Federal Court  Cour fédérale

Date: 20200325

Docket: T-1535-19

Citation: 2020 FC 415

Ottawa, Ontario, March 25, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KENNETH PATRICK PIKE

Applicant

And

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a negative decision by a delegate for the Minister of Employment and Social Development ("Minister's Delegate" or "Delegate"), dated September 9, 2019. The Minister's Delegate found that Mr. Pike had not been denied any benefit as the result of erroneous advice or an administrative error pursuant to s 32 of the *Old Age Security Act*, RSC 1985, c O-9 (the "OAS Act").

[2] For the reasons that follow, this application for judicial review is granted.

Background

[3] The background to this matter is lengthy, however, for the purposes of these reasons the relevant events can be summarized as follows.

[4] On January 29, 2013, Service Canada sent a letter to Mr. Pike advising him that Service Canada's records showed that they had not yet received his application for an Old Age Security ("OAS") benefit for which he may be eligible. Service Canada enclosed an application form (SC ISP-3000 (2012-01-01) E) and an information sheet (SC ISP-3000A (2012-01-01) E). Mr. Pike completed and submitted the application form. By an undated letter, Service Canada advised Mr. Pike that his OAS pension had been approved and that his payments would commence in February 2014. By way of another undated letter, Service Canada advised Mr. Pike that under Canada's public pension system, seniors with an expected net income of more that $70,954 in the 2013 tax year have to pay back all or part of their OAS pension and that Service Canada would be doing this as a monthly recovery tax. The recovery tax was calculated to be $551.54; that is, Mr. Pike's entire benefit.

[5] On April 21, 2015, Mr. Pike wrote to Service Canada advising that he had recently learned that there was an option to defer his pension if he was still working and that this had not been referenced in his pension Service Canada pension approval, or "award", letter. He requested a deferral of his pension retroactive to the date of his eligibility, February 2014.

[6] Many communications followed. Service Canada denied the request by letter of June 5, 2015 on the basis that Mr. Pike had not made his request within six months after the date on which payment of his pension was first issued, being February 2014. On November 14, 2015, Mr. Pike sought a reconsideration. By a letter dated November 20, 2015, entitled Reconsideration Decision Letter, the request was denied. The content of that letter is reproduced here as it sets out the background to the right to defer as well as the reason why Mr. Pike's request to defer was denied:

> In Budget 2012, the Government of Canada introduced the Voluntary Deferral of the Old Age Security (OAS) Pension starting July 1, 2013. This allows individuals to delay receipt of the OAS pension starting the month they become eligible to receive the pension for a maximum of 60 months up to the age of 70 in exchange for an increased pension.
>
> Also, the 2012 Federal Budget included changes to the *Old Age Security Act* that allow a pensioner to cancel their Old Age Security pension as of March 1, 2013, provided the Department is notified in writing within six months after the day the pension commenced (the date the first payment was issued). Individuals who cancel their OAS pension may potentially take advantage of the Voluntary Deferral of the OAS pension.
>
> In June 2013, it was recognized that individuals who had already applied to receive their OAS pension may not have been aware of these changes since the information was not included in the OAS application or the OAS Award letter they received. To inform these individuals, a special notification letter was sent the week of June 24, 2013 advising them to notify the Department in writing if they did not want to receive their OAS pension at that time. Approximately 280,000 individuals who were currently in pay or awaiting payment from January 2013 to December 2013 received that special notification.
>
> A sample of that letter is enclosed.
>
> Since your application for the Old Age Security Pension was received by our office on March 6, 2013 and processed on March 21, 2013, this special notification would have been sent to you.

> On April 21, 2015 you submitted a written request to cancel your Old Age Security Pension in order to defer until a later date. We denied that request on June 5, 2015 because your request was received more than six months after you started receiving the pension.
>
> This decision has been maintained.

[7] Mr. Pike appealed to the Social Security Tribunal ("SST"), General Division, where his appeal was dismissed. He then appealed to the SST, Appeal Division, which refused leave to appeal. Mr. Pike then applied to this Court for judicial review of the Appeal Division's decision.

[8] Of note is that before the SST General and Appeal Divisions and before this Court in *Pike v Canada (Attorney General)*, 2019 FC 135 ("*Pike*"), Mr. Pike argued that he had not been provided with any information advising him that he could defer his pension. Specifically, he argued that he had not received the June 2013 special notification letter (*Pike* at paras 30-31).

