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

Citation: *M. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 229

Tribunal File Number: AD-16-477

BETWEEN:

M. F.

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: Neil Nawaz

DATE OF DECISION: June 23, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On August 27, 2015, the General Division (GD) of the Social Security Tribunal of Canada determined that a pension under the *Old Age Security Act* (OASA) was not payable to the Applicant.

[2] The Applicant filed an Application for Leave to Appeal (Application) with the Appeal Division (AD) of the Social Security Tribunal on March 24, 2016, beyond the time limit set out in paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[3] I must decide if an extension of time to make the Application should be granted.

THE LAW

DESDA

[4] Pursuant to paragraph 57(1)(b) of the DESDA, an Application for Leave to Appeal must be made to the AD within 90 days after the day on which the decision was communicated to the Applicant.

[5] The AD must consider and weigh the criteria as set out in case law. In *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, the Federal Court stated that the criteria are as follows:

(a) The Applicant must demonstrate a continuing intention to pursue the appeal;

(b) The matter discloses an arguable case;

(c) There is a reasonable explanation for the delay; and

(d) There is no prejudice to the other party in allowing the extension.

[6] The weight to be given to each of the *Gattellaro* factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served – *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[7] According to subsections 56(1) and 58(3) of the DESDA, an appeal to the AD may only be brought if leave to appeal is granted. The AD must either grant or refuse leave to appeal. Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[8] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[10] The Federal Court of Appeal has concluded that the question of whether a party has an arguable case at law is akin to determining whether that party, legally, has a reasonable chance of success – *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

OASA and Associated Regulations and Agreements

[11] Under section 3 of the OASA, a person must have resided in Canada for at least 40 or more years after his or her 18th birthday in order to receive a full OAS pension.

[12] To receive a partial pension, an applicant must have resided in Canada for at least ten years if he or she resides in Canada on the day before the application is approved. An applicant who resides outside of Canada on the day before the application is approved must prove that he or she had previously resided in Canada for at least 20 years.

[13] Subsection 21(1) of the *Old Age Security Regulations* makes the distinction between "residence" and "presence" in Canada. A person resides in Canada if he or she makes his or her home and ordinarily lives in any part of Canada, but a person is merely present when he or she is physically in any part of Canada.

[14] Under section 40 of the OASA, where an applicant has spent time living and working abroad, International Social Security Agreements (ISSAs) with other countries may assist him or her to qualify for OAS benefits.

[15] Under the Canada-Italy ISSA, periods of contributions to social security programs established by Italian legislation may be added to periods of residence in Canada to assist the applicant in meeting minimum residence requirements.

APPLICANT'S SUBMISSIONS

[16] The Applicant submitted her Application Requesting Leave to Appeal on March 24, 2016, 189 days after the decision was mailed to her residential address in Italy and well after the requisite 90-day filing deadline. The Application form requires claimants to disclose the date on which they received the GD's decision and provide reasons, if applicable, for why the request for leave to appeal was late. In response, the Applicant said she received the GD decision on September 8, 2015 and was delayed because she was living with a disability and dependent on overburdened caregivers for every act in her life. In November, she had suffered a severe prescription drug overdose that required many weeks of recovery. At the end of the same month, her father also passed away.

[17] The Applicant also explained why she believed her appeal had a reasonable chance of success. She submitted that the GD erred in law by applying to her case the concept of "actual residence," rather than "ordinary residence," as required by the OASA and the Canada-Italy ISSA. She alleged that the GD erroneously found that the date on which she physically left

Canadian territory, October 1966, and the date on which she commenced contributing to Italian Social Security, November 1966, marked the end of her "ordinary residence" in Canada. In fact, she was an ordinary resident of Canada for more than the minimum 53 weeks demanded under the ISSA—from January 1966, the month of her 18th birthday, until February 1967—and as such has a right to an OAS pension.

ANALYSIS

[18] I find that the Application for Leave to Appeal was filed after the 90-day limit. The Appellant stated that she received the GD's decision at her home in Italy on September 8, 2015. She did not submit her application until March 24, 2016, more than 2½ months after the submission deadline elapsed.

[19] In deciding whether to allow further time to appeal, I considered and weighed the four factors set out in *Gattellaro*.

Continuing Intention to Pursue the Appeal

[20] The Appellant wrote that she was late in filing her Application for Leave to Appeal because she was disabled and dependent on others. She said she suffered a severe prescription drug overdose that required weeks of recovery. I am willing to accept that she faced challenges during the relevant period and did have a continuing intention to pursue the appeal during the relatively short time that elapsed between the end of the filing period and her eventual submission of the leave application.

