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

Citation: *I. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 197

Tribunal File Number: AD-16-1129

BETWEEN:

I. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 28, 2017

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division of the Social Security Tribunal of Canada (Tribunal) summarily dismissing the Appellant's appeal for payment of a pension under the *Old Age Security Act* (OAS Act). The General Division dismissed the appeal because it was not satisfied that it had a reasonable chance of success.

[3] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the General Division.

[4] As I have determined that no further hearing is required, this appeal is proceeding pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations* (SST Regulations).

OVERVIEW

[5] The Appellant applied for an Old Age Security (OAS) pension on June 19, 2015. In his application, he indicated that he was born in Pakistan and arrived in Canada as a permanent resident on May 23, 2006. On August 30, 2006, after only 99 days in this country, he returned to Pakistan to dispose of property, but his wife fell ill, and he had no choice but to remain there. On July 21, 2009, the Appellant returned to Canada, and he has been present here since. He submitted that he would attain the requisite 10 years of Canadian residence as of May 23, 2016.

[6] The Appellant became a Canadian citizen on March 27, 2014.

[7] The Respondent denied the Appellant's application because he did not meet the minimum residency requirement of at least 10 years to become eligible for a partial pension under subsection 3(2) of the OAS Act. The Respondent determined the Appellant could not show that he ordinarily lived and made his home in Canada until after he returned to Canada

from Pakistan in July 2009. It determined that any period in which the Appellant was physically outside Canada prior to July 2009 did not meet the definition of residence under Section 21 of the *Old Age Security Regulations* (OAS Regulations), as it was for more than one year, and it did not fall within any of the accepted exemptions for absence.

[8] The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the General Division on March 23, 2016.

[9] In compliance with section 22 of the SST Regulations, the General Division notified the Appellant in writing of its intention to summarily dismiss the appeal. The letter said in part:

> The facts in your case show that after only 99 days of presence in Canada you departed for a period of 2 years and 325 days. You have stated that you remained outside Canada due to extenuating circumstances and it was your intention to make Canada your home. Residency is based on fact, not on intention. You have suggested that over seven years of residency should be enough in the circumstances because you intended to return to Canada sooner but for the extenuating circumstances.
>
> The Tribunal can find no reviewable error by the Minister in the processing of your application for an OAS pension. The Tribunal is created by legislation and, as such, it has only the powers granted to it by its governing statute. The Tribunal has no equitable powers to grant an appeal on compassionate grounds. The Tribunal is required to interpret and apply the provisions as they are set out in the OAS Act.
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> In your case you the facts show you did not establish residency in Canada after you first arrived May 23, 2006 and before departing again on August 30, 2006 for 2 years 325 days despite your intention to have returned sooner and, as such, no arguable case exists and your appeal must therefore be summarily dismissed.

[10] In his reply to the General Division dated August 12, 2016, the Appellant stated that he recognized that he had been outside Canada for an extended period but that he had no other choice because his wife became seriously ill in Pakistan, and he could not leave her alone at that time. After a very long and painful illness, she passed away, and he returned to Canada. He understood that 10 years of residency were required to qualify for an OAS pension, but he noted there were exemptions for certain types of absences.

[11] On August 23, 2016, the General Division issued its decision, which determined that the Appellant's case had no reasonable chance of success. The General Division found that the Appellant's brief period of presence in Canada in 2006 and his extended absence of 1,056 days thereafter clearly fell outside the requirements of the OAS Act and the OAS Regulations for

him to be considered ordinarily a resident in Canada from May 2006 onward. It also found that the only permitted circumstances under which an absence of more than one year would not interrupt residency were clearly set out in subsection 21(4) of the OAS Regulations. In the General Division's view, the Appellant did not fall within any of those categories. Nothing in the applicable legislation allowed for residency rules to be overlooked on the basis of compassionate grounds.

