Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. D. v Minister of Employment and Social Development*, 2019 SST 1038

Tribunal File Number: AD-19-653

BETWEEN:

D. D.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: October 16, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, D. D., was born in July 1949 and entered Canada as a landed immigrant in March 1979, having previously lived in India, Iran, and the United States. In May 2015, he applied for an Old Age Security (OAS) pension and Guaranteed Income Supplement (GIS), claiming that he had continuously resided in Canada for the previous 36 years.

[3] The Respondent, the Minister of Employment and Social Development (Minister), asked the Applicant for proof of his Canadian residence. It sent him questionnaires. It assigned an investigator to interview him multiple times. It requested documentation to show that he had been living in Canada, such as leases, bank statements, and copies of his current and expired passports.

[4] In a letter dated January 30, 2018, the Minister refused the Applicant's OAS and GIS applications because, in its view, the Applicant had failed to provide sufficient evidence showing that he had ever resided in this country: "The information in your file shows that you have spent more time living and travelling abroad than in Canada."[1] The Minister later confirmed its position on reconsideration.

[5] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by videoconference and, in a decision dated June 25, 2019, dismissed the Applicant's appeal. The General Division found that, on balance, the Applicant did not demonstrate deep-rooted ties to Canada. In particular, it found that the Applicant lacked credibility when he testified about his residential and work history.

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[1] Minister's refusal letter dated January 30, 2018, GD2-151.

[6] On September 23, 2019, the Applicant requested an appeal from the Tribunal's Appeal Division, alleging that the General Division had committed various errors in coming to its decision, among them:

- The General Division found the Applicant's evidence deficient yet did not request additional documentation or witness statements;
- The General Division called the Applicant's oral testimony unreliable but did not support this finding with anything concrete;
- The General Division assumed that information from the Canada Revenue Agency (CRA) about the Applicant's earnings history was infallible;
- The General Division drew a negative inference from the Applicant's lack of reported earnings without realizing that others may choose more entrepreneurial and self-directed paths in life; and
- The General Division chose to ignore much of the Minister's evidence.

[7] Having reviewed the Applicant's submissions against the record, I have concluded that this is not a suitable case in which to grant leave to appeal.

ISSUES

[8] According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[9] An appeal may be brought only if the Appeal Division first grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The

[2] DESDA at ss 56(1) and 58(3).
[3] *Ibid*. at s 58(1).

Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[10] I must determine whether the Applicant has raised an arguable case on the following questions:

Issue 1: Did the General Division err by not requesting additional documentation or witness statements?

Issue 2: Did the General Division err when it found the Applicant's oral testimony unreliable?

Issue 3: Did the General Division err in assuming that information from CRA is infallible?

Issue 4: Did the General Division inappropriately draw a negative inference from the Applicant's lack of reported earnings?

Issue 5: Did the General Division err by choosing to ignore much of the Minister's evidence?

ANALYSIS

Issue 1: Did the General Division err by not requesting additional documentation or witness statements?

[11] I do not see an arguable case for this submission.

[12] It is important to keep in mind that the burden of proof lies with the person claiming entitlement to OAS benefits.[5] The onus is on the Applicant to prove that he is entitled to OAS benefits; it is not the job of the Minister or the General Division to prove that he is not. By the time the Applicant appeared before the General Division, he had had more than four years to marshal evidence showing that he had been a resident of Canada since 1979. He took advantage of that opportunity, submitting testimonial letters and other evidence in support of his claim.

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[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[5] *De Carolis v Canada (Attorney General)*, 2013 FC 366.

[13] The Applicant specifically alleges that the General Division dismissed a letter[6] from S. K., his friend of 26 years, on what he sees as invalid reasons—that the letter was vague, not subject to questioning, and relevant to only a limited timeframe. However, the General Division dismissed, not just the S. K. letter, but four other letters for those reasons, noting that only "some" of them were worthy of less weight because they addressed short periods. In my view, the General Division acted within its mandate as trier of fact to find all five of the letters "vague," and it was not wrong to discount them because their authors could not be cross-examined.

[14] It was up to the Applicant to present the best possible evidence in support of his claim. In doing so, he owed it to himself to identify potential weaknesses in that evidence and, where possible, address those weaknesses. The Applicant chose to submit the five testimonial letters, but he also had the option of lending them greater weight by calling witnesses, including the letter writers themselves.[7] He chose not to do so. The General Division cannot be blamed for having noted some of the deficiencies in the evidence that was before it.

Issue 2: Did the General Division err when it found the Applicant's oral testimony unreliable?

[15] I do not see an arguable case for this submission.

[16] The Applicant denies that his testimony lacked credibility and accuses the General Division of relying on "perceptions, suppositions, and beliefs."

[17] As trier of fact, the General Division is owed a measure of deference in how it assesses the evidence, particularly on findings of credibility.[8] That principle is reflected in the wording of section 58(1)(c) of the DESDA, which permits a decision to be overturned only if a factual error has been made in a "perverse or capricious manner" or "without regard for the material." Here, the General Division found that the Applicant's testimony did not meet the "common-sense

[6] Letter from S. K. dated March 12, 2019, GD5-6.
[7] The Applicant alleged that the Tribunal discouraged him from bringing witnesses to the hearing. I saw nothing on the record to substantiate this claim.
[8] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

test,"[9] but it did not make this finding casually. It identified two specific instances in which the Applicant's testimony was at odds with the documentary evidence:

- The Applicant testified that, after arriving in Canada, he worked in the hospitality industry, earning between $30,000 and $40,000 from 1979 to 1984. The General Division noted that the Applicant's record of earnings (ROE)[10] reflected only marginal income during those years.
- The Applicant stated that he owned and operated a Vancouver-based international consultancy that employed between six and eight people between 1984 and 1992. The General Division noted that the Applicant did not produce any documentation to substantiate this enterprise, nor did he furnish any evidence to show that he generated any income from it.

