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

Citation: *K. T. v. Minister of Employment and Social Development*, 2017 SSTADIS 214

Tribunal File Number: AD-16-564

BETWEEN:

K. T.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: May 9, 2017

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 28, 2016, which determined that she is entitled to 24/40 of a full Old Age Security pension. The Applicant submits that she qualifies for a full Old Age Security pension under section 3 of the *Old Age Security Act*, on the basis that her spouse satisfies the terms of Article 9 of the Agreement between Canada and France on Social Security, dated February 9, 1979 (Agreement). The Article provides that if a person is subject to the legislation of Canada during any period of residence in France, that period, in respect of that person, his spouse and any dependents who live with him, shall be considered as a period of residence in Canada for the purposes of the *Old Age Security Act.*

ISSUE

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

BACKGROUND FACTS

[3] The following facts are relevant for the purposes of this application:

i. The Applicant and her spouse were born in 1948. Both turned 65 years of age in 2013;

ii. After age 18, the Applicant resided in Canada for less than 25 years, from August 21, 1966 to May 31, 1991;

iii. The Applicant's spouse resided in Canada for 22 years, from January 1969 to June 1991, before returning to reside in France in June 1991. He has not resided in Canada since then. In 1976, he became a Canadian citizen;

iv. The Applicant applied for a Canada Old Age Security pension on August 30, 2012, while her spouse applied for a Canada Old Age Security pension on September 17, 2012 (GD2-70). In his application, he indicated that he had

worked in France from 1964 to 1968 and again from October 1991 to July 2007.

[4] The Applicant's spouse suffered injuries in a workplace accident that occurred in July 1985 and, as a result, he received a retroactive wage loss settlement from 1993 to 2005 and Yukon workers' compensation benefits from 2005 to 2010. The Applicant and her spouse argue that the years in which he received the wage loss settlement and workers' compensation benefits should count towards years of residency in Canada.

[5] The Applicant's spouse also received a Canada Pension Plan disability pension, with payments commencing May 2009. The Applicant and her spouse argue that the years in which he received a Canada Pension Plan disability pension should also count towards years of residency in Canada.

ANALYSIS

[6] 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.

[7] Before granting leave to appeal, 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.

[8] The Applicant's spouse filed a separate application requesting leave to appeal. The Applicant's submissions mirror those of her spouse. She submits that the General Division erred as follows:

- At paragraph 33, in failing to recognize that the scope of application of the Agreement, in relation to Canada, applies to only the *Old Age Security Act* and the *Canada Pension Plan*, and not to other pieces of provincial or federal legislation. The Applicant claims that the phrase "legislation of Canada" is defined within the Agreement as being limited to the *Old Age Security Act* and the *Canada Pension Plan.*

- In failing to accept the Respondent's submissions, summarized at paragraph 23(*e*) of its decision, that, "If a person is subject to the CPP or to the comprehensive pension plan of a province of Canada during any period of presence or residence in (the other country), that period shall be considered as a period of residence in Canada for that person." In other words, the Applicant submits that the General Division should have counted the years in which her spouse received a Canada Pension Plan disability pension towards his years of Canadian residency. (I note that this misrepresents the Respondent's position, as summarized by the member, as the Respondent in fact contemplates a person making compulsory contributions to the Canada Pension Plan or Quebec Pension Plan.)

- In interpreting Article 9 according to the intent or intentions of Parliament, without regard to the parties' mutual intentions and in thereby failing to properly apply the provisions of Article 9 of the Agreement.

- In factually distinguishing *Canada (Attorney General), v. Simon*, [1998] 4 F.C. 3 (GD2-105), when she argues that it is entirely on point and therefore applicable to his claim.

- In overlooking the fact that her spouse was unable to make any contributions to the Canada Pension Plan when he received workers' compensation benefits, but

that he nonetheless fell under Canadian legislation because he received territorial workers' compensation benefits.

- In response to the member's interpretation of the words "subject to," at paragraph 29, she argues that 25% of her spouse's workers' compensation benefits were deducted at source in part to "cover 'intended' Canada Pension Plan contributions…" She claims that because workers' compensation benefits were deducted at source, her spouse was subject to the legislation of Canada, for the purposes of the Agreement.

