[TRANSLATION]

Citation: *JN v Minister of Employment and Social Development*, 2023 SST 1716

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	J. N.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated June 28, 2016 (issued by Service Canada)

Tribunal member:	Jean Lazure
Type of hearing:	In writing
Decision date:	October 26, 2023
File number:	GP-20-1532

Decision

[1] The appeal is dismissed.

[2] The Appellant, J. N., isn't entitled to receive benefits under the *Old Age Security Act* (OAS Act) while incarcerated. So, I am dismissing his claim concerning the constitutionality of section 5(3) of the OAS Act. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant applied for an Old Age Security (OAS) pension on August 11, 2015.[1] The Minister approved his application, with payments starting in June 2016.

[4] On May 5, 2016,[2] the Minister told the Appellant that his OAS benefits would be suspended as of June 2016 because the Correctional Service of Canada had informed the Minister that he was incarcerated.[3]

[5] On May 12, 2016,[4] the Appellant asked the Minister to reconsider its decision. On June 28, 2016,[5] the Minister upheld its decision in a Reconsideration Decision Letter. On July 21, 2016,[6] the Appellant appealed that decision to the Tribunal's General Division.

[6] Then the case took its course and involved several decisions by our General Division,[7] our Appeal Division,[8] and even the Federal Court.[9]

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[1] This is the date the Minister received the application. The application is at GD2-3 in the record.
[2] See GD2-18.
[3] See GD2-20.
[4] See GD2-10.
[5] See GD2-7.
[6] See GD1-1 *et seq*. This is the date the Tribunal received the appeal.
[7] See the July 19, 2017, January 15, 2019, and May 29, 2020, decisions.
[8] See the January 30, 2018, and March 28, 2018, decisions in file AD-17-551, and the May 30, 2019, decision in file AD-19-213.
[9] See 2019 FC 1367.

[7] The latest Appeal Division decision in this file was made on October 8, 2020.[10] The Appeal Division decided that the General Division had made an error "by failing to provide adequate reasons to justify its dismissal of the Applicant's notice of constitutional question."[11] So, it sent the matter back to the General Division with the following directions:

> a. The General Division will provide the Applicant with the information sheet on the presentation of a constitutional appeal as well as the notice of appeal form involving the Charter.
>
> b. The General Division will give the Applicant a reasonable period of time to submit this form or another form of notice under section 20(1)(a) of the SST Regulations. If he wishes, the Applicant can also inform the Tribunal that he continues to rely on an earlier notice of constitutional question.
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> c. If the General Division finds that the Applicant still has not satisfied the conditions stated in section 20(1)(a) of the SST Regulations, the General Division will clearly state its concerns and give the Applicant the opportunity to make the necessary corrections before dismissing his notice of constitutional question again.
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> d. I note that the same member of the General Division has already dismissed the Applicant's appeal twice. To avoid any possibility of an apprehension of bias, the appeal will be assigned to another General Division member.

[8] After that, the file was the subject of steady correspondence between the new General Division member and the Appellant, as well as a few interlocutory decisions on two main points:

- the constitutional questions that the Appellant may raise
- a request by the Appellant for the legal advice and studies provided to the Minister of Justice Canada in relation to the enactment of the bill leading to the coming into force of section 5(3) of the OAS Act

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[10] See the decision by my colleague Jude Samson in file AD-20-715.
[11] See page 6 of the decision.

[9] Concerning the latter issue, I find that it was settled by an interlocutory decision that the Tribunal made on June 10, 2021, which I will quote here:

> [translation]
>
> The Tribunal is informing the parties that it will no longer discuss the Appellant's access to information request, since the Tribunal has no power over the Minister of Justice. The Tribunal cannot force the Minister of Justice to produce the documents in question.[12]

[10] Concerning the constitutional questions, the Tribunal defined them as follows in an interlocutory decision dated January 26, 2021:[13]

> [translation]
>
> - Is section 5(3) of the OAS Act discriminatory on the basis of civil status, and does it breach the equality rights under section 15(1) of the Charter?
>
> - Does section 5(3) of the OAS Act infringe one of the three interests protected by section 7 of the Charter, namely the life, liberty, or security of the person?

