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

Citation: *S. Z. v. Minister of Employment and Social Development,* 2016 SSTADIS 6

Date: January 04, 2016

File number: AD-15-1235

APPEAL DIVISION

Between:

S. Z.

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] The Applicant seeks leave to appeal a decision of the General Division of the Social Security Tribunal of Canada, (the Tribunal), issued August 19, 2015, (the Application). In its decision the General Division denied the Applicant's appeal of a reconsideration decision that found that she did not meet the criteria for receipt of an *Old Age Security,* (OAS), pension. At issue was whether the Applicant had sufficient years of residence in Canada to meet the requirements of paragraph 3(2)(b) of the OAS. The Applicant had to prove that she had resided in Canada from May 11, 1970 to September 6, 1972 and, also, from September 1, 1984 to September 1, 1986, (the disputed periods).

[3] The General Division found that she did not meet her onus to do so.

GROUNDS OF THE APPLICATION

[4] The Applicant submitted that the General Division decision is based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. She also argued that the General Division committed breaches of natural justice by denying that she was residing in Canada during the disputed periods and made errors of law in respect of its application of the governing statutory provisions.

ISSUE

[5] The Appeal Division must decide if the appeal has a reasonable chance of success.

APPLICABLE LAW

[6] As set out in subsection 56(1) of the *Department of Employment and Social Development Act,* (the DESD Act), leave to appeal a decision of the General Division of the

Tribunal is a preliminary step to an appeal before the Appeal Division.[1] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the DESD Act, namely, breaches of natural justice or jurisdictional errors; error of law; or errors of fact.[2]

[7] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[3] In *Tracey v. Canada (Attorney General) 2015 FC 1300* the Federal Court observed that the current statutory regime sets out at subsection 58(2) the test that the Appeal Division must apply when determining an application for leave to appeal. "Leave to appeal is refused if the SST-AD is satisfied that the appeal has no reasonable chance of success." The question for the Appeal Division is, in the context of the present statutory regime, what constitutes a reasonable chance of success?

[8] Notwithstanding this poser, subsection 58(1) of the DESD Act provides the only grounds on which an appellant may bring an appeal, namely that the General Division has committed a breach of natural justice or has either failed to exercise or has exceeded its jurisdiction; or has committed either an error of law or an error of fact.[4]

[9] In previous decisions, the Appeal Division has held that to grant leave the Appeal Division must first find that, were the matter to proceed to a hearing, at least one of the grounds

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[1] Subsections 56(1) and 58(3) of the DESD Act govern the granting 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." 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."

[2] **58(1) Grounds of Appeal** –

a. 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.

[3] Subsections 56(1) and 58(3) of the DESD Act govern the granting 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." 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."

[4] **58(1) Grounds of Appeal** –

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of the Application relates to a ground of appeal and that there is a reasonable chance that the appeal would succeed on this ground. In *Tracey*, the Federal Court did not address the question of how the Appeal Division is to be satisfied that an appeal has no reasonable chance of success. The Federal Court left the matter up to the Appeal Division, stating at paragraph 22 of its decision that this determination was within the expertise of the Appeal Division.

[10] In *Bossé v. Canada (Attorney General)* 2015 FC 1142 the Federal Court appeared to accept "plain and obvious" as the appropriate test for determining whether an appeal has no reasonable chance of success.[5] For its part, the Appeal Division finds it helpful to enlist the plain and ordinary meaning of the term "reasonable chance" and to adopt the approach taken by the Federal Court of Appeal in *Villani v. Canada (Attorney General)* 2001 FCA 248.

[11] In *Villani*[6] 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. The Appeal Division takes a similar approach to determining whether or not the appeal would have a reasonable chance of success. The Oxford Dictionary[7] 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."

[12] In *Canada (Minister of Human Resources Development) v. Hogervorst, 2007 FCA 41* as well as in *Fancy v. Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. Thus, the Appeal Division finds that, in order to grant the Application, it must be satisfied that the appeal has a fairly good or average chance of being successful or that the Applicant has raised an arguable case. The Appeal Division does not have to be satisfied that success is certain.

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[5] 44. …"because, upon reading the reasons of the Appeal Division Member for refusing leave to appeal, it is necessary to understand that this case , in fact, concerns a summary dismissal of the appeal. It was "plain and obvious" that the applicant's appeal had no reasonable chance of success."
[6] *Villani v. Canada (Attorney General)* 2001 FCA 248.
[7] The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971

ANALYSIS

[13] The Application is premised on breaches of section 58(1), paragraphs (a), (b) and (c) of the DESD Act. The Applicant set out in her submissions what she considers the legal and factual errors made by the General Division in denying her appeal. She has also set out what she sees as breaches of natural justice on the part of the General Division. The Appeal Division is not persuaded of the Applicant's positions.

