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

Citation: *E. T. and P. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 124

Tribunal File Number: AD-16-1154
AD-16-1155

BETWEEN:

E. T.
P. T.

Applicants

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 29, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicants seek leave to appeal decisions of the General Division of the Social Security Tribunal dated June 16, 2016. The General Division had earlier conducted a joint hearing by videoconference to assess the Applicants' respective periods of residence in Canada for the purposes of determining their eligibility for benefits under the *Old Age Security Act* (OAS Act).

[2] On September 23, 2016, within the specified time limitation, the Applicants submitted to the Appeal Division applications requesting leave to appeal that detailed alleged grounds for appeal. For these applications to succeed, I must be satisfied that the appeal has a reasonable chance of success.

JOINING OF APPLICATIONS

[3] As these two requests for leave to appeal share a common question of law (with only immaterial differences in their respective facts), I think it is appropriate to deal with them jointly, as permitted under section 13 of the *Social Security Tribunal Regulations* (SST Regulations). In taking this action, I am satisfied that no injustice will be caused to any party.

OVERVIEW

[4] The Applicants are a husband and wife who were born, respectively, in Jamaica in August 1944 and in St. Vincent in November 1944. Mrs. P. T. entered Canada as a landed immigrant in June 1966 and Mr. E. T. entered Canada in April 1969. In their applications for the Old Age Security (OAS) pension, both submitted in March 2010, they indicated that they had moved to the United States in January 1976, where they lived until March 1988, when they returned to Canada. They claimed that they had been living in this country ever since.

[5] The Respondent requested further evidence from both Applicants to substantiate their residence in Canada during the claimed periods. In reply, the Applicants submitted various documents, including income tax returns, university transcripts and cancelled passports, although they acknowledged that they did not have complete records of their movements from decades ago.

[6] On November 16, 2010, the Respondent informed Mr. E. T. that his OAS application had been approved and that he was eligible for a full pension, effective September 2009. Mrs. P. T. submitted a second application for the OAS pension in November 2011. On December 14, 2011, she was informed that her application had been approved for a full pension, effective December 2010. On March 10, 2012, Mrs. P. T. wrote to the Respondent to express her disagreement with effective date of her OAS pension, asking that it be calculated from the date of her original application date.

[7] In May 2012, the Applicants applied for the Guaranteed Income Supplement (GIS): Mr. E. T. for the payment period July 2010 to June 2011, and Mrs. P. T. for the payment period July 2012 to June 2013.

[8] On January 29, 2013, the Respondent wrote to Mr. E. T. and indicated that his pension had been suspended, pending a review of his OAS file to determine whether he satisfied the residency requirements for receipt of the pension. On the same date, the Respondent acknowledged Mrs. P. T.'s request for reconsideration. The Respondent demanded further documents from both Applicants and also asked them to complete questionnaires.

[9] In separate letters dated September 26, 2013, the Respondent informed the Applicants that the results of its investigation had led to revisions of their OAS entitlements. Mr. E. T. was informed that his file showed that he had lived in Canada after age 18 for only 14 years: from April 7, 1969 to January 10, 1976, and from March 15, 1988 to September 25, 1995. Mrs. P. T. was informed that her file showed that she had lived in Canada after age 18 for only 18 years: from July 6, 1966 to January 1, 1976, and from March 1, 1987 to January 1, 1996.

[10] On January 13, 2014, the Respondent informed that Applicants that the *Agreement Between the Government of Canada and the Government of the United States of America with*

Respect to Social Security (Agreement) permitted them to meet the 20-year residency threshold to receive OAS pensions outside of Canada. The Respondent explained that, under the Agreement, it was able to offer Mr. E. T. and Mrs. P. T. partial pensions at rates of 14/40 and 17/40, respectively, both effective as of December 2010. However, the Respondent also advised the Applicants that these determinations had resulted in overpayments of $16,852 for Mr. E. T. and $10,757 for Mrs. P. T.

