. As noted, the interlocutory decision stated that, if the requirements listed in the decision were not met, the appeal could be treated as a regular appeal, and the Appellant would not be allowed to raise the constitutional challenge during the proceeding. The appeal was therefore treated as a regular appeal given the Appellant's withdrawal of the constitutional question.

[6] A letter was sent to the Appellant on January 3, 2017, informing him that a new Tribunal member had examined his file and was considering summarily dismissing the appeal because, according to section 5(3) of the OAS Act, the OAS pension should be suspended because the Appellant was incarcerated. The letter indicated that, if the Appellant believed that the appeal should not be summarily dismissed, he had to explain, in writing, why the appeal had a reasonable chance of success by January 27, 2017.

[7] On January 31, 2017,<sup>7</sup> the Appellant filed a document in response to the January 3, 2017, letter and raised constitutional questions again.

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<sup>5</sup> GD2-10.

<sup>6</sup> GD-8.

<sup>7</sup> GD-13.

[8] On May 10, 2017, the Appellant was informed that his appeal would not be summarily dismissed, and on May 15, 2017, he was sent a notice of hearing informing him that a teleconference hearing had been scheduled for June 15, 2017, to explain several aspects of his file to him, including that he could not preserve his rights and raise constitutional questions again, and also to discuss the merit file. According to inquiries made by the Tribunal, it was possible for the Appellant to exercise the right to make a telephone call if the notice with date and time was sent to him far enough in advance. The letter also indicated that the Appellant could ask for a change of hearing date or request an adjournment, otherwise the hearing would go ahead on the scheduled date and time.

[9] The day of the teleconference, after a 30-minute wait, given that the Appellant did not attend on the scheduled date and time for the appeal, a decision was made on the basis of the written record. According to inquiries made, the notice of hearing was delivered on May 19, 2017, with proof of signature from the establishment where the Appellant was incarcerated. Furthermore, the Appellant had sent submissions to the Tribunal on May 17, 2017, regarding the summary dismissal.<sup>8</sup> For this reason, in accordance with section 12(1) of the *Social Security Tribunal Regulations*, the Tribunal member had decided to proceed in the Appellant's absence.

[10] The July 19, 2017, decision on the record stated that the Appellant was not eligible to receive OAS benefits while he was incarcerated in accordance with the OAS Act.

[11] The Appellant appealed the July 19, 2017, decision, and the Tribunal's Appeal Division decided, on March 28, 2018, that the decision to hear the appeal in a manner in which the Appellant could not participate was a violation of the principles of natural justice. As a result, the file was returned to the General Division for reconsideration. The Appeal Division added that it had not stated that the Appellant's OAS pension should be reinstated and that the General Division could dismiss the appeal a second time, but it must do so while respecting the principles of natural justice.

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<sup>8</sup> GD-14.

[12] The Appellant then raised constitutional questions a third time in his letters of March 26, March 27, June 21, and June 26, 2018.<sup>9</sup>

[13] On September 28, 2018, a letter was sent to the Appellant informing him again that if he wished to raise a constitutional challenge before the Tribunal, he had to file a notice in accordance with section 20(1)(a) of the *Social Security Tribunal Regulations* by November 5, 2018.

[14] The Appellant made several submissions between October 26, 2018, and December 27, 2018.<sup>10</sup>

[15] On January 15, 2019, the Tribunal informed the Appellant that, following the September 28, 2018, letter, he had not met all the conditions stated in section 20(1)(a) of the *Social Security Tribunal Regulations*, and as a result, his appeal would be heard as a regular appeal.

[16] On January 31, 2019, the Appellant appealed the January 15, 2019, letter to the Tribunal's Appeal Division.

[17] On May 30, 2019, the Appeal Division refused the Appellant leave to appeal.

[18] After the Appeal Division's decision, the Appellant filed an application for judicial review with the Federal Court. On November 11, 2019,<sup>11</sup> the Federal Court dismissed the Appellant's *mandamus* application. The Federal Court said in its decision that it was plain and obvious that the Appellant's appeal was premature and that it had no reasonable chance of success.

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<sup>9</sup> AD-4, AD-5, IS-2, and IS-3.

<sup>10</sup> IS-4, IS-5, and IS-6.

<sup>11</sup> *N v Canada (Attorney General)*, 2019 FC 1367.

**ii. Appeal to the Tribunal's General Division**

[19] The evidence on file shows that the Appellant turned 65 in May 2016. He applied for an OAS pension, which was date stamped on August 11, 2015. His application was approved with benefits starting in June 2016.

[20] Also according to the evidence on file, the Appellant's OAS benefits were suspended in June 2016 because, on April 20, 2016, Correctional Services Canada informed the Minister that the Appellant was incarcerated.

[21] The Appellant was eligible for OAS benefits under section 3(1)(c) of the OAS Act. However, because the Appellant was incarcerated, section 5(3) of the OAS Act must apply. According to this section, 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*.

[22] After reviewing the evidence, during his period of incarceration in a federal penitentiary, except for the first month of incarceration, according to section 5(3) of the OAS Act, no OAS pension benefits may be paid to the Appellant until his release.

[23] As a result, based on the evidence on file and the OAS Act, I find that the Appellant is not eligible for OAS benefits while he is incarcerated.

**CONCLUSION**

[24] The appeal is dismissed for these reasons.

Antoinette Cardillo  
Member, General Division – Income Security