Did the General Division fail to observe a principal of natural justice?

[14] The Applicant has raised this charge in light of what she sees as the preferential treatment that had been accorded to her husband. She took issue with the finding of the General Division that when she came to Canada during the disputed periods she was simply accompanying her husband. In her submission, she and her husband were treated differently even though their circumstances during the disputed periods were identical.

[15] The Appeal Division is not persuaded that these submissions can properly be asserted or that the alleged discriminatory treatment could be ascribed to the Tribunal. Firstly, it was not the Tribunal that determined the pension rights of the Applicant's husband, thus it can hardly be seen as having acted in a discriminatory manner towards her. Neither is the Tribunal in possession of all of the facts relating to her husband's application, as this application was not before it. In these circumstances, Appeal Division finds that the Applicant's subjective assessment of preferential treatment cannot be sufficient to ground an appeal.

Did the General Division err in law, specifically, in applying the Test for residence?

[16] The Applicant submitted that the General Division either misapplied the legal test for residence or applied the wrong legal test in its determination of her ties to Canada during the disputed periods. The Applicant also complained that the General Division placed undue emphasis on the fact that during the periods at issue she had family ties and property in Bangladesh. She also took issue with the General Division's finding that her life had been "guided in a large way by her spouse's career and education." Further, she

submitted that during these years she had substantially greater ties to Canada than to Bangladesh as evidenced by the number of resources, her employment and her way of life in Canada at these times. The Applicant argued that the General Division placed an inappropriate emphasis on her family ties and property in Bangladesh.

[17] In the submission of the Applicant during the disputed periods she had satisfied the criteria for residence and the General Division ought to have given due consideration to that fact. As well, the Applicant contended that the General Division ought to have recognized her as having been resident in Canada during the disputed periods by virtue of the fact that in 1971-1972 she entered and remained in Canada as the spouse of a Commonwealth scholar; and in 1984-1986 as the spouse of a Visiting Professor. The Applicant submitted that these circumstances automatically mean that she should be considered a resident of Canada during these periods.

[18] After enumerating some of the factors that have been used to determine whether a person is resident in Canada and examining the Applicant's circumstances, the General Division concluded that she had not satisfied the test for residence. The General Division concluded that despite working in Canada and "living like any Canadian citizen" she did so as a visitor, having come to Canada on a Visitor's visa and having returned to Bangladesh with her husband once his studies were completed. The General Division came to a similar conclusion concerning the September 1984 to September 1986 period. In the view of the General Division, the Applicant's actions pointed to an absence of intention to reside in Canada.

[19] The Appeal Division finds no error in these conclusions given that the test for residency is not set in stone and depends on the circumstances of the case. *Singer v. Canada (Attorney General)*, 2010 FC 607, affirmed 2011 FCA 178. The determination of whether the Applicant's circumstances during the disputed periods could lead to a finding that she had been resident in Canada during these times was clearly the task of the General Division. It is not the task of the Appeal Division to reweigh the evidence. Accordingly, leave to appeal cannot be granted on this basis.

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

[20] Much of the Applicant's submissions under this head were also made under the other heads of appeal on which she relied. The Appeal Division finds that her submissions in this regard are not sufficient to ground an appeal. The Applicant submitted that the General Division misconstrued her responses to a questionnaire that asked her about her desire to immigrate to Canada during the disputed periods. The Applicant had the opportunity to clear up any misconceptions at the hearing. She has not shown how the General Division erred in respect of its understanding of her responses.

[21] As well. the Appeal Division finds that the General Division did not err in law when it found that the Applicant did not satisfy the criteria for residence in Canada on the mere fact that when she entered and remained in Canada during the disputed periods she did so as the spouse of a Commonwealth scholar or as a Visiting Professor, and on a Visitor's visa. This, after all, was what had to be established at the hearing. It does not appear that the Applicant provided any objective evidence to support her belief. Thus, her submission that the status of her spouse as a Commonwealth scholar or as a Visiting Professor automatically endowed her with the status of resident of Canada is no more than a statement of the Applicant's belief.

CONCLUSION

[22] At the hearing the Applicant was required to establish that during the disputed periods she had sufficient residence in Canada. The General Division found that she had not met her onus to do so and the Appeal Division is unable to find any potential error in its conclusion.

[23] The Application is refused.

Hazelyn Ross
Member, Appeal Division