Federal Court  Cour fédérale

Date: 20170426

Docket: T-1105-16

Citation: 2017 FC 405

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 26, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

IRMA THÉRIAULT

Respondent

JUDGMENT AND REASONS

[1] The Attorney General of Canada is seeking judicial review of a decision rendered by the Social Security Tribunal of Canada – Appeal Division [SST-AD] on June 8, 2016. The application for judicial review is made pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] The situation is rather unusual in that the applicant is without an opponent before this Court, and the issue is a narrow one. Should the SST-AD have granted leave to appeal?

I. Preliminary issue

[3] Ms. Thériault chose not to participate in this application for judicial review. Furthermore, she did not concede the appeal, meaning that only the Attorney General of Canada could be heard before this Court. Nevertheless, this somewhat unusual situation does not prevent the judicial review from being heard. What must be understood is that the burden is on the shoulders of the applicant in a judicial review and that, if this burden is not discharged, the application for judicial review will be dismissed despite the absence of a respondent. I would add that the representative of the Attorney General acted with all the aplomb one could expect under such circumstances.

II. Facts

[4] Ms. Thériault, now 61 years old, sought disability benefits through the *Canada Pension Plan*, RSC 1985, c C-8. She finished Grade 12 and reportedly completed two years of post-secondary studies. She worked at a funeral home as a housekeeper and office assistant until she stopped working in July 2011 as a result of pain. She reports that her medical condition arising from fibromyalgia, osteoarthritis and irritable bowel syndrome rendered her disabled within the meaning of subsection 42(2) of the *Canada Pension Plan*. Some medical reports were filed in the record. It is unnecessary to elaborate on them because Parliament has recognized that jurisdiction for disposing of pension applications resides with the administrative tribunals. To

determine whether a judicial review should be allowed, this Court is not required to consider the merits of the pension application.

[5] According to the department that administers the pension plan, Ms. Thériault was not incapable of pursuing any substantially gainful occupation. Consequently, her disability application was denied.

III. Relevant decisions for resolving the dispute

A. *SST-GD's decision*

[6] On November 28, 2015, the Social Security Tribunal of Canada – General Division [SST-GD] rendered its decision on Ms. Thériault's application concerning the Minister of Employment and Social Development's decision to deny her disability application.

[7] After briefly summarizing the evidence and more closely examining the medical opinions filed in support of the application, the SST-GD found that the alleged disability was not severe enough to warrant benefits (paragraph 23). Paragraph 17 of the decision contains a very brief summary under the heading [TRANSLATION] "severity":

> [TRANSLATION]
> [17] The appellant has a Grade 12 education, post-secondary training, and transferable skills. She has not attempted to return to work, to retrain, or to find another job. Medical evidence indicates that her condition is mild and that only conservative treatment methods have been prescribed. The appellant testified that she is capable of completing certain household tasks, though in a modified form and at her own pace.

[8] The paragraph of the SST-GD's decision that is problematic is paragraph 18. It contains the statement made by the SST-GD with respect to the test that should be applied. It reads as follows:

> [TRANSLATION]
> [18] The Tribunal acknowledges that the appellant faces certain limitations due to her health; however, a finding of a severe disability can only be established if efforts to work in any kind of employment are unsuccessful as a result of her health.

[9] Without ever making any connection with the description of the test to be applied that is outlined in paragraph 18, the SST-GD follows with three paragraphs that, in my view, appear merely to be templates. Those paragraphs state that the severity of a disability is assessed in a [TRANSLATION] "real-world context" that takes into consideration age, level of education, language proficiency, and past work and life experience. The Tribunal cites *Villani v Canada (Attorney General)*, 2001 FCA 248 [*Villani*] to support this proposition.

[10] It states that labour market conditions are irrelevant to a determination of disability. In this regard, the Tribunal refers to *Canada (Minister of Human Resources Development) v Rice*, 2002 FCA 47. Finally, if the individual is capable of work, the decision in *Inclima v Canada (Attorney General)*, 2003 FCA 117 [*Inclima*] teaches that claimants must show that their efforts to obtain and maintain employment have been unsuccessful by reason of their health condition.