Arguable Case

[21] To receive a partial OAS pension, an applicant who resides outside of Canada on the day before the application is approved must prove that he or she had previously resided in Canada for at least 20 years. In this case, the Applicant, who has lived in Italy for many years and who resided in Canada for approximately one year after her 18th birthday, sought the assistance of the Canada-Italy ISSA in attempting to show that she was entitled to an OAS pension.

[22] In its decision, the GD found that the Appellant resided in Canada for 312 days after turning 18 on January 10, 1966, prior to leaving for Italy on November 18, 1966. Although the GD said these facts were "not in dispute," a perusal of the file suggests that the Appellant has argued that while she may have physically departed Canadian territory in November 1966, she intended to return to Canada and did not make the decision to remain in Italy permanently until February 1967, when she registered as an Italian resident.

[23] It is important to the Appellant's claim that she be found a Canadian resident for more than 53 weeks because this is the minimum residency that triggers the provisions of the Canada-Italy ISSA. Paragraph 6 of Article XI of the agreement says:

> If the number of credited periods of a person under the legislation of one Party amounts in aggregate to less than 53 weeks, no benefit shall be paid by that Party by virtue of paragraphs (4) and (5), but those credited periods shall be accepted by the other Party for the purpose of applying the legislation of that Party.

Although the Applicant suggested that the GD had incorrectly applied a new version of the Canada-Italy ISSA, one that is not yet in force, I could find no evidence of such an error and am satisfied that the provisions quoted by the GD were in effect at the time of application.

[24] In arguing for leave to be granted, the Applicant drew a distinction between "actual" and "ordinary" residence, but these concepts are unknown in law, which recognizes either residence or non-residence and in so doing draws on a range of factors, including, but not limited to, physical presence within the territorial borders of Canada, intention to live in Canada, and ties to Canada in the form of property, financial holdings and family relations (*Canada (MHRD) v. Ding* 2005 FC 76 and *Canada (MHRD) v. Chhabu* 2005 FC 1277).

[25] The GD's reasons for finding that the Applicant ceased to be a resident of Canada as of October 1966 were brief, but it is clear that it discounted the Applicant's purported intention to return to this country and was not persuaded by the fact that she maintained a bank account here for some time afterward. In making this determination, the GD was acting within its jurisdiction to weigh the evidence, determining what facts, if any, it chose to accept or disregard, before ultimately coming to a decision based on its interpretation and analysis of the material before it. Hence, I do not see how this ground has a reasonable chance of success, arising out of the fact

that the GD chose to place more or less weight on some of the evidence than the Applicant submits was appropriate. In *Simpson v. Canada (Attorney General)*, 2012 FCA 82, the Federal Court of Appeal held that "assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact."

[26] As I see no error in law or fact in the GD's finding that the Applicant lacked the 53 weeks of Canadian residency required under the Canada-Italy ISSA, I find that she does not have an arguable case and would have no reasonable chance of success on appeal.

Reasonable Explanation for the Delay

[27] The Applicant pleads that she relies on others for her care and had suffered prescription drug overdose in November 2015 that required weeks of recovery. Although she provided no supporting evidence, I find this explanation reasonable and note it is consistent with the medical conditions that were disclosed previously in the hearing file.

Prejudice to the Other Party

[28] It is unlikely that extending the Applicant's time to appeal would prejudice the Respondent's interests given the relatively short period of time that has lapsed following the reconsideration decision. I do not believe that the Respondent's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

CONCLUSION

[29] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. The Applicant offered a plausible explanation for submitting her Application for Leave to Appeal 2½ months late, and it could be reasonably presumed that she had a continuing intention to pursue her appeal, despite the delay. It is also true that the Respondent's interests would not likely be prejudiced by extending time. Although three of the four *Gattellaro* factors were in her favour, they were ultimately overwhelmed, in my estimation, by the Applicant's lack of an arguable case: I saw

no grounds—whether an error in law or fact—on which the Appellant would have a reasonable chance of success on appeal. Although the AD has the authority to allow an extension in some circumstances, careful consideration of the applicable legal criteria has led me to conclude that this is not an occasion to exercise that discretionary power.

[30] In consideration of the *Gattellaro* factors and in the interests of justice, I would refuse an extension of time to appeal pursuant to subsection 52(2) of the DESDA.

Member, Appeal Division