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

[TRANSLATION]

Citation: *A. B. v. Minister of Employment and Social Development*, 2017 SSTGDIS 68

Tribunal File Number: GP-16-3713
GP-16-3714

BETWEEN:

A. B.

Appellant

and

Minister of Employment and Social Development

Respondent

and

H. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Jude Samson

DATE OF DECISION: May 23, 2017

REASONS AND DECISION

INTRODUCTION

[1] The Appellant is appealing the Minister's decision requiring him to pay back $16,769.65 in Old Age Security (OAS) benefits and a Guaranteed Income Supplement (GIS) overpaid for the period from August 2002 to January 2010. This decision was rendered following an investigation in which the Minister found that the Appellant had not completed the years of Canadian residence declared on his initial pension application, as well as the addition of unreported earnings for the purpose of calculating the GIS.

[2] The initial decision was rendered on January 15, 2010 (GD2-42). Following a request for reconsideration, the initial decision was upheld on May 18, 2010 (GD2-28). The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT). However, the appeal was withdrawn and the OCRT closed his file in December 2010, after receiving a letter from the Appellant's representative (GD2-12).

[3] Then, in February 2016, the Appellant followed up with the Legal Aid Office that was representing him in his appeal to the OCRT to ask why his case had never proceeded. In the meantime, several amendments had been made to the relevant legislation, and the OCRT had been replaced by the Social Security Tribunal (Tribunal).

[4] After reviewing the file, Mr. Lacoursière, the Appellant's new representative, sent the Tribunal a letter explaining that there had been a misunderstanding and that the file should never have been closed. He asked the Tribunal to reactivate the old file—the OCRT file—but the Tribunal replied that it had no jurisdiction in this case, since only active files were transferred from the OCRT to the Tribunal (GD1-7 to 17). Therefore, on October 31, 2016, Mr. Lacoursière filed with the Tribunal a new notice of appeal on behalf of the Appellant, requesting the following (GD1):

a) The reactivation of the file, since the Appellant had never signed a document to abandon his appeal; or

b) An extension of time to appeal.

ANALYSIS

Reactivation of the Old File

[5] The Appellant's old file with the OCRT cannot be reactivated for two reasons:

a) The appeal to the OCRT was validly withdrawn by the Appellant's representative; and

b) The OCRT no longer exists, and the Appellant's file was not among those transferred to the Tribunal.

[6] First, the appeal to the OCRT was filed in July 2010 by Wolfe Falaise, the Appellant's representative (GD1-19). On December 29, 2010, Wolfe Falaise sent the following letter to the Appellant, with a copy to the OCRT (GD2-12):

> Given that we had not heard from the Office of the Commissioner of Review Tribunals, we contacted you and learned that your problem had been resolved.
>
> We are very pleased to hear this and are therefore closing your file. We are also informing Nancy Pitre from the Office of the Commissioner of Review Tribunals that we will not be pursuing your appeal.

[7] The next day, the OCRT sent letters to the Minister and to Wolfe Falaise, with a copy to the Appellant, confirming that the Appellant had withdrawn his appeal (GD1-18 and GD2-22). The OCRT had the right to take note of the letter from Wolfe Falaise, the Appellant's representative, and to close the Appellant's file. Now, the Appellant argues that the OCRT should not have closed his file without a document signed by him indicating that he was abandoning his appeal. The Appellant does not point to any legislative provision indicating that a document signed by the appellant is necessary for an appeal to be withdrawn, and the Tribunal does not know of any such provision, either.

[8] The letters from Wolfe Falaise and the OCRT informed the Appellant of what had happened. If there was a misunderstanding between the Appellant and his representative, he should have pointed it out at that time.

[9] Further, the Tribunal does not know of any provision that would allow the Appellant to reactivate a file that was validly closed. In this regard, Mr. Lacoursière argues that subsection 28(1) of the *Old Age Security Act* (OASA) authorizes the Tribunal to reopen the old file.

[10] The Tribunal does not see any way that this provision could support the Appellant's position. Rather, subsection 28(1) of the OASA relates to the Tribunal's review of decisions made by the Minister. Where this subsection refers to "a decision in relation to further time to make a request," it is referring to the Minister's decision whether or not to allow a longer period to make a request for reconsideration (see section 29.1 of the *Old Age Security Regulations*).

[11] Second, in terms of the transition from the OCRT to the Tribunal, only those appeals filed with the OCRT that were not heard by March 31, 2013, were transferred to the Tribunal (*Jobs, Growth and Long-term Prosperity Act* (S.C. 2012, c. 19). Since the Appellant's file had been closed in December 2010, it was not transferred from the OCRT to the Tribunal in April 2013.

[12] In light of the above, the Tribunal finds that Mr. Lacoursière proceeded correctly by filing a new notice of appeal to the Tribunal and by requesting an extension of time to appeal. Given that the OCRT did not render a decision in this case, *res judicata* does not apply.

