Federal Court Cour fédérale

Date: 20180720

Docket: T-1642-17

Citation: 2018 FC 768

Ottawa, Ontario, July 20, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DENNIS STEWART

Respondent

JUDGMENT AND REASONS

[1] When the Respondent Dennis Stewart was incarcerated in a federal penitentiary, his monthly Old Age Security [OAS] payments were suspended by operation of section 5(3) of the *Old Age Security Act* [*OAS Act*]. He challenged this to the Social Security Tribunal General Division [GD] who dismissed his claim. He then appealed to the Social Security Tribunal Appeal Division [AD] who granted his appeal and referred his challenge back to the GD.

[2] On this application, the Attorney General of Canada [AG] seeks review of the AD findings that the GD erred by summarily dismissing Mr. Stewart's claim, and that the GD erred by not considering his *Charter of Rights and Freedoms* [*Charter*] arguments.

[3] Mr. Stewart represented himself, and appeared in person at the hearing. Legal counsel for the AG appeared via videoconference. For the reasons that follow this judicial review is allowed. No costs are awarded.

I. Background

[4] In submissions to the GD, Mr. Stewart challenged the suspension of his OAS payments on compassionate grounds (his poor health) and he argued that his *Charter* rights were infringed.

[5] On September 28, 2015, the GD advised Mr. Stewart that it was considering summarily dismissing his appeal because of s.5(3) of the *OAS Act* and because it had no authority to consider relief on compassionate grounds. The GD also advised Mr. Stewart that he needed to comply with the procedural requirements of s.20(1) of the *Social Security Tribunal Regulations* [SSTRs] on the *Charter* issues he raised.

[6] On October 8, 2015, Mr. Stewart responded to the GD stating that his rights under s.6 of the *Charter* to a "defense" were violated by "Income security programs—OAS/CPP."

[7] On June 27, 2016, the GD issued an interlocutory order requiring Mr. Stewart to file a *Charter* record with particulars by September 1, 2016. In the order, the GD noted that "[F]ailure

to comply with the above time limit and requirements…may result in the appeal being treated as a regular appeal. Should this occur, the Appellant would be precluded from raising the constitutional challenge during the proceedings.”

[8] In subsequent correspondence, Mr. Stewart advised the GD that he was incarcerated, in segregation, with no access to resources therefore he would “not be submitting any further documentation…in respect to my ‘constitutional’ challenge.”

[9] On October 12, 2016, the GD asked Mr. Stewart if he was seeking an extension of time to file a record. On November 15, 2016, the GD advised him that he had until December 1, 2016 to notify the GD of his intentions.

[10] Having not received a response, on December 5, 2016, the GD ordered that Mr. Stewart was precluded from raising the *Charter* challenge. The GD also ordered that his appeal would continue as a regular appeal.

[11] Subsequently, the GD summarily dismissed his appeal and Mr. Stewart appealed to the AD.

II. Decision Under Review

[12] In the decision of the AD dated September 29, 2017, the AD noted four issues for consideration: (1) deference to the GD decision (2) whether the GD applied the correct test for summary dismissal (3) whether the GD appropriately barred Mr. Stewart from raising

constitutional issues; and (4) whether the GD erred in summarily dismissing his demand to reinstate his pension despite his incarceration.

[13] On the first issue, the AD concluded that *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 applies to its review of the GD decision. The AD concluded that the enabling statute (the *Department of Employment and Social Development Act* [*DESDA*]), signaled that the AD should intervene when the GD "bases its decision on an error that is clearly egregious or at odds with the record."

[14] On the second issue, the AD concluded that the proper test for summary dismissal is whether it is "plain and obvious on the record that the appeal is bound to fail." The AD noted that the threshold is "very high". The AD also looked to other AD cases which applied this threshold and other stringent standards for summary dismissal.

