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

Citation: *C. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 456

Tribunal File Number: AD-16-238

BETWEEN:

C. B.

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: Janet Lew

Date of Decision: November 23, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 13, 2016, which determined that the Applicant had ceased to be resident in Canada on September 2, 1998 and did not re-establish residency in Canada before the end of October 2012, for the purposes of determining entitlement to an Old Age Security pension and Guaranteed Income Supplement. The General Division declined to make any findings regarding the Applicant's residency after October 2012. The Applicant filed an application requesting leave to appeal on February 3, 2016, invoking several grounds of appeal.

ISSUES

[2] Does the appeal have a reasonable chance of success?

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

> **(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.

[4] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

i. Canadian Charter of Rights and Freedoms

[5] The Applicant indicated in his correspondence of March 9, 2016 that he would no longer pursue an appeal on the basis of the *Charter* (AD1A).

ii. Natural justice

[6] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his or her case, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. It relates to issues of procedural fairness before the General Division.

[7] The Applicant asserts that the General Division breached principles of natural justice as it did not compel the attendance of representatives on behalf of Service Canada to attend the hearing and give evidence under oath.

[8] The parties are under no obligation to attend or participate in hearings before the General Division, although it is generally in a party's best interests to attend, otherwise evidence material to his or her case may not otherwise be adduced, his position might not be advanced and an adverse interest might be drawn against the absent party.

[9] At the same time, the General Division is under no duty to order a party to attend the proceedings.

[10] If the Applicant had been of the position that representatives on behalf of Service Canada might have had evidence favourable to his appeal (which was not already set out in the documentary evidence), he could have requested the attendance of those representatives, and if they did not appear at the hearing, could have requested that they attend, sought an order compelling their attendance, or requested that the General Division draw adverse interests against the Respondent for failing to produce witnesses. The Applicant however did not request the attendance of the representatives of Service Canada, nor seek any orders against them.

[11] The Applicant has not provided any evidence that the General Division deprived him of an opportunity to fully and fairly present his case. I am not satisfied that the appeal has a reasonable chance of success on this ground.

iii. Errors of law

Old Age Security Act* and *Regulations

[12] The Applicant submits that the General Division erred in its interpretation and application of subsection 34(h) of the *Old Age Security Act* (OAS Act) and subsections 20(1), 21(1) and 21(4) of the *Old Age Security Regulations* (OAS Regulations).

[13] Subsection 34(h) of the OAS Act provides that the Governor in Council may make regulations defining residence and presence in Canada and defining intervals of absence from Canada that shall be deemed not to have interrupted residence or presence in Canada. I do not see that this particular subsection has any relevance to the decision rendered by the General Division. The Applicant has not explained how the subsection applies or is even relevant.

[14] Subsection 20(1), 21(1) and 21(4) of the OAS Regulations state the following:

> **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.
>
> **21(1)** For the purposes of the Act and these Regulations,
>
> **(a)** person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and
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> **(b)** a person is present in Canada when he is physically present in any part of Canada.
>
> **(4)** Any interval of absence from Canada of a person resident in Canada that is
>
> **(a)** of a temporary nature and does not exceed one year,
>
> **(b)** for the purpose of attending a school or university, or
>
> **(c)** specified in subsection (5).

[15] Subsection 3(2) of the OAS Act sets out the requirements to meet to qualify for a partial pension.

[16] The Applicant suggests that the General Division failed to properly apply these subsections as he is a Canadian citizen, has always spent more than six months per year in Canada from 1999 to 2015 and has always rented an apartment. In citing paragraph 73, he denies that he has ever been resident outside of Canada for six or more months per year from 1999 to 2015. He argues that unless he lived at least one complete year outside Canada, he should be considered a resident of Canada for that year.

[17] The Applicant also points to the fact that he had Canadian bank accounts; held bank cards, Medicare card and a Canadian driver's licence; had purchased home furnishings and supplies; filed personal income taxes with Canada Revenue Agency and Revenue Quebec and has friends and relatives in Canada. He argues that he should therefore be considered resident in Canada from 1999 to 2015. He cited pages 29, 30, 33 and 34 to 36 of the decision of the General Division. The Applicant suggests that the General Division should have considered these factors determinative of his residency in Canada.

[18] Subsection 21(1) of the OAS Regulations defines "residency". It stipulates that physical presence alone is insufficient. An individual must make Canada his home and ordinarily live in any part of Canada. As the member stated in paragraph 54, several factors are relevant to the determination of whether a person makes Canada his home and ordinarily lives in any part of Canada.

