Federal Court Cour fédérale

Date: 20190726

Docket: T-1355-18
T-1357-18

Citation: 2019 FC 996

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 26, 2019

PRESENT: The Honourable Mr. Justice Annis

Docket: T-1355-18

BETWEEN:

GAETANE CYR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1357-18

BETWEEN:

JEAN-CLAUDE MARTIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] Today, the applicants, Jean-Claude Martin and Gaétane Cyr, are common-law partners.

[2] Each is seeking judicial review of a reconsideration decision issued by the Minister of Employment and Social Development [Minister] dated June 14, 2018. The Minister denied their requests to remit the debts owing to the Minister following overpayments of their Guaranteed Income Supplement [GIS] benefits between July 2012 and January 2018.

[3] In the initial decisions of January 22, 2018, the Minister informed each of the applicants that they had erroneously received GIS benefits as a person living alone when they were actually living in a common-law relationship between July 2012 and January 2018, resulting in an overpayment of $16,325.99 to Mr. Martin and an overpayment of $22,077.04 to Ms. Cyr. The Minister therefore informed Mr. Martin that $136.05 would be recovered from his monthly GIS payment while $183.98 would be recovered from Ms. Cyr's monthly payment, in both cases starting from the month of July 2018.

[4] In their memorandum of fact and law, Mr. Martin and Ms. Cyr ask the Court to quash the reconsideration decisions of June 14, 2018, declare that they fulfilled their obligation to inform the Minister of the change in marital status, declare that the debt results from an administrative error of the Minister, and refer the decision back to the Minister for reconsideration of the remission request.

[5] By consent, the Court ordered that the applications for judicial review of the two decisions of the Minister be consolidated and heard together under section 105 of the *Federal Courts Rules*, SOR/98-106 (T-1355-18 relates to Ms. Cyr, and T-1357-18 relates to Mr. Martin).

[6] For the reasons that follow, the Court is of the opinion that the Minister exercised his discretion in a reasonable manner, and the application for judicial review will be dismissed.

[7] Some clarification of the applicable legislative framework is needed before proceeding to the merits of this case.

[8] First, under subsections 12(5) and 12(6) of the *Old Age Security Act*, RSC 1985, c O-9 [OASA], a GIS is determined by, among other things, the annual income of the pensioner and marital status. The GIS is essentially an additional benefit for low-income pensioners who are already eligible for an old age security pension.

[9] It is also important to understand that, according to the OASA, the notion of common-law partner is defined as follows: “a person who is cohabiting with the individual in a conjugal relationship at the relevant time, having so cohabited with the individual for a continuous period of at least one year”.

[10] Moreover, according to subsections 15(1) and 15(9) of the OASA, a pensioner has an obligation to inform the Minister of any change in marital status:

15(1) Every person by whom an application for a	15(1) Le demandeur doit, dans sa demande de supplément

supplement in respect of a payment period is made shall, in the application, state whether the person has or had a spouse or common-law partner at any time during the payment period or in the month before the first month of the payment period, and, if so, the name and address of the spouse or common-law partner and whether, to the person's knowledge, the spouse or common-law partner is a pensioner.	pour une période de paiement, déclarer s'il a un époux ou conjoint de fait ou s'il en avait un au cours de la période de paiement ou du mois précédant le premier mois de la période de paiement et, s'il y a lieu, doit également indiquer les nom et adresse de son époux ou conjoint de fait et déclarer si, à sa connaissance, celui-ci est un pensionné.
. . .	[...]
(9) Every applicant shall inform the Minister without delay if they separate from, or cease to have, a spouse or common-law partner, or if they had a spouse or common-law partner at the beginning of a month, not having had a spouse or common-law partner at the beginning of the previous month.	(9) Le demandeur qui devient l'époux ou conjoint de fait d'une autre personne, cesse d'avoir un époux ou conjoint de fait ou s'en sépare est tenu d'en informer le ministre sans délai.
[Emphasis added.]	[Je souligne.]

