Federal Court  Cour fédérale

Date: 20220727

Docket: T-101-22

Citation: 2022 FC 1124

Ottawa, Ontario, July 27, 2022

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

AHZARD MOHAMMED

Applicant

And

SOCIAL SECURITY TRIBUNAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Social Security Tribunal, Appeal Division ("Appeal Division"), dated December 29, 2021, denying leave to appeal of the General Division ("General Division") decision dated November 1, 2021. The Applicant wished to reverse the Division of Unadjusted Pensionable Earnings, or "credit split", that his ex-wife Ms. Ramjohn ("the Added party") applied for and then tried to withdraw some months later. This occurred in the Province of Ontario.

I. Background

[2] The Applicant, Mr. Mohammed, and the Added Party, married in May 1974. They separated in February 1997, and divorced on January 18, 2002. The parties entered into a separation agreement dated August 8, 2001 and were divorced February 18, 2002. The separation agreement said that: "… there would not be a division of unadjusted pensionable earnings" and that "they promise to remain honour – bound to do nothing that would lead to such a division."

[3] On July 3, 2019, the Added Party applied for a credit split. She subsequently provided a copy of the judgment granting the divorce in November 2019 as requested. The Minister sent a letter to the Applicant on December 23, 2019, asking him to confirm details regarding the couple's cohabitation.

[4] On December 30, 2019, the Added Party sought to withdraw her credit split application. The Applicant also sent a letter on January 15, 2020 requesting the withdrawal of the credit split application and that "[their] CPP benefits stay unchanged". However, the Minister proceeded with the credit split on January 28 with the following explanation:

> In regards to your letter dated January 15, 2020, once an application is made for a Credit Split for divorced spouses, it cannot be withdrawn as per Canada Pension Plan Legislation.

[5] The Applicant then pursued an appeal of the credit split. He requested reconsideration on February 7, 2020, which the Minister denied on August 13, 2020. In its decision letter, the Minister emphasized that Service Canada's discretion "does not extend to an ability to override legislation". Pursuant to legislation, "the department is required to perform credit splitting after

receiving sufficient proof that a divorce has taken place". As the Added Party provided sufficient information, the Minister was required to proceed regardless of any withdrawal request.

[6] The Applicant appealed before the Social Security Tribunal, General Division on August 31, 2020. A hearing before the General Division took place on November 1, 2021. The Applicant claimed that:

- The credit split should be reversed because the Added Party applied by mistake;
- The Added Party has attempted to withdraw her application several times and thus her wishes should be honoured; and
- Furthermore, the separation agreement between the Applicant and the Added Party precludes credit splitting.

[7] A month later, on December 2, 2021, the General Division dismissed the appeal decision. The Applicant then sought leave to appeal to the Appeal Division on December 13, 2021. The Applicant sought for leave of his appeal to be granted, and the credit split be reversed, with his benefits being returned to him "back to 100%."

[8] On December 29, 2021, the Appeal Division refused leave to appeal.

[9] In his submissions, the Applicant claimed the General Division made the following errors:

- It acted with bias by supporting only the Minister and not listening to the Applicant and the Added Party;

- It made an error of jurisdiction by declaring it lacked power to make any change;
- It made an error of law by forcing people to do something they had agreed not to do, thus violating human rights; and
- It failed to consider the Applicant's sickness and inability to work since 2019.

[10] The Applicant submits that the decision is "unreasonable, unfair, [not transparent], inconsiderate, unjust and harsh."

II. Issue

[11] The issue is whether the Appeal Division's refusal to grant leave to appeal was reasonable.

III. Standard of Review

[12] It is settled law that the standard of review when reviewing a decision of the Appeal Division of the Social Security Tribunal is reasonableness (see, e.g. *Balkanyi v Canada (Attorney General)*, 2021 FCA 164).

