Citation: ***Q. V. H. v. Minister of Employment and Social Development,*** **2015 SSTAD 1454**

Date: December 18, 2015

File number: AD-15-1105

APPEAL DIVISION

Between:

Q. V. H.

Applicant

and

Minister of Employment and Social Development

Respondent

Leave to Appeal

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] In March 2005 the Applicant applied for and was awarded an *Old Age Security,* (OAS), pension. He was awarded a partial pension. Several years later the Applicant filed a request asking the Respondent to reconsider its decision regarding his residency in Canada and his pension eligibility.

[3] The Respondent received the request for reconsideration in August 2013. (GD1-10) The Respondent asked the Applicant to provide more information. The Applicant replied to the Respondent on January 29, 2015. On receiving the additional information, the Respondent denied the Applicant's request for reconsideration of its 2005 decision. The Respondent denied the request because not only was it made late, but the Respondent found that the Applicant had not a satisfactory explanation for the long delay. The Respondent notified the Applicant of its decision by letter dated March 10, 2015. (GD1A-3) The Applicant appealed the reconsideration decision to the Tribunal. His completed Notice of Appeal was filed with the Tribunal on June 19, 2015.

[4] On August 10, 2015 the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued its decision denying the appeal. The Applicant seeks leave to appeal the General Division decision, (the Application).

GROUNDS OF THE APPLICATION

[5] The Applicant submits that the General Division decision breached section 58 (1)(c) of the *Department of Employment and Social Development Act,* (the DESD Act). He submitted that the General Division did not consider the arguments he had made to the Respondent but had focussed only on the procedural aspects of the process. He also contended that the General Division did not analyse the evaluations that had been made by the Respondent against the factors set out in *Canada v. Gattellaro 2005 FC 883.*

ISSUE

[6] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[7] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success[2]. The three grounds on which an appellant may bring an appeal to the Appeal Division are set out in section 58 of the DESD Act.[3]

[8] In *Tracey v. Canada (Attorney General)* 2015 FC 1300 the Federal Court addressed the question of the Appeal Division's jurisdiction on an application for leave. The Federal Court noted that this jurisdiction has now been codified by law, stating that,

> [1] "in contrast with the former scheme which was grounded in common law through jurisprudence, the test to be applied by the SST-AD when determining leave to appeal is now set out in subsection 58(2) of the DESDA. Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success."

[9] In determining whether the Applicant's appeal has a reasonable chance of success, the Appeal Division finds it helpful to identify what is meant by "reasonable chance." In *Villani*[4] Isaacs, J. A. specifically approved the approach taken by the Pension Appeals Board, (PAB), in Barlow, wherein the PAB applied the dictionary definition of the words "regularly; pursuing; substantial; gainful; and occupation" to assist its determination of Ms. Barlow's eligibility for a CPP disability pension. Given that the term is not one that is defined in the legislative scheme, the Appeal Division takes a similar approach to determining whether or not the appeal would have a reasonable chance of success. The

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[1] Subsections 56(1) and 58(3) of the DESD Act govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."
[2] The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."
[3] **58(1) Grounds of Appeal** – The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or 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.
[4] *Villani v. Canada (Attorney General)* 2001 FCA 248.

Oxford Dictionary[5] defines "reasonable' variously as fair, sensible or fairly good or average. Ironically, the on-line version of the dictionary gives the following example of usage: "I am not satisfied that the appellant has any reasonable chance of success if allowed to proceed with the appeal."

[10] Thus, the Appeal Division finds that, in order to grant the Application, it must find that the Applicant's submissions relate to at least one of the enumerated grounds of appeal; the Appeal Division must also be satisfied that the ground or grounds of appeal raised has or have a reasonable i.e. a fairly good or average chance of being successful. The Appeal Division does not have to be satisfied that success is certain. For the reasons set out below the Appeal Division is not satisfied that this appeal would have a reasonable chance of success.

ANALYSIS

Did the General Division base its decision on erroneous findings of fact?

[11] The Applicant has submitted that the General Division decision breached section 58(1)(c) of the DESD Act. The Applicant took particular exception to paragraphs 20 and 21 of the General Division decision. He submitted that while the Respondent may have used the correct *Gattellaro* criteria, its evaluations and conclusion with regard to these criteria are flawed. The paragraphs of the General Division decision to which he takes particular objection to are:

> [21] The Tribunal finds the Respondent has evaluated the request for reconsideration using the correct criteria. It is also acknowledged by the Appellant and noted by the Respondent that over 7 years had passed since receiving the initial decision and receiving the OAS benefit.
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> [21] The Tribunal is satisfied that the Respondent used its discretionary power judiciously and did not ignore any relevant factors or acted in a discriminatory manner when making its decision whether to grant the Appellant's request for an extension of time.