[11] In addition, section 16 of the *Old Age Security Regulations*, CRC, c 1246 [Regulations] provides for the manner in which the benefit applicant must inform the Minister that he or she is in a common-law relationship if the Minister has not received sufficient evidence or information:

16 If the Minister has not received sufficient evidence or information in support of an application to determine the relationship between the applicant and their spouse or common-law partner, the	16 Si le ministre n'a pas reçu suffisamment de preuves ou de renseignements à l'appui d'une demande de prestation pour déterminer la relation entre le demandeur et son époux ou conjoint de fait, le demandeur

applicant or their representative shall allow the Minister access to the following documents:	ou son représentant doit permettre au ministre d'avoir accès aux documents suivants :
. . .	[...]
(b) in the case of common-law partners,	b) dans le cas de conjoints de fait :
(i) a statutory declaration setting out information as to the relationship of the common-law partners, and	(i) d'une part, une déclaration solennelle contenant les renseignements relatifs à la relation entre les conjoints de fait,
(ii) other evidence of the relationship.	(ii) d'autre part, toute autre preuve de la relation entre les conjoints de fait.
[My emphasis.]	[Je souligne.]

[12] Finally, although an amount overpaid by a pensioner becomes a debt due to Her Majesty the Queen, the Minister retains the discretion to remit the debt in the circumstances provided by the OASA:

37 (1) A person who has received or obtained by cheque or otherwise a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.	37 (1) Le trop-perçu — qu'il s'agisse d'un excédent ou d'une prestation à laquelle on n'a pas droit — doit être immédiatement restitué, soit par remboursement, soit par retour du chèque.
(2) If a person has received or obtained a benefit payment to which the person is not entitled, or a benefit payment	(2) Le trop-perçu constitue une créance de Sa Majesté dont le recouvrement peut être poursuivi en tout temps à ce

in excess of the amount of the benefit payment to which the person is entitled, the amount of the benefit payment or the excess amount, as the case may be, constitutes a debt due to Her Majesty and is recoverable at any time in the Federal Court or any other court of competent jurisdiction or in any other manner provided by this Act.	titre devant la Cour fédérale ou tout autre tribunal compétent, ou de toute autre façon prévue par la présente loi.
. . .	[...]
(4) Notwithstanding subsections (1), (2) and (3), where a person has received or obtained a benefit payment to which that person is not entitled or a benefit payment in excess of the amount of the benefit payment to which that person is entitled and the Minister is satisfied that	(4) Malgré les paragraphes (1), (2) et (3), le ministre peut, sauf dans les cas où le débiteur a été condamné, aux termes d'une disposition de la présente loi ou du Code criminel, pour avoir obtenu la prestation illégalement, faire remise de tout ou partie des montants versés indûment ou en excédent, s'il est convaincu :
(a) the amount or excess of the benefit payment cannot be collected within the reasonably foreseeable future,	a) soit que la créance ne pourra être recouvrée dans un avenir suffisamment rapproché;
(b) the administrative costs of collecting the amount or excess of the benefit payment are likely to equal or exceed the amount to be collected,	b) soit que les frais de recouvrement risquent d'être au moins aussi élevés que le montant de la créance;
(c) repayment of the amount or excess of the benefit payment would cause undue hardship to the debtor, or	c) soit que le remboursement causera un préjudice injustifié au débiteur;
(d) the amount or excess of the benefit payment is the result of erroneous advice or administrative error in the	d) soit que la créance résulte d'un avis erroné ou d'une erreur administrative survenus dans le cadre de l'application

administration of this Act, the Minister may, unless that person has been convicted of an offence under any provision of this Act or of the Criminal Code in connection with the obtaining of the benefit payment, remit all or any portion of the amount or excess of the benefit payment.	de la présente loi.
[Emphasis added.]	[Je souligne.]

[13] Normally, an administrative review by the Minister will be appealed to the Social Security Tribunal (Income Security Section) [Tribunal]. However, in a decision regarding the Minister's discretion under subsection 37(4) of the OASA, an application for judicial review before the Federal Court, as made by the applicants in this case, must be filed because the Tribunal does not have jurisdiction to rule on such a decision on appeal (*Nanka v Canada (Attorney General)*, 2018 FC 959 at para 10; *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278 at paras 11-15).

[14] Now that the legislative framework is well defined, the facts underlying the two applications for judicial review must be reproduced.

II. Facts

[15] Mr. Martin and Ms. Cyr are pensioners born in 1945.

[16] In April 2006, Ms. Cyr's husband died. She filed an application for an Allowance for the Survivor in September 2006 and an application for a benefit under the OASA on December 3, 2008. Ms. Cyr has been receiving a GIS since May 2009 as a single person.