[11] Additionally, in an interlocutory decision dated January 28, 2021, the Tribunal found that [translation] "the Appellant raised a constitutional challenge and met the conditions set out in section 20(1)(a) of the *Social Security Tribunal Regulations*."[14] That decision also ordered the Appellant to provide, by March 29, 2021, [translation] "all the evidence supporting the constitutional challenge (including any affidavits and expert evidence)."[15]

[12] Lastly, in an interlocutory decision dated June 6, 2022,[16] I asked the parties several questions. Among other things, I asked them [translation] "to provide me with

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[12] See ISN16-2.
[13] See ISN9-1 [*sic*].
[14] See ISN10-1.
[15] See ISN10-2.
[16] See ISN25-1.

any evidence relevant to the Appellant's arguments" on the constitutional questions he had raised.

[13] I also asked the Appellant about his preferred form of hearing. On June 15, 2022,[17] he confirmed that he [translation] "still want[ed] a written proceeding, in accordance with Regulation 21(a) [of] the Social Security Tribunal of Canada."

[14] Having exhausted the written questions I had for the parties in my June 15, 2022, decision, I am making my decision on the record as it stands.

What the Appellant must prove

[15] For the Appellant to succeed, he will have to prove to me one or more breaches of his Charter rights.

[16] As I mentioned, on January 26, 2021, the Tribunal defined the constitutional questions raised by the Appellant as follows:

- Does section 5(3) of the OAS Act infringe one of the three interests protected by section 7 of the Charter, namely the life, liberty, or security of the person?

- Is section 5(3) of the OAS Act discriminatory on the basis of civil status, and does it breach the equality rights under section 15(1) of the Charter?

[17] In that January 26, 2021, letter, the Tribunal also told the Appellant that he had the burden of proof:

> [translation]
>
> It is up to the Appellant to prove that the OAS Act infringes his rights under section 15 of the Charter (*Law v Canada (Minister of Employment and Immigration)*, [1999] SCR 497. [*sic*]
>
> […]

[17] See ISN26-1.

> If the Tribunal decides that section 5(3) of the OAS Act breaches one of the equality rights, then the Minister will have to justify the infringement of those rights under section 1 of the Charter.
>
> So, the Appellant is the one who has to prove an infringement of his rights. Only then will the Minister have to show that this infringement is justified under section 1 of the Charter.[18]

[18] The burden of proof is the same for a breach of section 7 of the Charter. In all cases, the initial burden of proof for a breach of one or more Charter rights is on the person alleging the breach.

[19] So, it isn't until *prima facie* (at first glance) evidence of a breach of a Charter right [is provided] that the burden of proof shifts to the party seeking to justify the breach as reasonable in a free and democratic society.[19]

[20] In *Kahkewistahaw*,[20] the Supreme Court confirmed this burden of proof and added:

> I think intuition may well lead us to the conclusion that the provision has some disparate impact, but before we put the Kahkewistahaw First Nation to the burden of justifying a breach of s. 15 in its *Kahkewistahaw Election Act*, there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct.[21]

[21] This means that raising the constitutionality of legislation must not be a fishing expedition. The party alleging the breach must not simply raise it, but prove it:

> [translation]
>
> Even though, on its face, the issue may appear to be one of law alone, the courts will not agree to make Charter decisions "in a

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[18] See ISN9-2.
[19] See SHARPE, Robert J. and ROACH, Kent, The Canadian [*sic*] Charter of Rights and Freedoms, Irwin Law, 2021, p. 98.
[20] See *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548 at para 34.
[21] See *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548 at para 34.

> factual vacuum" or based on "the unsupported hypotheses of enthusiastic counsel."[22]

Reasons for my decision

[22] I find that the Appellant isn't entitled to receive benefits under the OAS Act while incarcerated. So, I am dismissing his claim concerning the constitutionality of section 5(3) of the OAS Act. These are my reasons below.

The parties' positions

[23] I will summarize below the parties' positions concerning a possible breach of the section 7 or 15(1) Charter rights by section 5(3) of the OAS Act.