[19] In *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, the Federal Court examined the test for residency. The Federal Court found the decision of Noel J. of the Exchequer Court of Canada in *Schujahn v. Canada (Minister of National Revenue)*, [1962] Ex. C.R. 328 (QL) at para. 8 to be helpful:

> It is quite a well settled principle in dealing with the question of residence that it is a question of fact and consequently that the facts in each case must be examined closely to see whether they are covered by the very diverse and varying elements of the terms and words "ordinarily resident" or "resident". It is not as in the law of domicile, the place of a person's origin or the place to which he intends to return. The change of domicile depends upon the will of

> the individual. A change of residence depends on facts external to his will or desires. The length of stay or the time present within the jurisdiction, although an element, is not always conclusive. Personal presence at sometime during the year, either by the husband or by the wife and family, may be essential to establish residence within it. A residence [page 332] elsewhere may be of no importance as a man may have several residences from a taxation point of view and the mode of life, the length of stay and the reason for being in the jurisdiction might counteract his residence outside the jurisdiction. Even permanency of abode is not essential since a person may be a resident though travelling continuously and in such a case the status may be acquired by a consideration of the connection by reason of birth, marriage or previous long association with one place. Even enforced coerced residence might create residential status.

[20] From this, the Federal Court concluded that "residency is a factual issue that requires an examination of the whole context of the individual under scrutiny." The Court referred to several factors which may be considered in determining residency: ties in the form of personal property; social ties in Canada; other fiscal ties in Canada (medical coverage, driver's licence, rental lease, tax records, etc.); ties in another country; regularity and length of visits to Canada, and the frequency and length of absences from Canada; the lifestyle of the person, i.e. his mode of living, or whether the person living in Canada is sufficiently deep rooted and settled. This is by no means an exhaustive list. As Layden-Stevenson J. stated in *Canada (Minister of Human Resources Development) v. Chhabu,* 2005 FC 1277 stated at paragraph 32, "such factors are significant but they are not exhaustive and the ultimate determination must be made having regard to all the circumstances".

[21] There is a general presumption that a tribunal considers all the evidence before it, although, as Layden-Stevenson J. stated in *Kiefer v. Canada (Minister of Human Resources Development),* 2008 FC 786, they are not to be read "hypercritically". The courts have consistently maintained that it is up to the decision-maker to assess and weigh the evidence before it. However, as noted in *Kiefer* at paragraph 28:

> much will depend on the significance of the evidence that is not mentioned. I regard it as settled law that a court will be reluctant to defer to a tribunal's decision where the tribunal's reasons consider in detail the evidence supporting its conclusions, but do not refer to important evidence pointing to a different conclusion: *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 (CanLII), 362 N.R., 1 (F.C.A.); *Cepeda-Guiterrez v Canada (Minister of Citizenship and Immigration)* (1998), 1998 CanLII 8667 (FC), 157 F.T.R. 35 (F.C.T.D.).

[22] In the *Kiefer* decision, the Federal Court noted that the Review Tribunal had not undertaken any comparative analysis of the evidence in relation to Ms. Kiefer's residence in the United States and her residence in Nova Scotia. The Federal Court regarded this as a failure to refer to evidence that was central to the issue before it, and allowed the application for judicial review. This necessitates a review of the General Division's decision, to determine whether it might have failed to refer to evidence that was central to the issue before it.

[23] The General Division found that there were two time periods during which the Applicant did not reside in Canada: October 9, 1990 to January 13, 1993 and from September 2, 1998 to October 31, 2012. The Applicant was absent from Canada during this first timeframe but claimed he was resident in Canada. While there may have been other ties which the Applicant had to Canada, he primarily argued that he had rented an apartment and intended on returning to Canada, to establish residency. The General Division noted that intention alone is insufficient to establish residency and that it was unlikely he had an apartment of his own, if he returned to Canada and lived with his brother until he found an apartment of his own.

[24] As for the timeframe from September 2, 1998 to October 31, 2012, the General Division acknowledged that the Applicant had considerable ties to both Greece and to Canada. The Applicant argues that the General Division should have considered the fact that he has bank accounts, credit cards, a driver's licence and medical coverage in Canada. In fact, the General Division acknowledged that the Applicant has a driver's licence and medical coverage; however, the member also noted that he has a driver's licence and medical coverage in Greece. Hence, the fact that he held these in Canada could not have

been determinative of his residency. The General Division indicated that it had regard to all of the different circumstances, as it reviewed many of the factors set out in *Ding*.

[25] The General Division addressed the very evidence which the Applicant argues the member should have considered. The Applicant is essentially asking that I assess the evidence in a manner that would be more favourable to him, which falls beyond my jurisdiction under the DESDA.

[26] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Service Canada

[27] The Applicant claims that the General Division relied on "obvious incorrect writing statements" provided by Service Canada. The Applicant did not identify these "obvious incorrect writing statements", nor provide any evidence disproving these "obvious incorrect writing statements" to substantiate his allegations. However, in my review of the General Division's analysis, I do not see any explicit reference or any suggestion by the member that she relied on any statements which might have been made by Service Canada or the Respondent, other than two instances when she relied on the Respondent's investigations, at paragraph 64. For the most part, the member largely relied on the documentary trial provided by the Applicant, rather than on any statements provided by the Respondent.