Extension of Time to Appeal

[13] At the time the Appellant was informed of the reconsideration decision, subsection 82(1) of the *Canada Pension Plan* (CPP) applied and provided that a reconsideration decision could be appealed within 90 days following the day on which the decision had been communicated to the appellant, or within a longer time frame that the OCRT could grant. The *Jobs, Growth and Long-term Prosperity Act*, cited above, brought changes in April 2013 to the way in which appellants could appeal decisions of the Minister under the OASA. More specifically, subsection 52(2) of the *Department of Employment and Social Development Act* now provides for an extension of the time to appeal a reconsideration decision to the Tribunal, but in no case may the appeal be brought more than one year after the decision is communicated to the appellant.

[14] The Tribunal has previously found that the one-year time limit under subsection 52(2) of the *Department of Employment and Social Development Act* does not apply to appellants who were informed of a reconsideration decision before April 1, 2013. In this regard, the Tribunal refers, for example, to the Appeal Division's decision in *A.O. v. Minister of Employment and Social Development*, SSTADIS 419, at paragraph 18. In arriving at this conclusion, the Tribunal considered rules regarding the interpretation of legislation, particularly the general rule that legislation must not be interpreted as having a retroactive effect. Therefore, the Tribunal finds that subsection 52(2) of the *Department of Employment and Social Development Act* does not apply in this case.

[15] In deciding whether to allow further time to appeal, the Tribunal must consider the four criteria set out in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883. As the Federal Court of Appeal pointed out in *Canada (Attorney General) v. Larkman*, 2012 FCA 204, at paragraph 62, these criteria guide the Tribunal. To be successful, the appellant does not need to meet all the criteria. What needs to be determined is whether granting an extension of time would be in the interest of justice.

[16] The Tribunal invited the parties to present their submissions on each of the criteria below, but only the Appellant responded to this invitation (GD4).

Reasonable explanation for the delay? No

[17] The Appellant claims that the delay is explained by the misunderstanding and the fact that the appeal was made within the legal time frame applicable at that time (GD4-1 to 2). The Tribunal finds that the Appellant's explanations are insufficient in light of the length of the delay.

[18] Although there may have been a misunderstanding between the Appellant and his lawyer, the fact that the appeal to the OCRT had been withdrawn was confirmed in the Tribunal's letter dated December 30, 2010 (GD1-18) and indicated in a letter from Service Canada dated March 16, 2012 (GD2-18). In the second letter, the Appellant was encouraged to contact the OCRT for more information, but there is no evidence that he did so. At some point,

the Appellant should have realized that his appeal was not proceeding, but he did not provide a credible explanation as to why he did not follow up on it for more than five years.

[19] The Tribunal is not satisfied that the Appellant has provided a reasonable explanation for the delay.

Continuing intention to appeal? No

[20] The Appellant argues that he filed the appeal within the legal time frame and was reassured by the fact that his file was in the hands of a lawyer. Because of health problems between 2012 and 2015, he could not devote as much time to his file as he wanted to. However, as soon as he returned to the Legal Aid Office in 2016, his new representative took the necessary steps to try to reactivate the file (GD4-2).

[21] The Tribunal cannot accept the Appellant's arguments in this regard. In December 2010, the OCRT informed the Appellant that his appeal had been withdrawn and his file had been closed. From that date until 2016, the Tribunal sees only one letter, dated February 2012, in which the Appellant complains about the decisions made in his regard (GD2-20). As for the health problems the Appellant experienced from 2012 to 2015, the Tribunal has no information about them.

[22] Although the Appellant may have intended to pursue his appeal at certain times, he has not established that his intention to pursue the appeal continued throughout the entire period in question.

Arguable case on appeal? Yes

[23] To meet this criterion, the Appellant must show that, legally, the appeal has a reasonable chance of success [*Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41].

[24] The issue pertains to the Appellant's residence in Canada during certain periods, starting in 1959. On February 6, 2010, following the initial decision, the Appellant filed a request for reconsideration in which he contested the Minister's findings, provided some explanations, and attached an additional document from the United States Social Security Administration

(GD2-36 to 41). Since February 2010, the Appellant has not filed any other documents to establish his residence in Canada.

[25] *Callihoo v. Canada (Attorney General)* (1990) 190 FTR 114 and *Leblanc v. Canada (Human Resources and Skills Development)*, 2010 FC 641, set out that presenting significant new evidence or raising a question of an error of law are among the ways to establish an arguable case.

[26] In this matter, the Appellant submits that there is an arguable case on appeal for the following reasons (GD4):

> This is a case that hinges on the concept of residence. During certain periods, our client worked in the United States. However, he has explained to us that he never wanted to transfer his residence from Canada to the United States. Therefore, he wants a hearing before the Tribunal to testify on the periods of residence mentioned in his file, so that he can establish that for some of these periods, he was indeed a Canadian resident.