– The Minister's position

[24] On the issue of section 7 of the Charter, the Minister's position is that the record doesn't support a finding that section 5(3) infringes the legal rights set out in section 7:

> [translation]
>
> The Appellant has not made any argument that section 5(3) of the OAS Act infringes his section 7 Charter rights, or any argument showing how it infringes his life, liberty, or security of the person.[23]

[25] On the issue of section 15(1) of the Charter, the Minister's position is that the record submitted by the Appellant doesn't allow me to address the constitutionality of section 5(3) of the OAS Act:

> [translation]
>
> The Appellant's record is incomplete. The Appellant simply alleges that the OAS Act infringes his Charter right to equality, but he has not provided a sufficient factual or evidentiary record to show that

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[22] See BRUNELLE, Christian, j.c.q. and SAMSON, Mélanie, L'objet, la nature et l'interprétation des Chartes des droits [The purpose, nature, and interpretation of charters of rights], in Collection de droit 2023 [Law collection 2023] - Volume 8 - Droit public et administratif [Public and administrative law], 2023, Centre d'accès à l'information juridique [Legal information access centre] (CAIJ), p. 47. See also *MacKay v Manitoba*, [1989] 2 SCR 357, pages 361 and 362; *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086, page 1093; *Baron v Canada*, [1993] 1 SCR 416, pages 452 and 453; and *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267, page 329.
[23] See ISN15-17.

> section 5(3) of the OAS Act infringes his right to equality under section 15 of the Charter.[24]

[26] In any event, the Minister is of the view that, if section 5(3) of the OAS Act does infringe a Charter right, the infringement is justified under section 1 of the Charter.[25]

– **The Appellant's position**

[27] Concerning a section 7 breach, it should be noted that the Appellant hasn't provided any argument or evidence relating to a breach of a section 7 Charter right.

[28] There is even very little mention of section 7 of the Charter in the record. In the entire record, all the Appellant has said about a possible section 7 breach is the following:

- His appeal was filed [translation] "in accordance with" a list of Charter sections, including section 7.[26]
- His appeal [translation] "is based on" that same list of sections, including section 7.[27]
- He [translation] "referred to" that same list of sections, including section 7, "in his appeal."[28]
- He [translation] "referred to" section 7 in a list of sections in his appeal filed in 2016.[29]

[24] See ISN28-11.
[25] See ISN15-22 *et seq*.
[26] See GD1-4.
[27] See GD13-4.
[28] See IS4-2.
[29] See ISN22-3, paragraph 8.

[29] In light of the above, in my interlocutory decision of June 6, 2022, I asked the Appellant how section 5(3) of the OAS Act infringes one of the three interests protected by section 7 of the Charter. He said:

> [translation]
>
> Section 7 of the *Canadian Charter of Rights and Freedoms* is breached in cases where the vagueness or overbreadth of legislation violates the principles of fundamental justice.[30]

[30] Concerning a breach of the section 15(1) right to equality, it should first be noted that the identified constitutional question doesn't allege the status of being a prisoner as a ground of discrimination under this section of the Charter.

[31] It was somewhat ambiguous whether the Appellant raised this ground in his initial notice of appeal dated July 21, 2016, which had the following paragraph:

> [translation]
>
> By making and proving this distinction, Bill C-31 on the suspension of OAS [benefits] for the Appellant, who is incarcerated, shows that to apply against him the suspension of the payments owing to him is to target certain groups of incarcerated persons, which violates section 15(1)(2) of the *Canadian Charter of Rights and Freedoms* by discriminating against the elderly and breaching the right to equality before the law and the right to the equal protection and equal benefit of the law.[31]

[32] However, this issue has been decided by both the Federal Court of Appeal and the Supreme Court: The status of being a prisoner isn't a ground of discrimination analogous to those enumerated in section 15(1) of the Charter.[32] In *Sauvé*, the Supreme Court stated:

> Prisoners do not constitute a group analogous to those enumerated in s. 15(1) because the fact of being incarcerated cannot be said to have arisen because of a stereotypical application of a presumed group characteristic. The status of

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[30] See ISN26-2 and ISN27-2.
[31] See GD1-7.
[32] See *Sauvé v Canada (Chief Electoral Officer)*, [2000] 2 FC 117 (CA), affirmed by 4 out of 9 judges of the Supreme Court, not contradicted in [2002] 3 SCR 519.