[11] These propositions are presented in succession. They lead only to the general conclusion that Ms. Thériault did not have a severe disability preventing her from pursuing a substantially gainful occupation.

B. *SST-AD's decision*

[12] The focus of the appeal before the SST-AD is on paragraph 18 of the SST-GD's decision. However, the appeal decision precedes a decision on the merits.

[13] Specifically, the SST-AD's decision relates to leave to appeal the SST-GD's decision. The *Department of Employment and Social Development Act*, SC 2005, c 34 [the Act] does not provide for an appeal as of right before the SST-AD. Rather, this appeal is subject to a screening process that requires the person seeking to appeal a decision by the SST-GD to satisfy the SST-AD that one of the grounds of appeal is present, and leave should be refused if it is satisfied that the appeal has no chance of success based on the grounds cited.

[14] Thus, section 56 of the Act specifically provides that "[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted." In this case, section 58 applies to determine the permitted grounds of appeal; it is relevant to reproduce the first four subsections:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	**(2)** La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.
Decision	**Décision**
(3) The Appeal Division must either grant or refuse leave to appeal.	**(3)** Elle accorde ou refuse cette permission.
Reasons	**Motifs**
(4) The Appeal Division must give written reasons for its decision to grant or refuse leave and send copies to the appellant and any other party.	**(4)** Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et à toute autre partie.

An individual who wishes to appeal the decision must therefore cite one of the three grounds of appeal, and the Appeal Division must be satisfied that leave to appeal should not be refused because the appeal has no reasonable chance of success. Subsection 58(2) is clearly a filter to prevent an appeal from being heard, even though it has no reasonable chance of success, as a result of the presence of a ground of appeal. However, the refusal to allow the appeal despite the presence of a ground of appeal shall be permitted only if there is no chance of success. If there is a reasonable chance of success, the appeal must be heard.

[15] It is clear that the SST-AD was not satisfied that the appeal had no reasonable chance of success. The SST-AD found that the appeal should proceed because [TRANSLATION] "the appeal has a reasonable chance of success" (paragraph 27). That is the decision for which the government is seeking judicial review.

[16] The SST-AD notes that the appeal is not a new hearing on the merits of the disability application. Simply repeating the arguments will not be sufficient to establish that one of the grounds of appeal has a reasonable chance of success. It also seems to be quite clear that there was a lack of precision in the grounds of appeal.

[17] Thus, even though Ms. Thériault had not specified how the SST-GD's decision contained an error of law, the SST-AD seems to have found one. Reproducing paragraph 18 of the SST-GD's decision, the SST-AD underlined the second part of the paragraph, namely:

> [TRANSLATION]
> . . . a finding of a severe disability can only be established if efforts to work in any kind of employment are unsuccessful as a result of her health.
>
> [Emphasis added]

It should be understood that it is the underlined part that [TRANSLATION] "is problematic" (paragraph 25).

[18] Without further explanation, the SST-AD states that, despite the reference to *Inclima*, [TRANSLATION] "the application of the case law to the present facts seems to be erroneous" (paragraph 26). Thus, the SST-AD passes directly from the underlined excerpt said to be

problematic and clearly tries to draw attention to its finding that there is a reasonable chance of success because the SST-GD did not apply the relevant case law to the facts. If we were to stop here, it could seem that this was a blatant example of an error of mixed fact and law. However, at paragraph 27, the SST-AD instead mentions an error of law described in the preceding paragraphs.

[19] On that basis alone, the SST-AD finds that the appeal has a reasonable chance of success, as required under section 58 of the Act. The SST-AD provides no explanation other than that such an error could result in the impugned decision being set aside. Leave to appeal was granted.

