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

Citation: *D. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 330

Tribunal File Number: AD-16-1232

BETWEEN:

**D. C.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 13, 2017

## REASONS AND DECISION

## INTRODUCTION

[1] The Appellant applied for an Old Age Security (OAS) pension in March 2012 under the *Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security* (Canada–U.S. Agreement). In June 2013, the Respondent advised the Appellant that it could not approve the application because the Appellant had less than one complete year of residence in Canada after age 18 and from January 1, 1952.

[2] The Appellant requested a reconsideration of the Respondent's decision. The Respondent advised the Appellant, by letter dated October 22, 2013, that the initial decision was being maintained on the basis that the Appellant did not meet all the eligibility requirements of the *Old Age Security Act* (OAS Act). The Appellant submitted further information to the Respondent, and the Respondent reviewed it. In May 2014, the Respondent again maintained its denial of an OAS pension.

[3] The Appellant appealed that decision to the General Division of the Social Security Tribunal of Canada (Tribunal) in August 2014. He requested that the Tribunal allow his appeal because he had answered the Respondent's every request for further information. However, he was unable to provide, to the Respondent's satisfaction, sufficient verification of trips between Canada and the U.S.

[4] On April 29, 2016, the Tribunal advised the Appellant of its intention to summarily dismiss his appeal. The Appellant made submissions on why his appeal has a reasonable chance of success.

[5] After reviewing these submissions, the General Division summarily dismissed the appeal on the basis that "[t]here is no possible interpretation of the facts presented that could reasonably lead to the Appellant's application for OAS benefits to be successful."

[6] The Appellant filed an application to appeal to the Appeal Division on October 21, 2016, stating that the decision to dismiss his appeal was biased and unfair, and requesting an independent review.

[7] The Appellant's reasons for appeal can be summarized as follows:

a) The decision to summarily dismiss his appeal was made by the Tribunal's Operations Manager.

b) That decision was biased, unfair and did not result from an objective understanding of the situation.

c) He requests an official, independent and objective review.

d) The Tribunal's Operations Manager was unwilling to overturn the initial decision (of one of the Respondent's junior employees).

e) He is fully qualified to receive all benefits owing.

[8] The Respondent did not file submissions before the Appeal Division.

[9] This appeal proceeded on the basis of the record for the following reasons:

a) the fact that the Appeal Division member had determined that no further hearing was required.

b) the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

**ISSUE**

[10] The Appeal Division must decide whether it should dismiss the appeal, render the decision that the General Division should have rendered, refer the case back to the General Division or confirm, reverse or modify the General Division's decision.

## LAW AND ANALYSIS

[11] The Appellant is appealing a decision dated July 15, 2016, whereby the General Division summarily dismissed his appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[12] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a General Division summary dismissal. Because no further hearing is required, this appeal before the Appeal Division is proceeding pursuant to paragraph 37(*a*) of the *Social Security Tribunal Regulations*.

[13] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

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.

[14] The relevant provisions include section 40 of the OAS Act, section 21 of the OAS Regulations and the Canada–U.S. Agreement.

### Legal Test for Summary Dismissal

[15] Subsection 53(1) of the DESD Act allows the General Division to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[16] Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal

Division considers appropriate, or it may confirm, rescind or vary the General Division's decision in whole or in part.

[17] Here, the General Division correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 2 of its decision.

[18] However, it is insufficient to simply cite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act without properly applying it. After identifying the legislative basis, the General Division must correctly identify the legal test and then apply the law to the facts.

[19] At paragraph 2 of its decision, the General Division asks "whether the appeal should be summarily dismissed." At paragraph 16, the General Division states the legal test it applied to arrive at its conclusion to summarily dismiss the appeal, namely, that there is "no possible interpretation of the facts presented that could reasonable lead to the Appellant's application for OAS benefits to be successful."

**The General Division's Decision**

[20] In the Tribunal's letter advising of its intention to summarily dismiss, as well as in the General Division's decision, the General Division explained the basis upon which it had summarily dismissed the appeal.

[21] In its letter of intention to summarily dismiss, the Tribunal explained that:

a) The Tribunal Member is considering summarily dismissing the appeal.

b) Under the the Canada–U.S Agreement, an applicant for OAS pension must, among other requirements, have lived in Canada for at least one year (after one's 18th birthday and from January 1, 1952).

c) The Appellant's application for OAS pension had been denied because, after the International Operations Division's assessment of the Respondent, it was determined that the Appellant had less than one year of residence in Canada.

d) The Appellant was absent from Canada from 1970–1988 and lost his permanent resident status.

e) The Appellant was unable to prove the date on which he entered Canada in 1988 or to provide proof of his legal status in Canada on entry in 1988.

[22] After the General Division member reviewed the Appellant's written submissions, filed in May 2016, she finalized the decision to summarily dismiss the appeal. The General Division decision states:

> [15] The Tribunal finds that the status the Appellant was granted upon entry in May 1970 ended when the Appellant voluntarily left Canada December 31, 1970 with the intention of making his permanent home in the United States, and he did in fact make his permanent home in the United States. The Appellant's time spent in Canada during 1988 can only be considered as presence not legal residence. There is no evidence to show the Appellant entered Canada in 1988 with current status as a permanent resident. Nor is there evidence the Appellant entered Canada in 1988 with the intention of becoming a permanent resident of Canada.
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> [16] The Tribunal finds that there is no arguable case disclosed. There is no possible interpretation of the facts presented that could reasonably lead to the Appellant's application for OAS benefits to be successful.
>
> [17] Accordingly, the Tribunal finds that the appeal has no reasonable chance of success.

