

**Citation: *O. B. v. Minister of Employment and Social Development*, 2015 SSTAD 549**

**Date: May 4, 2015**

**File number: AD-15-14**

**APPEAL DIVISION**

**Between:**

**O. B.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(formerly known as the Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Valerie Hazlett Parker, Member, Appeal Division**

**Decided on the record on May 4, 2015**

## REASONS AND DECISION

### INTRODUCTION

[1] The Appellant applied for a pension under the *Old Age Security Act* in April 1990. In June 2011 she requested a review of her Old Age Security pension (OAS pension) as she wished to have her years of residence in Italy utilized to qualify for a full OAS pension instead of a partial pension. The Respondent denied this request. The Appellant appealed this to the Office of the Commissioner of Review Tribunals. On April 1, 2013 the appeal was transferred to the General Division of the Social Security Tribunal pursuant to the *Jobs, Growth and Long-term Prosperity Act*. The General Division dismissed the Appellant's appeal on November 11, 2014.

[2] The Appellant's sought leave to appeal to the Appeal Division of this Tribunal. She argued that the General Division erred in its decision as it relied on the terms of a treaty between Canada and Italy regarding social benefits that was not in force. Leave to appeal was granted on this basis.

[3] The Appellant submitted that the appeal should be allowed and that she should be granted a full OAS pension based on the totalization of her years of residence in Canada (11 years) and Italy (39 years). She contended that the *Agreement of Social Security Between Canada and Italy* dated November 1977 is in force and permits this. Finally, she argued that this treaty is not clear that section 3(1) of the *Old Age Security Act* is to be exempted from its application.

[4] The Respondent conceded that the General Division erred by relying on a treaty between Canada and Italy that was not in force. It submitted, in addition, that this was not "fatal" as the General Division decision was correct that the Appellant could not totalize her years of residence in Canada and Italy to receive a full OAS pension, but only to permit the pension to be paid to her while outside of Canada. Therefore, the Respondent submitted, the appeal should be dismissed.

[5] The matter was decided based on the written record. This appeal concerned the interpretation of legislation and a Treaty and both parties filed lengthy and detailed submissions to support their positions. In addition, the parties resided in different countries so videoconferencing was not available, and the Appellant did not have a telephone. The parties were advised in writing that the decision would be made based on the written record and given a reasonable amount of time to file any further submissions prior to the decision being made. I considered all of the written submissions filed by the parties in support of the leave to appeal application and the appeal in making this decision.

## **STANDARD OF REVIEW**

[6] The Appellant made no submissions regarding what standard of review should be applied in this case. The Respondent made lengthy submissions on this. It argued that as this case involves an error of law, the standard of correctness should be applied.

[7] The leading case on this is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. For questions of law, and jurisdiction, the standard of review is correctness.

[8] The Respondent is correct that no Court has yet examined specifically what standard of review the Appeal Division of the Social Security Tribunal should apply to decisions made by the General Division of this Tribunal. I note, however, that the Federal Court of Appeal, in *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, and *Kiraly v. Canada (Attorney General)*, 2015 FCA 66 applied the reasoning in *Dunsmuir* to decisions of the Appeal Division. For reasons set out below, I do not find it necessary in this case to identify which standard of review is the proper one to apply in this case.

[9] I must decide whether the appeal should be allowed, and if so what remedy should be granted.

## ANALYSIS

[10] This case turns on the terms of the *Agreement of Social Security Between Canada and Italy* dated November 1977 that came into force on December 20, 1978 (Treaty). The Appellant argued that the General Division erred because it referred to a version of this Treaty that is not in force. The Respondent agreed.

[11] The General Division decision did not set out the date of the Treaty that it relied on in making its decision. From a review of the Treaty, however, it is clear that it was not this one. I am therefore satisfied that the General Division decision contained an error in law as it relied on a Treaty that was not in force when it made its decision.

[12] The Respondent argued that this error should not be “fatal” and that the appeal should be dismissed because the General Division, despite relying on the wrong law, made the correct decision. I am not persuaded by this argument. The terms of the Treaty are critical to the resolution of this matter. A decision based on the wrong law cannot stand. It is both unreasonable and incorrect to base a decision on the wrong Treaty.

[13] On this basis, the appeal must be allowed.