[17] Mr. Martin filed his first application for Old Age Security [OAS] on May 11, 2010, in which he said he was divorced. Mr. Martin has been receiving a GIS since March 2011 as a single person.

[18] The applicants say that they started living together in August 2010, at Mr. Martin's residence.

[19] According to their affidavits filed in support of their judicial review applications, Ms. Cyr spoke with a Service Canada agent on the telephone to advise her of the change in her marital status soon after they started living together in August 2010. However, the agent informed her that she had no steps to take during the first year of their cohabitation. Mr. Martin stated that he made a second call on November 26, 2010, and provided Ms. Cyr's social insurance number to the agent on the phone. Mr. Martin said that, according to the agent, that was sufficient.

[20] The respondent does not dispute that Mr. Martin contacted Service Canada in November 2010 to report that he was in a relationship with Ms. Cyr.

[21] Shortly after, Service Canada sent a Statutory Declaration of Common-Law Union form to Mr. Martin to determine the applicants' marital status. This form was never been returned, as

the applicants state that they never received the form sent by the Minister following the November 2010 call.

[22] On June 10, 2013, Ms. Cyr filed a new OAS application in which she checked a box indicating that her current marital status was “Surviving spouse or surviving common-law partner” instead of checking the “Common-Law” box.

[23] Following an investigation in October 2016, Service Canada sent a letter to the applicants stating that the marital status recorded on the form was different from the one reported to the Canada Revenue Agency [CRA] and requested that they complete the forms to determine their eligibility for the GIS. The applicants completed the form and stated that they had been in a common-law relationship since July 1, 2011.

[24] Further to a request from Service Canada November 28, 2016, the applicants sent a “Statutory Declaration of Common-law Union” on December 1, 2016, signed by Mr. Martin and Ms. Cyr.

[25] Subsequently, on January 22, 2018, the Minister determined that the applicants had received an overpayment of their GIS between July 2012 and January 2018, namely $22,077.04 for Ms. Cyr and $16,325.99 for Mr. Martin. Indeed, the monthly GIS payment made to each applicant (normally $915.14 per month) would be reduced by $183.98 for Ms. Cyr and by $136.05 for Mr. Martin, as of the month of March 2018.

[26] On February 1, 2018, the applicants requested an administrative review of the decisions of January 22, 2018, in a joint letter. They argued that they should not have to repay the overpayments because they had informed the CRA and Service Canada (on the phone) of the change in their marital status. In fact, they submitted that they were never informed that they should notify Service Canada in writing of the change.

[27] On March 16, 2018, counsel for the applicants filed an application with the Minister to receive the documents and notes recorded as part of the investigation prior to the Minister's initial decision. Counsel also requested that the Minister suspend the decision of January 22, 2018. On April 23, 2018, the Minister forwarded the contemporaneous notes recorded in each applicant's file. The notes are in the certified tribunal record.

[28] On June 14, 2018, the Minister rejected both requests for reconsideration. The Minister noted that under subsection 15(9) of the OASA, the applicants were required to inform the Minister of the change in their marital status without delay. According to the Minister, since July 2003, each GIS beneficiary is notified each year to report any changes in their marital status or income, both of which are taken into account in calculating the amount of the GIS. This notice informs beneficiaries of their current marital status.

[29] In the decision concerning Mr. Martin, the Minister noted his argument that he had informed the Minister on November 26, 2010, of the change in his marital status and that this was confirmed by the record of the notes in the Service Canada file; however, it is stated that a common-law form was sent at that time, and that Service Canada never received this form. For

both applicants, the Minister rejected their argument that they reported the change of their marital status to the CRA. CRA information is electronically transmitted to their computer systems without identifying clients for whom there has been a change in marital status.

[30] On July 13, 2018, each of the applicants filed a notice of judicial review of this decision pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

III. Analysis

[31] The applicants have presented a two-part argument. First, they submit that they satisfied their obligation to notify the Minister of changes to their marital status under section 15(9) of the OASA. Second, the Minister's claim is the result of an administrative error, and the Minister unreasonably refused to remit the excess of the benefit payment under paragraph 37(4)(d) of the OASA. For these reasons, the Minister did not exercise his discretion reasonably.