IV. Argument and analysis

[20] The Attorney General is seeking judicial review of the SST-AD's finding that paragraph 18 of the SST-GD's decision contains an error of law. The Attorney General, who, as noted above, has no opponent before this Court, submitted that the decision to allow an appeal to proceed before the SST-AD is unreasonable. Two arguments are presented. First, it is apparently unreasonable to find that there is a reasonable chance of success because paragraph 18 of the SST-GD's decision contains an error of law. Second, said decision is not justified, transparent or intelligible and does not fall within a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9, 1 SCR 190 [*Dunsmuir*], at paragraph 47).

[21] The Attorney General, therefore, argues that it is unreasonable to establish an error of law, because the decision would stray from the range of possible, acceptable outcomes; the decision is apparently unreasonable in this regard. It is apparently also unreasonable because it

does not meet the criteria of justification, intelligibility and transparency. The Attorney General is therefore attacking the two aspects of reasonableness, that is, the decision itself and the decision-making process.

[22] The Court finds that the decision itself with respect to an error of law falls within a range of possible, acceptable outcomes. Showing the proper deference to the decision, the Court concludes that an error of law could have been found. However, there is a lack of justification, transparency and intelligibility.

A. *Error of law*

[23] I find that the applicant correctly identified the difficulty that was raised by the SST-AD. At paragraph 34 of the memorandum of fact and law, the Attorney General states that the SST-AD noted a potential error in the concept used in paragraph 18 of the SST-GD's decision. That paragraph states that a finding of a severe disability [TRANSLATION] "can only be established if efforts to work <u>in any kind of employment</u> are unsuccessful as a result of her health." The Attorney General is correct to highlight the words "<u>in any kind of employment</u>". This may not correspond to the state of the law since the Federal Court of Appeal's decision in *Villani*. Moreover, the Attorney General very effectively describes the difficulty posed by these words at paragraph 34 of the memorandum. The Attorney General notes that the words may be indicative of [TRANSLATION] "a potential error as a result of the SST-GD's reference to efforts to work <u>in any kind</u> of employment rather than in occupations that correspond to her characteristics, such as age, education, work experience, etc." In my view, that is indeed the issue.

[24] Not ending there, the applicant refers to paragraph 19 of the SST-GD's decision, in which the Tribunal references *Villani*. The applicant submits that this is sufficient to establish that *Villani* was indeed applied in that case. Moreover, according to the Attorney General, this question does not truly arise in this case, since the evidence reportedly revealed that Ms. Thériault made no effort to find and maintain employment. It is contended that this is an essential condition for receiving a pension and that this makes the reasons purely academic; as a result, there could be no reasonable chance of success. No authority was provided to support the assertion that the reviewing court may examine the evidence to be satisfied of the mootness of an appeal.

[25] The applicant is correct that the decision to grant leave to appeal in this case is governed by the reasonableness standard (*Canada (Attorney General) v Bernier*, 2017 FC 120). I also find that the difficulty identified by the SST-AD is indeed the SST-GD's reference to an understanding of severe disability that requires that efforts to work in any kind of employment be unsuccessful as a result of the claimant's health. It appears that such a concept was part of a school of thought. However, the state of the law apparently indicates otherwise. Thus, such a statement could be contrary to the state of the law since *Villani*.

[26] In that case, the Federal Court of Appeal had to interpret subsection 42(2) of the *Canada Pension Plan*. That provision defines many of the terms used in that Act. It is paragraph 42(2)(a) that is relevant to this case, which reads as follows:

(2) For the purposes of this Act,	**(2)** Pour l'application de la présente loi :

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	**a)** une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and	**(i)** une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	**(ii)** une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

In our case, only subparagraph (i) needed to be interpreted. The question of prolonged disability was not examined.