[14] This, however, is not the end of the inquiry. Section 59 of the *Department of Employment and Social Development Act* permits the Appeal Division to give the decision that the General Division should have given when disposing of an appeal. As this case depends entirely on the interpretation of the legislation and Treaty and both parties have filed extensive submissions on how these documents should be interpreted, I am satisfied that this is an appropriate case to give the decision that the General Division should have given. The relevant legislative and Treaty provisions are in the Appendix to this decision.

[15] The OAS pension is payable to Canadians living in Canada or abroad based on residency. This residency is relevant in two ways. First, a person must have resided in Canada for a minimum period of time to be eligible to be paid the pension. Second, a person must have resided in Canada for a different minimum period of time to receive pension payments while residing outside of Canada.

[16] In this case, it is not disputed that the Appellant resided in Canada for 11 years, but not in the ten years prior to her application for an OAS pension. Therefore, pursuant to subsection 3(1) of the OAS Act, she was entitled to receive a partial pension. With 11 years of residence in Canada she was entitled to 11/40th of a full pension.

[17] The Treaty does not assist the Appellant to have an OAS pension payment increased by her years of residency outside of Canada. Paragraph 2 of Article XI of the Treaty states clearly that the OAS Act applies, except subsection 3(1) which is the section that permits an applicant to qualify for a full pension based on residency. Therefore, the Appellant's years of residence in Italy do not assist her to qualify to receive a full OAS pension payment.

[18] In addition, Paragraph 5 of Article XI of the Treaty states that the theoretical amount of the pension payable by Canada is to be calculated, then prorated by the actual number of years that the applicant resided in Canada (see subparagraph 5(b)). It does not permit the Appellant's Italian residency to be added to her Canadian residency to increase the amount of the pension payment that she is entitled to.

[19] Section 9 of the OAS Act provides that the OAS pension is not payable to applicants when they are outside of Canada because they have left, or because they reside in another country, unless they have resided in Canada for at least 20 years after attaining age 18. The Appellant resided in Canada for 11 years, so would not be able to receive her pension in Italy.

[20] However, the Treaty assists the Appellant in this regard. Paragraph 3 of Article XI permits an applicant to add her years of residence in Canada to her years of residence outside of Canada for the purpose of having the pension paid to her while residing in Italy. When the Appellant's 11 years of residency in Canada is combined with her 39 years of residency in Italy, she has over 20 years of residency after age 18. Therefore, the partial pension can be paid to her while she resides outside of Canada.

[21] Therefore, on a plain reading of the OAS Act and the Treaty, the Appellant was entitled to receive a partial pension (11/40th), to be paid to her while residing outside of Canada.

[22] The Appellant argued that the Treaty is not clear as the English version refers to subsection 3(1) of the OAS Act, the French version refers to paragraphe 3(1) and the Italian version refers to articolo III(1). She contended that these are not the same, and therefore there is uncertainty about what provisions of the OAS were to be excluded under the Treaty. I am not persuaded by this argument. Subsection 3(1) of legislation in English has the same meaning as paragraphe 3(1) in French. It is clear that the parties to the Treaty intended to exclude this provision of the OAS Act. This argument fails.

## **CONCLUSION**

[23] The appeal is allowed because the General Division made an error in law that was both incorrect and unreasonable.

[24] The Appellant's claim for a full *Old Age Security Act* pension is dismissed for the reasons set out above.

*Valerie Hazlett Parker*  
Member, Appeal Division

## **APPENDIX**

### **Department of Employment and Social Development Act**

58. (1) The only grounds of appeal are that
- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
  - (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
  - (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.
58. (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.
59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

### **Old Age Security Act**

3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to
- (a) every person who was a pensioner on July 1, 1977;
  - (b) every person who
    - (i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,
    - (ii) has attained sixty-five years of age, and
    - (iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and

has resided in Canada for at least one year immediately preceding the day on which that person's application is approved; and

(c) every person who

(i) was not a pensioner on July 1, 1977,

(ii) has attained sixty-five years of age, and

(iii) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least forty years.

(2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and

(a) has attained sixty-five years of age; and

(b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.

(3) Subject to subsection 7.1(3), the amount of a partial monthly pension, for any month, shall bear the same relation to the full monthly pension for that month as the aggregate period that the applicant has resided in Canada after attaining 18 years of age and before the day on which the application is approved, determined in accordance with subsection (4), bears to 40 years.

(4) For the purpose of calculating the amount of a partial monthly pension under subsection (3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.

(5) Once a person's application for a partial monthly pension has been approved, the amount of monthly pension payable to that person under this Part may not be increased on the basis of subsequent periods of residence in Canada.