Credibility is always a relevant factor in proceedings of this kind, and I do not see how the General Division erred by identifying discrepancies between what the Applicant said and what, according to the written record, he actually did.

[18] The Applicant also suggests that the General Division's reasons for doubting him were based on personal prejudices and Western norms.

[19] Again, I do not see an arguable case here. The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues. The Supreme Court of Canada[11] has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough.

[20] An unfavourable outcome is not, by itself, evidence of impartiality. The Applicant alleges that the presiding member brought a closed mind to the proceedings but, apart from disagreeing

[9] General Division decision, para 19.
[10] GD2-3.
[11] *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

with its findings, he has not offered any concrete examples of how the General Division exhibited cultural or personal prejudice.

Issue 3: Did the General Division err in assuming that information from the CRA is infallible?

[21] As he did at the General Division, the Applicant maintains that his ROE, which was compiled from information supplied by the CRA, is incorrect.

[22] I do not see an arguable case for this submission. Under section 97(1) of the *Canada Pension Plan*, a contributor's ROE is presumed to be accurate once four years have elapsed from the time the entries were made. As such, the General Division was within its authority to rely on the Applicant's ROE and, what is more, ask why the Applicant registered no earnings or Canada Pension Plan (CPP) contributions between 1981 and 2009. As we will see, the General Division was also within its authority to find the Applicant's answer to that question less than satisfactory.

Issue 4: Did the General Division inappropriately draw a negative inference from the Applicant's lack of reported earnings?

[23] The Applicant's ROE shows annual employment earnings between $4,000 and $12,000 in 1979–80, followed by a 28-year gap and a resumption of earnings in 2009, with reported income never exceeding $8,500 over the next five years.[12]

[24] At the General Division hearing, the Applicant portrayed himself as a self-employed entrepreneur whose business ventures were not always successful, preventing him from making CPP contributions in every year. The Applicant suggests that the General Division drew an unwarranted negative inference from his career, which did not involve salaried positions with job security:

> The Member's assumptions vis-a-vis the nature of motivation for work, i.e. financial gain only, do not take into account the need of the [Applicant]—or indeed any person—for self-actualization, and are thus invalid.

[12] A code ("S") on the ROE indicates that the Applicant's Unadjusted Pensionable Earnings from 2009 to 2013 were derived from self-employment income.

[25] In my view, this submission does not have a reasonable chance of success on appeal. The Applicant was asked to explain a decades-long gap in his earnings history and, in response, he pointed to his years of self-employment, including periods in which his ventures generated little income, as well as his particular lifestyle choices. The General Division did not find these explanations persuasive, and that was its prerogative as trier of fact.

[26] The Applicant also insisted that his ROE was wrong and that the CRA had failed to record and report all of his earnings over the years. As noted above, the General Division also found this unlikely:

> I do not believe he [*sic*] if the errors were of this magnitude that he would not follow up to have the matter corrected. A few alleged phone calls is not consistent with the importance of the issue to the [Applicant]. A 40-year history of contributions would result in a significant change in his finances. I do not accept it as logical or in keeping with common sense that he would not pursue the issue of 40 years of lost contributions.

In this passage, the General Division was merely making the reasonable point that, if the Applicant's ROE was in fact missing years of earnings and contributions, he was free to ask the Minister to correct the record.[13] Instead, he accepted a CPP pension of $55 per month, which he claimed was now his only source of income.

[27] In short, I do not see an arguable case that the General Division's findings on this matter were "perverse or capricious" or "made without regard for the record."

Issue 5: Did the General Division err by choosing to ignore much of the Minister's evidence?

[28] I do not see an arguable that the General Division ignored evidence.

[29] The Minister refused the Applicant benefits for many reasons, which it set out in an 18-page brief[14] that referred to a wide assortment documentary evidence, including the Applicant's available passports, his Canadian Border Services Traveller History Report, and his own written statements. It is true that the General Division did not refer in its decision to most of the

[13] An explicit provision for rectifying ROE entries is found at section 97(2) of the *Canada Pension Plan*.
[14] GD3.

Minister's arguments or supporting material, choosing to base its decision on the disconnect between what the Applicant said about his work history at the hearing and what was documented about it on the record. Indeed, the General Division explicitly declared its approach in paragraph 18 of its decision:

> I acknowledge the submissions of the Minister and their diligence in investigating the [Applicant's] application. There was no need to explore all the issues enumerated by the Minister as I based my decision on the lack of credibility of the alleged residence and work history of the [Applicant].

[30] In administrative tribunals, the decision-maker is presumed to have considered all the material before it and need not refer in its reasons to each and every item of evidence on the record.[15] In this case, the General Division signalled that it was aware of the Minister's other submissions but chose to focus on the Applicant's failure to convincingly explain selected gaps in the evidence. I see no error of law or fact in this approach, particularly where the submissions that the General Division allegedly ignored were prepared by the opposing party and therefore harmful to the Applicant's case.

CONCLUSION

[31] Since the Applicant has not identified any grounds of appeal under section 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave is refused.

Member, Appeal Division

REPRESENTATIVE:	D. D., self-represented

[15] *Simpson, supra.*