Federal Court of Appeal  Cour d'appel fédérale

Date: 20190125

Docket: A-97-18

Citation: 2019 FCA 17

CORAM: **PELLETIER J.A.**
DAWSON J.A.
WEBB J.A.

BETWEEN:

EMAD ELGUINDY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on January 15, 2019.

Judgment delivered at Ottawa, Ontario, on January 25, 2019.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The *Eliminating Entitlements for Prisoners Act*, S.C. 2010, c. 22 (Bill C-31) amended the *Old Age Security Act*, R.S.C. 1985, c. O-9 (Act) by adding subsection 5(3) which, when enacted read as follows:

(3) 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	(3) Il ne peut être versé de pension à une personne assujettie à l'une des peines ci-après à l'égard de toute période pendant laquelle elle est

a sentence of imprisonment	incarcérée, exclusion faite du premier mois :
(*a*) that is to be served in a penitentiary by virtue of any Act of Parliament; or	*a*) une peine d'emprisonnement à purger dans un pénitencier en vertu d'une loi fédérale;
(*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 33.1 for the administration of this paragraph.	*b*) si un accord a été conclu avec le gouvernement d'une province en vertu de l'article 33.1 pour la mise en oeuvre du présent alinéa, une peine d'emprisonnement de plus de quatre-vingt-dix jours à purger dans une prison, au sens du paragraphe 2(1) de la *Loi sur les prisons et les maisons de correction*, située dans cette province.

[2] By operation of subsection 5(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, Bill C-31 came into force on December 15, 2010 (the date the Bill received Royal Assent). At this time the applicant was incarcerated in a federal penitentiary, serving a sentence imposed as a result of his conviction of the offence of having committed fraud over $5,000.

[3] By letter dated January 5, 2012, the applicant was advised by Service Canada that as a result of the application of subsection 5(3) of the Act payment of his Old Age Security pension was suspended. The letter requested repayment of monies paid in error.

[4] The General Division of the Social Security Tribunal of Canada dismissed the applicant's appeal from the decision suspending payment of his pension. Subsequently, the Appeal Division of the Tribunal dismissed the applicant's appeal from the decision of the General Division (2018 SST 243). The Appeal Division dismissed the appeal because, while it found subsection 5(3) operated retrospectively in the applicant's case, there was "compelling external evidence" that

Parliament intended the provision to apply retrospectively (reasons, paragraphs 43 and 92). The Appeal Division also concluded that the applicant did not have a vested right to receive an Old Age Security pension when subsection 5(3) came into force (reasons, paragraph 98).

[5] On this application for judicial review of the decision of the Appeal Division the sole issue is whether the decision to dismiss the applicant's appeal was reasonable.

[6] The relevant chronology is that after serving a period of day parole the applicant was reincarcerated on January 14, 2010. Subsection 5(3) came into effect on December 15, 2010, while the applicant remained incarcerated. In September of 2011, while still incarcerated, the applicant attained the age of sixty-five years.

[7] The applicant takes issue with the conclusion of the Appeal Division that he had no vested right to receive an Old Age Security pension at the time subsection 5(3) came into force. He asserts that he had applied for the pension before subsection 5(3) came into force so that he had an accrued or accruing right to receive the pension.

[8] I disagree. Subsection 5(1) of the Act provides, among other things, that no pension may be paid to any person "unless that person is qualified under subsection 3(1) or (2)". Subsections 3(1) and 3(2) require, among other requirements, that pension claimants have "attained sixty-five years of age". Thus, irrespective of when a pension is applied for, there can be no entitlement to a pension until an applicant reaches sixty-five years of age. So, for example, a person who

applies for the pension at age sixty-four but who dies before reaching age sixty-five would have no entitlement to an Old Age Security pension.

[9] To the extent that the applicant relies upon subsection 43(*c*) of the *Interpretation Act* to argue that he had an accrued or accruing right to a pension, in *R. v. Puskas*, [1998] 1 S.C.R. 1207, Chief Justice Lamer, writing for the Court, wrote as follows about subsection 43(*c*) (at paragraph 14):

> … A right can only be said to have been "acquired" when the right-holder can actually exercise it. The term "accrue" is simply a passive way of stating the same concept (a person "acquires" a right; a right "accrues" to a person). Similarly, something can only be said to be "accruing" if its eventual accrual is certain, and not conditional on future events (*Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 95 D.L.R. (4th) 706 (Sask. C.A.), at p. 719). In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.

[10] This is a complete answer to the applicant's submission. No right to an Old Age Security pension can accrue, be acquired, or be accruing before an applicant attains the age of sixty-five years.

[11] To the extent that the applicant argues that subsection 5(3) was impermissible retrospective legislation, I agree with Professor Sullivan that in "contexts such as fiscal law or entitlement to periodic benefits, it is doubtful that there is any cogent basis for presuming that a legislature does not intend new legislation to apply retrospectively so as to change the tax or benefit regime for the future." (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014) at page 768).

[12] Assuming, without deciding, that subsection 5(3) operated retrospectively in the case of the applicant, this is, in my view, a complete answer to his submission. As the Appeal Division reasonably concluded, Parliament intended subsection 5(3) to apply to individuals who were already incarcerated.

[13] Finally on this point, the thrust of the applicant's submissions is to the effect that he had a vested right to the continuation of the existing provisions of the Act as he approached age sixty-five and anticipated receiving Old Age Security benefits, including the Guaranteed Income Supplement. As a general principle of law, no one has a vested right or an enforceable claim to the continuance of the law as it stands at a particular time: *Gustavson Drilling (1964) Limited v. The Minister of National Revenue*, [1977] 1 S.C.R. 271, at page 282; *Merck Frosst Canada & Co. v. Apotex Inc.*, 2011 FCA 329, 425 N.R. 279, at paragraph 39. This is so even in circumstances where expectations may exist that a law will continue in effect: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525. This general principle is simply a reflection of the principle of parliamentary sovereignty.

[14] In the applicant's written submissions he also argues that the member of the Appeal Division who heard his appeal ought not to have heard his appeal because she was in a position of conflict of interest. The applicant says a conflict arose because the member was appointed by the respondent Minister. The applicant cites no authority for this proposition.

[15] The applicant's submission is completely without merit. While superior courts are constitutionally required to possess objective guarantees of individual and institutional

independence, administrative tribunals are not. It is for Parliament to determine the degree of independence required of members of federal tribunals. Put another way, it is for Parliament to determine the composition of the Social Security Tribunal: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at paragraphs 20-24.

[16] Similarly, in light of the high legal threshold that must be met in order to demonstrate bias, no bias, real or apprehended, is established by the applicant's statement that an unnamed employee of the Tribunal told him that a draft decision had been sent to the legal department for review.

[17] For these reasons I would dismiss the application for judicial review. As costs were not sought by the successful respondent I would not award costs.

"Eleanor R. Dawson"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	JANUARY 25, 2019

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