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

Citation: *J. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 220

Tribunal File Number: AD-16-451

BETWEEN:

J. V.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 17, 2016

DECISION

[1] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), refuses leave to appeal.

INTRODUCTION

[2] The Applicant had been in receipt of benefits under the *Old Age Security, (OAS), Act* for several years when the Respondent initiated an investigation of his residency. Following the investigation the Respondent determined that the Applicant had not sufficiently established that he was a resident of Canada after 1993; therefore, he had not met the residency requirements in section 3 of the OAS Act. The Respondent determined that he had ceased to be resident in Canada as of May 14, 1993 and had received an overpayment of $83,493.49 (GT1-28). At the same time the Respondent gave the Applicant the opportunity to apply for benefits under the Canada/Chile International Agreement. (GT1-29)

[3] The Applicant asked the Respondent to reconsideration its decision; however, the Respondent maintained the denial. The Applicant then appealed to the Office of the Commissioner of Review Tribunals. In due course the appeal was heard by the Tribunal's General Division, which issued a decision in the matter on November 21, 2015. The General Division found that the Applicant ceased to reside in Canada as of June 21, 1993 not May 14, 1993.

[4] The Applicant seeks leave to appeal the General Division decision, (the Application).

GROUNDS OF THE APPEAL

[5] The applicant seeks leave to appeal on the basis that the General Division committed errors of law and based its decision on erroneous findings of fact made without regard to the material before it.

ISSUE

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

THE GOVERNING STATUTORY PROVISIONS

[7] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, (DESD Act) govern the granting of leave to appeal. As provided by subsection 56(1) of 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. According to subsection 56(1) "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[8] Subsection 58(1) of the *Department of Employment and Social Development, (DESD), Act*, sets out the only three grounds of appeal, namely:-

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.

[9] *Tracey v. Canada (Attorney General),* 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal.

[10] The *Old Age Security Act*, R.S.C. 1985, c. 0-9 provides for when a partial, monthly pension would be paid.

> 3. (2) *Payment of partial pension* - 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.

[11] The question of residence and how residence might be established is more fully addressed in the *Old Age Security Regulations, C.R.C., c. 1246.*

> 20. (1) to enable the Minister to determine a person's eligibility in respect of residence in Canada, the person or someone acting on the person's behalf shall provide a statement

giving full particulars of all periods of residence in Canada and of all absences from Canada that are relevant to that eligibility.

(2) Unless the Minister requires otherwise under the Act, a person is not required to provide a statement under subsection (1) in the circumstances set out tin subsection 5(2) or 5, 11(3) or (4) or 21(5) or 5.1) of the Act.

21. (1) For the Purposes of the Act and these Regulations,
(a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and
(b) a person is present in Canada when he is physically present in Canada.

PRELIMINARY ISSUE: – IS THE APPLICATION LATE?

[12] The General Division issued its decision on November 21, 2015. The Tribunal received an electronic version of the application requesting leave to appeal on March 18, 2016. This is clearly more than ninety days after the decision was sent to the Applicant, raising the preliminary issue that the Application may have been filed late.

[13] Responding to the Tribunal, the Applicant's counsel argued that the application was not, in fact, late. Counsel submitted that Applicant received the decision on December 20, 2015 and an electronic copy of the Application was submitted on March 18, 2016; therefore, the application was made in time.

[14] Counsel's submissions raise the question of how to determine when a decision has been communicated to an appellant and when time begins to run where an applicant resides outside of Canada.

[15] Section 57 of the DESD Act sets out the time limits for bringing appeals to the Appeal Division. Thus an application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

a) In the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and
b) In the case of a decision made by the Income Security Section, 90 days after the day on which it is communicated to the appellant.

[16] According to section 19 of the *Social Security Tribunal Regulation, (the Regulations)*[1] General Division decisions are deemed to have been communicated to a party 10 days after the day on which it is mailed if the decision was sent by ordinary mail. If sent by registered mail or courier on the date it is either signed for or delivered to the last known address of the party. If sent by facsimile transmission on the next business day on which it is transmitted. However, the *Regulations* do not provide for when the recipient is outside of Canada.

[17] The Oxford Dictionary defines communication as the imparting or exchanging of information or news. A secondary meaning is that it is the means of connection between people or place, in particular. This implies receipt of the information that is intended to be imparted or exchanged. This notion is perhaps reflected in the fact that the Tribunal's leave form asks would-be applicants to include the date on which they received the decision. (see e.g. AD1-5)

[18] The Applicant's counsel submits that the Appeal Division should take the date stated as the date of receipt of the decision as the deemed date of communication. In light of the fact that the decision was sent to an overseas address, the Appeal Division agrees. In the view of the Appeal Division to do so gives practical effect to the intent behind asking applicants to indicate when they received the decision being appealed; while also allowing for possible delay in delivery to an overseas address. Following from this, the Applicant had until March 19, 2016 to file the Application. The Tribunal received the Application on March 18, 2016. Therefore, the Application was made in time.

ANALYSIS

[19] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

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[1] *S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236.*

[20] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[2] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

Did the General Division err in law?

[21] The General Division had to determine whether the Applicant ceased to reside in Canada after May 14, 1993.

[22] Counsel for the Applicant argued that the General Division erred in law by.

> "placing an undue burden on the Applicant to prove his inability to obtain further records due to entities having limited record retention policies, and erred in refusing to infer this inability by the evidence that was provided and demonstrated that, at the relevant time, government departments had already destroyed documents dated earlier than 2000. The General Division further erred by not giving consideration to the jurisprudence submitted on behalf of the Appellant and in support of the Appellant." (AD1-5)

[23] The records counsel referred to are the Canada Border Services Agency, (CBSA), records of the Applicant's travel history prior to the year 2000, (GT1-24) and the paper OAS and CPP files. (GT1-65) The jurisprudence relied on by the Applicant's counsel consists of :-

> *Minister of Human Resources Development* v. *Ding*, 2005 FC 76 for the principle that residency is a question of fact and *Singer* v. *Canada (A.G.)*, 2010 FC 607 for the principle that continuous presence in Canada is not required.

