

Musani v. Canada (Attorney General), 2026 FCA 94 (CanLII)

Source: Federal Court of Appeal
Date: 2026-05-12
File number: A-182-25
Citation: Musani v. Canada (Attorney General), 2026 FCA 94 (CanLII), <<https://canlii.ca/t/kkx4j>>, retrieved on 2026-06-05

Date: 20260512

Docket: A-182-25

Citation: 2026 FCA 94

**CORAM: LASKIN J.A.
LEBLANC J.A.
BIRINGER J.A.**

BETWEEN:

FARRAH MUSANI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 10, 2026.

Judgment delivered at Ottawa, Ontario, on May 12, 2026.

REASONS FOR JUDGMENT BY:

LASKIN J.A.

CONCURRED IN BY:

LEBLANC J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] In this application, Farrah Musani seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal of Canada, which dismissed her appeal from a decision of the Tribunal's General Division. The General Division had for its part dismissed Ms. Musani's appeal from a reconsideration decision of the Employment Insurance Commission rejecting her request to antedate her claim for EI benefits; that is, to treat the claim as having been made earlier than it was. By subsection 10(4) of the *Employment Insurance Act*, S.C. 1996, c. 23 [*EI Act*], a claim for benefits "shall be regarded as having been made on an earlier day if the claimant shows that [they were] qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the [...] claim was made."

[2] Both Ms. Musani and her husband are Canadian foreign service officers who were, at the relevant times, posted in Berlin. In February 2022 she informed her human resources advisor that she was pregnant and expected to give birth in May 2022, following which she planned to take 26 weeks of maternal/parental leave and receive 26 weeks of maternal/parental benefits. These employer-provided “top-up” benefits are payable in addition to EI benefits, and bring a claimant’s total remuneration up to 93 percent of its ordinary level, but only if a claimant is eligible for and applies for EI benefits.

[3] After what Ms. Musani describes as a difficult and high-risk pregnancy, she gave birth in Berlin by emergency C-section on May 19, 2022. Her newborn spent several days in the neonatal intensive care unit before going home.

[4] On May 25, 2022, shortly after the birth of Ms. Musani’s child, her human resources advisor sent her an application package of documents she was to complete and submit to obtain top-up benefits. These documents included an “Employment Insurance (EI) statement.” The cover email sending her the package also suggested that she consult her collective agreement. Section 26.02 of the collective agreement included as one of the requirements for receiving top-up benefits that the employee have provided their employer with proof that they had applied for and were in receipt of benefits under the *EI Act* in respect of insurable employment with the employer.

[5] However, Ms. Musani did not apply for EI benefits during her leave, and did not receive them. Despite this failure, she was in error paid the top-up benefits. She states that she was not aware at that time that she needed to apply for EI benefits in order to receive the top-up benefits, and did not realize that the top-up benefits were being paid into her bank account.

[6] Ms. Musani states that she learned in July 2023, through discussions with another compensation advisor, that she should have applied for EI benefits. She finally did so on September 24, 2023, some 16 months after the birth of her child. The EI Commission refused her application for benefits on the basis that she did not have sufficient hours of insurable employment

during her qualifying period (September 25, 2022 to September 23, 2023). However, the EI Commission did not address Ms. Musani's request to antedate her qualifying period to May 22, 2022.

[7] Ms. Musani sought reconsideration by the Commission, maintaining her request for an antedate to May 22, 2022. She submitted, among other things, that neither she nor her husband had ever before applied for EI benefits; they had understood that there was only one application process to follow and assumed that her employer would look after it; they did not notice that they were not receiving regular EI benefits; there had been a delay by her advisor in completing the paperwork; by the time it was completed her baby had been born; she had remained in Berlin during and after her pregnancy and had therefore not been able to discuss the application process with advisors, friends, and colleagues; the time zone difference between Germany and Canada also made it difficult for her to obtain information; and having a new baby meant that she had been operating with little sleep and virtually no time to attend to personal matters. On reconsideration, the Commission maintained its initial decision.