[12] On September 14, 2016, the Appellant filed an appeal of the summary dismissal decision with the Tribunal's Appeal Division. I have decided that an oral hearing is unnecessary and the appeal will proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) This form of hearing respects the requirement under the SST Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

Department of Employment and Social Development Act

[13] Subsection 53(1) of the DESD Act states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Under subsection 56(2), no leave is required to appeal a summary dismissal to the Appeal Division.

[14] Subsection 54(1) of the DESD Act makes it clear that the General Division can only take an action that should have otherwise been taken by the Minister. The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or Commission in whole or in part or give the decision that the Minister or Commission should have given.

[15] Section 22 of the SST Regulations states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[16] According to subsection 58(1) of the DESD Act, 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;
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> (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.

***Old Age Security Act* and Associated Regulations**

[17] 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.

[18] 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.

[19] Subsection 21(1) of the 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.

[20] Subsection 21(4) of the OAS Regulations states that where a person who is a 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.

[21] Under subsection 21(5) of the OAS Regulations, absences from Canada shall be deemed not to have interrupted a person's residence in Canada while that person was engaged

(i) by the Government of Canada or by the government or a municipal corporation of any province;

(ii) in the performance of services in another country under a development or assistance program that is sponsored or operated in that country by the Government of Canada or of a province or by a non-profit Canadian agency;

(iii) as a member of the Canadian Forces, pursuant to and in connection with the requirements of his duties;

(iv) in work for Canada connected with the prosecution of any war;

(v) as a member of the armed forces of any ally of Canada during any war;

(vi) as a missionary with any religious group or organization;

(vii) as a worker in lumbering, harvesting, fishing or other seasonal employment;

(viii) as a transport worker on trains, aircraft, ships or buses running between Canada and points outside Canada or other similar employment; or

(ix) as an employee, a member or an officer of an international charitable organization, if he returned to Canada within six months of the end of his employment or engagement outside of Canada.

ISSUES

[22] The issues before me are as follows:

(a) How much deference should the Appeal Division extend to decisions of the General Division?

(b) Did the General Division err in summarily dismissing the Appellant's claim that he was eligible for an OAS pension by virtue of having accumulated the minimum 10 years of residence in Canada, as required by the law?

SUBMISSIONS

[23] In his letter dated September 13, 2016, the Appellant wrote that, after he was approved for permanent residence, he immediately moved to Canada and wholeheartedly took steps to settle in this country. He regarded his initial 99 days in Canada as

> a sort of probationary period when I learnt so many things which were necessary for my future residence in Canada. Only after this preliminary work I went to my country with the intent to return to Canada within six months (or earlier) being better equipped and prepared for settling in Canada permanently. The facts later on proved that I was sincere and firm in my intention to settle in Canada.

[24] It was the Appellant's view that the 10-year residency requirement for the OAS pension did not mean that he had to be in Canada for exactly 3,650 days. He noted that there were exemptions allowing absences that did not reduce a period of residence. Moreover, apart from those specified exemptions, a resident is permitted to live outside Canada for up to six months every year and preserve his or her status for the purpose of qualifying for the OAS pension. In theory, one could live outside of Canada for almost five years and still qualify; the Appellant noted that, by comparison, his time spent in Canada exceeded seven years at the time of his application. The Appellant submits that he only left Canada once, and his long stay in Pakistan was due to extenuating circumstance beyond his control—perhaps beyond any human's control. He could not see what other option he might have chosen to better protect his OAS entitlement.

[25] The Respondent made no submissions.

ANALYSIS

Degree of Deference Owed to the General Division

[26] Until recently, it was accepted that appeals to the Appeal Division were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick.*[1] In matters involving alleged errors of law or a failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to a first-level administrative tribunal. In matters where erroneous findings

[1] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9.

of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[27] The Federal Court of Appeal decision in *Canada v. Huruglica*[2] rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

[28] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law: "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[29] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> [T]he determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object […] The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[30] The implication here is that the standards of reasonableness or correctness will not apply unless those words, or their variants, are specifically contained in the founding legislation. Applying this approach to the DESD Act, one notes that paragraphs 58(1)(*a*) and (*b*) do not qualify errors of law or breaches of natural justice, which suggests that the Appeal Division should afford no deference to the General Division's interpretations.