[15] On the third issue, the AD concluded that the GD made an error by barring Mr. Stewart from raising the *Charter*. It noted that the GD sent a notice of intention for summary dismissal based upon s.5(3) of the *OAS Act*. Mr. Stewart responded with a handwritten note which the GD noted "alluded" to s.5(3) of the *OAS Act*. Yet in its June 27, 2016 interlocutory decision, the GD concluded that Mr. Stewart did not specify the provision at issue contrary to s.20(1)(a)(i) of the SSTRs. The AD concluded that this was an error, because s.5(3) of the *OAS Act* was "the very subject of the letter on which the [Respondent] wrote his *Charter* argument."

[16] The AD further concluded that the GD contradicted itself by allowing Mr. Stewart's case as a "special *Charter* appeal" despite this deficiency. The AD found that the GD wrongly imposed conditions on the continuation of the appeal which "(i) the [Respondent] had already fulfilled or (ii) were not required under any statute or regulation."

[17] The AD found that once the GD concluded that the appeal could continue under s.20(1)(a) of the SSTRs, it could not withdraw that certification or propose other requirements. According to the AD, s.20(1)(a)(ii) is a minimal requirement, only mandating a party on a *Charter* challenge to file a notice containing any submissions in support of the issue that is raised. As a result, according to the AD, the GD had no legal authority to assess the quality of the submissions or insist on form or content.

[18] Finally, the AD concluded that even if Mr. Stewart did not meet the requirements for a *Charter* argument, the GD should still have determined whether his appeal had a reasonable chance of success. The AD relied upon another case before the AD dealing with the same issues as those in Mr. Stewart's case, and on this basis concluded that his case might be "arguable," so the AD could not conclude that his case was bound to fail.

III. Issues

[19] The following are the issues for consideration in this application:

A. Does this Court have jurisdiction?

B. Did the AD have jurisdiction to hear the appeal?

C. Is the AD decision reasonable?

IV. Standard of Review

[20] The standard of review applied to decisions of the AD is reasonableness *(Atkinson v Canada (Attorney General)*, 2014 FCA 187 at para 33).

[21] In assessing reasonableness, this Court can look to other decisions of the AD (*Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at para 95; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*., 2013 SCC 34 at para 6).

A. *Does this Court have jurisdiction?*

[22] Under s.28(1)(g) of the *Federal Courts Act*, some judicial reviews of decisions of the Social Security Tribunal AD proceed to the Federal Court of Appeal. However, s.28(1)(g) contains an exception in cases where the AD summarily dismisses an appeal under s.53(3) of the *DESDA*. In such cases, this Court has jurisdiction:

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:	**28 (1)** La Cour d’appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :
[…]	[…]
(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made	**g)** la division d’appel du Tribunal de la sécurité sociale, constitué par l’article 44 de la *Loi sur le ministère de l’Emploi et du Développement social*, sauf dans le cas d’une

under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;	décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

[23] Here, in its decision the AD states:

> This is an appeal of a decision of the General Division of the Social Security Tribunal of Canada…which summarily dismissed the Appellant's appeal of the Respondent's decision to suspend his Old Age Security (OAS) pension and Guaranteed Income Supplement (GIS). The General Division dismissed the appeal because it was not satisfied that it had a reasonable chance of success.

[24] It is clear from the AD's decision that it considered Mr. Stewart's case to be an appeal from a summary dismissal by the GD. If so, this case falls within the exception noted above in s.28(1)(g) of the *Federal Courts Act.* I also note that the Federal Court has taken jurisdiction in other such cases of an appeal to the AD from summary dismissal at the GD level, see: *Bossé v Canada (Attorney General),* 2015 FC 1142; *Rose v Canada (Attorney General),* 2017 FC 185.

[25] Accordingly, I conclude this Court has jurisdiction to consider this judicial review.

B. *Did the AD have jurisdiction to hear the appeal?*

[26] The AG argues that the AD should not have heard Mr. Stewart's appeal because leave was not obtained as required by s.56(1) of the *DESDA* as follows:

56 (1) An appeal to the Appeal Division may only be brought if leave to appeal is granted.	**56 (1)** Il ne peut être interjeté d'appel à la division d'appel sans permission.

