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

Citation: *O. R. v. Minister of Employment and Social Development*, 2017 SSTADIS 297

Tribunal File Number: AD-16-863

BETWEEN:

O. R.

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: June 27, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Applicant seeks leave to appeal the General Division decision dated March 28, 2016. The General Division had determined that the Applicant was not a resident of Canada after March 2008, effectively upholding the Respondent's decision to terminate her partial Old Age Security pension and Guaranteed Income Supplement. As a result of the decision, the Applicant is required to repay benefits that had been paid to her between February 2009 and February 2013.

ISSUE

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

ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social 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 to appeal, I need to be satisfied that the reasons for appeal fall within any of the above grounds of appeal and that the appeal has a reasonable chance of success. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300.

[5] The Applicant alleges that 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. In particular, she claims that she has lived in Canada since 1998 (although the Record of Landing indicates that she arrived in Canada as a permanent resident on January 28, 1999), has worked in the country since 1999, and volunteers and remains active in the community and in her church. She claims that she has established deep roots and is well-settled in Canada. She also denies that she had severed her Canadian residency in March 2008; although she left Canada at that time, she claims that she was absent for only one week and that she returned to Canada within that time. She notes that she has "a very big circle of friends in X and X" and that she and her late husband's family regularly visit each other. She notes that she rents an apartment in Canada, maintains a bank account, participates in different professional organizations, has a Canadian passport and files annual provincial and federal income tax returns.

[6] The Applicant provided documentation to support her allegations, some of which were before the General Division. Many of the documents were obtained after the hearing before the General Division. There are statements from schools, her church and her family physician, all of which purportedly show that she is actively involved in and has strong social ties to her community. Her family physician confirmed that she has been a patient of his practice since September 2003 and that she visited him on multiple occasions in 2008 and 2009. The Applicant's son provided a statement, confirming that she resided with him from 1998 to 2008. The Applicant also provided a June 3, 2013 printout from the Canada Border Services Agency, which discloses some of her dates of passage.

[7] New evidence can be considered on an appeal to the Appeal Division only under very limited circumstances. Those circumstances, however, are not present here, as the Applicant has provided this evidence simply to buttress her claim that she continued to be a resident of Canada after March 2008.

[8] The Applicant mentions several facts, which she suggests the General Division either misconstrued or overlooked in determining whether she was ordinarily resident in Canada for the requisite length of time. She volunteers, has an extensive network of friends

and family, holds a Canadian passport, has an apartment in Canada and has financial ties to the country. She claims that she returned to Canada within one week after her departure in March 2008, although she did not refer to any of the documentary evidence that was before the General Division to support her Canadian residency claim.

[9] The General Division was aware of the Applicant's claims. For instance, it noted at paragraph 19 that she has been issued Canadian passports, at paragraphs 20 and 21 that she has Canadian bank accounts and files Canadian income taxes annually and at paragraphs 31, 46 and 52 that she resided at an apartment in X with her son until 2008, when he left Canada, and that she entered into a residential tenancy agreement in April 2011. At paragraph 70, the General Division noted a letter from the reverend from her church but, otherwise, I do not see that the Applicant adduced much, if any, documentary evidence before the General Division that she volunteers and has an extensive network of family and friends in Canada.

[10] The only fact before the General Division that is in dispute is whether the Applicant was in Canada in April 2008. The General Division determined that it appeared that the Applicant left Canada in April 2008. The General Division found support for this finding in that the Applicant had changed her address to that of her friend. The Applicant resided with friends until a social housing unit became available to her in April 2011. The Applicant denies that she left Canada in April 2008, although she acknowledges that she left Canada in March 2008 for one week. However, she failed to point to any corroborating documentary evidence of this. I note that several banking transactions suggest that the Applicant remained in Canada until at least late April 2008. After April 23, 2008, there are no further personal banking transactions for the same account until October 20, 2008, when a withdrawal was made against the account (although there is no indication where the withdrawal was made) (GD4-308 to GD4-317). This banking history would appear to undermine the Applicant's claim that she remained in Canada after April 2008.

[11] The General Division determined that the evidence and facts upon which the Applicant now relies to establish Canadian residency were not determinative. The General Division acknowledged that they were certainly factors it could consider but, ultimately, it

had to consider a preponderance of the evidence. The General Division listed some of the factors that may offer guidance in determining whether a claimant resides in Canada. The General Division was largely swayed by the length of time the Applicant spent in and outside of Canada and by her ties in and outside of Canada. I am not satisfied that there is an arguable case borne out that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it, or that it erred in law.

[12] Essentially, the Applicant is seeking a reassessment of her appeal. However, a review or reassessment of the evidence also does not fall within any of the grounds of appeal under subsection 58(1) of the DESDA. As the Federal Court held in *Tracey*, it is not the Appeal Division's role to reassess the evidence or reweigh the factors considered by the General Division when determining whether leave to appeal should be granted or refused.

CONCLUSION

[13] The application for leave to appeal is refused. However, this does not preclude the Applicant from making a second application in the future to determine whether she meets the residency requirements at that point.

Janet Lew
Member, Appeal Division