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

Citation: *T. G. v. Minister of Employment and Social Development*, 2016 SSTADIS 372

Tribunal File Number: AD-16-1031

BETWEEN:

T. G.

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

Leave to Appeal Decision by: Hazelyn Ross

Date of Decision: September 22, 2016

Canada

REASONS AND DECISION

INTRODUCTION

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

[2] This matter is a companion appeal to that of the Applicant's spouse, with whom she resides in X in the United States of America, (the US). In July 2013, the Respondent received her application for an Old Age Security pension pursuant to the Canada - United States of America Agreement on Social Security, (the Agreement). (GD2-43)

[3] By a letter dated May 15, 2014, the Respondent denied the application on the basis that the Applicant's resident in Canada after age eighteen, and from January 1, 1952, and her periods of coverage in the US after age eighteen, and from January 1, 1952, did not total the 20 years required for payment of an OAS pension abroad. (GD2-12) The Respondent upheld the denial on reconsideration. The Applicant appealed from the reconsideration decision to the General Division of the Tribunal.

[4] At issue, was whether the Applicant had twenty years of combined residency in Canada and the US so as to allow her to receive an OAS pension in the US. Also at issue was whether, as an accompanying spouse, she could benefit from the operation of Article VI of the Agreement. In its decision issued on June 24, 2016, the General Division concluded that the Applicant did not have the required twenty years of combined residency in Canada and the US. Thus, she was not eligible to receive a pension under the OAS Act.

[5] The Applicant applies for leave to appeal the decision of the General Division, (the Application).

GROUNDS OF THE APPLICATION

[6] The Applicant states that the General Division erred in law because it failed to determine whether factual residence was equivalent to the deemed residence alluded to in Articles 8 and 9 of the Second Supplement to the Agreement. She submitted that there was no difference

between factual residence and deemed residence and she questioned whether the definition of deemed residence in Article VI of the Agreement applied equally to employed and unemployed person. In addition, the Applicant submitted that Article VIII of the Second Amendment to the Agreement made no distinction between employed and unemployed persons and, she set out her belief that she was eligible for an OAS pension. (AD1-2)

ISSUE

[7] The issue is whether the appeal has a reasonable chance of success.

THE LAW

[8] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development*, (DESD), Act govern the grant of leave to appeal. Subsection 56(1) provides that "an appeal to the Appeal Division may only be brought if leave to appeal is granted." Thus, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.

[9] Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal." In order to obtain leave to appeal, an applicant must satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal.[1] In *Canada (Attorney General) v. O'Keefe* 2016 FC 503, the Federal Court examined the jurisdiction of the Appeal Division to grant leave to appeal, stating that:-

> [36] Leave to appeal a decision of the SST-GD may be granted only where a claimant satisfies the SST-AD that their appeal has a "reasonable chance of success" on one of the three grounds of appeal identified in subsection 58(1) of the *DESDA*: (a) a breach of natural justice; (b) an error of law; or (c) an erroneous finding of fact made in a perverse and capricious manner or without regard for the material before it. No other grounds of appeal may be considered (*Belo-Alves,* above, at paras 71-73).

[1] 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."

[10] 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] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63

[11] Subsection 58(1) of the 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.

[12] *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.

ANALYSIS

[13] In arguing that the General Division should have made a finding concerning whether deemed residence and factual residence are the same for the purposes of the OAS Act, the Applicant is revisiting an issue that that had been raised before the General Division. The concept of "deemed residence" appears in Article VIII, which refers back to Article VI of the Agreement. Under certain conditions periods of residence in the US can be treated as periods of residence in Canada for the purpose of establishing eligibility for an OAS pension. The Applicant argues that the General Division ought to have ruled, expressly, on whether the concepts of "deemed residence" and "actual residence" were the same for the purposes of her eligibility for an OAS pension.

[14] The Appeal Division finds that neither the Agreement nor the OAS Act places such a requirement upon the General Division. What they do require of the General Division is that, where eligibility for an OAS pension is not met solely under the OAS Act, it determines

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

whether an applicant's residence in the US could be deemed to be periods of residence in Canada.

[15] The Applicant submits that there is no difference between "deemed residence" and "actual residence". She states that the Canada Revenue Agency considers and treats the concepts the same. The Appeal Division is unable to speak to the position of the Canada Revenue Agency, but begs to differ on the position that the two concepts are identical in meaning. Applying the rule of statutory interpretation that words in a statute should be given their ordinary, everyday meaning the Appeal Division finds that the two words are not identical in meaning. The Oxford English Dictionary, Online version, defines the word actual as "existing in fact, real". It provides the following definition for the word deem: to regard or consider in a specified way. There is a qualitative difference between the two terms. Thus, deemed residence is different from actual residence.

The deeming provision

[16] Article VIII of the Agreement contains the deemed residence provision, namely:-

> **(1) (a)** - If a person is not entitled to the payment of a benefit because he or she has not accumulated sufficient periods of residence under the *Old Age Security Act*, or periods of coverage under the *Canada Pension Plan*, the entitlement of that person to the payment of that benefit shall, subject to sub-paragraph (1)(b), be determined by totalizing these periods and those specified in paragraph (2), provided that the periods do not overlap.
>
> **(b)** In the application of sub-paragraph (1)(a) of this Article to the *Old Age Security Act*:
>
> **(i)** only periods of residence in Canada completed on or after January 1, 1952, including periods deemed as such under Article VI of this Agreement, shall be taken into account; and

[17] The General Division's analysis of the Applicant's eligibility for an OAS pension is short. First, the General Division concluded that the Applicant did not meet the requirement of Article VI of the Agreement. It pointed out that Article VI takes as a reference point Article V(2) of the Agreement, which itself relates to persons employed in the territory of a Contracting State, which in the Applicant's case would be the US. It is not in dispute that the Applicant's spouse did not qualify under the Agreement. Therefore, as his non-working spouse, she also could not

qualify under the Agreement. Accordingly, the Appeal Division finds that the General Division did not err when it found that the provisions of the Agreement do not apply to her.