[27] However, the flaw with this argument is that section 56(2) provides an exception where the GD summarily dismisses a case because it has no reasonable chance of success under s.53. Section 56(2) provides as follows:

56 (2) Despite subsection (1), no leave is necessary in the case of an appeal brought under subsection 53(3).	**56 (2)** Toutefois, il n'est pas nécessaire d'obtenir une permission dans le cas d'un appel interjeté au titre du paragraphe 53(3).

[28] Based upon these provisions, leave is required in all cases *except* where the GD summarily dismisses a case for no reasonable chance of success. Here, the AD expressly held that the GD summarily dismissed the case and the AD considered case as an appeal from a summary dismissal. In which case, leave is not required.

[29] But, the AG argues, when *Charter* claims are made, the decision at the GD level is actually a decision pursuant to s.4 of the SSTRs, and not a decision pursuant to the *DESDA*. In which case, the AD erred by hearing the case without leave. The AG relies upon the following AD cases in support of this argument: *Minister of Employment and Social Development v C.B.*,

2017 SSTADIS 635; *Minister of Employment and Social Development v C.T.*, 017 SSTADIS 614; *Minister of Employment and Social Development v F.H.*, 2017 SSTADIS 636.

[30] Section 4 of the SSTRs provides:

4 A party may request the Tribunal to provide for any matter concerning a proceeding, including the extension of a time limit imposed by these Regulations, by filing the request with the Tribunal.	**4** À la demande déposée par une partie auprès du Tribunal, celui-ci peut déterminer la règle applicable à toute question relative à l'instance, notamment la prorogation des délais impartis par le présent règlement.

[31] The issue then is if Mr. Stewart's case was dismissed under the *DESDA* or under the SSTRs. The cases relied upon by the AG to support their position involve different factual situations than the one here. All three cases note that under ss.53 and 56 of the *DESDA*, the "term appellant must refer to the appellant at the General Division." Therefore, only the party appealing to the GD has a right of appeal to the AD. The moving party must be the same at each level to appeal without leave. In the cases relied upon by the AG, the moving parties were different.

[32] Here Mr. Stewart was the Appellant on the matter before both the GD and the AD. As the appellant he had the ability under the legislation to appeal as of right. Therefore, under ss.53 and 56 of the *DESDA*, the term "appellant" refers to Mr. Stewart, and the AD properly heard the case as of right.

[33] Further, the cases relied upon by the AG do not stand for the proposition that any time a *Charter* issue is raised, s.4 of the SSTRs governs those claims. In the cases where s.4 applied, the Minister filed a request to the GD to summarily dismiss the *Charter* portion of the appeal. However here, there was no summary dismissal of the *Charter* claim. Rather, the GD held, in its decision of December 5, 2016, that the matter would continue as a regular appeal and that Mr. Stewart was precluded from raising the constitutional challenge.

[34] In other words, the only summary dismissal at issue is in the GD's decision of December 9, 2016, which is the summary dismissal of the *regular appeal.* This was done in accordance with the *DESDA*. The GD states in its final order "[T]he appeal is summarily dismissed." In paragraph 10 of its decision, the GD states that "Subsection 53(1) of the [DESDA] states that the General Division must summarily dismiss an appeal if satisfied that it has no reasonable chance of success". The GD explains that "[S]ection 22 of the [SSTRs] states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions." Later in the reasons, the GD states that it complied with s.22 of the SSTRs.

[35] Given that the GD uses the term "summary dismissal" in paragraph 10 of the decision, orders that the case is summarily dismissed, and then states its compliance with the regulations regarding summary dismissal, it is reasonable to conclude that the GD dismissed the case under s.53(1). Further, the fact that Mr. Stewart, as the appellant, was in a position to obtain leave as of right, unlike in the cases cited by the AG, supports this conclusion.

[36] In my view, as the case was dismissed under the *DESDA*, leave was not required.

C. *Is the AD decision reasonable?*

[37] The AG argues that it was unreasonable for the AD to find that a notice of constitutional question is a sufficient basis alone to support Mr. Stewart's *Charter* arguments. The AG submits that the GD followed the proper approach by insisting upon a full record before the *Charter* issues raised by Mr. Stewart could be considered. The AG points out that without such a record, the AG is at a disadvantage as it does not know the case it has to meet. Further the requirement of a record is in keeping with Supreme Court decisions that *Charter* arguments should not be considered in a vacuum.