[13] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Canada (MCI) v Vavilov*, 2019 SCC 65 at para 13 [*Vavilov*]). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the

decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99). A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

IV. Analysis

(1) Legislation

[14] The *Canada Pension Plan*, RSC 1986, c C-8 provides for the following:

Division of Unadjusted Pensionable Earnings

When mandatory division to take place

55.1 (1) Subject to this section and sections 55.2 and 55.3, a division of unadjusted pensionable earnings shall take place in the following circumstances:

(a) in the case of spouses, following a judgment granting a divorce or a judgment of nullity of the marriage, on the Minister's being informed of the judgment and receiving the prescribed information;

(…)

Agreement or court order not binding on Minister

(2) Except as provided in subsection (3), where, on or after June 4, 1986, a written

Partage des gains non ajustés ouvrant droit à pension

Circonstances donnant lieu au partage des gains non ajustés ouvrant droit à pension

55.1 (1) Sous réserve des autres dispositions du présent article et des articles 55.2 et 55.3, il doit y avoir partage des gains non ajustés ouvrant droit à pension dans les circonstances suivantes :

a) dans le cas d'époux, lorsqu'est rendu un jugement accordant un divorce ou un jugement en nullité de mariage, dès que le ministre est informé du jugement et qu'il reçoit les renseignements prescrits;

(…)

Contrats ou ordonnances judiciaires sans effet à l'égard du ministre

(2) Sauf selon ce qui est prévu au paragraphe (3), sont sans effet quant au ministre en ce

agreement between persons subject to a division under section 55 or 55.1 was entered into, or a court order was made, the provisions of that agreement or court order are not binding on the Minister for the purposes of a division of unadjusted pensionable earnings under section 55 or 55.1.

Agreement binding on Minister

(3) Where

(a) a written agreement between persons subject to a division under section 55 or 55.1 entered into on or after June 4, 1986 contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1,

(b) that provision of the agreement is expressly permitted under the provincial law that governs such agreements,

(c) the agreement was entered into

(i) in the case of a division under section 55 or paragraph 55.1(1)(b) or (c), before the day of the application for the division, or

(ii) in the case of a division under paragraph 55.1(1)(a), before the rendering of the judgment granting a divorce or the judgment of nullity of the marriage, as the case may be, and

(d) that provision of the agreement has not been invalidated by a court order,

that provision of the agreement is binding on the Minister and, consequently, the Minister shall not make a division under section 55 or 55.1.

qui concerne le partage, en application de l'article 55 ou 55.1, des gains non ajustés ouvrant droit à pension, les dispositions d'un contrat écrit entre des personnes visées par le partage ou d'une ordonnance d'un tribunal respectivement conclu ou rendue le 4 juin 1986 ou après cette date.

Contrats ayant leurs effets à l'égard du ministre

(3) Dans les cas où les conditions ci-après sont réunies, le ministre est lié par la disposition visée à l'alinéa a) et n'effectue pas le partage en application de l'article 55 ou 55.1 :

a) un contrat écrit est conclu entre les personnes visées par le partage, le 4 juin 1986 ou après cette date, et contient une disposition qui fait expressément mention de la présente loi et qui exprime l'intention de ces personnes de ne pas faire le partage, en application de l'article 55 ou 55.1, des gains non ajustés ouvrant droit à pension;

b) la disposition en question du contrat est expressément autorisée selon le droit provincial applicable à de tels contrats;

c) le contrat a été conclu :

(i) dans le cas d'un partage visé par l'article 55 ou les alinéas 55.1(1)b) ou c), avant le jour de la demande,

(ii) dans le cas d'un partage visé par l'alinéa 55.1(1)a), avant que ne soit rendu un jugement accordant un divorce ou un jugement en nullité de mariage, selon le cas;

d) la disposition en question du contrat n'a pas été annulée aux termes d'une ordonnance d'un tribunal.

[15] Section 58 of *Department of Employment and Social Development Act* (S.C. 2005, c. 34) [*DESDA*] provides for the following:

58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) the General Division 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..	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.
(3) The Appeal Division must either grant or refuse leave to appeal.	**(3)** Elle accorde ou refuse cette permission.
(4) The Appeal Division must give written reasons for its decision to grant or refuse leave and send copies to the appellant and any other party.	**(4)** Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et à toute autre partie.
[Emphasis added]	[Je souligne]

[16] A reasonable chance of success, in other words, is having "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12).

(2) Advice/Mistake

[17] The Applicant recited a conversation with legal counsel demonstrating what he viewed as bad legal advice, which was – in his view – at least partially to blame for the troubles underlying this application.

[18] Regarding conversations between the Respondent's counsel and himself, that was not before the decision-maker, as clearly it occurred post decision. Such evidence is generally not admissible, as set out by Justice Stratas in *Association of Universities and Colleges of Canada v Access* Copyright, 2012 FCA 22 at paragraph 19 [*Access Copyright*]: "… the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the board."

