Citation: ***A. D. v. Minister of Employment and Social Development,*** **2015 SSTAD 1267**

Date: October 28, 2015

File number: AD-15-979

APPEAL DIVISION

Between:

A. D.

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 October 28, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant first entered Canada on April 8, 2002. She was absent from Canada for some periods after that time. On September 28, 2011 she applied for an *Old Age Security Act* pension. The Respondent denied the application initially and after reconsideration on the basis that she had not resided in Canada for the required time to receive the pension. The Appellant appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada. The General Division summarily dismissed her appeal on July 27, 2015.

[2] The Appellant appealed this decision to the Appeal Division of the Tribunal. There was no requirement to seek leave to appeal as the *Department of Employment and Social Development Act* provides an appeal as of right to the Appeal Division from a General Division decision that summarily dismisses a claim. The Appellant explained her two lengthy absences from Canada, and contended that it was not true that she did not consider Canada her home during that time.

[3] The Respondent argued that the General Division did not err in setting out the law with respect to summary dismissal of claims, or with respect to the residency requirements to receive this pension. The decision was reasonable and should stand.

[4] This appeal was decided on the basis of the written record after considering the following:

a) The complexity of the issue under appeal;

b) The fact that the credibility of the parties was not a prevailing issue;

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit; and

d) The nature of the submissions filed by the Respondent; the Appellant not having filed any submissions.

STANDARD OF REVIEW

[5] The Appellant made no submissions regarding what standard of review should be applied to the General Division decision. The Respondent argued that for errors of fact and errors of mixed fact and law, the standard of review of reasonableness should be applied, and for errors of law, the standard of review to be applied is that of correctness. 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. The correctness standard of review is to be applied to questions of jurisdiction, and questions of law that are of importance to the legal system as a whole and outside the adjudicator's specialized area of expertise.

[6] The grounds of appeal presented by the Appellant refer to questions of mixed fact and law, so the reasonableness standard is to be applied. Hence I must decide if the General Division decision was reasonable.

ANALYSIS

[7] The *Department of Employment and Social Development Act* governs the operation of the Tribunal. Sections 58 and 59 of the Act (reproduced in the Appendix to this decision) set out the only grounds of appeal that can be considered by the Appeal Division, and the remedies that the Appeal Division may grant on an appeal.

[8] In this case, the Appellant explained her two lengthy absences from Canada. These arguments do not point to any error of fact or law, or to any breach of the principles of natural justice by the General Division. The appeal cannot succeed on the basis of these arguments.

[9] The Appellant also contended that the General Division erred in deciding that she did not consider Canada her home during her periods of absence. The General Division decision did not refer to the Appellant's intent, or whether she considered Canada to be her home. It therefore made no error in this regard. The appeal cannot succeed on the basis of this argument.

[10] However, the General Division decision contained errors in law. The decision stated that the central question in the appeal was whether a person in Canada on a series of visitor's visas can be considered under any circumstances a "resident" for the purpose of *Old Age Security Act* pension eligibility. It relied on the decision of the Federal Court of Appeal in *Ata v. Canada* [1985] F.C.J. No. 800, and stated that this decision concluded that permanent residence is a status to be obtained by law with particular provisions in immigration law. The decision does say this. The General Division erred when it concluded, in reliance on this decision, that the time a person resides in Canada before obtaining permanent residence status cannot be counted a "residence" *for Old Age Security Act* purposes and therefore did not consider the time that the Appellant was in Canada prior to obtaining permanent residence status. The *Ata* decision did not say this. Accordingly, the General Division should have considered whether she was resident in Canada prior to obtaining a particular immigration status in 2007.

[11] In addition, the General Division stated that a person can reside in only one country at a time. It provided no basis in law for this conclusion. This conclusion is not consistent with what the Federal Court stated in *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76. In that decision the Court concluded, after a review of relevant legislation, that a person may have several residences from a taxation point of view, and the mode of life, length of stay and other factors must be considered when deciding if a person is "resident" in Canada. Hence, concluding that a person can reside only in one country may also be an error of law. These errors could lead to the conclusion that the General Division decision was unreasonable.

[12] The Supreme Court of Canada also decided, though, that the reasons for decision must be read together with the outcome of a case and serve the purpose of showing whether the result falls within a range of possible outcomes (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62). The General Division correctly stated the law with respect to when a claim must be summarily dismissed by the General Division and the legal requirements that must be met for a claimant to qualify to receive a pension under the *Old Age Security Act*. It considered the length of time the Appellant spent in Canada and her ties to this country as well as to India. I accept the Respondent's argument that, when read as a whole, the General Division reasonably concluded that the Appellant had not resided in Canada prior to when she was granted permanent residence status in 2007 after

considering her pattern of presence in Canada and other factors. She was only present in Canada for that time.

[13] The following facts are undisputed: The Appellant arrived in Canada on April 8, 2002. She applied for an *Old Age Security Act* pension on September 28, 2011. Section 3 of the *Old Age Security Act* states that an applicant must have resided in Canada for at least ten years after her 18th birthday to receive a partial *Old Age Security Act* pension. On the facts above, the Applicant had not resided in Canada for ten years prior to the date she applied for this pension.

[14] The Applicant also acknowledged that she had two lengthy absences from Canada, from May 10, 2003 to February 21, 2005 and from September 12, 2006 to July 8, 2007.
I acknowledge that an absence from Canada for a period of less than one year may not interrupt an applicant's residence in Canada. The absence from May 2003 to February 2005 was over one year, and could interrupt the Applicant's residence in Canada. It may be less likely that the absence from September 2006 to July 2007 would interrupt this residence. I need not decide this; however, as even without any interruption in her residence, the Appellant did not meet the ten year residence requirement under the Act.

CONCLUSION

[15] The appeal is dismissed. I am not persuaded that the error of law in the General Division decision rendered the General Division decision unreasonable. When the decision is read as a whole it is clear that the Appellant's claim to receive a pension under the *Old Age Security Act* could not succeed. The only conclusion that could be drawn was to dismiss the appeal. The General Division decision to summarily dismiss the claim was reasonable and defensible on the facts and the law.

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.

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.