[27] In *Villani*, the Court of Appeal had to decide between two schools of thought regarding the degree of disability required under the Act to find that there is a disability entitling the claimant to benefits. According to one school of thought, it was necessary to establish an inability to perform any physical activity or work. That school of thought was not endorsed by the Court of Appeal. Thus, paragraph 38 of the decision reads as follows:

> [38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement in a "real world" context. Requiring that an applicant be incapable *regularly* of pursuing any *substantially gainful* occupation is quite different from requiring that an applicant be incapable *at all times* of pursuing *any conceivable* occupation. Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an applicant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, it follows from this that the hypothetical occupations which a decision-maker must consider cannot be divorced from the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience.

[28] It seems rather clear to me that the test is not an individual's inability to hold any employment, as the SST-GD seems to state. If that is the test that was applied, that could constitute an error of law.

[29] The applicant's attempt to compensate for this error of law involves referring to the subsequent paragraph of the SST-GD's decision, where it refers to *Villani*. The difficulty with this argument is that the decision-maker does not make any connection between the paragraphs. Furthermore, paragraph 19 is merely a template, just as the subsequent paragraphs appear to be. With no connection to what is stated at paragraph 18, it is difficult to see how the mere acknowledgment of *Villani* mitigates what appears to be the error of law at paragraph 18. Some might argue that this only emphasizes the SST-GD's misinterpretation. In fact, the wording [TRANSLATION] "any kind of employment" is also found at paragraph 15 of the SST-GD's decision, which states that the respondent (the government) argues ineligibility because [TRANSLATION] "the medical information on file does not establish that her limitations prevent

her from performing any kind of employment." Thus, the words "any kind of employment" do not appear to have been used by mistake.

[30] The reasonableness standard applies to a decision to grant leave to appeal, which will be refused only if the Appeal Division is satisfied that the appeal has no reasonable chance of success. Clearly, the SST-AD has broad discretion that translates into ample flexibility. This broadens the range of options available to the decision-maker (*Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56; *Philipos v Canada (Attorney General)*, 2016 FCA 79). In other words, the range of possible, acceptable outcomes is broad for this type of decision. The SST-AD must establish whether an error of law might have been committed. It is not seeking a definitive finding at this preliminary stage. Is it a possible, acceptable outcome to find that the SST-GD committed an error of law? I consider the finding that a reference to the wrong test could constitute an error of law to be one of the possible, acceptable outcomes. Seeing this as an error of law is far from an impossibility: it is certainly a possible outcome on the face of the terms used in paragraph 18.

[31] The contention that the evidence does not establish that Ms. Thériault made an effort to find or maintain employment seems premature to me in trying to determine whether there is a ground of appeal that is one of the possible, acceptable outcomes. In an analysis, one should avoid addressing both together, since even the Act divides them into two different stages. That is not the issue at this stage. Specifically, we are at the stage of determining whether there is a possible error of law. Such a decision requires deference to the decision-maker. The SST-AD did not have to weigh the evidence to determine whether the test in section 42 was satisfied. First

and foremost, it was necessary to set the bar. However, placing this bar at "any kind of employment" is substantially too high and unrealistic within the meaning of *Villani*. The error of law consists of stating that the standard to be applied is an effort to work in any kind of employment, which is not the state of the law since *Villani*. If that is the test that was used, it is erroneous.

[32] The applicant submitted that despite the error of law that might have resulted from this, the SST-AD should nevertheless have refused leave to appeal because the appeal was destined to fail. However, the SST-AD still would have had to be satisfied that there was no reasonable chance of success; that decision also requires deference. According to the applicant, the SST-AD should have agreed that there was no attempt to find employment. The problem with the question of the efforts to find or maintain employment is its absolutist nature, as submitted by the applicant. In *Inclima*, the Court of Appeal appears to limit itself to ". . . where, as here, there is evidence of work capacity, [an applicant] must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition." This relativism is enhanced by *Villani*, which states that an applicant's particular circumstances have an impact when considering hypothetical occupations. Added to this is *Klabouch v Canada (Social Development)*, 2008 FCA 33, subsequent to the other two decisions, which includes the following statement: "I would add that the issue as to whether the applicant attempted to find alternative work or lacked motivation to do so was clearly a relevant consideration in determining whether his disability was 'severe'" [emphasis added] (paragraph 21).