[24] The General Division cited the relevant legislation, namely, subsection 3(2) of the OAS Act and paragraph 21(1)(a)) of the OAS Act Regulations. The General Division set out the factors relevant to a determination of whether a person resides in Canada. (para. 48). The General Division then considered the available evidence before coming to its ultimate conclusion that the Applicant had failed to meet his onus to establish his residency in Canada.

[25] Counsel for the Applicant submits that it was an error for the General Division not to conclude that the Applicant was unable to provide evidence of residency prior to 2000 because

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[1] [2] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

government departments had destroyed their records. The Appeal Division is not persuaded by this submission. The Appeal Division finds that there was no burden, undue or otherwise, placed on the Applicant to prove his inability to obtain further records from government entities. The case law on residency is clear; the onus is on the person asserting a right to prove the facts on which his or her claim is based. *Duncan v. Canada (Attorney General)* 2013 FC 319. It was up to the Applicant to establish residency in Canada to the satisfaction of the Respondent. While acknowledging the problem caused by the absence of documentation, the General Division found that the Applicant could still have established his residency using means other than government records. The Appeal Division finds that the Applicant's submissions do not point to an error of law on the part of the General Division. This is not a ground of appeal that would have a reasonable chance of success.

[26] With respect to the submission that the General Division failed to give consideration to the jurisprudence that was submitted on the behalf of the Applicant, the Appeal Division finds that there is reason to doubt and reject this submission. Both cases, *Ding* and *Singer*, speak to the proper considerations to be applied on a determination of residency. The Appeal Division finds that the General Division engaged in an extensive analysis of the evidence in the context of the factors and principles set out in the case law. This submission, also, does not give rise to a ground of appeal that would have a reasonable chance of success.

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

[27] Under this head Counsel for the Applicant submitted that the General Division erred by,

> "upholding the finding of A. S. that the Appellant ceased to reside in Canada in 1993, when A. S. himself in the documents provided by the Respondent admitted that he lacked sufficient information to make a determination as to residency. The General Division disregarded all information to the contrary." (AD1-5)

[28] A. S. is an Investigative Officer working for the Respondent. The Appeal Division finds that the General Division did not prefer his findings in disregard of information that was provided to support the Applicant, including the Affidavit evidence. However, the General Division gave little weight to that evidence because in the case of A. V. and R. E., it found their affidavits to be "almost identical" and not entirely consistent with the documentary evidence on

file as well as contradictory of the Applicant's own affidavit. The General Division came to a similar conclusion concerning the affidavit of L. E.

[29] The General Division's conclusions about the Applicant's credibility and the reliability of the documentary evidence tendered on his behalf took into consideration not only the findings of A. S. but also the Applicant's conduct. The Applicant appears to have been less than fully cooperative in responding to the Respondent's requests for information. (GT1-66)[3]

[30] The General Division also weighed the evidence that was put forward to support the Applicant and made conclusions about its reliability. For example, while the General Division found the CBSA report helpful, it also found that it did not provide a complete answer to the Respondent's request for a complete travel history. As the Applicant claimed to have spent more time in Canada than in Chile he had the onus of establishing his travel history. Having failed to do so, the Appeal Division finds that it cannot be said that the General Division upheld the findings of A. S. over the documentary and other evidence submitted on the behalf of the Applicant. Therefore, the Appeal Division is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[31] Counsel for the Applicant submitted that the General Division erred in law by placing an undue burden on the Applicant to provide documentary evidence to prove his residency and by ignoring the jurisprudence tendered. The Appeal Division has found that the onus to establish residency resides always with an applicant. Thus, the Applicant had to provide sufficient

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[3] [25] That same day, the Respondent's investigator prepared a report of an interview that he had done with the Appellant on June 22, 2011. After the interview, the Respondent sent the Appellant a letter, dated June 27, 2011, and asked the Appellant to complete a Questionnaire, which was enclosed with the letter. The Questionnaire was signed by the Appellant on August 21, 2011 and received by the Respondent on October 7, 2011. The Appellant responded to only a select number of questions. His responses indicate that (1) he received his driver's licence in Chile on June 22, 1993; (2) he opened his bank account in Chile on November 20, 1997; and (3) he began a common-law relationship with a woman in Chile in September 2003. The Questionnaire asked the Appellant to provide an accounting of his dates of travel for all periods in excess of 90 days since December 1, 1998, to provide the amounts of his Chilean pension received each year, to provide the date that his Chilean pension became effective, and to provide his residential address and telephone number in Chile. The Appellant did not respond to any of these questions, nor did he provide a reason for why he could not respond to these questions.

evidence to establish residency during the period(s) in dispute. After weighing the evidence, the General Division found that he has not met his onus. It is not the Appeal Division's role to reweigh evidence to arrive at a conclusion more satisfactory to an appellant, *Tracey, supra*..

[32] Similarly, Counsel for the Applicant submitted that the General Division erred by basing its decision on the findings of the Respondent's investigator to the exclusion of other supportive evidence. Upon considering the Tribunal Record as well as the decision, the Appeal Division finds this submission is not supported. Accordingly, for the reasons set out above the Appeal Division is not satisfied that Counsel's arguments raise grounds of appeal that would have a reasonable chance of success.

[33] The Application is refused.

Hazelyn Ross
Member, Appeal Division