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

[TRANSLATION]

Citation: *A. H. v. Minister of Employment and Social Development,* 2017 SSTADIS 320

Tribunal File Number: AD-16-884

BETWEEN:

A. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: July 6, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On March 14, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal.

[2] The General Division had determined that, in light of the criteria established in *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, the Applicant did not reside in Canada from August 1993 to June 2002, under the *Old Age Security Act* (Act).

File Background

[3] The Applicant applied for a partial pension in February 2005. The Respondent approved a partial pension (11/40th), effective April 2005.

[4] Following an investigation, the Respondent determined that the Applicant had not resided in Canada during the period from August 8, 1993, to May 2002. The Applicant requested reconsideration of this decision. On March 18, 2014, the Respondent refused the request for reconsideration.

[5] The Applicant appealed to the Tribunal on April 1, 2014, within the 90-day period provided for the filing of a notice of appeal.

[6] The General Division decision is dated April 14, 2016.

[7] The Applicant submits that the General Division failed to consider the criteria established in *Ding*, for confirming the Applicant's residence. He submits that the trips outside the country were temporary and that the only criterion on which the General Division based its decision was that of temporary relocations, which is an error of law. The Applicant also refers to *Schujahn v. Canada (Minister of National Revenue)*, [1962] Ex CR 328 (QL) and *Canada (Minister of Human Resources Development) v. Chhabu*, 2005 FC 1277.

[8] The appeal before the General Division was heard in English. However, the request to the Appeal Division was made in French. The Tribunal asked the Applicant to confirm his

language preference, and the Applicant's representative confirmed that [translation] "the language of correspondence will be French." For these reasons, the appeal will continue in French.

ISSUE

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

LAW AND ANALYSIS

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

[11] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[12] Subsection 58(1) of the DESD Act states that 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 that it made in a perverse or capricious manner or without regard for the material before it.

[13] The Tribunal will grant leave to appeal if it is satisfied that the Applicant has demonstrated that at least one of the aforementioned grounds of appeal has a reasonable chance of success.

[14] This means that the Tribunal must, in accordance with subsection 58(1) of the DESD Act, be in a position to determine whether there is a question of law, fact or jurisdiction, the answer to which may justify setting aside the decision under review.

[15] The Applicant's argument is based on Federal Court of Appeal jurisprudence and its application to the facts of this case.

[16] In its decision, the General Division noted *Ding* and set out the factors to be considered. In the "Evidence" section of the decision, certain items of evidence corresponding to these factors—personal property, other ties in Canada, the frequency and length of visits to Canada, as well as the frequency and length of absences from Canada—were stated. However, in the "Analysis" section, the General Division seems to have focused on the frequency and length of absences from Canada.

[17] The Exchequer Court of Canada, in *Schujahn*, noted the following:

> It is quite a well settled principle in dealing with the question of residence that it is a question of fact and consequently that the facts in each case must be examined closely to see whether they are covered by the very diverse and varying elements of the terms and words “ordinarily resident” or “resident”. It is not as in the law of domicile, the place of a person's origin or the place to which he intends to return. The change of domicile depends upon the will of the individual. A change of residence depends on facts external to his will or desires. The length of stay or the time present within the jurisdiction, although an element, is not always conclusive. Personal presence at some time during the year, either by the husband or by the wife and family, may be essential to establish residence within it. A residence [page 332] elsewhere may be of no importance as a man may have several residences from a taxation point of view and the mode of life, the length of stay and the reason for being in the jurisdiction might counteract his residence outside the jurisdiction. Even permanency of abode is not essential since a person may be a resident though travelling continuously and in such a case the status may be acquired by a consideration of the connection by reason of birth, marriage or previous long association with one place. Even enforced coerced residence might create residential status.

[18] Based on my reading of the General Division's decision, it seems to have limited its analysis to the frequency and length of the Applicant's absences from Canada. After an analysis of all the circumstances, I find that the residency question is a question of fact, and the fact that the General Division focused on only one factor (as alleged by the Applicant) may constitute an error of law.

[19] The issue of whether 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 is related to the alleged error of law. For this reason, I am not going to comment on the alleged erroneous finding of fact at this stage (*Mette v. Canada (Attorney General)*, 2016 FCA 276.

[20] Upon review of the appeal file, the General Division's decision and the parties' arguments, I find that the appeal has a reasonable chance of success. There are questions pertaining to an alleged error of law, the response to which may justify setting aside the decision under review.

CONCLUSION

[21] Leave to appeal is granted.

[22] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Shu-Tai Cheng
Member, Appeal Division