> being a prisoner is brought about by the past commission of serious criminal offences, acts committed by the individual himself or herself. The unifying group characteristic is past criminal behaviour. This was the view of the trial judge in *Jackson*, *supra*, noted by the trial judge in the case at bar: the differential treatment arises "not from their personal characteristics, but from past courses of conduct" (p. 920). This was also the view of Strayer J. in *Belczowski* at the trial level, *supra*, at p. 162: "I am unable to conclude that a law applied to the plaintiff to his disadvantage by reason of the circumstance that he has committed a crime and is imprisoned under lawful sentence amounts to discrimination on some ground analogous to those specified in subsection 15(1)".[33]

[33] As a result, the identified constitutional question concerning a possible breach of section 15(1) is clear, and the ground of discrimination is the Appellant's "single" civil status.

[34] The Appellant essentially argues that the partner of an incarcerated person can apply to receive that person's pension while they are incarcerated and not receiving their pension under section 5(3) of the OAS Act,[34] and that [translation] "common-law partners can apply to receive 'the base amount of the incarcerated partner's OAS pension.'"[35] The Appellant states:

> [translation]
>
> The Appellant would remind the SST and the Minister again that the regulations used section 5(3) of the Canada pension that the Appellant is affected and specifically targeted because he is single, so he cannot give his pension to his partner in certain cases, which makes him even more ostracized, and section 15(1)(2) of the Charter applies and falls within the wording of the *Canadian Charter of Rights and Freedoms* of 1982.[36]

[33] See decision above at para 195.
[34] See ISN29-2.
[35] See ISN29-7.
[36] See ISN7-4.

[35] The Appellant also said the following about his claim of discrimination on the basis of his "single" civil status:

> [translation]
>
> The Appellant's rights are being restricted, and he is being deprived of what he is owed in OAS, for the sole reason that he is an incarcerated person who is an orphan and single, which are justifiable reasons and grounds used by the Respondent (Minister) to avoid recognizing his rights under the *Canadian Charter of Rights and Freedoms* and the Canadian Constitution and the universality of the laws and rights applicable to all Canadians without exception.[37]

[36] Lastly, I can't overlook the fact that the Appellant devoted a substantial portion of his arguments to section 1 of the Charter. He repeatedly touched on it, often cited the Supreme Court's decision in *Oakes*,[38] and noted at length the burden of proof that rests on the party seeking to justify a breach of a Charter right. On January 18, 2018 [*sic*], he stated:

> [translation]
>
> Clear and compelling reasons for depriving us of rights that the Charter says are fundamental. Under section 1, it is up to the party seeking to restrict a right or freedom to show that the restriction is justified. The burden of justifying such a restriction arises only once it is recognized that a right or freedom enshrined in the Charter is infringed.[39]

[37] The Respondent [*sic*] talked about this again in his October 16, 2018, arguments,[40] as well as in his December 20, 2020, submissions, where he stated:

> [translation]
>
> Under section 1, the burden of preparing and presenting it clearly rests with the Attorney General or the person seeking to validate

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[37] See ISN26-2 and ISN27-3.
[38] See [1986] 1 SCR 103.
[39] See GD13-5.
[40] See IS4-1, paragraph 1.

> the Charter breach. **The evidence required under section 1 is compelling evidence**.[41]

[38] I will come back to this in my analysis below.

Analysis

[39] The Minister tells me that the record doesn't allow me to find a breach of a Charter right. The Minister is correct.

There are few, if any, arguments and no evidence relating to a section 7 Charter breach

[40] First, I note that the Appellant has made virtually no arguments relating to a section 7 Charter breach.

[41] I would go so far as to say that the Appellant has provided absolutely no evidence of such a breach.

[42] I can't overlook these gaps. At no time has the Appellant indicated how section 5(3) of the OAS Act breaches his right to life, liberty, or security of the person, let alone proven such a breach.

[43] The Appellant can't simply refer to a section of the Charter and hope that the Tribunal will take the ball and run with it. Earlier, I noted the burden of proof that rests on the Appellant: He must prove a *prima facie* (on its face, at first glance) breach of a Charter right.