[33] To succeed on the mootness of the entire case because leave should have been refused because the appeal allegedly has no chance of success, the applicant must ask the Court to weigh this evidence, even though neither the SST-GD nor the SST-AD did so thoroughly. As the applicant states in the memorandum, citing this Court in *Osaj*, "having a 'reasonable chance of success' in this context [subsection 58(2) DESDA] means having some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115). I myself would have proposed that the SST-AD must be satisfied that, despite the identified ground of appeal, there is no arguable ground on which the proposed appeal might succeed. The Court must resist the invitation to take the place of the specialized administrative tribunals to which Parliament has delegated the task of reviewing the facts. In my view, the problem with subsection 58(2) is elsewhere.

[34] It must, therefore, be concluded that the SST-AD identified a description of the applicable test that might not be consistent with *Villani*. I find it difficult to imagine that the error in the identification of the test could be corrected by template paragraphs. The identification of this question of law constitutes a possible, acceptable outcome in light of the state of the law since *Villani*.

B. *Reasons for decision*

[35] The final issue that needs to be addressed is whether the SST-AD's reasons are adequate. In my view, it is in this regard that the applicant must succeed in this judicial review.

[36] As it is now well established, inadequacy of reasons is not a stand-alone reason to set aside the decision of an administrative tribunal. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Court writes:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses—one for the reasons and a separate one for the result.

[37] In fact, what is required is that the reviewing court be able to "understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (paragraph 16).

[38] The SST-AD's decision is extremely undeveloped; one must literally read between the lines to understand that the question of law that would give rise to an appeal is the reference in paragraph 18 of the SST-GD's reasons to the wrong test for establishing what constitutes a severe disability. In fact, the SST-AD also discusses the application of the case law to the facts, which does not constitute an error of law, but rather a mixed error. It is at the bounds of acceptability to be able to benefit from *Newfoundland and Labrador Nurses' Union*. It seems to me that there should have been another articulation of the error of law aside from underlining the deficient wording to find that, somewhere, an error of law had allegedly been committed. Furthermore, the Supreme Court of Canada invites reviewing judges to examine the record to assess the reasonableness of the outcome (*Newfoundland and Labrador Nurses' Union*, at

paragraph 15). In fact, the Court cited with approval an excerpt from one of memoranda submitted in that case, which presented the proposition as follows:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum–the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.
>
> (*Newfoundland and Labrador Nurses' Union*, at paragraph 18)

[39] What is lacking in the case at hand is any articulation of the reasons for which the SST-AD found that the appeal should proceed. Section 58, reproduced at paragraph 14, has two elements: the only grounds that can be invoked on appeal and the refusal of leave to appeal despite the presence of a ground of appeal permitted under the Act.

[40] The *Department of Employment and Social Development Act* requires that "written reasons for its decision" (subsection 58(4)) be provided, even to grant leave to appeal. Here, no reasons are provided. At best, the SST-AD states that there is an error of law, or an error of mixed fact and law. Where are the reasons for granting or refusing leave? The English version of subsection 58(4) is articulate: "must give written reasons for its decision to grant or refuse leave." Furthermore, the state of the law continues to require that the reviewing court be able to assess the reasons to determine the lawfulness of a decision. Perfection is not required; the reviewing court may even look for reasons. However, it cannot take the place of the administrative tribunal. Speculation and rationalization are not permitted. In *Lloyd v Canada (Attorney General)*, 2016 FCA 115, the Court of Appeal stated the following:

> [24] In light of the adjudicator's findings, even on a generous application of the principles in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization. As I noted in *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[41] In this case, it seems that the SST-AD found that the articulation of the test by the SST-GD was not in accordance with the law. However, it is far from clear. How this error of law does not fall within the exception in subsection 58(2) remains impossible to identify. First, the error of law is not articulated and is barely identified and, second, the reason that it reportedly has a chance of success is in no way explained. Stating that an appeal should be allowed and that the appeal has a reasonable chance of success is not the same as providing reasons for the decision.