[9] The crux of the Applicant's submissions involves the interpretation of the words "subject to the legislation of Canada," set out in paragraph 1 under Article 9 of the Agreement, and on the applicability of *Simon*. Article 9 of the Agreement, reads as follows:

> **DEFINITION OF CERTAIN PERIODS OF RESIDENCE WITH RESPECT TO THE LEGISLATION OF CANADA**
>
> ## ARTICLE 9
>
> **1** Subject to paragraph 2, if, under the terms of this Part, a person other than a person referred to in the first subparagraph of Article VII(b) is subject to the legislation of Canada during any period of residence in the territory of France, that period shall be considered, in respect of that person, his spouse and any dependants who live with him during that period, as a period of residence in Canada for the purposes of the *Old Age Security Act.*
>
> **2** However, no period during which the spouse or the dependant referred to in paragraph 1 are subject, by reason of their employment, to the legislation of France shall be treated as a period of residence in Canada for the purposes of the *Old Age Security Act*.
>
> **3** Subject to paragraph 4, if, under the terms of this Part, a person other than a person referred to in the first subparagraph of Article VII(b), is subject to the legislation of France during any period of residence in the territory of Canada, that period shall not be considered, in respect of that person, his spouse and any dependants who live with him during that period, as a period of residence in Canada for the purposes of the *Old Age Security Act*.

> **4** Any period of contribution to the *Canada Pension Plan* by the spouse or dependants referred to in paragraph 3 shall be considered as a period of residence in Canada for the purposes of the *Old Age Security Act*.
>
> **5** When a province of Canada has instituted a comprehensive pension plan within the meaning of the *Canada Pension Plan*, paragraphs 1 and 4 shall be read as if the expression "legislation of Canada" in paragraph 1 included the legislation of that province and as if the words "and to the comprehensive pension plan of that province" were added to paragraph 4 after the words "Canada Pension Plan".
>
> (My emphasis)

[10] I note that the French version uses similar wording as the English and that it does not clarify the meaning of the words "subject to the legislation of Canada."

[11] The Applicant argues that there should be a broad and liberal interpretation of the words "subject to the legislation of Canada," and that the "legislation of Canada" should include Canadian provincial and territorial laws, although this is seemingly inconsistent with her other submissions that the scope of the Agreement, in relation to Canada, applies to only the *Old Age Security Act* and the *Canada Pension Plan*, and not to other pieces of provincial or federal legislation. Notwithstanding this seeming inconsistency with her other submissions, she further argues that a broad and liberal interpretation of the expression "subject to the legislation of Canada" contemplates receiving any benefits under <u>any</u> Canadian, provincial or territorial legislation, rather than being under a legislative obligation or debt. In this regard, she maintains that the General Division erred in its interpretation of the words "subject to the legislation of Canada."

[12] Or, if I have misunderstood the Applicant's submissions, it may be that she accepts that, in relation to Canada, the Agreement is limited in scope to the *Old Age Security Act* and the *Canada Pension Plan*, and that her spouse was "subject to" the *Canada Pension Plan* during the years when he received workers' compensation benefits, by virtue of the fact that there were source deductions from the workers' compensation benefits to cover Canada Pension Plan contributions, if that was indeed the case.

[13] This is one of those cases in which it is impracticable to parse the grounds, as the individual grounds raised by the Applicant are inter-related.

[14] Article 2 of the Agreement sets out the scope of its application, in relation to both France and Canada. It stipulates that, in relation to Canada, the legislation to which the Agreement applies is the *Old Age Security Act* and the *Canada Pension Plan*.

[15] The Applicant submits that the General Division erred at paragraph 33 of its decision, in failing to recognize that the scope of application of the Agreement, in relation to Canada, is limited to the *Old Age Security Act* and the *Canada Pension Plan.*

[16] At paragraph 33, instead of considering the scope of the Agreement, the General Division interpreted the words, "subject to the legislation of Canada." In interpreting the expression "subject to the legislation of Canada," the member was guided in part by what he perceived as Parliament's intentions in arriving at the Agreement. In *Simon* at para. 23, the Federal Court held that the unilateral interpretation by one country is not evidence "that establishes the *agreement* of the parties regarding its interpretation," as the focus should be on the agreement of the parties regarding the interpretation of a treaty. In this regard, the General Division member may have erred, to the extent that he relied on Parliament's intentions in interpreting the words "subject to the legislation of Canada," without considering firstly the scope of the Agreement and secondly, the agreement of the parties regarding its interpretation. However, although the member suggested that he was considering Parliament's intentions, this may have been a mischaracterization by him, as the member referred to and was considering revised social security agreements between Canada and other countries.