[8] Ms. Musani appealed the reconsideration decision to the Tribunal's General Division, again requesting an antedate to May 22, 2022. She again raised the difficulties associated with a first child, especially one born to mature parents and outside Canada.

[9] Referring to subsection 10(4) of the *EI Act* and to case law of this Court (*Canada (Attorney General) v. Burke*, 2012 FCA 139 at para. 5; *Canada (Attorney General) v. Somwaru*, 2010 FCA 336 at paras. 7-11; and *Canada (Attorney General) v. Kaler*, 2011 FCA 266 [*Kaler*] at paras. 4-7, the General Division held that to show good cause, an appellant must prove that they acted as a reasonable and prudent person would have acted in similar circumstances, and did so for the entire period of delay. They must also show either that they took reasonably prompt steps to ascertain their entitlement to benefits and their obligations under the law, or that there were exceptional circumstances that explain why they failed to do so. These requirements are "both demanding and strict." Moreover, ignorance of the law, even if coupled with good faith, is not sufficient to establish good cause: *Kaler* at para. 4.

[10] Applying these and related propositions of law, the General Division dismissed the appeal. It acknowledged that there can be challenges for parents with a first child, and that these could be greater with a birth outside of Canada, but found that there were no exceptional circumstances that prevented Ms. Musani from applying for EI benefits or rendered it exceptionally difficult to claim them. Moreover, while she “had a duty to inquire about her rights and obligation and the steps that should be taken to protect her claim for benefits,” she had “made no effort to find out her rights and obligations under the Act.”

[11] Ms. Musani advised the General Division that her employer was clawing back the top-up benefits it had paid her, and that she was now experiencing serious further health issues. While the General Division expressed sympathy for her position, it stated that it could not rewrite the legislation and that absent good cause for her delay, which she had failed to establish, her application could not be antedated.

[12] Ms. Musani sought and obtained leave to appeal to the Appeal Division. As set out in the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, s. 58(1), the only grounds of appeal permitted in an appeal of this nature are that the General Division (1) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (2) erred in law in making its decision; or (3) 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.

[13] The Appeal Division dismissed the appeal. It found that the General Division had erred in one respect: in finding as a fact that Ms. Musani’s actions throughout were consistent with a lack of concern or negligence. The evidence, it found, supported a finding that Ms. Musani engaged with her compensation advisor to clarify the next steps and pursue her EI application from August 23, 2023 forward, so that she had good cause from that date.

[14] But as the Appeal Division observed, that finding was not, in the result, of any real help to her. Based on an August 23, 2023 good cause date, her qualifying period would have begun in August 2022. Ms. Musani was on leave during that period, but even if she had worked full-time during that additional month, it was doubtful, the Appeal Division stated, that she could have accumulated sufficient hours to qualify for EI benefits.

[15] Before I proceed further, there are three preliminary issues that require consideration.

[16] The first is a procedural issue relating to the style of cause. In her notice of application, Ms. Musani named the Canada Employment Insurance Commission as respondent. This was an error. [Rule 303](#) of the *Federal Courts Rules*, SOR/98-106, requires in circumstances like those here in which there is no one directly affected by the order sought or required to be named by law, the Attorney General of Canada is to be named as respondent; see, for example, *Mercer v. Canada (Attorney General)*, [2012 FCA 37](#) at para. 9. The style of cause in this Court's judgment and these reasons now reflects this requirement, as it should in any future documents in this proceeding.

[17] The second preliminary issue is the proper standard of review. The parties agree that the standard of review of the Appeal Division's decision should be reasonableness. This is the standard that this Court and the Federal Court have applied even when *Charter* values are properly engaged: *Sturgeon v. Canada (Attorney General)*, [2026 FCA 46](#) at para. 9.

[18] The third, and most significant, preliminary issue in this application arises from the inclusion in Ms. Musani's memorandum of fact and law before this Court of some 35 paragraphs of submissions asserting that the Appeal Division's decision should be set aside as unreasonable because the Appeal Division failed to balance *Charter* rights and *Charter* values: Applicant's memorandum, paras. 34-73. She made extensive oral submissions before this Court to the same effect.