**Application of Legal Test for Summary Dismissal**

[23] Although the General Division has stated the legal test for summary dismissal somewhat differently than the Appeal Division did in its previous decisions, paragraphs 15 to 17 of the General Division decision are correct, and I agree with the findings stated therein.

[24] The Appellant takes issue with not receiving OAS pension benefits, which he feels are owed to him because he returned to Canada in 1988 "with a view to staying for a year to test the business climate and to stay permanently if successful."

[25] The following facts are not in dispute:

a) The Appellant entered Canada in May 1970 as a landed immigrant. He was 23 years old.

b) He left Canada in December 1970 and resided in the U.S. until 1988.

c) He lost his permanent residency status in Canada because he had been absent from Canada from 1970 to 1988.

d) He returned to Canada in 1988 and stayed in Canada for a period of time.

e) He has resided in the U.S. since October 1, 1988.

f) He has provided all the evidence he has to the Respondent and to the Tribunal pertaining to his legal status and his stay in Canada in 1988.

[26] This is the factual basis upon which the General Division determined that the appeal had no reasonable chance of success.

[27] Although "no reasonable chance of success" was not defined further in the DESD Act, for the purposes of the interpretation of subsection 53(1) of the DESD Act, it is a concept that has been used in other areas of law and that has been the subject of previous Appeal Division decisions.

[28] There appear to be three lines of cases in previous Appeal Division decisions that deal with appeals of summary dismissals by the General Division, namely:

*a)* *J. S. v. Canada Employment Insurance Commission*, 2015 SSTAD 715; *C. D. v. Canada Employment Insurance Commission*, 2015 SSTAD 594; *M. C. v. Canada Employment Insurance Commission*, 2015 SSTAD 237; and *J. C. v. Minister of Employment and Social Development*, 2015 SSTAD 596. The following legal test was applied: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264.

b) *C. S. v. Minister of Employment and Social Development*, 2015 SSTAD 974; *A. P. v. Minister of Employment and Social Development*, 2015 SSTAD 973; and *A. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178. In these decisions, the Appeal Division applied a differently articulated legal test: whether there is a "triable issue" and whether there is any merit to the claim using the language of "utterly hopeless" and "weak" case in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and as long as the outcome was not "manifestly clear," then the matter would be inappropriate for a summary dismissal. A weak case would not be appropriate for a summary dismissal, as it necessarily involves assessing the merits of the case, examining the evidence and assigning weight to it.

c) *K. B. v. Minister of Employment and Social Development*, 2015 SSTAD 929. In this decision, beyond citing subsection 53(1) of the DESD Act, the Appeal Division did not articulate a legal test.

[29] I find that the application of the two tests cited in paragraphs 28 (*a*) and (*b*) of this decision leads to the same result in the present case—the conclusion that the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a "weak" case but rather an "utterly hopeless" one, as it does not involve assessing the merits of the case or examining the evidence.

[30] The General Division's articulation of the test also leads to the same result, stated as "There is no possible interpretation of the facts presented that could reasonably lead to the Appellant's application for OAS benefits to be successful."

[31] Neither the Tribunal's General Division nor its Appeal Division can vary the legislative provisions and international agreements applicable to applications for OAS benefits.

[32] The Canada–U.S. Agreement provides, among other things, that Canada shall not pay a pension if the period of residence completed in Canada is less than one year (See Article VIII).

[33] The determinative issue in this appeal is whether the Appellant had residency in Canada for at least one year during the relevant period.

[34] Presence in Canada is not equivalent to residency. Subsection 21(1) of the *Old Age Security Regulations* (OAS Regulations) makes this distinction clear. A person "resides" in Canada if "he makes his home and ordinarily lives in any part of Canada." A person is "present" in Canada when he or she is physically present in any part of Canada.

[35] In *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, the Federal Court noted that one can refer to many factors to determine whether a person has made his or her home in Canada and ordinarily lives in Canada. It also held that the claimant's "obvious intentions" should not be the basis of the test.

[36] In the present matter, the Appellant has been unable to prove any of the favourable factors despite, as he insists, having answered every request for additional information. His assertion that he resided in Canada between January and September 1988, rests on his stated intention—that he returned to Canada in 1988 "with a view to staying for a year to test the business climate and to stay permanently if successful"—and a few equivocal documents. Regardless of the arguments that the Appellant could present on appeal, the result is plain and obvious on the face of the record.

[37] When the Appellant was present in Canada in 1988, he was not a Canadian citizen or a permanent resident of Canada. He did not "make his home and ordinarily live" in Canada. Therefore, he did not reside in Canada for the purposes of the OAS Act, the OAS Regulations or the Canada–U.S. Agreement. As the Appellant did not have a period of residence completed in Canada of at least one year, his appeal is bound to fail.

[38] The Appellant's other grounds of appeal are also dismissed for the following reasons:

a) The General Division member assigned to the appeal—not the Tribunal's Operations Manager—decided to summarily dismiss his appeal.

b) The General Division decision was made after an official, independent and objective review.

c) There is no evidence that the General Division decision was biased or unfair. In *Arthur* v. *Canada (Attorney General)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or the applicant's mere impressions. It must be supported by material evidence demonstrating conduct that derogates from the standard. While the Appellant may strongly disagree with the General Division decision, there is no evidence demonstrating that the General Division's conduct derogated from the standards of the duty to act fairly.

[39] After reviewing the Appellant's notice of appeal, his correspondence, the parties' submissions, the General Division's record, its decision and the Appeal Division's previous decisions relating to summary dismissals, as well as after applying the legal test applicable to a summary dismissal, I hereby dismiss the appeal.

**CONCLUSION**

[40] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division