[38] Mr. Stewart for his part argues that the decision of the AD is fair and that his OAS benefits should be reinstated for the period of time they were withheld. At the hearing of this judicial review, Mr. Stewart also argued that he was not incarcerated within the meaning of the *OAS Act* at the relevant time. However this argument was not made before the GD or the AD. Therefore it cannot be considered for the first time on this judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 23).

[39] To put these submissions into perspective, the decisions made by the GD must be considered. In its interlocutory decision, the GD concluded that it was satisfied that Mr. Stewart filed a notice under s.20(1)(a) of the SSTRs, and thus continued the appeal as a special *Charter* appeal. However, the GD imposed a requirement that Mr. Stewart file evidence and argument in

support of his *Charter* claim. When he failed to do so, the GD held that the appeal would proceed as a regular appeal.

[40] The GD then concluded that the test for summary dismissal was met because it was a regular appeal. The GD concluded that the facts giving rise to Mr. Stewart's incarceration were not in dispute and therefore s.5(3) of the *OAS Act* applied. This was a straightforward exercise of the application of law to the facts of Mr.Stewart's case. As the GD correctly noted, because it is a creature of statute, it can only apply the law as set out in the statute (*Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch),* 2001 SCC 52 at para 24). As section 5(3) of the *OAS* does not provide exceptions for cases which do not meet the procedural requirements set out by the *DESDA*, the GD reasonably interpreted those requirements.

[41] Despite this, the AD found that the GD was wrong to require a *Charter* record. According to the AD, since the GD held that the case was consistent with s.20(1)(a) of the SSTRs, it was wrong for the GD to require more from Mr. Stewart.

[42] However this finding is at odds with the provisions of the SSTRs which provide the GD with authorization to require a *Charter* record. Section 20(1) (a) and (3) of the SSTRs provide:

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*	**20 (1)** Lorsque la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une disposition du *Régime de pensions du Canada*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi sur l'assurance-emploi*, de la partie 5 de la *Loi*

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	*sur le ministère de l'Emploi et du Développement social* ou de leurs règlements est mis en cause devant le Tribunal, la partie qui soulève la question:
(a) file a notice with the Tribunal that	**a)** dépose auprès du Tribunal un avis qui contient:
(i) sets out the provision that is at issue, and	**(i)** la disposition visée,
(ii) contains any submissions in support of the issue that is raised;	**(ii)** toutes observations à l'appui de la question soulevée;
[…]	[…]
(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.	**(3)** Si un avis est déposé au titre de l'alinéa (1)a), les délais prévus par le présent règlement pour le dépôt de documents ou d'observations ne s'appliquent pas et le Tribunal peut enjoindre aux parties de les déposer dans les délais qu'il fixe

[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.

[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 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.

[45] This interpretation is supported by cases before the GD and AD, which provide that after an applicant has complied with s.20(1)(a), "the [SST] generally will invite parties to provide a fulsome record, which should include their evidence, submissions, and the authorities that they intend to rely upon" (*J.C. v Minister of Employment and Social Development*, 2016 SSTADIS 126 at para 11*; G.B. v Minister of Human Resources and Skills Development*, 2014 SSTADIS 28 at para 38).

[46] This interpretation is also consistent with direction from the Supreme Court of Canada, which has held that *Charter* issues cannot be decided in a factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357 at 364). Here the lack of a *Charter* record inhibited the ability of the GD to consider the case properly. Mr. Stewart'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.

[47] The AD erred by faulting the GD for proceeding with the regular appeal in absence of *Charter* submissions. However the GD had the power to do so, and on the regular appeal, the GD reasonably applied the applicable law. Further, the GD is entitled to control its own procedures (*Prassad v Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560 at 568-569).

[48] The decision of the AD is therefore unreasonable.

JUDGMENT in T-1642-17

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed. The decision of the Appeal Division is set aside and the matter is remitted for redetermination; and
2. There will be no order as to costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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