[42] In this case, the SST-GD did note, in the paragraph preceding the paragraph found to be problematic in law, that Ms. Thériault [TRANSLATION] “has not attempted to return to work, to retrain, or to find another job. Medical evidence indicates that her condition is mild and that only conservative treatment methods have been prescribed” (paragraph 17, SST-GD’s decision).

[43] If it is true that efforts to find employment are required to succeed or are simply an important factor, it would have been necessary, in accordance with both subsection 58(4) and the principles of administrative law, to provide the reasons for which, despite the error of law, the SST-AD did not dismiss the application for leave because the appeal had no chance of success.

[44] In my view, subsection 58(2) is part of the decision on leave to appeal. The reasons must be given not only on the existence of permitted grounds of appeal, but also on the decision to allow that appeal to proceed. One could expect that the party opposing leave to appeal would argue its reasons for which the appeal is allegedly destined to fail despite the presence of a ground of appeal.

[45] I find no indication in the Act that the written reasons must be developed. When the question is posed clearly, much of the process is already completed. It may even, perhaps, be quite obvious that the question is not frivolous and that it has a reasonable chance of success, or better.

[46] However, Parliament clearly intended that decisions on leave to appeal be given consideration. It requires the discipline of writing. The syllogism for arriving at an appeal

appears to be the following: (1) only certain grounds of appeal can receive leave to appeal; (2) despite the presence of a ground of appeal, leave may be refused; (3) reasons must be provided for decisions on leave; (4) the reasons must be given in writing. Only under these circumstances is leave to appeal granted. Clearly, it will not be in all cases that raise a valid ground of appeal under subsection 58(1) that leave to appeal must be granted.

[47] Both the Act and the rules of administrative law regarding judicial reviews require minimal reasoning for the reviewing court to perform its duties. It is difficult to conduct a judicial review of an administrative decision if its reasons cannot be identified. It is one of the most fundamental prerogatives of reasonableness that "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility . . ." (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 59). With respect, that is why I find that this matter must be referred back to the SST-AD.

V. Conclusion

[48] What has been lacking in this case is the thoroughness that makes it possible to identify the issues and dispose of them. The SST-GD uses template paragraphs. This is not forbidden, but it should be done wisely. Given the articulation of the test at paragraph 18 of its decision, the templates only lead to confusion. As for the SST-AD, some interpretation is required to understand the error of law that it appears to have identified. However, the decision to be rendered does not just involve identifying a question of law, but also finding that leave should not be refused because the appeal has no reasonable chance of success, in which case, leave for

appeal will be granted. In any event, this decision to refuse or grant leave to appeal based on the chance of success must be reasoned. The SST-AD provided no reasons for that decision.

[49] Thus, the matter must be referred back to the SST-AD, differently constituted, for the question of law to be reconsidered. Leave to appeal should be refused if the SST-AD is satisfied that the appeal has no chance of success. The decision on leave shall be substantiated in writing. If it can be accepted that the SST-AD's decision was one of the possible, acceptable outcomes, meaning that an error of law was committed, this constitutes only half of the test under section 58. *Dunsmuir* also requires that, for a decision to be reasonable, there must be justification, transparency and intelligibility in the decision-making process. That was lacking in this case. This is all the more true since the Act requires written reasons for the decision.

[50] Consequently, the application for judicial review is allowed, without costs.

JUDGMENT in T-1105-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed in order for the Social Security Tribunal – Appeal Division, differently constituted, to reconsider whether the error of law qualifies under subsection 58(2) of the *Department of Employment and Social Development Act*.

Without costs.

"Yvan Roy"
Judge

Certified true translation
This 17th day of February 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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