[19] Ms. Musani was represented by counsel before both the General Division and the Appeal Division. Yet she made no reference to the *Charter* or *Charter* values in either administrative forum, and raised it for the first time as a potential ground for relief only in her notice of application to this Court for judicial review.

[20] The third preliminary issue, therefore, is whether this Court should consider Ms. Musani's *Charter* arguments. In my view, it should not do so.

[21] Courts have a discretion whether to consider an issue, including a *Charter* issue, raised for the first time on judicial review. They will ordinarily exercise this discretion against hearing the issue where, as here, the issues the applicant seeks to raise could have been but were not raised before the administrative tribunal. Thus “[i]t is too late, on judicial review, to raise new arguments that were not raised before the administrative tribunal”: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 22-23 [*Alberta Teachers*]; *Sturgeon v. Canada (Attorney General)*, 2026 FCA 46 at paras. 10, 12.

[22] This and other courts have recognized the sound reasons for this position. They include, first, respect for the legislative choice to vest in the administrative tribunal, and not the courts, the responsibility to determine at first instance the merits of the factual, legal, and constitutional issues within their authority. Bypassing the tribunal also risks depriving the court of the benefit of the views of the tribunal, grounded in its experience and expertise. It may, in addition, prejudice responding parties' ability to contribute to the building of an adequate record because, as the Attorney General observes here, “there is little opportunity to adduce countering evidence on judicial review”: *Alberta Teachers* at paras. 24-26; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at paras. 37-46; Respondent's memorandum at para. 31.

[23] Ms. Musani states in paragraph 36 of her memorandum in this Court that she “invoked the *Charter* value of equality.” This is presumably a reference to what occurred in her appeals to the General Division and the Appeal Division. In my view the record does not bear out her assertion.

[24] In her notice of appeal to the General Division (Respondent's Record at pg 549), Ms. Musani set out the errors she was alleging as that the Commission's decision "failed to consider extenuating circumstances, lacked procedural fairness and was based on incorrect dates." There was no reference to the *Charter* or *Charter* values. Nor was there any discussion of these matters either during the hearing or in the General Division's reasons.

[25] What occurred in the appeal to the Appeal Division was very similar. In her application for leave to appeal to the Appeal Division, which became her notice of appeal once leave was granted, Ms. Musani set out as follows (Respondent's Record at pg 274) the errors she was asserting the General Division had committed:

the General Division made a number of important errors of fact and/or law, as well as an error of procedural fairness:

- a. The General Division failed to consider the exceptional circumstances [she] was facing;
- b. The General Division failed to consider that [she] did have good cause for [her] delay in applying for EI benefits; and
- c. The General Division failed to grapple with the prejudice caused by the Commission's mistakes.

[26] None of these alleged errors engaged the *Charter* or *Charter* values. Rather, their focus was on whether Ms. Musani had met the statutory prerequisites for obtaining an antedate. There was, again, no discussion of *Charter* issues during the hearing of the appeal to the Appeal Division, and none in the Appeal Division's reasons.

[27] At the outset of the hearing of this application (beginning at 3:04 in the recording), the following exchange took place between the Court and counsel for Ms. Musani:

THE COURT: Is it your position, Ms. Lodge, that the *Charter* matter, the *Charter* issue, was raised before the General Division and the Appeal Division?

COUNSEL: Our position was that the decision-maker should have been alive to the *Charter* at both of those instances, yes.

THE COURT: But was it raised?

COUNSEL: The words “the *Charter*” were not directly raised but our submissions, which raised questions of equality, were raised throughout, so yes.

[28] On the record before us, I would not accept this submission. Whatever counsel might have observed and understood, I would conclude that the Appeal Division cannot be faulted for failing to address arguments that were never put to it. It is too late now for this Court to consider Ms. Musani’s *Charter* arguments.