[32] The applicants acknowledge that, according to case law, informing the CRA of a change in marital status is insufficient to satisfy the obligation under subsection 15(9) of the OASA (*Barry v Canada (Attorney General)*, 2010 CF 1307 [*Barry*] at paras 18-19). However, they argue that in the case at bar, Mr. Martin notified the Minister of the change to his marital status by telephone and forwarded Ms. Cyr's name and social insurance number in November 2010. They submit that, according to the Service Canada notes in their files, there was a change of information on November 26, 2010, and that an agent processed the change of marital status information on December 6, 2010.

[33] The applicants argue that subsection 15(9) of the OASA does not impose any formal requirement as to the manner in which a pensioner must inform the Minister of a change in marital status. By informing the Minister by telephone on November 26, 2010, they submit that they fulfilled the obligation to inform the Minister of the change in their marital status without delay.

[34] According to the applicants, the fact that they informed the Minister in November 2010 of the change in their marital status, which is confirmed by the Minister's contemporaneous notes, and the fact that the Minister did not treat the applicants as common-law partners before the month of January 2018, show that the overpayment is the consequence of an administrative error.

[35] The applicants acknowledge that in Mr. Martin's decision, the Minister addressed the argument that they informed Service Canada by telephone of the change in their marital status. However, they argue that in his decision, the Minister did not explain why it was necessary to inform him of the change by form instead of a phone call. In their view, the Minister's reasoning is inadequate in this regard.

[36] The respondent submits that the overpayments are not the result of an administrative error in the application of the OASA by the Minister and that the Minister's decision not to award a remission is therefore reasonable. The respondent submits that the Minister could not change the applicants' marital status at the time of Mr. Martin's call with Service Canada in November 2010 because the applicants had been in a conjugal relationship for two months at that

time (since August 2010). A couple must cohabit for at least one year in order to be considered common-law partners under the OASA, and that is why Service Canada sent a Statutory Declaration of Common-Law form in November 2010, which the applicants did not return.

[37] The respondent also argues that the applicants did not inform the Minister of the change in their marital status in a timely manner. Other than Mr. Martin's call in November 2010, the applicants did not send the statutory declaration form. Moreover, Ms. Cyr did not take any action herself to inform the Minister. In this regard, the Minister notes that in her 2013 GIS application, Ms. Cyr indicated that she is the surviving spouse of her late husband and not Mr. Martin's common-law partner.

[38] The parties agree that the review of the Minister's decision to determine whether the applicants had complied with the obligations under subsection 15(9) of the OASA and whether to remit the overpayment pursuant to paragraph 37(4)(d) of the OASA is subject to the standard of reasonableness: this concerns the assessment of questions of fact and the exercise of discretionary powers (*Barry v Canada (Attorney General)*, 2010 FC 1307 at para 15; *Canada (Attorney General) v Torrance*, 2013 FCA 227 at para 34; *Manning v Canada (Human Resources Development)*, 2009 FC 523 at para 23).

[39] First, the Court takes heed of the notes in Mr. Martin's file dated November 26, 2010, and December 6, 2010, which indicate the following (CTR at p 8):

> [TRANSLATION]
>
> **November 26, 2010**: E-mail sent to notify the QPC of a change in MS [marital status] / says he is in a common-law relationship with Ms. GAÉTANE CYR (SIN XXXXXXXXX) [Social Insurance

> Number] // isp 3004 sent [Statutory Declaration of Common-Law Union form]
>
> December 2010. Mr. Martin has been in a common-law relationship with Ms. Gaétane Cyr for about 2 months, so waiting for ISP300 . . . .

[40] Moreover, in his affidavit, Mr. Martin states that, following the call, he never received the form and the agent on the phone told him that she was [TRANSLATION] "going to make additions to the file" and did not mention the form.

[41] That being said, the Court is of the view that the Minister reasonably exercised his discretion in deciding that there was no reason to remit the overpayments under paragraph 37(4)(d) of the OASA, for the following reasons.

[42] First, the Court does not agree with the applicants' argument that subsection 15(9) of the OASA does not provide for any formal requirements to inform the Minister of a common-law relationship and that the declaration by a spouse over the phone is sufficient. Section 16 of the Regulations states that a person who applies for a benefit "shall allow the Minister to access" the "statutory declaration setting out information as to the relationship of the common-law partners" when "the Minister did not receive sufficient evidence or information in support of an application to determine the relationship between the applicant and their . . . common-law partner".