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[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

[31] The word "unreasonable" is nowhere to be found in paragraph 58(1)(*c*), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" and "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division bases its decision on an error that is clearly egregious or at odds with the record.

Summary Dismissal

[32] Subsection 53(1) of the DESD Act requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Had the General Division either failed to identify the test or misstated the test altogether, this would have qualified as an error of law—one that is held to a strict standard.

[33] Here, the General Division correctly stated the test by citing subsection 53(1) of the DESD Act at paragraphs 3 and 16 of its decision. However, it is insufficient to simply recite the test for a summary dismissal without properly applying it. Having correctly identified the test, the General Division was then required to apply the law to the facts. The decision to summarily dismiss therefore involved a question of mixed fact and law and was subject to a degree of deference—within the parameters of subsection 58(1).

[34] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. Although I am not bound by decisions of my fellow members of the Appeal Division, I am persuaded by the reasoning in *A.P. v. MESD. and P.P.*,[3] in which my colleague used the language of "utterly hopeless" to distinguish an arguable appeal from one that was appropriate for a summary dismissal. As long as there was some factual foundation to support the appeal and the outcome was not "manifestly clear," then the matter would not qualify for summary dismissal. A merely weak case would not be appropriate for a summary disposition, as it would necessarily involve assessing the merits of the case, examining the evidence and assigning weight to it. Assessing the evidence and the merits of the case signals that the matter is not appropriate for a summary dismissal.

[3] *A.P. v. Minister of Employment and Social Development and P.P.*, (2015), SSTAD-15-297.

[35] In this case, I agree with the General Division that the Appellant's case was, in essence, doomed to fail. After landing in Canada in May 2006, the Appellant spent almost three years in Pakistan. Subsection 21(4) deems an absence from Canada exceeding one year to be an interruption of residence, subject to specific enumerated exceptions. At no point has the Appellant produced evidence, either before the General Division or the Appeal Division, to show that he fell under any of those exceptions. I see nothing to indicate that the General Division erred when it found that the Appellant's stated reason for remaining in Pakistan—his wife's illness—could not preserve his Canadian residence under the law.

[36] The Appellant was left to argue that his continuing intention to remain a resident should have been considered by the General Division. Unfortunately, there is nothing in the law that requires or permits this, nor is it relevant that he subsequently became a Canadian citizen.

[37] In addition, the General Division correctly found that it was unable to consider the fairness of the outcome demanded by the OAS Act. Ultimately, both the General Division and the Appeal Division are compelled to follow the letter of the law and lack the discretion to provide a remedy in this situation. They can only exercise such jurisdiction as granted by their enabling statute. Support for this position may be found in *Canada v. Tucker*,[4] among many other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

[38] The bulk of the Appellant's submissions recapitulated evidence and arguments that, from what I can gather, were already presented to the General Division. Unfortunately, subsection 58(1) of the DESD Act does not give the Appeal Division any mandate to re-hear OAS claims on their merits; instead, it requires appellants to show how the General Division committed an error that falls within one or more of the three categories of grounds. It is not sufficient for an appellant to merely state their disagreement with the General Division's decision, nor is it enough to express their conviction that they have resided Canada for at least 10 years.

[39] Based on the set of facts before it, the General Division was left with no option but to dismiss the Appellant's appeal. Given that there was no basis to find a 10-year period of

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[4] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.

Canadian residence within one year of the application date—that is, there were no triable issues or any merit to the claim—the General Division rightly concluded that the matter could be disposed of by way of a summary dismissal.

CONCLUSION

[40] For the reasons set out above, the appeal is dismissed.

Member, Appeal Division