[19] There are some, albeit limited, exceptions to this rule, as enumerated in Access Copyright at paragraph 20, specifically pertaining to that which (a) providing a general background in circumstances where that information might assist the Court in understanding the issues relevant to judicial review; (b) where necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness; or (c) to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[20] The Applicant has not alleged this evidence to be admissible as a result of one of these exceptions, and I do not see it fit to apply them. Rather, it is being adduced now to bolster his argument that he was told the application can be withdrawn. These exceptions are, as the name would indicate, exceptional, and require substantial circumstances which the Applicant in this case has not proven. I will not consider this new evidence.

[21] I also note here the Applicant claims that Service Canada misled the Added Party by advising her she could withdraw her application for a credit split. The Applicant claims that he and the Added party experienced "many conflicting promises and reports from the Respondent."

[22] Multiple times in argument, the Applicant indicated that the Added party had just made a mistake, noting that everyone makes mistakes so this should be reversible. At the hearing, he said that the Added party had applied for the split erroneously believing that it was just something the government paid that was available to her.

[23] The Applicant made a submission that because the Added Party has agreed with the Applicant that the credit split should be reversed it should be done. In oral argument, the Applicant stated that he was told by his lawyer that the separation agreement would overrule the credit split. Given that they informed Service Canada through multiple phone calls and letters of their agreement to withdraw the application, the Applicant therefore questions why the decision is being forced on them when it is against their wishes. He says she "repented." His argument was that this was a mistake and an administrative error.

[24] The Applicant's argument that the Added party's mistake was because of information she received from government officials, without adducing sufficient evidence to prove this must fail. This is a case where the legislation is clear and unequivocally, that in Ontario once you apply for a credit split there cannot be a withdrawal. So whether they were told or not it could be withdrawn after it already had been done is irrelevant.

[25] While I sympathize that everyone makes mistakes, it is not a persuasive argument in this case. The Applicant's argument is that the Respondent has shown no compassion because everyone makes mistakes. I am sympathetic with the Applicant and his situation. However, *Vavilov* principles make it clear that the governing statute is the strongest constraint on any decision-maker. In the event of a reasonable decision from the decision-maker, the Court cannot overturn the decision. Justice Kane summarized the issue best at paragraph 38 of *Kinsella v Canada (Attorney General)*, 2019 FC 429:

> The Court's role, as described above, is very limited. Where there is no error by the Appeal Division, the Court cannot do more than confirm the decision. The Court cannot change the provisions of the statute to address the circumstances of individuals. With respect to Mr. Kinsella's comment regarding the need for compassionate consideration, the Federal Court of Appeal recently stated in Wilson v Canada (Attorney General), 2019 FCA 49 at para 14 that "the law as it stands must be applied and it is beyond the role of this Court to make compassionate rulings". Unfortunately, in the context of CPP decisions made pursuant to the CPP legislation there is no jurisdiction for the Court to provide relief that is not provided in the CPP.
>
> (See also *O'Rourke v Canada (Attorney General)*, 2018 FC 498 at para 21).

[26] I note the Applicant's arguments that he will suffer a significant loss of Canada Pension Plan ("CPP") benefits due to the Respondent's inability to make a fair and just decision and to

show compassion. However, in my view, the Appeal Division properly addressed the Applicant's submissions regarding his illness and his perception of unfair treatment. The law provides for no discretion to decide differently once the credit split is applied. The Respondent cites *Wilson v Canada (Attorney General)*, 2019 FCA 49: "the law as it stands must be applied and it is beyond the role of this Court to make compassionate rulings."

[27] I acknowledge the Applicant's submission that he is being coerced by the decision which is against his and the Added party's explicit wishes. However, he is making arguments against the law, as set out in the *Act*. As this Court expects the relevant decision-makers to follow the law, so must the Applicant.

[28] The Appeal Division therefore reasonably determined that equitable remedy, or any remedy outside of the *Act*, cannot be provided to the Applicant.

(3) Bias

[29] The Applicant alleges that the Respondent acted inappropriately and without bias. I disagree, and find that the Applicant has adduced no evidentiary support for this.

> The established law on bias was well set out in *Younis v Canada (Minister of Immigration, Refugees and Citizenship)*, 2021 FCA 49. Citing *Miglin v Miglin*, 2003 SCC 24 [*Miglin*], the Federal Court of Appeal confirmed the test is "whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias" (para 35). The finding must be "more than an allegation" (para 35). They also confirmed that theanalysis is "inherently contextual and fact-specific", with a high burden on the party alleging bias (para 36).