[12] The Appeal Division is not persuaded of the Applicant's position. Neither is the Appeal Division persuaded that the General Division was too preoccupied with procedural questions.

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[5] The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971.

The General Division was not simply required to decide whether the Applicant had provided a sufficient explanation for the lateness of the reconsideration request. Rather, the General Division's task was to assess whether the Respondent had exercised its discretion properly. It would appear that the Applicant did not fully appreciate or understand this point.

[13] The Respondent's power to reconsider a decision is governed by section 27.1 of the OAS. The section provides:

> 27.1 *Request for reconsideration by Minister* – (1) A person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to the person, or respecting the amount of a benefit that may be paid to the person, may, within ninety days after the day on which the person is notified in writing of the decision or determination, or within any longer period that the Minister may, either before or after the expiration of those ninety days, allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination.

[14] Being dissatisfied with the Minister's decision on his reconsideration request, the Applicant had a right to appeal the denial to the Social Security Tribunal.

> 28 *Appeal – benefits* – (1) A person who is dissatisfied with a decision of the Minister made under section 27.1, including a decision in relation to further time to make a request, or, subject to the regulations, any person on their behalf, may appeal the decision to the Social Security Tribunal established under section 44 of the Department of Employment and Social Development Act.

[15] While section 28 of the OAS gives an appellant a right of appeal to the Tribunal, the fact that the appeal is in respect of the Minister's exercise of a discretionary power means that the General Division inquiry must first engage an examination of the manner in which that power was exercised. Support for this position is found in *Canada (Attorney General) v. Purcell* [1996] 1 FC 644, upon which the General Division relied and, also on *Lee v. Canada (Minister of Citizenship and Immigration)* 2006 FC 158; (Can LII) — 2006-02-16. In both of these cases the Federal Court made it clear that the decision maker is required to act in good faith in the exercise of a discretionary power. According to Shore, J. in *Lee,* "subjective decisions cannot be judicially reviewed except on grounds that the decision maker acted in bad faith, erred in law, or acted on the basis of irrelevant considerations."

[16] Thus, the General Division could disturb the reconsideration decision only if it found that the Respondent had acted in "bad faith" in the exercise of the discretion given to it by section 27.1 of the OAS to extend the time for making a reconsideration request beyond the ninety-days provided for.

[17] It is not in dispute that the reconsideration request was made more than seven years after the initial decision on the Applicant's eligibility was reached. Unless extended, by the Minister, the legislation allowed the Applicant ninety days in which to ask the Minister to reconsider the decision. The Applicant's request was made well outside the 90 day limit. The Respondent requested more information from the Applicant in order to allow it to assess whether the time limit ought to be extended. The Respondent received a reply from the Applicant on January 29, 2015. It assessed the contents of the reply against the factors set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. The Respondent also addressed the question of whether extending the time would result in unfairness to a party. The Respondent concluded that no unfairness would result if the extension was granted. (GD1A5-6) the Applicant is unhappy with how the Respondent assessed the additional information.

[18] The General Division found that the Respondent had demonstrated "good faith" in other words that Respondent had not acted "in bad faith or for an improper purpose or motive, had taken into account an irrelevant factor or ignored a relevant factor or acted in a discriminatory manner." The Appeal Division agrees.

[19] In the instant case, the Applicant contends that he realised only relatively recently that he could seek to establish his residence in Canada during the disputed years by means of alternative documents. He provided and sought to rely on his University degrees and CPP contributions. These are the arguments that he alleged the General Division did not consider. In *Panopoulos v. Canada (Attorney General)* 2010 FC 877, a delay of nine (9) months was held to be too long. Given the Applicant's personal circumstances as a well-educated, professional, the Appeal Division, too, is not persuaded that, even if "bad faith" had been found, a seven year delay is satisfactorily explained by the Applicant not being aware for that entire period that he could seek to establish residence by other means.

CONCLUSION

[20] To succeed on this Application the Applicant would have had to establish a ground of appeal that would have a reasonable chance of success. The Applicant submitted that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. This is a case where the General Division was required first to examine how the Respondent had exercised its discretion in relation to extending the time for making a reconsideration request. The General Division did so, ultimately deciding that the Respondent had exercised the discretion judiciously. This ended the General Division's enquiry. The Appeal Division finds no error on the part of the General Division. Therefore, the Appeal Division is not satisfied that the Applicant's appeal would have a reasonable chance of success.

[21] The Application is refused.

Hazelyn Ross
Member, Appeal Division