[43] According to the agent's notes in November and December 2010, the Minister sent this form to the applicants following Mr. Martin's call. Although the applicants were not aware of the

contents of the notes at the time of their reconsideration request in February 2018, their counsel filed an application for access to these notes on March 16, 2018, and they received these notes on April 23, 2018. The applicants were able to submit additional arguments about Service Canada's notes before the Minister rendered the decisions on June 14, 2018, but they chose not to do so.

[44] The Court understands that there is immigration case law on instances of failed communications (such as letters or e-mails from the Minister not received by refugee protection claimants or visa applicants). In such instances, the Minister is required to demonstrate on a balance of probabilities that the communication was correctly sent to the applicant to establish a rebuttable presumption that the communication was sent, failing which the Court finds a breach of procedural fairness (*Wu v Canada (Citizenship and Immigration)*, 2018 FC 554 at para 7). In these cases, the evidence required for the Minister to meet his burden is quite onerous (*Ghaloghlyan v Canada (Citizenship and Immigration)*, 2011 FC 1252 at paras 9-10).

[45] However, it is important to understand the context. In this case, the applicants alleged in their request for reconsideration (February 2018), therefore at the administrative level, that they were never informed that they had to notify the Minister in writing of the change in their marital status. The above case law arose as part of an application for judicial review in which the applicant alleged that the administrative decision maker violated his right to procedural fairness by failing to properly convey important documents to him (such as a letter advising a visa applicant to provide additional information in support of the application). Moreover, it is not in the interests of visa applicants or refugee protection claimants to ignore letters asking them to

provide additional information, failing which they risk having their application rejected or even treated as abandoned.

[46] In discretionary tax decisions where an applicant alleges the non-receipt of a notice or letter as a reason for relief or a remission, the Minister is not required to demonstrate that a taxpayer has received the notice; the Minister must only demonstrate that it was sent (*Jiang v Canada (Attorney General)*, 2019 FC 629 at paras 9-13, citing *Bowen v Canada (Minister of National Revenue)*, [1991] FCJ No. 1054 at para 8).

[47] The Court is of the view that, in this case, at the administrative review stage, the Minister could reasonably conclude that the notes of the Service Canada agent, indicating that the required form was sent to the applicants, demonstrate, on a balance of probabilities, that the form had been sent. The applicants did not file evidence to the contrary at the administrative review stage. Moreover, the applicants' counsel admitted at the hearing that the addresses of the applicants reported to Service Canada and to the CRA did not change from the time they began living together until the reconsideration decision of the June 14, 2018. Therefore, as a result, the Minister could reasonably conclude that the treatment of applicants as unmarried pensioners from July 2012 to January 2018 was not the result of an administrative error and therefore refused to exercise his discretion to grant a remission.

[48] Second, as noted in the decisions dated June 14, 2018, since July 2003, each year, GIS recipients have been notified of the monthly amount they will receive based on their financial information received from the CRA. The notice includes the current marital status of the

pensioner in question and reminds them of their obligation to inform the Minister of any change (see on this point *Barry* at paras 4-5).

[49] In this regard, the Minister noted the following in the decisions, with the Court's emphasis: [TRANSLATION] "Since July 2003, all [GIS] applicants are notified each year that the new benefit amount is based on their most recent tax return and their current marital status".

[50] This is another reason that the Minister's decision is reasonable. Each of the applicants would have been informed by the Minister in 2012 and in each subsequent year of their marital status (single in the case of Mr. Martin and surviving common-law partner in the case of Ms. Cyr) and that they should advise the Minister of any change to their marital status.

[51] The only hint of communication from the applicants about their marital status, between the November 2010 phone call and the Minister's investigation, is in July 2013, when Ms. Cyr sent in a GIS form indicating that her current marital status is "Surviving common-law partner" instead of "Common-Law".

[52] Although the Court is sympathetic to the applicants' financial situation, given the factual circumstances of this case, the Minister's decision is justified, transparent, and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47).

[53] For these reasons, the applicants' application for judicial review is dismissed.

[54] The Minister did not make any submissions on the issue of costs, but the Court is of the view that no costs will be awarded in this case.

JUDGMENT in T-1355-18 and T-1357-18

THIS COURT'S JUDGMENT is that:

1. The applicants' application for judicial review is dismissed;

2. No costs are awarded.

"Peter Annis"
Judge

Certified true translation
This 1st day of August, 2019.

Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1355-18 AND T-1357-18
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STYLE OF CAUSE:	GAÉTANE CYR v ATTORNEY GENERAL OF CANADA
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