[17] The General Division indicated that the Respondent had submitted before it that international social security agreements are being revised to remove any reference to "subject to the legislation of Canada" and to usher in more restrictive language. It is evident that this weighed heavily on the General Division, in coming to its decision. It may well be that the language of revised agreements between Canada and other countries are now markedly more restrictive and specifically require that a person who resides outside Canada be making contributions to the Canada Pension Plan, if he depends on that time outside Canada to count towards residency in Canada. Under these circumstances, as the Federal Court indicated in *Simon* at para. 19, it is mandatory under Article 31(3)(b) of the *Vienna*

Convention on the Law of Treaties, 23 May 1969, Can. T.S. 1980 No. 37, for a tribunal to admit and take into account evidence of a subsequent practice if such evidence helps to establish the agreement of the parties regarding the interpretation of a treaty.

[18] However, I do not see any evidence of a revised agreement between Canada and France, before the General Division. (According to http://www.treaty-accord.gc.ca/details.aspx?id=105388, a revised agreement was entered into between Canada and France on March 14, 2013, but insofar as I can determine, it has yet to come into force and operation, and a copy of the revised agreement has yet to be released.) Indeed, the General Division's decision does not refer to nor mention a revised agreement between Canada and France. As the Federal Court indicated in *Simon* at paras. 20 and 21, it is insufficient that other countries might expressly agree with Canada's practice respecting the interpretation of similar provisions, as it is conceivable, without evidence to the contrary, that France holds a different opinion than Canada. Without evidence that a copy of the revised Agreement was made available to the General Division, I am satisfied that there is an arguable case that the member gave undue consideration to the fact social security agreements between Canada and other countries are going to be revised, without ascertaining the mutual intentions of Canada and France.

[19] The General Division noted that the Applicant relied on *Simon* but the member distinguished the decision on factual and legal grounds. In *Simon*, the agreement between Canada and Germany included the wording, "subject to the *Canada Pension Plan.*" The member found that this established a "relatively narrow application that happened to match the program to which the claimant was applying." The member also wrote at para. 34:

> In that case, the Federal Court therefore had the luxury of interpreting "subject to" to mean not just a contribution to the CPP, but any connection with it. In the present case, by contrast, the phrase that follows 'subject to" in the Canada-France ISSA is "the legislation of Canada," which, as noted above, potentially encompasses a vast range of legal associations with Canada, however tenuous. In this context, if one is to give a broad meaning to "subject to" then one must necessarily give a narrow meaning to "the legislation of Canada" and confine it to the federal CPP scheme.

[20] This does not appear consistent with the reasoning in *Simon* or, for that matter, Article 2 of the Agreement, which limits the scope of the Agreement's application. The Federal Court queried why the words "contributing to" the Canada Pension Plan or words of similar import were not used in the social security agreement between Canada and Germany, and why the broader words "subject to" were used instead, if indeed the parties had intended a more restrictive approach. The Federal Court found that the use of the words "subject to the Canada Pension Plan" was not obvious. In this vein, it is unclear why the words "subject to the legislation of Canada" in the Canada-France agreement should be more narrowly interpreted than the words "subject to the *Canada Pension Plan*," when, on the face of it, these words are seemingly broader in scope.

[21] Interestingly, the Federal Court found that it would be surprising if a person who elected to leave Canada and receive an early Canada Pension Plan retirement pension could use his or her years of receipt of that pension while outside of Canada as a credit towards Canadian old age pension entitlement. The Federal Court, however, was convinced that a person receiving a Canada Pension Plan disability pension may not be in the same circumstances as a person who elected to receive an early Canada Pension Plan retirement pension and leave Canada. To complicate matters, in this case, the Applicant's spouse resided in Canada until June 1991 and then returned to France, where he worked from October 1991 to July 2007. He received retroactive wage loss and workers' compensation benefits and then subsequently received a Canada Pension Plan disability pension, commencing in May 2009.

CONCLUSION

[22] The application for leave to appeal is granted. This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division