Federal Court of Appeal | Cour d'appel fédérale

Date: 20221220

Dockets: A-287-20 (lead file)
A-82-21

Citation: 2022 FCA 221

CORAM: **DE MONTIGNY J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

BRIAN SMITH and MICHELLE SMITH

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the registry on December 14, 2022.

Judgment delivered at Ottawa, Ontario, on December 20, 2022.

REASONS FOR JUDGMENT BY: LOCKE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] This is an appeal of a decision of the Federal Court (*per* Justice Glennys L. McVeigh, 2020 FC 996), which dismissed applications for judicial review by the appellants (spouses Brian

and Michelle Smith) concerning two decisions by Service Canada. The Service Canada decisions concerned the appellants' efforts to obtain certain benefits under the *Old Age Security Act*, R.S.C. 1985, c. O-9 (the Act), that were lost because of the date on which they were sought. Specifically, while Mr. Smith applied for an Old Age Security (OAS) Pension on March 29, 2017 that was paid retroactive to April 2016 (the maximum permissible amount of 11 months), the appellants' related applications for Guaranteed Income Supplement (GIS) and OAS Allowance benefits (ALW) were filed only on August 2, 2017. Initially, these benefits were granted and paid retroactive to September 2016 (likewise, the maximum permissible amount of 11 months).

[2] Dissatisfied with the loss of GIS and ALW benefits for the period from April 2016 (when the OAS Pension began) to September 2016, and believing that the loss was the result of erroneous advice and/or an administrative error in the administration of the Act, the appellants then each sought the application of section 32 of the Act to remedy the situation. This provision reads as follows:

32 Where the Minister is satisfied that, as a result of erroneous advice or administrative error in the administration of this Act, any person has been denied a benefit, or a portion of a benefit, to which that person would have been entitled under this Act, the Minister shall take such remedial action as the Minister considers appropriate to place the person in the position that the person would be in under this Act had the erroneous advice not been given or the administrative error not been made.	**32** S'il est convaincu qu'une personne s'est vu refuser tout ou partie d'une prestation à laquelle elle avait droit par suite d'un avis erroné ou d'une erreur administrative survenus dans le cadre de la présente loi, le ministre prend les mesures qu'il juge de nature à replacer l'intéressé dans la situation où il serait s'il n'y avait pas eu faute de l'administration.

[3] The appellants argued that the written material that Service Canada provided (the appellants cite the Service Canada website, the application forms, and certain information sheets – hereinafter, the Material) never informed them that they could avoid the loss of retroactive GIS and ALW benefits by applying for such benefits at the same time as Mr. Smith applied for his OAS Pension. They argued that the Material led them to believe that they had to wait until the application for the OAS Pension had been granted before applying for the related benefits. It was only months later, in a conversation with a Service Canada employee, that they were advised that this was not the case.

[4] The Service Canada decisions in issue found that (i) there had been an administrative error in that Service Canada had failed to respect its policy of immediately providing the forms necessary to apply for GIS and ALW benefits in cases in which an OAS Pension applicant indicated a desire to apply to these benefits, and (ii) if that administrative error had not occurred, the appellants would have been able to apply in April 2017, one month after the application for the OAS Pension. Accordingly, the two similar decisions respectively granted the appellants GIS and ALW benefits retroactive 11 months to May 2016 instead of September 2016. The decisions also found that there had been no erroneous advice, saying:

> There is no finding that erroneous advice was given to you by an employee of Service Canada, which caused the delay of your application for the [GIS or ALW benefit, as the case may be] being received. Your interpretation of information sheets and the Service Canada website is what caused the delay and this is not considered erroneous advice.

[5] In effect, the appellants were partially successful. They received additional GIS and ALW benefits, but not for the month of April 2016. It is this month of benefits that is in issue in the present appeal.

[6] The appellants applied for judicial review of the Service Canada decisions before the Federal Court. As indicated above, their applications were dismissed in a joint decision. They now appeal the Federal Court's decision to this Court.

II. Standard of Review

[7] The parties agree that the standard of review to be applied by this Court on appeal of a decision on a judicial review application is as contemplated in Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45, and confirmed in Northern Regional Health Authority v. Horrocks, 2021 SCC 42 at para. 12: this Court must determine whether the court below correctly identified the standard of review on the judicial review and, if so, whether it properly applied that standard of review. Effectively, this Court steps into the shoes of the lower court and focuses on the administrative decision. Though this Court should not ignore the reasons given by the Federal Court, it need not defer thereto.

[8] There is no argument that the Federal Court erred in identifying the applicable standard of review. Rather, the disagreement concerns whether the standard of review was correctly applied.

[9] For most issues, the question is whether the Service Canada decisions were reasonable. However, for issues of procedural fairness, the question is whether the procedure was, in fact, fair. Finally, for issues on which the Federal Court made any original findings of law and/or fact, the appellate standard of review, as set out in Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, applies. Housen instructs that questions of law are reviewed on a correctness standard and questions of fact or mixed fact and law in which there is no extricable question of law are reviewed on a standard of palpable and overriding error.