[29] That conclusion leaves for consideration Ms. Musani’s submission that the Appeal Division’s decision was otherwise unreasonable. The sole task before this Court, then, is to determine whether “it was reasonable on this evidentiary record for the Appeal Division to find that the General Division did not make erroneous findings in a perverse or capricious manner or without regard to the material before it”: *Dhalla v. Canada (Attorney General)*, [2022 FCA 94](#) at para. 7. Ms. Musani submits that it was unreasonable in three respects.

[30] First, she submits, it was unreasonable because the Appeal Division “failed to reasonably consider several key pieces of evidence and fact” relating to her physical and mental condition during the period for applying for EI, which she stated materially hindered her ability to attend properly to the application process. Second, she submits that the Appeal Division failed to grapple with one of her central arguments—that “her mental and physical condition during the EI Application Period was compromised due to her high-risk pregnancy, emergency C-section and stress associated with her newly born child in the NICU,” which amounted to exceptional circumstances. On this point, she further submits that the Appeal Division entirely failed to consider her core argument that she had relied on representations from her employer and advisor, who had indicated that there were no errors on her forms, and that her “first indication that any error had happened was when the Compensation Advisor contacted her well over a year after the application was to be completed.” Finally, she submits that the Appeal Division’s decision was unreasonable because it was unintelligible and unjustifiable.

[31] With respect to the first two issues, it is established law that a “tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all of the evidence,” and that “assigning weight to evidence [...] is the province of the trier of fact”: *Simpson v. Canada (Attorney General)*, [2012 FCA 82](#) at para. 10. Moreover, the Appeal Division squarely addressed (at paragraphs 47 to 53 of its reasons) Ms. Musani’s physical and mental state, as well as her reliance on the Government of Canada as a foreign service diplomat, concluding that although she had challenges, they were not so severe as to absolve her of her basic duty to make inquiries about her rights and obligations with respect to EI. The Appeal Division also considered in detail (at paragraphs 57 to 62 of its reasons) Ms. Musani’s interactions with and reliance on her employer and compensation advisor, and concluded that the General Division could reasonably find that her situation was not “exceptional,” given that all that was required of her was to confirm the correctness or otherwise of her understanding.

[32] In submitting that the Appeal Division decision was unintelligible and unjustifiable, Ms. Musani argues that the Appeal Division unreasonably implied that she was acting negligently; that the Appeal Division made unintelligible findings with respect to its calculation of the relevant insurable hours; and that the Appeal Division “drew unjustifiable and unintelligible conclusions about the Applicant’s state of mind regarding her efforts to complete the required forms.”

[33] None of these arguments can stand. First, the Appeal Division (at paragraph 70) explicitly found that the General Division had erred in finding that Ms. Musani’s actions were consistent with negligence, and antedated the application for a month to correct for that error. The Appeal Division’s other findings do not imply negligence, only that Ms. Musani had failed to take positive steps to determine her obligations with respect to EI. Furthermore, save for its typographical or clerical error in referring to August 2022 as one month prior to August 2023 (when it clearly was referring to July 2023 as the beginning of the qualifying period), the Appeal Division applied the statutory scheme with respect to insurable hours in an entirely straightforward manner. Finally, the Appeal Division’s findings with respect to Ms. Musani’s state of mind were intelligible, and clearly contemplate that she had assumed everything was in order in light of the top-up payments she received.

[34] This Court acknowledges that Ms. Musani endured a difficult pregnancy, birth, and postpartum period, and now faces a very frustrating situation, particularly given her further health condition and the clawback of the amounts paid to her in error. However, the role of the Appeal Division and this Court is narrowly circumscribed. The Appeal Division was alive to the relevant arguments presented, and produced reasonable, coherent, and responsive reasons. There are accordingly no grounds for this Court to intervene.

[35] For the reasons set out above, I would dismiss this application. The Attorney General does not seek costs, and none will be awarded.

“J.B. Laskin”

J.A.

“I agree.

René LeBlanc J.A.”

“I agree.

Monica Biringer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-182-25
STYLE OF CAUSE:	FARRAH MUSANI v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 10, 2026
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	LEBLANC J.A. BIRINGER J.A.
DATED:	MAY 12, 2026

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