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

Citation: *M. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 324

Tribunal File Number: AD-16-875

BETWEEN:

M. B.

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 10, 2017

REASONS AND DECISION

INTRODUCTION

[1] On April 4, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that "the evidence does not demonstrate that the Appellant resided in Canada after June 1997 pursuant to subsection [*sic*] 21(1)(*a*) of the *OAS Regulations* and is therefore not eligible to the Allowance for the period of January 1998 to August 2001, to the GIS for the period September 2001 to February 2012 and to a full OAS pension from September 2001 to March 2014 but rather to a partial pension of 26/40."

[2] The Applicant filed a typed letter, which was treated as an application for leave to appeal (Application) with the Tribunal's Appeal Division on June 26, 2016. Enclosed with the Application were supporting documents.

[3] On July 4, 2016, the Tribunal asked the Applicant to provide additional information, as her Application was incomplete.

[4] The Applicant filed further information on July 25, 2016.

ISSUE

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

THE LAW

[6] 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."

[7] 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."

[8] 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."

[9] 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

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

a) The General Division failed to give her an opportunity to prove all six of the *Ding* factors (see *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76).

b) There is information on all six *Ding* factors that could change the decision, including:

1. property in Quebec;

2. membership in a ski club;

3. contributions and tax returns, both provincial and federal, driver's licence, Canadian passport;

4. from 1970 to 2011, she was not outside of Canada for more than six months; since 2011, she has lived in Hungary and has visited Canada yearly for several weeks, "factual resident status";

5. a son living in Canada, a daughter raised in Canada and living in Hungary, and other family members in Canada (living or deceased).

c) The General Division ignored her “factual resident status” and failed to recognize property ownership in Quebec.

d) The General Division ignored her evidence. The full OAS pension was approved based on the regulations applicable to those who had arrived in Canada prior to 1977. There were changes made after that which changed how her case was treated. She refuses to pay back the differences that resulted from OAS Office errors or changes.

ANALYSIS

[11] The Applicant applied for a spousal allowance (Allowance) in September 1995, and she applied for the Old Age Security (OAS) pension in February 2001. She was granted the Allowance, a full OAS pension effective December 2001 and the Guaranteed Income Supplement (GIS). After an investigation, the Respondent determined that the Appellant had not been a resident of Canada since June 1997 and that she therefore was no longer eligible to receive the GIS from January 1998 to March 2014. This reduced the number of years of residence for the OAS pension, caused a reduction of that pension from full to partial and resulted in an overpayment of benefits that were required to be repaid.

[12] The Applicant requested reconsideration of this decision. The Respondent maintained its decision upon reconsideration on the basis that the Applicant was not considered a resident of Canada after June 30, 1997.

[13] The Applicant appealed that decision to the Tribunal’s General Division. The appeal was joined to the appeal of her spouse (GP-14-2517) to be heard together. The General Division decided the appeal after conducting a teleconference hearing. The Applicant and her spouse attended the hearing and gave evidence. The Respondent was not present at the hearing but had filed written submissions.

[14] The issue before the General Division was whether the Applicant was eligible to receive the Allowance, the GIS benefits and a full or partial OAS pension after June 1997.

[15] 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.

[16] In the Application and enclosed documents submitted to the Appeal Division, the Applicant argues that she remained a resident of Canada after June 1997 and, therefore, there was no overpayment of benefits to her.

[17] The General Division stated the correct legislative basis and legal tests. It found that, since 1997, the Applicant had had stronger ties abroad than to Canada. It set out the evidence presented and pertaining to her ties to Canada and her ties abroad. The General Division was not satisfied that the evidence demonstrated that the Applicant resided in Canada after June 1997.

[18] For the most part, the Application repeats the Applicant's submissions before the General Division (that she remained a resident of Canada until September 2011). The General Division decision mentions the arguments set out in paragraph 10 b) 3 to 5, above.

[19] The Applicant also seeks to introduce one document with dates of 1987 and 1992 (a debenture to the Austrian Ski Club of X) as proof that she was a member of the Austrian Ski Club of X. She also enclosed copies of various cards, and she states that she has property in X, Quebec since 1987.

[20] New evidence is not a ground of appeal under section 58 of the DESD Act. The debenture to the Austrian Ski Club of X is not in the appeal record, despite being dated in 1987 and 1992. The X property was mentioned in the appeal record of the Applicant's spouse (GD3-34 a letter from the Applicant's spouse to the Respondent in March 2013) as "property part-owners", but the Applicant produced no documents in relation to that property. In the Application, the Applicant states that the General Division "failed on recognising … my property ownership … in Quebec X [*sic*] Landing". I note that during an interview that the Respondent conducted in August 2012, the Applicant was asked whether she owned anything in Canada and her answer was "no." As for the debenture from the ski club, the document was issued in 1987 to a person whose name is undiscernible; it appears to have been surrendered to the Applicant in 1992.

[21] It was incumbent upon the Applicant to submit any evidence she had to the Respondent and to the General Division prior to or at the hearing. At this stage of the proceedings, new evidence is usually not accepted. In any event, "part-ownership" of a property in 1989 for an undisclosed period of time and membership in a social club in X in 1987 or 1992 would not have changed the General Division's determination on the Applicant's residency in 1997.

[22] As for the *Ding* factors, the General Division did assess them in paragraph 23 of the decision. The "factual resident status" is specifically referred to, and the General Division concluded that it does not apply to matters related to the OAS pension.

[23] The Applicant argues that her full OAS pension was approved based on the regulations applicable to those who had arrived in Canada prior to 1977 and that the Respondent cannot, after approving it, change how her case was treated. The Applicant's applications for various benefits were reviewed and approved in accordance with the legislation as it was at the time of those applications. The change to the Applicant's OAS pension, from full to partial, resulted from a determination that the Applicant did not reside in Canada after June 1997, rather than from a misapplication of the legislation as it relates to those who had arrived in Canada prior to 1997. The General Division decision makes reference to the OAS Act provisions pertaining to those who arrived in Canada prior to 1997 in paragraphs 3, 19, and 24. The General Division took into consideration the fact that the Applicant had arrived in Canada prior to 1977.

[24] The Applicant argues that the General Division "failed on giving me a chance to answer and prove the six questions of *Ding*" and "ignored my explanation." To the extent that these statements are allegations that she was denied the right to fully present her case, I will briefly discuss the natural justice issue.

[25] An appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC), at paras 21 and 22. 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 mere impressions of the applicant. It must be

supported by material evidence demonstrating conduct that derogates from the standard. The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[26] Even with the Applicant's arguments at face value, the evidence falls short of showing that the General Division did not give the Applicant sufficient opportunity to be heard or that the General Division was prejudiced or biased. While the Applicant may have thought of other points to argue since the General Division hearing, the evidence does not demonstrate that the General Division's conduct derogated from the standards of the right to be heard and the right to an impartial hearing.

[27] 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.

[28] 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 may have made in a perverse or capricious manner or without regard for the material before it in coming to its decision.

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

CONCLUSION

[30] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division