[44] As for section 7 of the Charter, the Appellant hasn't met his burden of proof, so I have to reject this argument.

The law and the evidence don't support the Appellant's argument about discrimination on the basis of his "single" civil status

[45] The Appellant alleges that a spouse or common-law partner (hereinafter "partner" for ease of reference) can receive their partner's OAS pension if that person is

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[41] See ISN7-4. In fact, the Appellant devoted all of ISN7-5 to it.

incarcerated and that this violates his right to equality as a person whose civil status is "single."

[46] In his July 8, 2022, arguments,[42] he explained this claim and even described how it works, according to him:

> [translation]
>
> A common-law partner goes to a Service Canada office and says that their pensioner partner is incarcerated and applies to receive "the base amount of the incarcerated partner's pension" "now it is asking for an allowance that is the equivalent of the base amount of the pension mentioned by the Appellant, and the amount is the same, that is, $648.28 to continue to support themselves and to pay rent or the mortgage and other bills, that, alone, she can't survive without the incarcerated pensioner's pension.[43]

[47] In paragraph 15 of those arguments, the Appellant cited section 19 of the OAS Act. And, in paragraph 14, he expressed his view that "allowance" refers to the incarcerated partner's OAS pension.

[48] However, I don't think the evidence and the law support the Appellant's arguments.

[49] The allowance under section 19 of the OAS Act isn't a substitute for an incarcerated partner's OAS pension. This allowance is available to any person aged 60 to 64[44] who meets the other criteria of section 19, including essentially being the partner of a pensioner.

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[42] See ISN29-2.
[43] See ISN29-2.
[44] See section 19(1)(b) of the *Old Age Security Act* (OAS Act).

[50] For the allowance under section 19, the following applies to the partner of an incarcerated pensioner:

- Incarceration doesn't make them former common-law partners, and they aren't considered to be separated,[45] so the partner continues to receive the allowance.

- Both partners have to apply annually, and an application will be considered as though it were made by both partners if one of them is incarcerated.[46]

- The allowance isn't paid to the partner if this person is incarcerated.[47]

- Also, the **monthly joint income** under section 22 includes the income of an incarcerated partner.[48]

[51] This allowance can absolutely be payable to the partner of a pensioner who **isn't incarcerated**. Through the mechanism of sections 19(1.1) and (1.2), it **remains** or is also payable to the partner of a pensioner who is incarcerated. What changes here isn't the civil status, but the incarceration status.

[52] In my view, there is no mechanism in the law that makes an incarcerated person's OAS pension payable to their partner. In fact, as the Minister pointed out to me, section 36 of the OAS Act says quite the opposite:

> **Benefit not assignable**
>
> **36 (1)** A benefit shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void.

[53] The Appellant referred to the discussions among parliamentarians on the legislative changes that led to the enactment of section 5(3) of the OAS Act. My

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[45] See sections 19(1.1) and (1.2) of the OAS Act.
[46] See sections 19(4) and (4.01) of the OAS Act.
[47] See section 19(6)(f) of the OAS Act.
[48] See section 22(1) of the OAS Act.

understanding is that parliamentarians discussed incarcerated persons because they didn't want partners to be penalized by the incarceration of those persons. I see nothing here to support the Appellant's position.

[54] The Appellant hasn't proven to me that the OAS Act infringes his right to equality as a person with "single" civil status. I believe that, inevitably, the reason he isn't receiving his OAS pension always comes down to his status of being incarcerated, not his civil status. But, as I said earlier, the status of being incarcerated isn't a ground of discrimination.

[55] As for the Appellant's section 1 Charter arguments, as noted above, the Appellant first has to prove a breach of his Charter rights before the burden of proof shifts, where a party will have to try to justify the breach. This section 1 analysis isn't necessary in this appeal, since the Appellant hasn't proven a breach of one of his Charter rights.

Conclusion

[56] I find that the Appellant isn't entitled to receive benefits under the OAS Act while incarcerated. I am also dismissing his claim concerning the constitutionality of section 5(3) of the OAS Act.

[57] This means that the appeal is dismissed.

Jean Lazure
Member, General Division – Income Security Section