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

Citation: *D. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 341

Tribunal File Number: AD-16-1007

BETWEEN:

D. L.

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 17, 2017

REASONS AND DECISION

INTRODUCTION

[1] On May 24, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant "had not shown that he satisfied the legal resident requirement to qualify for an OAS pension."

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 10, 2016. Enclosed with the Application were supporting documents.

[3] The Applicant filed additional documents on September 19, 2016, and September 22, 2016 (letters from S. J. P.).

ISSUE

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

THE LAW

[5] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision appealed from was communicated to the appellant. Moreover, "The Appeal Division may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant."

[6] According to subsections 56(1) and 58(3) of the 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."

[7] 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."

[8] 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.

SUBMISSIONS

[9] The Applicant's reasons for appeal can be summarized as follows:

a) The General Division stated that it had no documentary evidence on his acceptance into an amnesty program.

b) He thought that the General Division would get all the records pertaining to the Amnesty Program for long-term illegal immigrants and his application. He has been advised that these records may no longer exist.

c) He was not aware that he had the burden of proof or that he had to provide more than his statements made under oath.

d) It is relevant only that he was accepted into the Amnesty Program for long-term illegal immigrants. This gave him legal status in Canada.

e) The letters of S. J. P.support his position. Three articles in Toronto area newspapers do so as well.

f) He arrived in Canada in 1968 and began paying into the Canada Pension Plan in November 1968. This substantiates his arrival date in Canada.

ANALYSIS

[10] The Applicant applied for the Old Age Security (OAS) pension in October 2012. The Respondent denied the application initially and upon reconsideration, based on its determination that the Applicant had left Canada in July 1986, that he was not living in Canada legally before he left and, in addition, that his documents did not establish his stated legal status ("with special permission through a Temporary Resident Permit or an Order in Council").

[11] The Applicant appealed that decision to the Tribunal's General Division in April 2013. The General Division decided the appeal after conducting a teleconference hearing. The Applicant attended the hearing and gave evidence. The Respondent was not present at the hearing.

[12] The issue before the General Division was whether the Applicant met the eligibility requirements to qualify for an OAS pension, more specifically, whether the Applicant had been legally residing in Canada on the day before he left in July 1986.

[13] The General Division reviewed the evidence and the parties' submissions. It rendered a written decision that was understandable, sufficiently detailed and that provided a logical basis for the decision. The General Division weighed the evidence and gave reasons for its analysis of the evidence and the law. These are the General Division's proper roles.

[14] In the Application and enclosed documents submitted to the Appeal Division, the Applicant argues that he had legal status in Canada before leaving to live in the United States in June/July 1986, and, therefore, he meets the eligibility requirements for OAS benefits.

[15] Section 4 of the OAS Act states:

> (1) A person who was not a pensioner on July 1, 1977 is eligible for a pension under this Part only if
>
> (a) on the day preceding the day on which that person's application is approved that person is a Canadian citizen or, if not, is legally resident in Canada; or
>
> (b) on the day preceding the day that person ceased to reside in Canada that person was a Canadian citizen or, if not, was legally resident in Canada.

> (2) The Governor in Council may make regulations respecting the meaning of legal residence for the purposes of subsection (1).

[16] Section 22 of the OAS Regulations states:

> (1) For the purposes of subsections 4(1), 19(2) and 21(2) of the Act, *legal residence*, with respect to a person described in any of those subsections, means that, on the applicable day specified in paragraph (a) or (b) of those subsections, that person
>
> (a) is or was lawfully in Canada pursuant to the immigration laws of Canada in force on that day;
>
> (b) is or was a resident of Canada and is or was absent from Canada, but
>
> (i) is deemed, pursuant to subsection 21(4) or (5) or under the terms of an agreement entered into under subsection 40(1) of the Act, not to have interrupted the person's residence in Canada during that absence, and
>
> (ii) was lawfully in Canada pursuant to the immigration laws of Canada immediately prior to the commencement of the absence; or
>
> (c) is not or was not resident of Canada but is deemed, pursuant to subsection 21(3) or under the terms of an agreement entered into under subsection 40(1) of the Act, to be or to have been resident in Canada.

[17] The Applicant's main argument is that he was lawfully in Canada prior to leaving in 1986. Therefore, he meets the eligibility requirements, and his application for an OAS pension should be approved.

[18] The General Division stated the correct legislative basis and legal tests. It found that the Applicant did not have the legal authority to reside in Canada. The General Division was not satisfied that the evidence demonstrated that the Applicant "was lawfully in Canada pursuant to the immigration laws of Canada."

[19] For the most part, the Application repeats the Applicant's submissions before the General Division. The General Division set out the Applicant's evidence and submissions at pages 3 to 9 of its decision.

[20] The Applicant also seeks to introduce a new argument, two new documents and some newspaper articles.

[21] The Applicant's new argument relates to his arrival date in Canada (in 1968 or 1969). His arrival date in Canada is not at issue in this appeal.

[22] New evidence is not a ground of appeal under section 58 of the DESD Act. The two new documents are letters from one S. J. P., a X lawyer, who represented the Applicant in "approximately 1985 to 1986." According to S. J. P., the Applicant approached him to submit an application to the Amnesty Program for long-term illegal immigrants (on an anonymous basis), the Applicant attended a meeting at the immigration department (alone) and the immigration department did not expel him from Canada. S. J. P. took this to mean that the Applicant was legally in the country. S. J. P. did not complete or finalize the application. The Applicant told S. J. P. than he had carried on with the Amnesty Program directly himself.

[23] The newspaper articles attached to the Application indicate that, after the Applicant's anonymous application was made and a letter from Immigration Canada to X Metro police told the force to expect the Applicant for fingerprinting and identification, the police arrested him. I note that these articles state that the Applicant was illegally in Canada.

[24] It was incumbent upon the Applicant to submit any evidence he had to the Respondent and to the General Division prior to or at the hearing. The Applicant could have obtained these documents much earlier in this appeal. S. J. P.'s letters refer to the years 1985 and 1986. The newspaper articles appear to have been published in March 1986. At this stage of the proceedings, new evidence is usually not accepted. In any event, even if S. J. P.'s letters were accepted into evidence and the content of them was taken as true, the most that could be said is that the Applicant advised S. J. P. that he had carried on with the Amnesty Program for long-term illegal immigrants directly himself. The articles state that the Applicant was illegally in Canada. This evidence would not have changed the General Division's determination on the Applicant's legal status in Canada pursuant to the immigration laws.

[25] There is no evidence that the Applicant had been lawfully in Canada pursuant to the immigration laws of Canada in force on the day preceding the day on which the Applicant ceased to reside in Canada in 1986. The Applicant's assertion is not sufficient. His argument that he was allowed to stay in Canada after his arrest in 1986 is not sufficient either. Taken together, the Applicant's arguments do not disclose a ground of appeal that has a reasonable chance of success.

[26] Once leave to appeal has been granted, the Appeal Division's role is to determine whether the General Division has made a reviewable error set out in subsection 58(1) of the DESD Act and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the Appeal Division to intervene. It is not the Appeal Division's role to rehear the case *de novo*. It is in this context that the Appeal Division must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[27] I have read and carefully considered the General Division decision and the record. There is no suggestion that the General Division failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact that the General Division, in coming to its decision, may have made in a perverse or capricious manner or without regard for the material before it.

[28] I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[29] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division