[27] On the face of the record, the Appellant's arguments seem weak:

a) No new evidence has been filed with the Tribunal;

b) The evidence currently on file was gathered by the Minister's integrity branch;

c) The Appellant's testimony is the only new piece of evidence put forward by him; and

d) The Appellant has not raised an error of law.

[28] In addition, the Appellant says that he wants to explain why he had never wanted to transfer his residence from Canada to the United States. However, the assessment of an individual's residence is a question of fact that requires an examination of the individual's whole context and that cannot be determined based on that individual's intentions [*Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, at paragraph 58].

[29] Despite the weakness of the Appellant's arguments, the Tribunal finds that there is an arguable case on appeal because it is possible that the explanations already provided by the

Appellant, combined with his testimony under oath and the evidence on file, could establish a period of residence in Canada that is different than the one retained by the Minister.

Prejudice to other parties? Yes

[30] The Minister and the Added Party (the Appellant's former spouse) did not answer this question. The Appellant answered it as follows (GD4-2): "In this matter, what is being requested is to recognize additional periods of residence in Canada. If the Tribunal recognizes them, it will not cause any prejudice to [the Added Party]; it could even be beneficial for her if, in her case, the same periods were not recognized as residence in Canada."

[31] Although the Minister seems to have retained its file (GD2), it is clear that some pieces of evidence may have been lost and that it may be more difficult to assess the evidence because more than seven years have passed since the initial decision. This may negatively impact the parties' ability to answer the questions raised in this matter. And although the recognized periods of residence in Canada may be increased by the Tribunal, they may also be decreased. This is always a risk, given the nature of a *de novo* appeal to the Tribunal (i.e. an appeal where all the evidence and the facts are re-examined) [*Stevens Estate v. Canada (Attorney General)*, 2011 FC 103].

[32] In addition, if the request for an extension of time is granted, the Added Party could be required to prove her residence in Canada starting in 1959. The Tribunal finds that this requirement could cause prejudice to the Added Party because she was probably under the impression that these issues had been completely settled since 2010.

CONCLUSION

[33] In light of the criteria set out in *Gattellaro* and in the interest of justice, the Tribunal finds that the extension of time to appeal under subsection 82(1) of the CPP (as it read at the time) must be refused.

[34] The Tribunal acknowledges that there are some Federal Court decisions suggesting that of the four criteria set out in *Gattellaro*, the one regarding an arguable case is the most important [*McCann v. Canada (Pension Plan Disability Benefit*, 2016 FC 878]. However, it is

well established that the weight to be assigned to each of the four criteria varies from case to case, in accordance with a flexible, contextual approach, and that the Tribunal has the discretionary authority to find that one or two criteria outweigh all the others [*McCann* at paragraph 6; *Leblanc* at paragraph 20; and *Canada (Attorney General) v. Blondahl*, 2009 FC 118, at paragraph 12]. The Tribunal uses these criteria to ensure that justice is done between the parties (*Larkman* at paragraph 62, and *Blondahl* at paragraph 18).

[35] In this case, given the time that has passed, the Tribunal gives much more weight to the fact that the Appellant has not provided a reasonable explanation for the delay and that he has not demonstrated a continuing intention to pursue the appeal for six years. The Appellant received a letter from the OCRT and from the Minister indicating that his file had been closed, as requested by his lawyer, but he did not take notice of these letters in a timely manner. In the meantime, the OCRT was replaced by the Tribunal and changes were made to the way in which appellants could appeal decisions of the Minister under the OASA.

[36] In addition, granting an extension of time to appeal could have a significant impact on the Added Party, because she could be required to prove her Canadian residence or face other consequences because of the Appellant's appeal. This burden could be heavy and costly, not only for the Added Party, but also for the Minister, given the relevant period and the evidence that may have been lost or difficult to find over the years.

[37] The Tribunal recognizes that this decision will deny the Appellant the opportunity to have his case heard by the Tribunal, which could be considered contrary to the interests of justice. However, in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Supreme Court of Canada acknowledged that the finality of decisions can also be taken into consideration when assessing issues like this one. According to Binnie J. at paragraph 18: "Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided."

[38] Although the Tribunal has already found that the April 2013 changes to the legislation do not apply in this case, these changes represent Parliament's view that extensions should not be granted in situations where there has been a long delay between when the person receives a decision and when that decision is contested—more than six years in this case. The Tribunal finds that this objective is reasonable and valid.

[39] Therefore, after assessing the *Gattellaro* criteria for an extension of time, and taking into account the interests of justice, the request for an extension of time to appeal is refused.

Jude Samson
Member, General Division – Income Security Section