9. (1) Where a pensioner, having left Canada either before or after becoming a pensioner, has remained outside Canada after becoming a pensioner for six consecutive months, exclusive of the month in which the pensioner left Canada, payment of the pension for any period the pensioner continues to be absent from Canada after those six months shall be suspended, but payment may be resumed with the month in which the pensioner returns to Canada.



(2) In the circumstances described in subsection (1), payment of the pension may be continued without suspension for any period the pensioner remains outside Canada if the pensioner establishes that at the time the pensioner left Canada the pensioner had resided in Canada for at least twenty years after attaining the age of eighteen years.

(3) Where a pensioner ceases to reside in Canada, whether before or after becoming a pensioner, payment of the pension shall be suspended six months after the end of the month in which the pensioner ceased to reside in Canada, but payment may be resumed with the month in which the pensioner resumes residence in Canada.

(4) In the circumstances described in subsection (3), payment of the pension may be continued without suspension if the pensioner establishes that at the time the pensioner ceased to reside in Canada the pensioner had resided in Canada for at least twenty years after attaining the age of eighteen years.

## **Agreement of Social Security Between Canada and Italy (November 1977)**

### **Article XI**

1. If a person is entitled to old age benefit under the legislation of either Party without recourse to the following provisions of this Article, the benefit payable under the legislation of Italy shall be payable in the territory of Canada; and the benefit payable under the legislation of Canada shall be payable in the territory of Italy provided that either the number of years of residence in Canada under legislation of Canada total to at least twenty, or the periods of residence in the territories of both Parties aggregated pursuant to the rules referred to in paragraph (4) of this Article when expressed as years in Canada total to at least twenty.

2. The legislation of Canada applicable to the remaining provisions of this Article shall, notwithstanding any other provision in this Agreement, be the Old Age Security Act excepting subsection 3 (1) of that Act.

3. If a person is not entitled to old age benefit on the basis of the periods credited under the legislation of either Party, entitlement to old age benefit shall be determined by totalizing the credited periods in accordance with the provisions of the succeeding paragraphs of this Article.

4.  
a. For purposes of determining the amount of old age benefit payable by Canada under paragraph (5) of this Article, residence in the territory of Italy shall be treated as residence in the territory of Canada.

- b. For purposes of determining the amount of old age benefit payable by Italy under paragraph (5) of this Article,
  - i. a week ending on or before December 31, 1965, which would be recognized as a week of residence under the Old Age Security Act shall be treated as a week of contributions under the legislation of Italy;
  - ii. a year commencing on or after January 1, 1966, in which a contribution has been made to the Canada Pension Plan shall be accepted as 52 weeks of contribution under the legislation of Italy and in a year in which an equivalent period is credited under the Canada Pension Plan and no contribution to that program is made, a week in that equivalent period shall be accepted as a week of contributions under the legislation of Italy;
  - iii. a week commencing on or after January 1, 1966, which would be a week of residence for the purposes of the Old Age Security Act and in relation to which no contribution has been made under the Canada Pension Plan, shall be accepted as a week of contributions under the legislation of Italy.

5.

- a. Each Party shall determine, in accordance with the criteria set forth in the preceding paragraph, the theoretical amount of the old age benefit to which the person concerned would be entitled if all the periods credited on the basis of the legislation of both the Parties had been credited strictly in accordance with the legislation of the said Party. In order to establish said theoretical amount, the Party whose legislation provides for the computation of the old age benefits based on the amount of earnings or contributions, determines the earnings or contributions to be taken into consideration for the periods credited according to the legislation of the other Party, based on the average earnings or contributions ascertained for the periods credited in accordance with the legislation applied.
- b. Each Party shall pay an amount determined by multiplying the theoretical amount referred to in sub-paragraph (a) by the fraction that the periods credited under the legislation of that Party is, either of the total periods credited under the legislation of both Parties, or of such period as may be provided for by administrative arrangements.
- c. The administrative arrangements referred to in Article XIX (3) shall include appropriate detailed formulae for the administration of sub-paragraphs (a) and (b).
- d. Notwithstanding sub-paragraph (b), where the total of credited periods under sub-paragraph (a) is not equal to at least ten years, Canada will not be liable to pay any old age benefit under this Article, and where the total is not equal to at least twenty years, Canada will not be liable to pay any old age benefit under this Article in the territory of Italy.