[11] In a letter dated February 27, 2014, the Applicants maintained that they had been residents in Canada for approximately 45 and 48 years, respectively. They admitted that they left Canada in 1995, that they had obtained U.S. TN visas in May 1997 and that, for the next 10 years, they travelled in and out of Canada. As they have adult children in both countries, they resided with them and their families as needed. They claimed that, since retiring, they have spent most of their time in Canada.

[12] By letter dated August 12, 2014, the Respondent informed the Applicants that it had had decided to uphold its decision because their time in Canada between 1997 and 2007 was presence rather than residence. The Applicants appealed this reconsideration decision to the General Division on September 22, 2014.

[13] At the hearing before the General Division on April 12, 2016, the Applicants testified about their ties to Canada and answered questions about their movements to and from the U.S. over the years. They noted that they had filed Canadian income tax returns and that they had never been absent from Canada for more than six months at a time.

[14] In its decisions of June 16, 2016, the General Division allowed in part both of the Applicants' appeals. In the case of Mr. E. T., the General Division found that he had been a resident of Canada from April 7, 1969 to December 31, 1978, and from March 15, 1988 to December 31, 1994, for a total of 16 years and six months. In the case of Mrs. P. T., the General Division found that she had been a resident of Canada from July 7, 1966 to December 31, 1975, from July 1, 1976 to March 31, 1977, from January 1, 1978 to June 30, 1979, and from March 15, 1988 to September 25, 1995, for a total of just over 19 years. Both Applicants were therefore eligible for higher partial OAS pensions than what the Respondent had awarded them,

although neither was found eligible for any GIS payments because they had not been residents of Canada during the relevant time periods.

THE LAW

OAS Act and Associated Regulations

[15] Under section 3 of the OAS Act, 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.

[16] To receive a partial pension, an applicant must have resided in Canada for at least 10 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.

[17] The GIS is an income-tested monthly benefit that is paid to individuals who receive the OAS pension and who have little or no other income. The GIS is suspended six months after the month a person leaves Canada or ceases to reside in Canada, as the case may be (paragraphs 11(7)(*c*) and (*d*) of the OAS Act).

[18] Section 40 of the OAS Act permits the Respondent to enter into reciprocal agreements with the governments of other countries, and this provision contemplates that such agreements might affect the eligibility for pensions.

[19] Under section 40 of the OAS Act, where an applicant has spent time living and working abroad, agreements with other countries may assist him or her to qualify for OAS benefits.

[20] Under the Canada-U.S. Agreement, periods of contributions to the U.S. Federal Old Age, Survivor's and Disability Insurance Program may be added to periods of residence in Canada to assist the applicant in meeting the minimum residence requirement. Each valid quarter of contributions equals three months of residence in Canada, provided they do not overlap with periods of Canadian residence. Article VIII states:

> 1. In this Article, "pension" means a monthly pension under Part I of the *Old Age Security Act*.
>
> 2. (a) If person is entitled to a pension under paragraph 3(1)(*a*) or (*b*) of the Act, the totalization provisions of subparagraphs (3)(*a*) and (*b*) of this Article may be used, if necessary, to accumulate the required 20 years of residence in Canada for payment of a pension in the United States. Only a partial pension calculated in accordance with the Act may be paid.
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> (b) If a person is entitled to a partial pension under subsection 3(1.1) of the Act, that pension may be paid in the United States if the periods totalized according to subparagraphs (3)(*a*) and (*b*) of this Article equal not less than 20 years.
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> 3. (a) If a person is not entitled to a pension under the *Old Age Security Act* because of insufficient periods of residence, entitlement to a pension may be determined by totalizing periods of residence in Canada on or after January 1, 1952 and after the attainment of age 18, and periods of coverage under United States laws as specified in subparagraph (3)(*b*) of this Article, but where the periods coincide, only one period shall be counted.
>
> (b) For the purposes of establishing entitlement to a pension by means of totalization, a quarter of coverage under United States laws on or after January 1, 1952 and after the attainment of age 18, shall be counted as three months of residence in Canada.
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> (c) The agency of Canada shall calculate the amount of the pro-rated pension at the rate of 1/40th of the full pension for each year of residence in Canada which is recognized as such in subparagraph (3)(*a*) of this Article or deemed as such under Article VI of this Agreement.
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> 4. If the total duration of the periods of residence completed in Canada in accordance with subparagraph (3)(*a*) of this Article or Article VI of this Agreement is less than one year, the agency of Canada shall not pay a pension in respect of those periods.

