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

Citation: *B. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 392

Tribunal File Number: AD-16-1157

BETWEEN:

B. D.

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: October 6, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant requests leave to appeal the decision of the General Division issued on July 13, 2016. The General Division found that the Applicant was not eligible for a pension under the Old Age Security, (OAS), Act. The General Division was not persuaded that he met the definition of residence contained in the OAS Act and Regulations.

ISSUE

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

THE LAW

[3] Subsections 56(1) and 58(3) of the 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.

[4] 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]

[5] 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.

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

[6] 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.

[7] *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.

GROUNDS OF THE APPLICATION

[8] Counsel for the Applicant submitted that the General Division breached all three of the grounds of appeal set out at subsection 58(1) of the DESD Act.

SUBMISSIONS

[9] On his behalf, Counsel for the Applicant submitted that the General Division failed to observe a principle of natural justice by not accepting the Applicant's explanation for the conflicting dates he gave for his residency in Canada. He also submitted that the General Division made a number of errors of law, namely, by failing to observe that the Respondent has never denied the Applicant's application and by failing to observe that the entitlement to a pension is established on residency of ten years.

[10] As well, Counsel for the Applicant submitted that the decision is based on erroneous finding of facts regarding the totality of the Applicant's residence in Canada. Specifically that the Applicant's calculation of his total residence on the statement he submitted to the General Division amounted to thirty-four years. Counsel argued that the statement was made on the basis of the stamps in the Applicant's passports, copies of which had been made available to the Respondent. He also submitted that the General Division failed to recognise that during the period 1990 to 2005 the Applicant did not have a passport, (and presumably did not travel), which was conclusive proof of his residence in Canada.

[11] Counsel for the Applicant also argued that the General Division failed to consider the totality of the evidence concerning the Applicant's history and circumstances in Canada in determining whether he met the definition of resident.

ANALYSIS

The General Division failed to observe a principle of natural justice

[12] The principles of natural justice are concerned with "fairness": that is, that parties in a proceeding are able to present their cases fully; to know the case they have to meet; and to have their cases heard by an impartial decision-maker. In the administrative law context the concept of natural justice extends to procedural fairness.

[13] Counsel's arguments on this issue, do not relate to "fairness". They attempt to explain the conflicting dates the Applicant provided regarding his residency in Canada. They do not show in what way the General Division prevented the Applicant from fully presenting his case; or denied him the opportunity to know the Respondent's position; or acted in a less than impartial manner towards him. However, the General Division did address this submission in its reasoning. It provided a clear rationale for why it did not accept his submissions. The Appeal Division finds that no breach of natural justice arises from the General Division's determination. Accordingly, this submission does not disclose a ground of appeal that would have a reasonable chance of success.

The General Division erred in law

[14] Under this head, Counsel for the Applicant makes two main submissions. First he alleged that the General Division erred because it failed "to observe that the Minister has never denied the application of the applicant". Counsel for the Applicant argued that at paragraph 48 of its submission, (GD5-13), the Respondent "admits that according to appellants CPP contribution, it appears that he would have enough years to collect the pension as long as he is still residing in Canada." However, the Respondent did not end its observation there. It went on to take the position that the CPP record was supplementary information; and did not provide sufficient proof of the Applicant's years of Canadian residence.

[15] The Applicant had raised its argument before the General Division. (para. 28(a)) The General Division indicated that the onus rested on the Applicant to establish, on a balance of probabilities, that he met the period of residence required by section 3 of the OAS Act. The Appeal Division agrees. In this respect, the Tribunal record contains several letters from the Respondent advising the Applicant that it could not process his application because it lacked sufficient information to allow the Respondent to assess his residence. (GD2-39 to GD2-43) In the circumstances the Appeal Division is not persuaded that failing to observe that the Minister had never denied the application is an error of law. Accordingly, the Appeal Division finds the submission discloses no ground of appeal that would have a reasonable chance of success.

[16] Counsel for the Applicant the Applicant also submitted that the General Division erred in law in that it failed to "observe that the entitlement to old age pension is established on the residency of 10 years." The General Division set out the appropriate statutory provision that governs entitlement to an OAS pension at paragraph 6 of its decision, however, implicit in this submission is the position that the General Division ought to have calculated the Applicant's residence. The Appeal Division disagrees. The General Division found that the Applicant had failed to provide clear evidence of his residence history in that he had filed conflicting accounts in the several questionnaires he submitted.

[17] The issue is one of credibility. The onus is on the Applicant to establish his residency. In circumstances where he filed conflicting accounts of that residency, the Appeal Division finds that the General Division did not err in finding that there was not a reliable basis before it on which it could find that the Applicant met the residency requirement set out in Section 3 of the OAS Act. Leave to appeal will not be granted in respect of this submission.

The General Division based its decision on erroneous findings of fact

[18] Counsel for the Applicant submitted that the General Division failed "to observe that if we deduct the four years when he was out of the country for more than six months in a year, the appellant's residency is establish [ed] for 34 years out of 38 years and he is entitled for old-age pension on the pro-rata basis of 34/40." In making this submission, Counsel relied on the statement prepared by the Applicant and his son. Counsel stated that this statement showed that the Applicant had been out of Canada for more than six months only in the years 1958, 1986,

1987 and 1990. Having noted the numerous stamps in the Applicant's passports, the Respondent argued that the statement was not a reliable indicator of his residency in Canada. (GD5-13) in the circumstances, the Appeal Division finds that the General Division did not err as submitted by Counsel for the Applicant the Applicant.

[19] Counsel for the Applicant also argued that the General Division failed to recognise that the Applicant had more ties to Canada than he did to his native country. However, in the context of the General Division finding that the Applicant failed to meet his onus to establish residence, the Appeal Division is unable to find that any error on the part of the General Division.

CONCLUSION

[20] The Applicant requested leave to appeal the decision of the General Division on the ground that the General Division failed to observe a principle of natural justice, erred in law in making its decision, whether or not the error appears on the face of the record and that its 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. In the Application, he re-stated many of the arguments he made before the General Division and objects to a number of the findings made by the General Division member in his decision. The Appellant is essentially asking that the Appeal Division to re-hear the case and come to a legal conclusion different from that already rendered.

[21] The role of the Appeal Division is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the General Division and if so to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not the Appeal Division's role to re-weigh the evidence or re-hear the case *de novo*. *Tracey v. Canada (Attorney General),* 2015 FC 1300

[22] The Application is refused.

Hazelyn Ross
Member, Appeal Division