[9] Justice Norris dismissed Mr. Pike's application for judicial review of the SST Appeal Division's decision refusing to grant leave to appeal. This was because the General Division did not have the legal authority to extend the six-month time period within which the pension could be cancelled, and on that basis, the Appeal Division's refusal was reasonable:

> [32] For some reason, in denying leave to appeal, the Appeal Division saw fit to note that information about the changes to the OAS pension scheme was "widely available" to the public, at the very least implying that Mr. Pike should have known about the changes in the law. This is irrelevant. It does not matter whether Mr. Pike ought to have known about the changes or not. While the Appeal Division thus relied on an erroneous consideration, this does not render its decision unreasonable. The difficulty for Mr. Pike's position is that, even though he did not know about the changes in the law, the General Division could not extend the time to cancel the pension on this basis. To be clear, the General

> Division did not dismiss his appeal on the basis that he ought to have known about the changes. Given the limited scope of the legal authority of the General Division, the Appeal Division's conclusion that there were no arguable grounds of appeal in relation to this issue is reasonable.

[10] Although that finding was sufficient to dispose of the application for judicial review before him, Justice Norris also queried whether the matter should have been dealt with under s 32 of the OAS Act, and stated that his decision did not foreclose the possibility of relief for Mr. Pike under s 32, given the distinct authority granted to the Minister by that provision (*Pike* at para 35). Justice Norris also noted that counsel for the respondent had confirmed that, if Mr. Pike were to make a request for relief under section 32 of the OAS Act, an investigation would be undertaken and a decision under that provision would be made (*Pike* at para 38).

[11] Section 32 of the OAS Act states:

> [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.

[12] On February 10, 2019, Mr. Pike submitted a request for relief under s 32 of the OAS Act. He pointed out that neither the letter from Service Canada inviting him to apply for his OAS pension, the application form that Service Canada provided with that letter, nor Service Canada's letter advising him that his pension had been approved, mentioned the possibility of deferral. As to the June 2013 special notification letter sent to 280,000 Canadians who had not been notified

of the deferral option and who were currently in pay or awaiting payment from January 2013 to December 2013, he did not fall into that category as he was not currently in pay and was awaiting pay for February 2014. He therefore never received the letter. He was missed.

[13] In a decision dated September 9, 2019, the Minister's Delegate denied Mr. Pike's request. That decision is the subject of this judicial review.

Decision under review

[14] The Delegate's refusal letter, dated September 9, 2019, states that Mr. Pike's submissions concerning his allegation – that he received erroneous advice from Service Canada in that he had not received notification of the voluntary deferral option at the time of his application for and approval of the OAS benefits – had been thoroughly reviewed. However, the Minister's Delegate concluded that Mr. Pike had not been denied a benefit as the result of erroneous advice for the following reasons:

> Service Canada recognized that individuals who had already applied to receive their OAS pension might not have been aware of the recent changes (because the information was not included in the OAS application they completed or the OAS Award Letter they received). In the week of June 24, 2013, Service Canada sent out a special notification letter to 280,000 individuals "who are currently in pay or awaiting payment from January 2013 to December 2013."
>
> It has been confirmed by National Headquarters that your Social Insurance Number (SIN) was included in the list of clients selected for this special notification.
>
> Service Canada did their responsibility "where possible" to inform clients about the legislative change of deferral.

[15] As a result of the above analysis, the Minister's Delegate was satisfied, on a balance of probabilities, that an administrative error did not occur.

[16] There is further analysis concerning this decision found in a document titled, "Erroneous Advice/Administrative Error Underpayment Submission" and dated September 3, 2019. Therein, the program consultant who prepared the document summarized the issue, Mr. Pike's claim, the background of his claim, and provided an analysis and recommendation. The document was signed and approved by the Minister Delegate.

[17] The issue was described as follows:

> Did an administrative error occur when the Department did not inform Mr. Kenneth Pike that he could have deferred his Old Age Security (OAS) pension from the start date, and once his pension was started, he only has 6 months from receiving his OAS pension to cancel it and defer it to later? Should the Department have allowed Mr. Pike to cancel his OAS pension so that he could then take advantage of the option of deferring it, even though he did not ask to cancel his pension within the required time.

[18] Mr. Pike's claim was described as follows:

> Mr. Pike claims that he did not receive any information about deferral when he applied for OAS in March 2013, when he later received his Award letter, and he did not receive the OAS Special Notification (ISP7030) Mail-out for the Voluntary Deferral of the OAS pension that was mailed the week of June 24, 2013 to 280,000 Canadians.

[19] Following a detailed background summary, there is an analysis section. This offers three questions followed by a "yes" or "no" selection option. These questions were: was the alleged erroneous advice made by someone acting in an official capacity in the administration of the

OAS and CPP; was there a loss of benefits/credit split; and, was the applicant/beneficiary entitled to these benefits if the error had not been made? "No" was the answer selected for each question.

[20] A recommendation section followed the analysis. This began by noting that a review of the file did not support a claim of administrative error because when Mr. Pike's 2013 application for an OAS pension was processed in March 2013, effective February 2014, he was not denied a benefit, as his application was processed correctly with information that the Department had in Mr. Pike's application.

[21] The recommendation section recounted that in April 2012, a letter was sent to those in receipt of OAS benefits who were 54 years or older, which criteria included Mr. Pike, and that the letter directed clients to find out more about changes from the Service Canada website or a 1-800 number. Further, that in February 2013, before Mr. Pike applied for his OAS pension, he would have received a tax insert that advised him of future changes to OAS including a sentence concerning the voluntary deferral program. The recommendation states that as per the ISP Onus Policy, the onus is on the client to read all letters from Service Canada and take steps to obtain or supply required information to allow Service Canada to effectively adjudicate benefit requests. It also noted that it is the Branch's (presumably meaning a branch of Service Canada) responsibility "where possible" to inform clients of legislative changes that could effect their eligibility. According to the recommendation, the tax insert notified Mr. Pike of the upcoming deferral change and directed him to the Service Canada website.

[22] The recommendation acknowledged that Service Canada had recognized that individuals who already applied to receive their OAS pension might not have been aware of the recent change because the information was not included in the OAS application they completed or the OAS Award letter they received. In the result, in July 2013, the special notification letter was sent to 280,000 individuals "who are currently in pay or awaiting payment from January 2013 to December 2013."

[23] The recommendation referenced *Jiang v Canada (Attorney General)*, 2019 FC 629 ("*Jiang*") as standing for the proposition that where an applicant alleges non-receipt of a notice or letter as a reason for relief, the Minister is only required to demonstrate that the letter was sent. The recommendation stated that it had now been confirmed by National Headquarters that Mr. Pike's Social Insurance Number was included in the list of clients selected for the special notification letter.

[24] The recommendation found that the OAS award letter sent to Mr. Pike was received before the award letter was updated to include deferral information.

[25] After summarizing the SST Appeal and General Division decisions, as well as aspects of *Pike*, the recommendation concluded that Service Canada "did their responsibility 'where possible'" to inform clients about the legislative change of deferral through the following methods:

- the OAS/CPP tax insert in February 2013
- the modified award letter mailed effective April 1, 2013

- the special notification letter for anyone in pay or awaiting pay from January 2013 to December 2013
- the OAS Application Information sheet updated in October 2013
- the deferral information on Service Canada's website (because nearly all correspondence from Service Canada ends with a reference to the website)
- media articles that reported on the federal budget

[26] As such, the conclusion was that the Minister was satisfied, on a balance of probabilities, that an administrative error did not occur and it was recommended not to involve s 32 of the OAS Act.

Issue and standard of review

[27] There is only one issue in this matter, being whether the decision of the Minister's Delegate, made pursuant to s 32 of the OAS Act, was reasonable.

[28] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") held that the standard of reasonableness presumptively applies whenever a court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption may be rebutted where the legislature has prescribed the standard of review or where there is a statutory appeal mechanism, which signals the legislature's intent that appellate standards should apply (*Vavilov* at para 33). Or, where the rule of law requires the application of the correctness standard (*Vavilov* at para 17). However, none of those circumstances have application in this matter, and accordingly, the reasonableness standard of review applies.

[29] The Supreme Court in *Vavilov* also addressed how a reasonableness review is to be conducted by a reviewing court (at paras 73-145). In that regard, it held that a reviewing court must determine whether the decision as a whole is reasonable, and to make that determination, the reviewing court "asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility – an whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision-maker it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

Positions of the parties

Mr. Pike's position

[30] Mr. Pike emphasizes that the OAS application and information sheet that were sent to him by Service Canada contained no information about the potential of deferral and that he did not received the special notification letter. And, although the Minister's Delegate found that the special notification letter would have been sent to him, and despite many requests made by Mr. Pike, a copy of that letter has not been produced by Service Canada. Further, the Minister's Delegate has not explained its position in light of internal emails indicating that Mr. Pike would not have received the letter. Mr. Pike also points out the finding of Justice Norris, in *Pike*, "[t]hat there is no direct evidence that this letter was ever sent to Mr. Pike. Given when he submitted his application for an OAS pension and when it was due to begin, it is not clear whether Mr. Pike would have been among those to whom the special notification letter was sent or not. In any

event, even if this letter was sent to him, it should be evident to all that he did not receive it" (*Pike* at para 31). Mr. Pike submits that he was missed when the special notification was sent out, and the resultant injustice, the refusal to permit his request to defer his pension – a request he made as soon as he became aware of the possibility – is what he has been trying to rectify.

Minister's position

[31] The Attorney General submits that the decision was reasonable because the Minister Delegate identified and applied the applicable legislation and case law, conducted a review of all the relevant documents in the Minister's possession, and because the Minister found no evidence to substantiate Mr. Pike's assertions that an administrative error occurred or that erroneous advice was given. Further, Mr. Pike was not denied a benefit; he applied for and received the benefit to which he was entitled. The legislation prevented the Minister from cancelling Mr. Pike's benefits because he applied for deferral subsequent to the stipulated six-month period, and therefore, the Minister's application of the legislation cannot be equated with an error or with the denial of a benefit. Further, the investigation made under s 32 of the OAS Act was not made in bad faith and is supported by the evidence. Finally, the Attorney General submits that the Minister does not have a positive duty to inform applicants or recipients of OAS benefits about the law, or changes to the law, and their entitlement.

Analysis

[32] Much of the Attorney General's written submission are concerned with general principles, for example, that the Minister has no legal obligation to inform individuals of their

entitlement to a benefit (*Lee v Canada (Attorney General)*, 2011 FC 689 at para 72) and that the Minister is afforded wide discretion with respect to the procedure to be followed when conducting an investigation pursuant to s 32 of the OAS Act (*Leskiw v Canada (Attorney General)*, 2004 FCA 177 at para 7; *Raivitch v Canada (Minister of Human Resources Development)*, 2006 FC 1279 at para 35).

[33] However, Mr. Pike's challenge to the decision of the Minister's Delegate does not concern those principles. His argument is simple and straight-forward. He requested discretionary relief under s 32 of the OAS Act because there was no mention of the availability of a deferral on his OAS application or in his award letter, and because he did not receive the special notification letter. As he was not aware of the option to defer his OAS pension, he did not make his request to defer within the specified six-month window to do so. Accordingly, he sought discretionary relief from the Minister to permit his late request for deferral. The administrative error that he alleges is that he did not receive the special notification, not that the Minister failed to notify him of available benefits. Indeed, the Delegate appears to acknowledge this in her description of the issue before her, being "Did an administrative error occur when the Department did not inform [Mr. Pike] that he could have deferred his [OAS] pension start date…".

[34] Mr. Pike submits that the claim of Service Canada that he was among one of the 280,000 individuals who were sent the special notification letter is not supported by the record. He refers to an internal Service Canada email chain, which he claims states that he would not have received the special notification letter. In my view, the referenced emails do not support that

conclusion, but they do leave open the very relevant question of whether Mr. Pike fell within the group of 280,000 individuals who were sent the special notification.

[35] The subject emails are between Karen Suckling and Janet Lauber. The email from Ms. Suckling states that Mr. Pike's award letter (ISP3061) did not include the updated deferral information and that, "SDB-605 dated June 26/13 states that since the ISP3061 was not updated, a 'special notification' was mailed to client's [*sic*] who were currently in pay or awaiting pay from Jan13-Dec13." Mr. Pike's OAS pension start date was February 2014. She therefore asked whether he would have received the special notification letter, even though his OAS start date was later than the date specified for being sent the special notification letter.

[36] The response from Ms. Lauber is unintelligible:

> Hi Karen,
>
> The client would not receive the information on the 3065. The start date would be determined [*sic*] how he completes his application. It asks him this information and tells him to read the information sheet which explains about deferral. So he would have been given all of that information at the time he applied and would make his decision based on that information. You can send the client a copy of the sheet from e-forms. I found the old one http://www.servicecanada.gc.ca/eforms/forms/sc-isp-3000a(2014-03-03)e.pdf.

[37] The email then cuts and pastes what appears to be an extract from form SC ISP-3000A (2014-03-03) E 10.

[38] A number of concerns stem from Ms. Lauber's email. First, there is no reference to a form "3065" in Ms. Suckling's email or, indeed, based on my review, anywhere else in the

record. At the hearing of this judicial review, I asked counsel for the Attorney General if she could identify a form 3065 from the record, or explain how it was relevant to this matter. She was unable to provide any guidance to the Court.

[39] That said, it is probable that Ms. Lauber meant to reference ISP3061 (award letter). If so, and despite saying that Mr. Pike would *not* have received the information on the "3065", Ms. Lauber goes on to say that he, "would have been given all of that information at the time he applied". Yet it is clear from Ms. Suckling's email that Service Canada had already recognized that, because ISP3061 had not been updated, the special notification letter was sent to recipients who were currently in pay or awaiting payment from January to December 2013.

[40] Indeed, in the subsequent Reconsideration Decision Letter, dated November 20, 2015, Service Canada explicitly recognized that *neither* the OAS applications *nor* the award letters had been updated when sent to the identified group:

> In June 2013, it was recognized that individuals who had already applied to receive their OAS pension may not have been aware of these changes *since the information was not included in the OAS application or the OAS Award letter they received.* To inform these individuals, a special notification letter was sent the week of June 24, 2013 advising them to notify the Department in writing if they did not want to receive their OAS pension at that time. Approximately 280,000 individuals who were currently in pay or awaiting payment from January 2013 to December 2013 received that special notification.
>
> [emphasis added]

[41] Further, the linked document in Ms. Lauber's email is not found in the record. Mr. Pike submits that the linked form is from 2014. This would appear to be the case given that the cut

and pasted extract refers to SC ISP-3000A (2014-03-03) E 10 and contains information about the deferral. As noted by Ms. Suckling in her originating email, Mr. Pike's award letter did not include deferral information. Further, he applied for his OAS pension in 2013. Therefore, if the linked a form is from 2014, then Mr. Pike is correct that it is a form created after he applied.

[42] And, not to put too fine a point on this, the application, information sheet and award letter sent to Mr. Pike by Service Canada are all found in the record. This conclusively establishes that he was not sent the updated documents.

[43] Ms. Lauber's unintelligible response is significant in that it does not answer Ms. Suckling's question, being whether Mr. Pike would have received the special notification letter.

[44] And, as noted by Mr. Pike, this issue was acknowledged by Justice Norris in *Pike* when he stated that, "[g]iven when [Mr. Pike] submitted his application for an OAS pension and when it is due to begin, it is not clear whether Mr. Pike would have been among those to whom the special letter was sent or not" (*Pike* at para 31). Here, Mr. Pike applied for his pension in March 2013, and was set to receive his pension in February 2014. Therefore, it is not clear that he would fall within the group that would be in pay or awaiting pay in January 2013 to December 2013, nor did Ms. Lauber's email intelligibly answer that question when it was put to her.

[45] I also note that the background portion of the policy consultant's report states that the Reconsideration Decision Letter indicted that Mr. Pike would have received the special notification because his application was processed on March 21, 2013. It is true that the

Reconsideration Decision Letter states that since Mr. Pike's application was received on March 6th and processed on March 21, 2013, it "would have been sent to [him]". Service Canada also stated that position in its submissions to the SST Tribunal on February 3, 2016. The policy consultant, in her recommendations, states only that, "[a]fter a through review of the file, the information found does not support a claim of administrative error when Mr. Pike's March 2013 OAS application was processed in March, effective February 2014. He was not denied a benefit as his application was processed correctly at the time, with the information that the Department had on Mr. Pike's application".

[46] It is entirely unclear from this if the policy analyst is implicitly accepting the Reconsideration Letter Decision statement that, because the application was processed in March, Mr. Pike would have received the special notification. However, to the extent that she was, I agree with Mr. Pike that there is nothing in the record to support that the processing date was related to the whether a special notification letter would be sent. Further, the OAS: Special Notification (ISP7030) Mail-out for the Voluntary Deferral of the OAS Pension does not reflect this. It states:

> Individuals who have already applied to receive their OAS pension (up to 11 months in advance) may not be aware of these changes since the information was not included in the OAS application or the OAS Award letter (ISP3061) they received. To inform these individuals, a special notification letter is being sent the week of June 24, 2013 advising them to notify the Department in writing if they do not wish to receive their OAS pension at this time. Approximately 280,000 individuals *who are currently in pay or awaiting payment from January 2013 to December 2013 will receive the special notification.*
>
> All other clients will be informed of the Voluntary Deferral of the OAS Pension through the proactive enrolment notification letter, the updated OAS award letter, the updated OAS application kit and the Service Canada web page.

[emphasis added]

[47] The above Special Notification does not reference processing dates.

[48] And, in *Pike*, Justice Norris referenced the November 20, 2015, Reconsideration Decision Letter and the January 20, 2017 SST General Division decision, and found that:

> [29] That being the case, I can only offer the following observations to assist Mr. Pike in understanding the proceedings before the two Divisions of the Social Security Tribunal. The General Division may decide an appeal on the basis of the documents and written submissions filed or it may hold a hearing (*Social Service Tribunal Regulations*, SOR/2013-60, section 28). In this case, the General Division explained that it had decided the appeal based on the written record because, among other reasons, the issues under appeal were not complex, there were no gaps in the information in the file or any need for clarification of that information, and credibility was not a "prevailing issue." This is important because, in his written submissions to the General Division, Mr. Pike had raised squarely the issue of whether he had received the special notification letter sent in June 2013 or otherwise knew about the right to cancel his pension when he could have done so. One can understand Mr. Pike's frustration about how this issue was dealt with over the course of his dealings with Service Canada. *However, what Mr. Pike may not have appreciated is that this factual dispute was effectively resolved in his favour by the General Division. Given the reasons the General Division provided for not conducting a hearing, it is apparent that the member was able to decide the appeal on the basis that Mr. Pike had not received the letter and did not otherwise know about the deferral option until shortly before he asked to cancel his pension in April 2015*. However, even accepting Mr. Pike's statements about his lack of timely knowledge of the deferral option, the appeal nevertheless had to be dismissed because the General Division did not have the legal authority to grant him the relief he was seeking. In such circumstances, even if he had raised the issue earlier, Mr. Pike would have had some difficulty persuading the Appeal Division that the General Division had failed to observe a principle of natural justice.
>
> …

> [31] Once again, this issue turns out to be less significant than Mr. Pike understandably thought it was. *I agree with Mr. Pike that the November 20, 2015 decision by Service Canada denying his request for reconsideration erroneously relied on a finding that the special notification letter "would have been sent" to him and, implicitly, that he must have received it.* There is no direct evidence that this letter was ever sent to Mr. Pike. Given when he submitted his application for an OAS pension and when it was due to begin, it is not clear whether Mr. Pike would have been among those to whom the special notification letter was sent or not. In any event, even if this letter was sent to him, it should be evident to all that he did not receive it. However, for the reasons given by the General Division, this could not make any difference for his appeal to that body.
>
> [emphasis added]

[49] The Attorney General does not suggest that Justice Norris's findings are in question.

[50] However, subsequent to *Pike*, the Minister's Delegate found that it was confirmed with National Headquarters that Mr. Pike's social insurance number was on the list of people selected for the special notification letter.

[51] It is correct that the Minister is not obligated to demonstrate that Mr. Pike received the special notification letter. The Minister need only demonstrate that the letter was sent (*Jiang* at paras 11, 13). However, in my view, the record does not demonstrate that the special notification letter was sent to Mr. Pike.

[52] In the September 9, 2019, decision letter the Minister's Delegate stated that it had been confirmed by National Headquarters that Mr. Pike's social insurance number was included in the list of clients selected for the special notification letter. The program consultant stated that Mr.

Pike had made submissions in support of his s 32 request in "August 2019" (the record indicates that they were submitted on August 5, 2019) and that:

> On August 26, 2019 a Procedures Enquiry Knowledge Management (PEKM) inquiry was sent to National Headquarters to confirm if Mr. Pike was mailed that special notification letter sent in June 2013. The response, 2019PEKM2991, was received on August 30, 2019, indicating he was on the mail out list for the special notification letter from SDB-605.

[53] I am unable to locate anything in the record before me identified as a PEKM sent on August 26, 2019.

[54] The only evidence in the record that addresses an inquiry is an email from Crystal Burke CA [NC], a Senior Business Analyst for Service Canada, dated August 30, 2019 to Sandra LeBlanc, responding to Ms. LeBlanc's question of whether the lists of the 280,000 client accounts could be located and if Mr. Pike was on the list. Or, if not, what selection criteria were used to select the clients. Ms. Burke's reply states only that:

> Sandra: I am confirming that your client Mr. Pike [*sic*] SIN … was included on the Part 1 Scan. He would have received a letter.

[55] The email below of the same date (from an email address that is not that of an individual) to Ms. Burke states that the scan was done through "an IR3185434", that the results were copied to her area in two parts. In fact, the two parts referenced are the same, being IR 3185434 PART ONE.xlsx.

[56] It is possible, but unclear, that the email from Ms. Burke is the confirmation from National Headquarters referenced by the Minister's Delegate, and that the email confirming Mr.

Pike's inclusion in the "scan" was the evidence upon which the Minister's Delegate drew the conclusion that Mr. Pike was selected for the special notification letter. However, and despite referencing *Jiang*, the Delegate makes no specific finding that the letter was actually sent to Mr. Pike.

[57] The email from Ms. Burke is, of course, a development subsequent to *Pike*, where Justice Norris held that there was no direct evidence that the letter was ever sent to Mr. Pike (*Pike* at para 31). However, I have serious concerns with the adequacy of this email to establish that the special notification letter was sent to Mr. Pike.

[58] The record indicates that Mr. Pike has repeatedly asked for a copy of the special notification letter which Services Canada asserts was sent to him. He claims that this has not been provided. The November 20, 2015, Reconsideration Decision Letter references an attached "sample letter". The upper right-hand corner of this form letter designates a place for the insertion of a client's name and identification number. The record does not contain a copy of a special notification letter bearing Mr. Pike's name and no explanation has been offered by Service Canada as to why the letter has not been produced. Yet, there are other form letters from Service Canada in the record that are addressed to Mr. Pike, including the Service Canada generated pension application, the award letter and the claw-back letter. It is also of note that when Mr. Pike requested a copy of the June 2015 decision wherein his request for deferral was first rejected, Service Canada provided a copy of the decision letter addressed to Mr. Pike marked with a "COPY" stamp. The record also contains copies of many other communications both to and from Mr. Pike.

[59] As the Attorney General notes, a review of the Delegate's decision includes an assessment of whether the procedures required for a s 32 investigation were followed (*Mackeen v Canada (Attorney General)*, 2015 FC 1032 at para 27). While there are no procedures stipulated in the OAS Act, there is an email in the record setting out requirements for the review of an "EA/AE" submission, which I understand to mean "Erroneous Advice / Administrative Error". An email from Adrice King, Business Expertise Consultant, dated May 13, 2019, listed the required documentation for the review of an AE/EA submission. This included, "a copy of the client's OAS application, all letters sent to or received from the client regarding his OAS entitlement and voluntary deferral request/decision, the relevant SDB bulletin & notification letter, SST and judicial review decisions, and the listed". However, as noted above, a special notification letter sent to Mr. Pike is not found in the record.

[60] Further, the scanned list referenced by Ms. Burke, or a redacted version of it, is not found in the record. There is also no affidavit evidence from an individual with Service Canada confirming that Mr. Pike's name was on the scanned list and confirming that individuals who were on the list were sent the special notification letter, describing the manner in which that letter was generated and sent to those individuals, or explaining why a copy of the special notification letter sent to Mr. Pike found is not found in the record.

[61] In these circumstances, and given the repeated and unanswered concerns raised by Mr. Pike as to whether he actually fell within the group of 280,000 individuals to whom the special notification letter was sent as his benefits did not start until after December 2013, I am not persuaded that the record before the Delegate established that the Minister sent the special

notification letter to Mr. Pike (*Jiang* at paras 11, 13). In fact, I am not convinced that the Delegate actually put her mind to the issue.

[62] Instead, the Delegate lists six ways in which Service Canada "did their responsibility 'where possible'" to inform clients about the legislative change pertaining to the OAS pension deferral. This, presumably, arises from the referenced ISP Onus Policy, a copy of which is not found in the record.

[63] In that regard, the Delegate first refers to the OAS/CPP T4 tax insert in February 2013, a copy of which is not found in the record. More significantly, Service Canada explicitly acknowledged that, in June 2013, it was recognized that individuals who had already applied to receive their OAS pension may not have been aware of the legislative changes since the information was not included in the OAS application or the OAS Award letter they received. To inform these individuals, a special notification letter was sent the week of June 24, 2013. Thus, to the extent that the Delegate is suggesting that the tax insert served to sufficiently inform those individuals of the legislative change, Service Canada itself determined that it had not.

[64] The Delegate then refers to the modified ISP award letter that the Delegate states was mailed effectively April 1, 2013. However, the record establishes that Mr. Pike was not sent the amended award letter. A copy of the award letter sent to him is in the record and it does not refer to the deferral. I am unable to ascertain how the Delegate arrives at the view that the subsequently amended award letter, which was not sent to Mr. Pike, illustrates that Service Canada met its self-acknowledged responsibility to him.

[65] The Delegate then references the special notification letter for anyone going into pay from January 2013 to December 2013. However, as noted above, the record does not establish that the special notification was sent to Mr. Pike, nor does the Delegate make an actual finding in that regard. The record also does not establish that Mr. Pike falls within that category of persons as he was not going into pay until February 2014.

[66] The Delegate next notes that the OAS Application Information sheet was updated in October 2013. Again, however, I am unable to ascertain how this demonstrates that Service Canada met its self-acknowledged responsibilities to Mr. Pike as the information sheet sent to him is contained in the record and it is not the updated version.

[67] The Delegate then notes that the deferral information is on Service Canada's website and was addressed in media articles, such as the Globe and Mail, which reported on the 2012 budget, including that Canadians could choose to delay receiving OAS benefits to receive a higher benefit. These are general references. It is also difficult to see how media reports satisfy the responsibility of Service Canada to alert individuals of legislative changes. Regardless, viewed in whole, these six listed factors do not support the Delegate's conclusion.

[68] Accordingly, for the above reasons, the Delegate's decision that an administrative error did not occur was not justified based on the record before the Delegate and was unreasonable.

[69] Given this conclusion, I need not address the Attorney General's further submission that the Minister's decision is reasonable because Mr. Pike was not denied any benefit. In that

regard, the Attorney General references generally, and with no further explanation, pages 6 to 15 of the program consultant's report in support of this position. I note that in the analysis section of that report, a box was checked "No" in response to the question "Was there a loss of benefits/credit split?". There is no direct analysis relating to that question. However, the program consultant commented that:

> If Mr. Pike was granted deferral from February 2014 to February 2016, his new rate of pension would be increased by 15%, giving him a rate of $665.31 in March 2017, instead of the rate of $578.53, this amount to an increase of $86.78. Mr. Pike would be overpaid by $14,052.99 for the period of February 2014 to February 2016 and then underpaid March 2017 to August 2019 $2665.15 to give an overpayment of $11,387.84. This is money that was paid to CRA as a recovery rate, and the Department could obtain it back for Mr. Pike, if his deferral is granted. (Mr. Pike had a recovery tax on his account until June 2017).

[70] When appearing before me, Mr. Pike pointed out that the benefit he lost is that, in exchange for deferral, his pension would be increased by a factor of 0.6% for every month deferred (see *Pike* at para 3). Thus, if he deferred his pension entitlement, Mr. Pike would not receive his pension during the deferral period, however, he would subsequently receive a greater pension upon reinstatement. This is in contrast to his actual situation where, when his deferral request was refused, his pension was clawed back in whole while he continued working, and upon reinstatement, he is now receiving only his regular pension amount.

[71] Benefit, as defined by the OAS Act, means "a pension, supplement or allowance" (OAS Act, s 2). A pension means, "a monthly pension authorized to be paid under Part I" (OAS Act, s 2). Pursuant to s 32 of the OAS Act, the Minister must be satisfied that an administrative error did not occur whereby an applicant was denied a benefit or a portion of a benefit. As the

Delegate unreasonably found that no administrative error occurred, the finding that Mr. Pike did not lose any benefit as a result similarly cannot stand. Moreover, the above explanation offered by the Delegate suggests that, in fact, Mr. Pike did lose a portion of a benefit to which he would have been entitled if the deferral had been granted.

Relief Sought

[72] Mr. Pike requests this Court to grant him the right to defer his OAS pension from February 2014 up to and including February 2017 with the resultant an increase of 0.6% per month.

[73] In most circumstances, when the Court determines that the decision of an administrative decision maker is unreasonable, the remedy afforded is that the matter is sent back for redetermination by a different decision maker with the benefit of the Court's reasons. Exceptionally, it may be appropriate for the Court to decline to remit a matter back, such as where it becomes evident to the Court in the course of its review that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose (*Vavilov* at paras 141-142).

[74] While I am of the view that Mr. Pike, who has been self-represented throughout this entire process, has diligently, effectively and in the utmost good faith pursued this issue for many years and deserves a final resolution, I am not convinced that this is a circumstance where it is appropriate for the Court to make the determination that he seeks.

[75] I will remit the matter back to Service Canada who shall cause a new s 32 investigation to be conducted, expeditiously, by a different program consultant and by a different Minster's Delegate, and taking into consideration these reasons.

Costs

[76] Mr. Pike has represented himself in this judicial review. He has been successful and has requested costs. However, he has not identified the particulars of the costs claimed or specified an amount sought.

[77] The Federal Court of Appeal in *Yu v Canada (Attorney General)*, 2011 FCA 42 confirmed that costs can be awarded to self litigants:

> [37] The appellant is seeking costs. The rule against awarding costs to self-represented litigants has been somewhat alleviated in recent years: *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] 4 F.C. 865 at paragraphs 46 to 52; *Thibodeau v. Air Canada*, 2007 FCA 115, 375 N.R. 195 at paragraph 24. This new approach to costs for self-represented litigants seeks to provide a moderate allowance for the time and effort devoted to preparing and presenting a case insofar as the successful self-represented litigant incurred an opportunity cost by foregoing remunerative activity.

[78] Accordingly, within ten days of the issuance of this judgment and reasons, Mr. Pike may make brief written submissions as to any actual out of pocket expenses he incurred in preparing and presenting his application. And, if he was employed or otherwise lost the opportunity to receive remuneration while he prepared and presented his case, he may submit substantiation of this and of the remuneration lost. The Attorney General, within ten days, of any cost submission by Mr. Pike, may make brief written submissions in reply. In either case, the written

submissions (as opposed to documentation of the costs incurred by Mr. Pike) shall not exceed two pages in length, in total.

[79] Alternatively, the parties may agree on a lump sum, all inclusive cost award to Mr. Pike and inform the Court of the agreed sum.

JUDGMENT IN T-1535-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The matter will be remitted back to Service Canada which will cause investigation, pursuant to s 32 a new *Old Age Security Act*, to be conducted, expeditiously and by a different program consultant and a different Minster's Delegate, and taking into consideration these reasons.

3. Mr. Pike may, within ten days of the issuance of this judgment and reasons, make written submissions as to any actual out of pocket expenses he incurred in preparing and presenting his application for judicial review and, if he was employed or otherwise receiving remuneration while he prepared and presented his case, any lost opportunity for remuneration that he incurred. The Attorney General, within ten days of any cost submission by Mr. Pike, may make brief written submissions in reply. In either case, the written submissions (as opposed to any documentation of the costs incurred by Mr. Pike) shall not exceed two pages in length, in total. Alternatively, the parties may agree on a lump sum, all inclusive cost award to Mr. Pike and inform the Court of the agreed sum.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1535-19
STYLE OF CAUSE:	KENNETH PATRICK PIKE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	MARCH 9, 2020
JUDGEMENT AND REASONS:	STRICKLAND J.
DATED:	MARCH 25, 2020

APPEARANCES:

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Sandra L. Doucette	FOR THE RESPONDENT

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