[30] In answer to the Applicant's argument regarding bias, the Appeal Division reviewed the evidence and applied the appropriate legal principles, noting that the parties had adequate notice and opportunity to make their case. I also agree with the Appeal Division's finding that disagreeing with the decision is not proof of bias in itself.

[31] The Applicant makes a mere allegation with no substantial evidence that meets the test in *Miglin*. I find he has failed to meet the high burden to allege bias on the part of the Appeal Division and General Division.

(4) Error of Law – Statutory Interpretation

[32] The Applicant argued that an error was made regarding statutory interpretation. I disagree, and find that the Appeal Division reasonably found the General Division properly exercised its statutory authority under subsection 54(1) of *DESDA*. The Appeal Division properly addressed the Applicant's claim in this regard.

[33] Subsection 54(1) of *DESDA* states that "[t]he General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given." A plain reading of the provision states that the General Division may dismiss or confirm the appeal, giving it discretion on what to decide as long as its decision meets the principles of *Vavilov*. Once again, disagreeing with the outcome — i.e. preferring that the General Division confirm the appeal instead of dismiss it — does not mean there is an error of jurisdiction. The Appeal Division thus reasonably found that the General Division properly exercised its statutory authority.

[34] The Appeal Division reasonably found that the General Division properly interpreted section 55 of the *Act*, which mandates a credit split upon notice to the Minister without the ability to opt out in Ontario. Considering the mandatory nature of the legislation, the Appeal Division reasonably found the Applicant had no reasonable chance of success.

[35] When reviewing the reasonableness of the Appeal Division's legislative interpretation, the Court must ask whether the decision: 1) is alive to the essential elements of text, context and purpose, 2) contains an important omitted aspect that cannot be implied, 3) is consistent with the text, context and purpose of the provision, and 4) is genuine (*Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 4, leave to appeal to the Supreme Court of Canada ("SCC") granted, no. 39855 (2022-03-03)).

[36] Furthermore, the SCC in *Vavilov* indicated that a governing statutory scheme is likely to be "the most salient aspect of the legal context relevant to a particular decision". Administrative decision-makers like the Appeal Division receive their powers by statute, and cannot disregard or rewrite the law enacted by Parliament (*Vavilov* at para 108).

[37] There is no unreasonable omission in the Appeal Division upholding the General Division's interpretation of the credit split's mandatory nature. A plain reading of subsection 55.1(a) provides that the Minister was required to perform the credit split upon notification of the divorce judgment and receipt of the required information. The use of "shall" means it is imperative for the Minister to perform the credit split. "Shall" confers no residual discretion on the decision-maker (*Canada v Callidus Capital Corporation*, 2017 FCA 162 at para 24 citing

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Canada: LexisNexis, 2014), at 91-92; see also *Interpretation Act*, RSC 1985, c I-21, section 11).

[38] Equally, there is no unreasonable omission in the Appeal Division upholding the General Division's interpretation that the separation agreement is non-binding. Subsection 55.2(3) of the *Act* outlines the requirements that must be met for an agreement to be binding on the minister. Once again, the provision uses "shall" — that the Minister "shall not make a division under section 55 or section 55.1". Paragraph 55.2(3)(b) indicates that for an agreement to be binding on the Minister, the provision must be "expressly permitted under the provincial law that governs such agreements".

[39] In this case, the Applicant and the Added Party's separation agreement was signed in Ontario, which has no legislation that allows a waiver of the credit split. Only Saskatchewan, Quebec, Alberta, and British Columbia have such an opt-out legislation (Service Canada, *How to Apply for a Canada Pension Plan Credit Split*, Form No ISP-1901A (Ottawa: Service Canada, 25 May 2022)). I therefore find that the Appeal Division was alive to and was consistent with the *Act*'s text, and it made no important omissions. It reasonably upheld the General Division's interpretation of section 55.

[40] The Appeal Division did not fundamentally misapprehend or fail to account for the evidence before it. It was reasonable for the Appeal Division to conclude there was no reasonable chance of success where the legislation would not permit a different interpretation other than what has been applied.

V. Conclusion

[41] The Appeal Division's decision was reasonable. It reached an outcome through cogent reasoning within the constraints of statute and case law. I will dismiss the application.

[42] The Respondent did not seek costs and none are granted.

JUDGMENT IN T-101-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-101-22
STYLE OF CAUSE:	AHZARD MOHAMMED v SOCIAL SECURITY TRIBUNAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JULY 18, 2022
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	JULY 27, 2022

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