[21] Subsection 21(1) of the *Old Age Security Regulations* (OAS 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.

[22] Subsection 21(4) of the OAS Regulations states that where a person who is resident in Canada is absent from Canada, that absence shall be deemed not to have interrupted that person's residence or presence in Canada, provided that (i) the absence is of a temporary nature and does not exceed one year; or (ii) the absence is for the purpose of attending a school or university; or (iii) the absence is for a reason specified in subsection 21(5) of the OAS Regulations.

[23] Subsection 21(5.3) of the OAS Regulations states that where, by virtue of an agreement entered into under subsection 40(1) of the OAS Act, a person is subject to the legislation of a country other than Canada, that person shall, for the purposes of the OAS Act and the OAS Regulations, be deemed not to be resident in Canada.

Department of Employment and Social Development Act

[24] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[25] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

[26] According to subsection 58(1) of the DESDA the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

[27] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada.*[1] The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada.*[2]

[28] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicants 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 Applicants do not have to prove their case.

ISSUE

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

SUBMISSIONS

[30] In their joint application requesting leave to appeal, the Applicants made the following allegations:

(a) Although the member presiding over their hearing informed them that the General Division is an independent institution that would be assessing the evidence objectively, her decision was subjective and based on information suggesting that their cases be dismissed. The result did not vary significantly from what had been determined previously.

(b) When they submitted their initial applications, they followed all the requirements of the OAS Act. The Respondent later denied them their benefits because they supposedly had not lived in Canada for 10 years after their 18th birthdays, even though the OAS Act says residence means (i) a person resides in Canada if he or she makes his or her home and ordinarily lives in any part of Canada; and (ii) a person is present in Canada if he or she is physically in any part of Canada. The

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

Applicants believe they qualify under subsection 21(5.1) of the OAS Regulations, which states the following:

> Where, by virtue of an agreement entered into under section 40(1) of the Act, a person is subject to the Act while residing in a country other than Canada, the absence from Canada of that person, the person's spouse or common-law partner and the dependents of the person or of the person's spouse or common-law partner, if the spouse, common-law partner or dependents, as the case may be, reside with the person in that country, shall, for the purposes of an allowance, not be considered to have interrupted the residence or presence in Canada of the person, spouse, common-law partner or dependents.

(c) There are also some categories of workers employed or engaged in other countries who are deemed not to have interrupted their residence in Canada. For example, subparagraph 21(5)(*b*)(vi) of the OAS Regulations exempts missionaries with any religious group or organization. Mr. E. T. claims that he worked in the U.S. as credentialed missionary for the Seventh day Adventists, for which he submitted the following supporting documents:

- Letter dated September 16, 2016, from Sylvia Germany, benefits specialist at Oakwood University in Harvest, Alabama, confirming that E. T. was employed by the university and that he held a missionary credential;
- North American Division Service Record indicating that Oakwood University had employed E. T. from January 2002 to January 2011;
- Ontario vehicle registration permit in the name of E. T., effective date July 2016.