[18] Secondly, the General Division correctly identified the criteria that must be met in order to qualify for an OAS pension. It noted that there were essentially two rules: a 40 year rule; and the 10 year rule. The General Division also identified that there was a 3 for 1 "helper" rule to the 10 year rule. The helper rule requires residence in Canada for at least one year immediately preceding the day on which an applicant's application is approved.

[19] The General Division found that the Applicant met neither rule. After age eighteen and from January 1, 1952 she had not resided in Canada for an aggregate period of forty years. It is not in dispute that her residence in Canada amounted to eight years and three months. Moreover, being resident in Florida, the "helper' exception in paragraph 3(1)(b)(iii) of the OAS Act did not apply to her case. The General Division dismissed her appeal.

[20] Having considered the Tribunal record and the decision, the Appeal Division finds that the General Division did not err in that it correctly identified the issue, the applicable legislation, and the relevant tests. Nor did it err in its application of the legislation and relevant tests to the circumstances of the Applicant's case.

CONCLUSION

[21] The Applicant submitted that the General Division erred in law in regard to its decision that found she did not qualify for an OAS pension. For the reasons set out above the Appeal Division is not satisfied that her arguments raise grounds of appeal that would have a reasonable chance of success.

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division

Schedule 1

3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to

(a) every person who was a pensioner on July 1, 1977;

(b) every person who
- (i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,
- (ii) has attained sixty-five years of age, and
- (iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved; and

(c) every person who
- (i) was not a pensioner on July 1, 1977,
- (ii) has attained sixty-five years of age, and
- (iii) 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 forty years.

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.

Schedule 2

ARTICLE V

1. Except as otherwise provided in this Article, an employed person who works in the territory of one of the Contracting States shall, in respect of that work, be subject to the laws of only that Contracting State.

2. a. Where a person who is normally employed in the territory of one Contracting State and who is covered under its laws in respect of work performed for an employer having a place of business in that territory is sent by that employer to work for the same employer in the territory of the other Contracting State, the person shall be subject to the laws of only the first Contracting State in respect of that work, as if it were performed in the territory of the first Contracting State. The preceding sentence shall apply provided that the period of work in the territory of the other Contracting State is not expected to exceed 60 months. For purposes of applying this sub-paragraph, an employer and an affiliated company of that employer (as defined under the laws of the Contracting State from which the person was sent) shall be considered one and the same, provided that the employment in the other Contracting State would have been subject to the laws on compulsory coverage of the Contracting State from which the person was sent in the absence of this Agreement.
   b. For the purpose of subparagraph (a), where a person is required to work in the territory of the other Contracting State for intermittent periods of short duration, each such period shall be considered a separate period of work.

1. Except as otherwise provided in this Article, where a person referred to in Article V(2) is subject to the laws of Canada, or the comprehensive pension plan of a province, during any period of residence in the territory of the United States, that period of residence, in respect of that person, his spouse and dependents who reside with him and who are not employed or self-employed during that period, shall be treated as a period of residence in Canada for the purposes of the Old Age Security Act.

(1) (a) - If a person is not entitled to the payment of a benefit because he or she has not accumulated sufficient periods of residence under the *Old Age Security Act*, or periods of coverage under the *Canada Pension Plan*, the entitlement of that person to the payment of that benefit shall, subject to sub-paragraph (1)(b), be determined by totalizing these periods and those specified in paragraph (2), provided that the periods do not overlap.

(b) In the application of sub-paragraph (1)(a) of this Article to the *Old Age Security Act*:

(i) only periods of residence in Canada completed on or after January 1, 1952, including periods deemed as such under Article VI of this Agreement, shall be taken into account; and

(1) If a person is entitled to the payment of an Old Age Security pension or a spouse's allowance solely through the application of the totalizing provisions of Article VIII, the agency of Canada shall calculate the amount of the pension or spouse's allowance payable to that person in conformity with the provisions of the *Old Age Security Act* governing the payment of a partial pension or a spouse's allowance, exclusively on the basis of the periods of residence in Canada on or after January 1, 1952 which may be considered under that Act or are deemed as such under Article VI of this Agreement.

(2) Paragraph (1) shall also apply to a person outside Canada who would be entitled to the payment of a full pension in Canada but who has not resided in Canada for the minimum period required by the *Old Age Security Act* for entitlement to the payment of a pension outside Canada.

(3) Notwithstanding any other provision of this Agreement:

(a) an Old Age Security pension shall be paid to a person who is outside Canada only if that person's periods of residence, totalized as provided in Article VIII, are at least equal to the minimum period of residence in Canada required by the *Old Age Security Act* for entitlement to the payment of a pension outside Canada; and

(b) a spouse's allowance and a guaranteed income supplement shall be paid to a person who is outside of Canada only to the extent permitted by the *Old Age Security Act*.