[28] The member accepted the investigator's statement that the Applicant had reportedly stated that he had returned to Canada in November 1987 to work so that he could send money to his family in Greece. The member accepted this statement to the extent that she was prepared to accept that, provided there was some documentary evidence, if the Applicant had rented an apartment in Canada, he was likely occupying that dwelling, rather than leaving it vacant. This conclusion would seem to favour the Applicant. Yet, even if the Applicant is to maintain that the investigator's statement was incorrect, the reason why he might have returned to Canada is immaterial and of no relevance to determining residency.

[29] The second statement which the member accepted was that after returning to Canada in January 1993, the Applicant lived in his brother's basement in Saint-Laurent until he was able to find an apartment of his own. The member concluded that it was unlikely therefore that the Applicant had been renting an apartment when he lived in his brother's basement. If the Applicant maintains that this statement is incorrect, he has not pointed to any of the evidence which was before the General Division to show that the investigator's statement that he had resided with his brother was incorrect.

[30] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Attendance of representatives of Service Canada

[31] The Applicant alleges that the General Division failed to consider the fact that the representatives of Service Canada refused to attend the hearing of the appeal. He suggests that the representatives might have refused to attend the hearing to avoid giving evidence under oath.

[32] As I have indicated above, there is no obligation on a party to attend the proceedings. In this particular instance, as the Applicant alleges that the representatives had refused to attend the hearing. This suggests that he had requested the representatives had attended. However, there is no evidence that he had requested that they attend or that he had requested the General Division to draw adverse inferences against Service Canada.

[33] I am not satisfied in the circumstances of this case that there is any substance to these allegations. For the purposes of this leave application, the Applicant would need to show that Service Canada might have had some evidence of some probative value which had not been produced or could not otherwise be produced without their attendance. This would have helped to establish that their attendance would have been helpful, if not altogether vital, to these proceedings, whether in assisting the Applicant or otherwise.

[34] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Determination by Service Canada

[35] The Applicant claims that Service Canada accepted that he had been resident in Canada for 2007 "and the previous years at 2007". He also claims that Service Canada should have been aware that he had been resident in Canada from 1993 to 2015.

[36] The General Division is not bound by determinations which have been made by the Respondent or by Service Canada, although its position on some of the issues could be relevant. However, Service Canada's determination on the Applicant's residency would not have been particularly helpful, without knowing the basis upon which Service Canada might have accepted that he had been resident in 2007 and for any preceding years. After all, there are a myriad of reasons why Service Canada might have accepted that the Applicant might have been resident at a particular time. It may have been based on limited information.

[37] Ultimately, the General Division was bound to make a determination on the Applicant's residency for 2007 and any preceding years, based on the totality of the evidence before it.

[38] I am not satisfied that the appeal has a reasonable chance of success on the ground that the General Division member should have adopted Service Canada's decision as her own.

Paragraph 20

[39] The Applicant submits that the General Division failed to consider the evidence set out in paragraph 20, which summarizes the Respondent's letter of November 13, 2012. The Respondent cancelled its initial finding that the Applicant was separated from his wife. The Respondent also determined that the Applicant was entitled to a partial Old Age Security pension, rather than a full pension, and that he was not entitled to any guaranteed income supplement. This was based on its finding that the Applicant had ceased to reside in Canada on November 28, 1982.

[40] While the Respondent's conclusions may be of some relevance, as I have indicated above, the General Division is not bound by any determinations which may have been made by the Respondent, as it must base its decision on the evidence before it. The General Division could well ultimately adopt the conclusions of the Respondent, but only after it conducts its own review and assessment of the evidence, and after it considers the appropriate jurisprudence.

[41] In any event, I see that the General Division accepted that the Applicant is not separated from his spouse. At paragraph 67, the member wrote that "the evidence indicates strong ties to Greece in that the Appellant is married…" After reviewing the evidence, the General Division also accepted that the Applicant was not resident in Canada from November 28, 1982 to November 1987.

[42] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Exercise of jurisdiction

[43] The Applicant submits that the General Division should have determined whether he was resident in Canada from 2009 to 2012.

[44] In fact, the General Division decided whether the Applicant was resident in Canada up to October 31, 2012. The General Division determined that the Applicant had re-established residency in Canada before the end of October 2012. The member declined to determine the Applicant's residency after October 2012, as that issue was not before it. The Applicant had appealed the reconsideration decision of November 13, 2012, which found that there had been an overpayment made to the Applicant for the period from February 1994 to October 2012. In other words, the Respondent accepted that the Applicant resumed residency in October 2012.

[45] I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[46] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division