III. Analysis

[10] Because of my conclusions below, it is not necessary to address all of the issues raised by the appellants. It is sufficient to state the following. The appellants read the finding that there was no erroneous advice (reproduced in paragraph 4 above) as an interpretation of the part of Service Canada that information conveyed in writing, and not in the context of a two-way conversation, does not fall within the scope of the word “advice” as used in section 32 of the Act. The appellants argue that this conclusion was the result of an unreasonable interpretation of that provision.

[11] In my view, it is not clear that the Service Canada decisions were based on an interpretation of the word “advice” that excludes the Material. It is true that the first sentence of the brief reasons provided by Service Canada refers to the fact that no erroneous advice was provided by “an employee of Service Canada” but this is simply a statement of fact – a fact that is not in dispute. The appellants’ inference that this sentence indicates a narrow interpretation of

the word “advice” is merely one possible reading. The second sentence states that the delay in the appellants’ applications for GIS and ALW benefits was the result of their interpretation of the Material. This sentence clearly implies that a different interpretation of the Material by the appellant would have avoided the delay. Presumably, such a different interpretation would have avoided the delay because it would have led the appellants to apply for GIS and ALW benefits at the same time as the OAS benefits and thereby avoid the loss. I infer from this that Service Canada found that the Material was not erroneous. The appellants argue that the concluding words of the second sentence, “and this is not considered erroneous advice”, indicate again that Service Canada interpreted the word “advice” narrowly. I disagree. Those words do not change my view that Service Canada found that the Material was not erroneous. Rather, I find that they confirm my understanding of the second sentence.

[12] Because of my conclusion that Service Canada’s decisions do not depend on a narrow interpretation of the word “advice”, it is not necessary to consider the appellants’ arguments on the following issues:

1. The reasonableness of a narrow interpretation of the word “advice”;
2. The fairness of reaching such an interpretation in view of the arguments that had been made to Service Canada; and
3. The propriety of the Federal Court’s conclusion that the argument on the interpretation of the word “advice” had not been raised before Service Canada, and was therefore not an appropriate issue for consideration on judicial review.

[13] Having concluded that Service Canada found that the Material was not erroneous, the next step is to consider the appellants' argument that that conclusion was unreasonable. The appellants argue that the Material does not instruct people seeking GIS and ALW benefits to apply at the same time as they seek the OAS Pension, and suggests that they must wait until the OAS Pension has been granted. The appellants point to several parts of the Material that are arguably ambiguous and fail to highlight the importance of promptly seeking GIS and ALW benefits to avoid a loss of retroactive benefits.

[14] In my view, the appellants' arguments amount mainly to criticisms of what the Material does not say rather than what it does say. While the Material might have gone into more detail and been more specific (and it appears that changes were subsequently made by Service Canada to clarify how applicants should proceed), I see nothing that is misleading such that an applicant in a time-sensitive situation would not inquire with an employee of Service Canada about their specific circumstances. The following comments in *Mauchel v. Canada (Attorney General)*, 2012 FCA 202 at para. 15, in the context of an argument that the website for assisting with employment insurance claims was misleading, are apt in the present appeal:

> Since the website does not purport to deal with the specifics of every person's particular situation, claimants cannot reasonably treat information on it as if it were personally provided to them by an agent in response to an inquiry about their eligibility on given facts.

[15] I am not convinced that it was unreasonable for Service Canada to conclude that the Material was not erroneous. I should note that, in reaching this conclusion, it is not necessary to comment on the Federal Court's analysis in this regard or the respondent's arguments thereon before the Federal Court.

[16] Based on the conclusions above, the appellants' argument that there was an earlier administrative error (to which section 32 of the Act would apply) in the creation of the application process that resulted in the appellants losing benefits must also fail. Service Canada reasonably found that the loss of benefits resulted from the appellants' interpretation of the Material (and apparently from their failure to seek advice particular to their situation), and not from any flaw in the application process.

IV. Conclusion

[17] For the foregoing reasons, I would dismiss the appeal. The respondent has not sought costs, and I would not award any.

[18] Before concluding, I have two final comments. First, I wish to thank the self-represented appellants for their written and oral submissions, which, though not successful, were helpful in defining the issues in dispute. Second, though I have found it unnecessary to comment on certain aspects of the Federal Court's reasons, my silence thereon should not be taken as approval.

"George R. Locke"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-287-20 (lead file) A-82-21
STYLE OF CAUSE:	BRIAN SMITH and MICHELLE SMITH v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	DECEMBER 14, 2022
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LEBLANC J.A.
DATED:	DECEMBER 20, 2022

APPEARANCES:

Brian Smith Michelle Smith	FOR THE APPELLANTS (ON THEIR OWN BEHALF)
Andrew Kirk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT