Federal Court  Cour fédérale

Date: 20230206

Docket: T-431-22

Citation: 2023 FC 171

Ottawa, Ontario, February 6, 2023

PRESENT: The Honourable Justice Pamel

BETWEEN:

KENNETH PATRICK PIKE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Old Age Security [OAS] pensions provide income to Canadian seniors. If seniors earn over a certain amount, they must repay a portion or the entirety of their OAS pension through a recovery tax. Parliament amended the *Old Age Security Act*, RSC 1985, c O-9 [Act], in 2012 to provide greater flexibility for seniors who wanted to defer their OAS pensions until a later date. Voluntary deferral of OAS pensions gives high-income seniors who would not otherwise receive any net OAS benefits on account of their income an option to defer their OAS pensions until a

later period when their income might be lower. If a senior is already in receipt of an OAS pension and wants to proceed with a voluntary deferral, he or she may only do so within six months from the date on which payment of the OAS pension benefits began (*Old Age Security Regulations*, CRC, c 1246 [Regulations], section 26.1).

[2] The applicant, Mr. Kenneth Patrick Pike, requested a deferral of his OAS pension; it was refused on account of the fact that it was not made within six months from the date on which he first began to receive payment of his pension. Mr. Pike then sought relief under section 32 of the Act, but his request was refused on July 27, 2021, by a delegate of the Minister of Employment and Social Development [Minister] on the grounds that Mr. Pike had not been denied any benefit as a result of an administrative error, as provided for under that section of the Act; Mr. Pike now seeks judicial review of that decision.

[3] For the reasons that follow, I will allow the present application for judicial review and will remit the matter back to Service Canada to be redetermined, taking these reasons into consideration.

II. Facts

[4] This is the third time that Mr. Pike finds himself before this Court, and he continues to represent himself.

[5] The matter involving Mr. Pike dates back to January 2013, when he received a proactive enrolment notification letter from Service Canada advising him that he had not yet applied for

his OAS pension benefits and inviting him to do so [Notification Letter]; an OAS pension application form and a four-page information sheet [Application Kit] were enclosed. Mr. Pike submitted his application, which was received and processed by Service Canada in March 2013. On March 24, 2013, Mr. Pike received a letter [Award Letter] in which Service Canada confirmed that his OAS pension had been approved and that his payments would begin about a year later, in February 2014. At some point during the summer of 2013, Mr. Pike received an undated letter from Service Canada advising that seniors with an expected net income of more than $70,954 in the 2013 tax year would see their benefits clawed back by the Canada Revenue Agency by way of a monthly recovery tax equal to, in the case of Mr. Pike, his entire monthly benefit. Indeed, this is what happened to Mr. Pike.

[6] On June 26, 2013, Service Canada published guidance in the form of Service Delivery Bulletin 605 [SDB 605], which stated, amongst other things, as follows:

> **OAS: Special Notification (ISP7030) Mail-out for the Voluntary Deferral of the OAS Pension**
>
> **Background**
>
> In Budget 2012 the Government of Canada introduced the Voluntary Deferral of the Old Age Security (OAS) Pension starting July 1, 2013. This change 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 (OAS) 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.

> 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 this special notification.
>
> All other client segments 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.]

[7] Nearly two years later, in April 2015, Mr. Pike wrote to Service Canada advising that he had recently learned of the deferral option regarding his pension in the event that he was still working and earning an income, but that such an option had not been mentioned in the Award Letter; as Mr. Pike's monthly pension benefits were being clawed back at the time by way of the monthly recovery tax, he requested the cancellation and deferral of his pension, retroactive to the date of his eligibility, that is, February 2014. On June 5, 2015, Service Canada denied the request on the basis that Mr. Pike had not made the request within six months from the date on which payment of his pension was first issued in February 2014 [Deferral Decision]; for some reason Mr. Pike did not receive that decision and was only provided with a copy of it on October 21, 2015, after pressing Service Canada for an answer on his deferral request. In November 2015, Mr. Pike sought a reconsideration of the Deferral Decision; this too was denied by letter dated November 20, 2015 [Deferral Reconsideration Decision]. After citing much of SDB 605, the Deferral Reconsideration Decision stated, in part:

> 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 wish 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 letter 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.
>
> [Emphasis added.]

[8] The Social Security Tribunal [SST] General Division dismissed Mr. Pike's appeal, and the SST Appeal Division refused leave to appeal; Mr. Pike then sought judicial review of that decision. Before this Court, Mr. Pike argued that he had not been provided with any information advising him that he could defer his pension and that, specifically, he had not received the special notification letter that was purportedly sent the week of June 24, 2013 [Special Notification Letter] and that was referred to in the Deferral Reconsideration Decision. On January 31, 2019, in *Pike v Canada (Attorney General)*, 2019 FC 135 [*Pike 1*], Mr. Justice Norris dismissed Mr. Pike's application, determining that the SST Appeal Division's finding that there were no arguable grounds of appeal in relation to Mr. Pike's situation was

reasonable. In short, Justice Norris determined that the issue was not whether Mr. Pike ought to have known about the changes to the legislation because they were supposedly "widely available to the public" an argument put forward by the Attorney General – but rather that the SST General Division did not have the legal authority to extend the six-month time period within which his pension could be cancelled, nor could the tribunal "use principles of equity or consider extenuating circumstances to grant more time to request cancellation of an OAS pension than is prescribed by the [Act] and [Regulations]" (*Pike 1* at paras 16 and 32). However, in dismissing Mr. Pike's application for judicial review, Justice Norris made the following comment, at paragraph 31:

> . . . 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.]

[9] Justice Norris's findings were sufficient to dispose of the application for judicial review that was before him; however, in arriving at his determination, he stated that his decision did not foreclose the possibility of relief for Mr. Pike under section 32 of the Act given the distinct authority granted to the Minister by that provision (*Pike 1* at para 35). Section 32 of the Act reads as follows:

Where person denied benefit due to departmental error, etc.	**Refus de prestation dû à une erreur du ministère**
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.

[10] In fact, before Justice Norris, counsel for the Attorney General confirmed that if Mr. Pike were to make a request for relief under section 32 of the Act, an investigation would be undertaken and a decision under that provision would be made (*Pike 1* at paras 35 and 38). Consequently, on February 10, 2019, Mr. Pike did just that [Section 32 Relief Request]. In support of his request, Mr. Pike pointed out that neither the Notification Letter, nor the Application Kit, nor the Award Letter mentioned the possibility of deferral. As to the Special Notification Letter purportedly sent during the week of June 24, 2013 to "280,000 individuals who [were] currently in pay or awaiting payment from January 2013 to December 2013", Mr. Pike argued that he did not fall into that category as he was not "currently in pay" during the week of June 24, 2013 or "awaiting payment from January 2013 to December 2013" – he was

awaiting payment starting in February 2014; Mr. Pike claimed that he therefore never received the Special Notification Letter, i.e., in other words, he was missed.

[11] Upon the invitation to do so by Service Canada, Mr. Pike submitted further information in support of his Section 32 Relief Request in early August 2019; Ms. Sandra LeBlanc, Program Consultant, seemingly based out of St. John's, NL, was tasked with reviewing the request. The record shows that on the morning of August 30, 2019, Crystal Burke, Senior Business Analyst with Service Canada in the National Capital Region, sent an email to an internal general email address advising that she was working with a team on the Section 32 Relief Request and that she was looking to determine whether Mr. Pike was included in the scan used to send the Special Notification Letter back in June 2013. Ms. Burke received a response from Kathie Jones, Program Advisor with Service Canada, who indicated that she had located Mr. Pike's account in the scan results, which were copied to Ms. Burke. In the early afternoon, Ms. Burke acknowledged receipt of the results and, with Ms. LeBlanc in copy, stated: "Sandra: I am confirming that your client Mr. Pike [social insurance number deleted] was included on the Part 1 Scan. He would have received a letter." [August 30 Confirmation].

[12] Mr. Pike's record before me includes a note that was placed in Service Canada's internal information management system [ITRDS] with a September 3, 2019, date stamp attached to it [September 3, 2019 Note], which states as follows:

> The Administrative Error (AE) submission has been reviewed and completed by the National Manager. We have not maintained the recommendation of the Region for this file, that AE had occurred, therefore, it is recommended that subsection 32 of the OAS Act NOT be invoked. The hard file is now being mailed back to PEI … .

[Emphasis added.]

[13] The “Region” – whether the New Brunswick, Prince Edward Island or Newfoundland and Labrador office of Service Canada – was not identified, nor was the name of the “National Manager” referred to in the September 3, 2019 Note. In addition, the decision of the “Region” that concluded that an administrative error had occurred in Mr. Pike’s file is not part of the record before me, and the reasons why the national headquarters of Service Canada [NHQ] overruled such decision have not been made clear to me. The September 3, 2019 Note was only discovered by Mr. Pike when he received documents in answer to an access to information and privacy [ATIP] request that he made on June 2, 2020. In any event, on September 3, 2019, J. C. Gagne, Manager at NHQ, signed off on the investigation report that was prepared by Ms. LeBlanc that same day [Section 32 Report] and that summarized the issue, the Section 32 Relief Request, and the background of Mr. Pike’s claim, provided an analysis and a recommendation, and concluded that, on the balance of probabilities, an administrative error did not occur in Mr. Pike’s case. By letter dated September 9, 2019 [Section 32 Decision], the Minister denied Mr. Pike’s Section 32 Relief Request; amongst other things, the Section 32 Decision stated the following: “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.” Mr. Pike sought judicial review of that decision.

[14] On March 25, 2020, in *Pike v Canada (Attorney General)*, 2020 FC 415 [*Pike 2*], Madam Justice Strickland allowed Mr. Pike’s application for judicial review and remitted the matter back to the Minister for a new section 32 investigation and decision. Justice Strickland determined that the Section 32 Decision was not justified based on the record before the Minister

and was thus unreasonable; Justice Strickland's particular concern was with the evidence purportedly supporting the proposition that the Special Notification Letter was sent to Mr. Pike. Specifically, Justice Strickland was not convinced that the record before the Minister established that Service Canada had sent the Special Notification Letter to Mr. Pike. The Court identified a number of shortcomings in the evidence in the record relating to the Special Notification Letter.

[15] It does not seem that any of the following were part of the record before Justice Strickland: the September 3, 2019 Note, which made reference to the disagreement between the Region and NHQ as to whether an administrative error took place in Mr. Pike's file; the actual determination by the regional office that an administrative error did in fact take place; any exchanges regarding the reasons why NHQ decided to overrule the regional office; or any affidavit evidence explaining the departure from the position first determined by the regional office. That is troubling as the matter was clearly before the "National Manager". The certificate issued by Employment and Social Development Canada pursuant to subsection 318(1) of the *Federal Courts Rules*, SOR/98-106, confirming the content of the certified tribunal record in *Pike 2* is dated October 11, 2019, and from what I can tell, the ITRDS entries that form part of that certified tribunal record end at February 20, 2019. Why the entry for the September 3, 2019 Note, just three entries above the one for February 2019, did not make it into the certified tribunal record is not clear, in particular as the Section 32 Report and the Section 32 Decision are dated September 3, 2019 and September 9, 2019, respectively.

[16] When I enquired at the hearing about whether the recommendation from the regional office of Service Canada or any other exchanges in relation therewith were available, Mr. Pike

indicated that the response he received to his ATIP request seeking to obtain that information – information which seemed to support his position – was that the recommendation was somehow not available. More importantly, what is also not clear is whether that recommendation of the Region, along with any possible exchanges relating to it, was made available to Ms. LeBlanc when she prepared the Section 32 Report. I must assume from the fact that the documents were not part of the certified tribunal record in *Pike 2* that it was not; this may well have added to the reasons for finding the Section 32 Decision unreasonable.

[17] In her analysis, Justice Strickland considered the reasons provided by the Minister in the Section 32 Decision and the reasons provided by Ms. Leblanc in the Section 32 Report. Justice Strickland found that the record did not resolve the issue that was identified in *Pike 1* at paragraph 31, in which Justice Norris stated: "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, after raising a series of deficiencies in the analysis leading to the Section 32 Report, the Court in *Pike 2* found that there was insufficient evidence to support the Minister's assertion that Mr. Pike was sent the Special Notification Letter. Specifically, the Court found that: (a) the question raised by Justice Norris in *Pike 1*, that is, whether Mr. Pike fell within the group of 280,000 individuals who were sent the Special Notification Letter, had not been resolved; (b) there was a lack of material evidence to conclude that the Special Notification Letter was sent to Mr. Pike; and (c) there was no explanation provided as to why the letter had not been produced in Mr. Pike's record. In the end, Justice Strickland found that 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, she was not convinced that the record before the Minister established that Service Canada sent the Special Notification Letter to Mr. Pike and that it conducted a proper enquiry of the matter before rendering its decision. As a result, Justice Strickland ordered that the matter be remitted back to Service Canada so that a new section 32 investigation could be conducted by a different program consultant and a decision could be made by a different Minister's delegate taking into consideration the Court's reasons.

III. Decision under Review

[18] The record before me contains an email dated May 12, 2020, from Elizabeth Charron, Senior Legislative Officer with the OAS Policy Division of the Seniors and Pensions Policy, Secretariat of Employment and Social Development Canada [Charron Email]. It was obtained by Mr. Pike following one of two ATIP requests that he made following Justice Strickland's decision in *Pike 2*, seeking the instructions that had been given to the investigation team regarding his Section 32 Relief Request. The email provides the background and instructions on conducting the new section 32 investigation ordered by the Court, in particular the need to address the concerns expressed by the Court in *Pike 2*. The Charron Email states, in part:

> …
>
> It will be extremely important that we address each issue of concern raised by Justice Strickland in the FC decision and explain in detail how and why we came to the conclusion we did. In particular, Service Canada must explain the following:
>
> …
>
> 2. Why Mr. Pike would be included in the group slated to receive the "special notification letter", i.e. those who were currently in pay or awaiting payment between January 2013 to December 2013

> when his first OAS payment was not due until February 2014. Right now, there is confusion about how the Minister can say Mr. Pike was part of the accounts sent a letter in June 2013 when he was awaiting payment in February 2014, not between January 2013 to December 2013. We need to explain how the system scan was done and why Mr. Pike was included in the group getting letters. We need to explain that it wasn't about his effective date of payment but rather it was the fact that his account was set up in the system in March 2013 and was awaiting payment throughout the remainder of 2013. This is how he met the criteria. This is the scan that was done.
>
> 3. Why the Minister knows for sure that the "special notification letter" of June 24, 2013 was actually issued to Mr Pike despite the fact there is no copy on file. We need to explain the process/practice of how, once the scan is done, these system-generated, automatic letters are issued.
>
> …

[19] In support of the new section 32 investigation, a different program consultant, Aldrick Theodore, prepared a report dated July 21, 2021, which was signed off on that same day by Catherine Chung, Director, Centre of Expertise, NHQ [Section 32 Reconsideration Report]. Mr. Theodore set out the extensive history of Mr. Pike's file, and in the "Recommendation" section, he concluded: "Following the extensive review of Mr. Pike's file, the Minister is not satisfied that on the balance of probabilities an Administrative Error occurred under section 32 of the OAS Act."

[20] The Attorney General does not contest the fact that neither the Notification Letter received by Mr. Pike in January 2013, nor the Application Kit that was enclosed therein, nor the Award Letter received on March 24, 2013, contained any reference to the deferral option. Although the general application documents were updated on September 6, 2013, and the standard award letters were updated on April 1, 2013, in order to inform seniors of such an

option, at the time that Mr. Pike received these documents, reference to such an option was not included. Mr. Theodore confirmed that in order to address that issue, the Special Notification Letter was sent out to "individuals who are currently in pay or awaiting payment from January 2013 to December 2013." In his report, Mr. Theodore indicated that when asked to clarify SDB 605 and what was meant by the words "currently in pay or awaiting payment from January 2013 to December 2013", the "Operations Manager who was the lead for the OAS Deferral project" provided the following explanation:

> What did we mean by January 2013 to December 2013? This means the client was on the system and either eligible i.e., already in pay (receiving) benefits or awaiting benefit payment (future entitlement date) regardless of the effective (entitlement) date. E.g. Mary applied for benefits in October 2013 with a future benefit payment date of June 2014. Mary was put on the system in November 2013 as pending therefore, she was picked up by the scan of Jan to December. Her entitlement date of June 2014 did not play a part in the selection criteria.
>
> [Emphasis added.]

[21] The record also contains what is stated to be an Excel spreadsheet with information specific to Mr. Pike [Spreadsheet] that was purportedly drawn from a larger scan of client information from the OAS legacy system that supposedly represented all 280,000 individuals who met the criteria to receive the Special Notification Letter. Apart from the headings identifying the columns, the one-line Spreadsheet contains information specific to Mr. Pike, including his name, his account number, his social insurance number, his address, the information relevant to his entitlement to an OAS pension, and the line number from the larger scan – line number 183863 – on which his name appeared.

[22] In making his recommendation in the Section 32 Reconsideration Report, Mr. Theodore clearly relied upon the internal advice of the unidentified operations manager who was the lead for the OAS deferral project, as well as the Spreadsheet – again prepared by someone who was not identified – in determining that, on the balance of probabilities, Mr. Pike was one of the "individuals who are currently in pay or awaiting payment from January 2013 to December 2013"; in reliance upon the Section 32 Reconsideration Report, on July 27, 2021, a different yet unidentified Minister's delegate rendered a decision [Section 32 Redetermination Decision] denying Mr. Pike his Section 32 Relief Request for the following reasons:

> . . .
>
> In your letter received February 14, 2019, you claimed that the Department made the following administrative errors, which you feel resulted in a loss of benefits:
>
> - The OAS pension application and four-page information sheet (2012-01-01) [enclosed with the Notification Letter] sent to you on January 29, 2013, did not mention a deferral option.
>
> - The [Award Letter] sent to you on March 24, 2013, once your OAS pension was approved did not mention a deferral option.
>
> - You were not a recipient of [the special notification letter] mail-out for the Voluntary Deferral of the OAS pension sent the week of June 24, 2013.
>
> After a careful review of all the information on file by a different official of this Department we have determined that you were not subjected to a loss of benefits due to an administrative error for the following reasons:
>
> - It is true that the OAS pension application, the four-page information sheet that came with the application and the award letter you received did not mention a deferral option; the OAS pension application and its information sheet were updated to include deferral information on September 6, 2013, while the award letter was updated on April 1, 2013. However, to address this very issue, the Department sent out a special notification letter the week of June 24, 2013, to approximately 280,000 individuals who were in pay or awaiting payment from

> January 2013 to December 2013. This means that clients who were in the system and either eligible (already in pay) or awaiting benefit payment (future entitlement date) regardless of the effective date would have received the special notification letter. Our records indicate that your account was set up in OAS Online on March 21, 2013, with an effective date of February 1, 2014. Therefore, the evidence shows that you were sent the notification letter.
>
> - You are identified on line 183863 of an Excel spreadsheet listing all 280,000 individuals who met the criteria to receive the special notification letter. Your address is also identified on the spreadsheet, [address removed], and is the same to which the presumptive OAS application kit was sent to on January 29, 2013. You received the presumptive OAS application kit, as you returned it on March 6, 2013, and you also indicated this address on your OAS application under Section 7a.
>
> - With respect to the special notification letter not being on your file, only letters created manually at Service Canada processing centres are copied and placed on client files. System-generated letters programmed for automated mail-out purposes only, such as the special notification letter on deferral, are not copied to client files.
>
> …
>
> [Emphasis added.]

[23] It is the Section 32 Redetermination Decision that forms the subject matter of the present application for judicial review.

IV. Issue and Standard of Review

[24] The sole issue in this matter is whether the Minister's Section 32 Redetermination Decision, made pursuant to section 32 of the Act, was reasonable. There is a presumption that reasonableness is the applicable standard when reviewing an administrative decision, and none of the exceptions apply in this case (*Canada (Minister of Citizenship and Immigration) v*

Vavilov, 2019 SCC 65 at paras 16-17 [*Vavilov*]). As noted by the majority in *Vavilov*, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). This Court should intervene only if the decision under review does not bear "the hallmarks of reasonableness – justification, transparency and intelligibility" and if the decision is not justified "in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

V. Analysis

[25] The burden is on the person claiming the administrative error or erroneous advice to prove, on a balance of probabilities, that it occurred (*Lee v Canada (Attorney General)*, 2011 FC 689 at para 81 [*Lee*]). Moreover, as stated by Madam Justice Gauthier (as she then was) in *Jones v Canada (Attorney General)*, 2010 FC 740 [*Jones*]: "before taking remedial action, the Minister must be satisfied that the error resulted in the denial of a benefit the appellant was entitled to. Thus, there must be a causal connection, the absence of which is fatal" (*Jones* at paras 34-35). In short, the Court must assess whether the decision of the Minister's delegate was reasonable based on the available evidence (*Lee* at para 60).

[26] As stated earlier, before me, the Attorney General did not insist that Mr. Pike actually received the Special Notification Letter; it seems to be accepted that Mr. Pike did not. In *Pike 1*, Justice Norris pointed out that the SST General Division had accepted that Mr. Pike had not received the Special Notification Letter and otherwise did not know about the deferral option until shortly before he asked to cancel his pension in April 2015 (*Pike 1* at para 29). In any event,

argues the Attorney General, the Minister need not establish that Mr. Pike actually received the letter; all the Minister needs to demonstrate is that such a letter was sent to him (*Bowen v Minister of National Revenue*, 1991 CanLII 13528 (FCA), [1991] FCJ No 1054 (QL), 1991 CarswellNat 520 (WL) at para 8; *Jiang v Canada (Attorney General)*, 2019 FC 629 at paras 11, 13 [*Jiang*]). Consequently, the issue to be determined is whether it was reasonable for the Minister to find, on the balance of probabilities, that the Special Notification Letter was sent to Mr. Pike and that therefore Mr. Pike was not denied OAS benefits on account of an administrative error (section 32 of the Act). In other words, the Minister is not obligated to demonstrate that Mr. Pike received the Special Notification Letter, only that such a letter was sent (*Jiang* at paras 11, 13).

[27] Moreover, although it was not expressly determined in *Pike 2*, I believe that any failure to send the Special Notification Letter would, in this case, be an administrative error on the part of the Minister under section 32 of the Act. Although there is generally no legal obligation on the part of the Minister to inform individuals of their entitlement to a benefit or to have issued the Special Notification Letter (*Consiglio v Canada (Attorney General)*, 2016 FC 1123 at para 25), it seems to me that once the decision was made to issue the Special Notification Letter, any administrative error in so doing may well fall to be determined under section 32 of the Act. Indeed, the Minister recognized that the issuance of Special Notification Letters during the week of June 24, 2013, was rendered necessary specifically because of the failure to update the systems in a timely manner and that individuals who had already applied to receive their OAS pension might not have otherwise been aware of the legislative changes given the delay in Service Canada updating the information that was sent to individuals such as Mr. Pike. It is

therefore difficult to imagine how the failure to send him the Special Notification Letter would be anything other than an administrative error in the administration of this Act, resulting in Mr. Pike being denied a benefit, as provided for under section 32 of the Act.

[28] Mr. Pike argues that the analysis made in the Section 32 Reconsideration Report is incorrect and was arrived at through a series of administrative errors and erroneous internal advice. This dispute centres on whether Mr. Pike was included in the category of – as expressed in SDB 605, the Section 32 Decision and the Section 32 Redetermination Decision – "280,000 individuals who [were] currently in pay or awaiting payment from January 2013 to December 2013", who purportedly were sent the Special Notification Letter. As stated earlier, Mr. Pike's interpretation is that he did not fall into that category as he was not "currently in pay" during the week of June 24, 2013 – which is not disputed by the Attorney General – and more importantly, nor was he "awaiting payment from January 2013 to December 2013"; he was awaiting payment starting in February 2014. In other words, he was missed and was not issued the Special Notification Letter.

[29] The Attorney General, on the other hand, concedes that the wording used to identify the group of seniors – first expressed in SDB 605 – who would have been sent the Special Notification Letter [Receiving Group] is not clear and is admittedly somewhat confusing; the Attorney General asserts that the composition of the Receiving Group was better described in subsequent documentation. In particular, the Attorney General points to the manner in which the Receiving Group was explained by the operations manager who was the lead for the OAS deferral project and upon whom Mr. Theodore relied to prepare the Section 32 Reconsideration

Report: “the client was on the system and either eligible i.e., already in pay (receiving) benefits or awaiting benefit payment (future entitlement date) regardless of the effective (entitlement) date.” The Attorney General also points to the way it was expressed in the Section 32 Redetermination Decision: “clients who were in the system and either eligible (already in pay) or awaiting benefit payment (future entitlement date) regardless of the effective date.”

[30] The Attorney General argues that as long as Mr. Pike was approved between January and December 2013 for benefit payments, even if those payments would start in February 2014, he would be considered as “awaiting benefit payment” and thus captured by the spreadsheet created from the scan containing the names and addresses of the Receiving Group – Mr. Pike’s name was seemingly on that spreadsheet, as reproduced on the Excel Spreadsheet.

[31] The difficulty for the Attorney General, as outlined by Mr. Pike, is that in the affidavit of Ms. Charron dated April 11, 2022, and filed in support of the Minister’s position, states as follows:

> [3] A Certified Tribunal Record (CTR) was prepared and transmitted to the Applicant and the Federal Court. The CTR contained a copy of all of the documents that were before the decision maker in July of 2021.
>
> [4] The CTR contained a spreadsheet with information specific to the Applicant, drawn from a larger scan of client information from the OAS Legacy System. In July 2013, new legislative changes were coming into force that included provisions that allowed claimants, in certain circumstances, to defer their OAS pensions. ESDC requested a scan of all clients in the OAS/IA (Old Age Security / International Agreements) systems to identify clients who were already in pay or who had applied for benefits (but were not yet approved) in order to send them a “special notification letter” informing them about the new legislative changes. Those who were identified on the scan were sent a one-time “special notification letter” the week of June 24, 2013 with information

> about the upcoming legislative changes. The excel spreadsheet submitted in the CTR is the result of the scan (containing only the information specific to the Applicant). Attached as Exhibit "A" is the spreadsheet.
>
> [Emphasis added.]

[32] In her affidavit, Ms. Charron suggests that the spreadsheet containing the names of the Receiving Group identified seniors already in pay and those who had applied but had not yet been approved during the 2013 calendar year. How she knew that to be accurate is unclear, but what is clear is that such a group of individuals who "were not yet approved" did not include Mr. Pike as he was definitely approved on March 21, 2013.

[33] The Minister argues that Ms. Charron's affidavit was imprecise in that her "were not yet approved" wording was simply not complete as it did not represent a full picture of who would have been on the scan – in other words, argues the Minister, Ms. Charron did not specifically exclude those individuals who had been approved from being part of the Receiving Group. That makes no sense to me. Ms. Charron clearly stated that those captured by the scan were individuals "who were already in pay" – admittedly not Mr. Pike's case – "or who had applied for benefits (but were not yet approved)" (emphasis added). There is nothing incomplete or imprecise to what Ms. Charron has sworn. The Minister then strained to explain what Ms. Charron clearly must have meant in her affidavit, stating that, taken in context, what she meant to say was that if someone is in the system, enrolled for benefits, or has applied for benefits but has not yet been approved, or even if the person has been approved but will begin to get paid later, that person's name would be on the scan. That may be so, but that is not what

Ms. Charron stated in her affidavit, and the fact that the Minister's counsel is asking me to interpret what Ms. Charron meant to say in her affidavit is not helpful.

[34] Ms. Charron also attaches, as Exhibit A to her affidavit, the Spreadsheet. From what I can tell, the Spreadsheet makes proof of nothing other than that someone created it by purportedly taking a row of data which could have been be found in Mr. Pike's file that may have been on a scan, and reproduced the information on an Excel spreadsheet. How the OAS system was set up or programmed to create the scan or how the scan was populated with the 280,000 names is not in the record, nor is the name of the person who created the spreadsheet or the scan. The statement that the scan – which is not in the record – purportedly contains the names of the Receiving Group is solely the bald assertion of the unidentified operations manager, and there is no information as to how the operations manager knows this to be correct. Even putting aside the fact that the operations manager is unidentified, no information exists to explain whether this person was involved in setting up the program to extract the information from the OAS data bank to create the scan, how the OAS information technology system created the scan, or whether this person has any information on how the scan was created other than possibly having viewed the final product. The fact that someone stated that the Spreadsheet was extracted from the scan that contains the names of the Receiving Group, and that that Receiving Group included Mr. Pike, does not make it so.

[35] The other problem with Mr. Theodore's reliance in the Section 32 Reconsideration Report upon the statement from the operations manager who was the lead for the OAS deferral project is that the example used to explain the composition of the Receiving Group is flawed. In

the example, Mary (a fictional name was used) applied for her benefits in October 2013 and somehow made it onto the list of 280,000 individuals who received the Special Notification Letter. The obvious problem, as outlined by Mr. Pike, is that the Special Notification Letter was sent out in June 2013, well before Mary would have applied for her OAS benefits. In addition, by October 2013, both the standard application kits and award letters sent to seniors were already updated to provide for notification of the deferral option (September 6, 2013 and April 1, 2013, respectively). The operations manager's example is confusing; how or why Mary would be part of the 280,000 individuals who received the Special Notification Letter remains a mystery. In fact, our famous Mary would more likely have fallen into the category of seniors that is described in SDB 605 as follows: "All other client segments 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." Consequently, given the Section 32 Reconsideration Report's reliance upon the flawed explanation given by the operations manager who was the lead for the OAS deferral project, it is unintelligible. Just as importantly, the attempt at an explanation is contradicted by the affidavit of Ms. Charron.

[36] In *Pike 2*, Justice Strickland commented on the paucity of evidence on whether the Special Notification Letter was sent to Mr. Pike. The Court mentioned that the Section 32 Decision stated that it had been confirmed by NHQ that Mr. Pike's social insurance number was included in the list of clients selected for the Special Notification Letter. The Court also pointed to Ms. LeBlanc's statement in the Section 32 Report that a Procedure Enquiry Knowledge Management [PEKM] enquiry was sent to NHQ to confirm whether Mr. Pike was mailed the

Special Notification Letter, which was later confirmed in the August 30 Confirmation. Yet, the Court was unable to locate anything in the record identified as a PEKM sent on August 26, 2019, and I am unable to locate it in the record before me. Justice Strickland also assessed the August 30 Confirmation yet had serious concerns with the adequacy of this email and therefore found that the email could not be relied on to conclude that the Special Notification Letter was sent to Mr. Pike. Justice Strickland also mentioned that the scan referenced by Ms. Burke was not in the record and that no affidavit evidence from an individual with Service Canada was filed to confirm that Mr. Pike's name was on the scan of the purported Receiving Group; none of these shortcomings were satisfactorily corrected leading up to the Section 32 Reconsideration Report or in the record before me.

[37] Justice Strickland found that the record before her did not resolve the issue that was identified in *Pike 1* at paragraph 31, in which Justice Norris stated: "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". I must say, nor does the record before me.

[38] Finally, the file before Mr. Theodore was incomplete, as he did not have before him the regional office's determination that an administrative error had indeed taken place in Mr. Pike's case. Given that such information was not part of the certified tribunal record either before me or before Justice Strickland, the Minister concedes that it is safe to assume that such information was not before Ms. LeBlanc or Mr. Theodore in the preparation of their respective reports. From what I can tell from the cryptic reference to the determination of the "Region" in the

September 3, 2019 Note, it would seem that determination went to contradict the recommendation in the Section 32 Reconsideration Report. I am not suggesting that Mr. Theodore was bound to accept the findings of the "Region", but at the very least, he should have indicated why he disagreed with them. The fact that he was not provided with the regional office's recommendation creates an even greater problem as that means that he was not provided with the tools and information that he needed to make a proper recommendation on his own; he should have been put in a position where he had access to it and if he disagreed with it, been given the opportunity to say why. The fact that no mention was made of the recommendation of the regional office renders the Section 32 Reconsideration Report unreasonable. I find support for my determination in the Section 32 Reconsideration Report itself; in Section D – Analysis, the following instructions were provided to the program consultant, in this case Mr. Theodore, who was tasked with conducting, in this case, the section 32 investigation:

> When reviewing the information the following factors are to be considered:
>
> - Was the information provided by the Minister accurate/complete? Did the Minister provide all the information?
>
> . . .

In this case, I it cannot be said that the Minister did "provide all the information", nor can it be said that the information provided to Mr. Theodore was "complete".

[39] In short, the Section 32 Redetermination Decision was based upon the findings of the Section 32 Reconsideration Report, which were based on an unsubstantiated statement by an unidentified operations manager who provided his or her opinion as to what was meant by the words first found in SDB 605 – "are currently in pay or awaiting payment from January 2013 to December 2013" – as well as on a spreadsheet prepared by another unidentified person

purportedly reflecting a larger scan of individuals falling within what, in the opinion of the unidentified operations manager, was the Receiving Group. However, there was no information on how the scan was created, and if not created manually, how the OAS IT system was programmed to extract the necessary information to create the scan, with the whole being contradicted by the affidavit of Ms. Charron.

[40] Going back to the Charron Email, the record before me does not "explain how the system scan was done and why Mr. Pike was included in the group getting letters." In fact, the Charron Email also does not explain on what basis Ms. Charron could make the following statement:

> We need to explain that it wasn't about his effective date of payment but rather it was the fact that his account was set up in the system in March 2013 and was awaiting payment throughout the remainder of 2013. This is how he met the criteria. This is the scan that was done.

Mr. Pike argues that this was somehow a directive by Ms. Charron to the investigation team as to what the outcome of the investigation should be. I am not prepared to go that far; however, without any basis for making such a statement, it seems to me that the above statement was simply a bald assertion on the part of Ms. Charron; again, saying so does not make it so when there is no basis for understanding how Ms. Charron was able to even make such a statement.

[41] Accordingly, I find that it was not reasonable for Mr. Theodore to have concluded that the information upon which he relied to come to his finding that, on the balance of probabilities, the Special Notification Letter was sent to Mr. Pike, had any probative value and was thus sufficient as a basis on which to make his recommendation found in the Section 32 Reconsideration Report that there was no administrative error in the application of the Act. My finding as regards the Section 32 Redetermination Decision is the same as my finding as regards

the Section 32 Reconsideration Report. I find the Section 32 Redetermination Decision not to be intelligible, transparent and justified given the record before the decision maker at the time, and therefore not reasonable.

[42] Under the circumstances, the present application for judicial review will be allowed. As to costs, the parties have agreed that if I was to allow the present application, costs in favour of Mr. Pike should be set at $1,100. I see no reason to depart from the agreement of the parties on this issue.

JUDGMENT in T-431-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the decision set aside.

2. The matter is remitted back to Service Canada which will cause investigation, pursuant to section 32 of the *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. Costs are awarded in favour of Mr. Pike in the amount of $1,100.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-431-22
STYLE OF CAUSE:	KENNETH PATRICK PIKE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	OCTOBER 11, 2022
JUDGMENT AND REASONS:	PAMEL J
DATED:	FEBRUARY 6, 2023

APPEARANCES:

Kenneth Patrick Pike	FOR THE APPLICANT (On his own behalf)
Ian McRobbie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Gatineau, Quebec	FOR THE RESPONDENT