ANALYSIS

Subjective Decision

[31] The Applicants suggest that the General Division had already made up its mind prior to the hearing. In doing so, they are essentially alleging that they were subjected to bias and thereby denied an opportunity to present their case in a full and fair hearing. This type of allegation is serious, but a negative outcome is not by itself an indicator of bias. In the absence of any specific evidence to support a reasonable apprehension of bias, allegations alone are insufficient to make out an arguable case.

Disregard for the Law

[32] To receive a partial OAS pension, an applicant must have resided in Canada for at least 10 years if he or she resides in Canada on the day before the application is approved. The Respondent at first found that the Applicants were not even eligible to receive partial OAS pensions because it determined that they had no longer been Canadian residents at their time of application. It later revised this determination and awarded them partial OAS pensions pursuant to the totalization provisions of Article VIII of the Canada-U.S. Agreement, which permitted the Applicants to deem their periods of U.S. coverage as periods of residence in Canada, but only for the purpose of accumulating the minimum 20 years that would make them eligible to receive their partial OAS pensions outside of Canada.

[33] Subsection 3(2) of the OAS Act requires an applicant to have at least 10 years of residence in Canada, but "residence" is more than just physical presence in Canada. Case law has held that residence—whether someone makes his or her home and ordinarily lives in Canada—is a question of fact and may depend on a number of factors. In its decisions, the General Division found that Mr. E. T. and Mrs. P. T. had actually resided in Canada for aggregate periods of 14 and 17 years, respectively having properly considered the factors set out in *Canada (MHRD) v. Ding* and *Singer v. Canada (AG)*[3] and applied them to the available evidence, which included the Applicants' home ownership, records of their movements across

[3] *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76 and *Singer v. Canada (Attorney General)*, 2010 FC 607, confirmed 2011 FCA 178.

borders and their work history and contributions to U.S. Social Security. In concluding that Mr. and Mrs. P. T. had been non-residents after December 31, 1994, and September 25, 1995, respectively, the General

Division 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 General Division chose to place more or less weight on some of the evidence than the Applicant submits was appropriate. In *Simpson v. Canada*,[4] 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.

[34] The Applicants invoked subsection 21(5.1) of the OAS Regulations, but this provision does not confer Canadian residence on persons affected by the Canada-U.S. Agreement, just as the Canada-U.S. Agreement itself does not do so; rather, they merely permit spouses of non-resident Canadians to benefit from totalization. Of course, the question before the General Division was whether the Applicants had been residents in the first place and, if so, when. My review of the General Division's decisions satisfy me that it applied the law and appropriately considered a wide range of factors, based on the available evidence, in determining Applicants' periods of Canadian residence.

[35] I see no arguable case on this ground.

Missionary Work and New Documents

[36] The Applicants submit that Mr. E. T. was an accredited missionary between 2001 and 2011 and thus should qualify for Canadian residence during that period under subparagraph 21(5)(*b*)(vi) of the OAS Regulations. My review of the record indicates that the Applicants failed to advance this argument before the General Division, nor had they previously submitted the three supporting documents that accompanied the request for leave (indeed, the letter from

[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

Oakwood University was prepared after the General Division's decision had been issued). An appeal to the Appeal Division is not ordinarily an occasion on which new or additional evidence can be considered, given the constraints of subsection 58(1) of the DESDA, which do not give the Appeal Division any authority to make a decision based on the merits of the case. Once a hearing is concluded, there is a very limited basis upon which any new or additional information can be raised. An applicant could consider making an application to the General Division to rescind or amend its decision. However, an applicant would have to comply with the requirements set out in section 66 of the DESDA, as well as in sections 45 and 46 of the SST Regulations. Not only are there strict deadlines and requirements that must be met to succeed in an application to rescind or amend, but an applicant would also have to demonstrate that any new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[37] I am not convinced that this ground has a reasonable chance of success on appeal.

CONCLUSION

[38] As the Applicants have failed to advance any arguable grounds, I am unable to consider granting leave under the claimed grounds of appeal.

[39] The applications for leave to appeal are therefore refused.

Member, Appeal Division