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

Citation: *H. F. v. Minister of Employment and Social Development*, 2017 SSTADIS 406

Tribunal File Number: AD-16-294

BETWEEN:

H. F.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

HEARD ON: July 27, 2017

DATE OF DECISION: August 11, 2017

Canada

REASONS AND DECISION

IN ATTENDANCE (via videoconference)

Appellant:	H. F.
Representative for the Appellant:	Daniel K. Sirhan (counsel)
Representative for the Respondent:	Marcus Dirnberger (counsel)
Observer:	K. S. (Appellant's son)

INTRODUCTION

[1] This is an appeal of the decision of the General Division dated November 5, 2015, which determined that the Appellant had not met the residency requirements pursuant to the *Old Age Security Act* and therefore was ineligible for an Old Age Security pension as well as the Guaranteed Income Supplement. The Appellant submits that the General Division erred in law and 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. I granted leave to appeal on one issue, namely whether the General Division had erred in determining that, due to his attendances at medical appointments and of banking transactions during certain timeframes, the Appellant could not have been in Canada and therefore was not resident in Canada.

[2] The hearing of this appeal was by videoconference, given the availability of videoconferencing facilities.

ISSUES

[3] The issues before me are as follows:

a. Did the General Division base its decision on an erroneous finding of fact that that it made in a perverse or capricious manner or without regard for the material before it, in determining that the lack of medical attendance or

banking transactions during certain timeframes necessarily meant that the Appellant could not have been in Canada and therefore was not resident in Canada;

b. If so, what is the appropriate disposition of this matter?

GROUNDS OF APPEAL

[4] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal. It reads:

> **58. (1)** The only grounds of appeal are that
>
> (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.

[5] The Appellant raised several issues in her application requesting leave to appeal. For the most part, I determined that the Appellant was seeking a reassessment of her claim for an Old Age Security pension, which is not a proper ground of appeal under subsection 58(1) of the DESDA. The Appellant also filed a copy of a cross-border currency or monetary instruments report (AD1A-10), in response to the General Division's finding that because there are gaps in the banking records, she must not have been a resident in Canada. The Appellant filed the monetary instruments report to demonstrate that she keeps large cash amounts and therefore does not have to rely on accessing any banking services. However, I had also determined that new evidence is generally not admissible in an appeal before the Appeal Division: *Marcia v. Canada (Attorney General)*, 2016 FC 1367.

[6] The Appellant noted in her leave to appeal application that the General Division relied on her Canadian banking and medical records to find that she has not been resident in Canada since 1995. I granted leave to appeal on the sole basis that the General Division

may have erred if it mechanistically equated lack of local medical attendances or banking transactions with non-residency.

[7] The Appellant maintains that the following considerations are relevant in determining whether the General Division erred:

1. the "just criteria in evaluating the notion of [Appellant's] status as being 'ordinarily resident' in Canada from 1995 until 2011";
2. the "probative weight given to said criteria individually and as a whole";
3. the "arbitrary notion applicable to the specific weight granted to said criteria"; and
4. the "notion of false extrapolation."

[8] The Appellant submits that the General Division, having relied on the banking and medical records, "wanton[ly] and blantant[ly] disregarded [other] evidence, without determining whether it was relevant, admissible or of any probative value." For instance, the Appellant argues that the General Division should have assigned more weight to the affidavit evidence, her testimony and the documentary evidence that established her ties to Canada. The Appellant further submits that the General Division erred in finding that her "successoral rights" to property in Syria superseded her ties to Canada. The Appellant asserts that the General Division acted arbitrarily when it assessed the evidence before it.

[9] The Appellant relies on *Canada (Minister of Human Resources Development) v. Chhabu*, 2005 FC 1277, although she claims that her circumstances are factually distinguishable from those of Mrs. Chhabu. The Appellant argues that Mrs. Chhabu had a bank account in India and was therefore found to have established ties with India. The Appellant denies that there was any evidence before the General Division that she had bank accounts in Syria. The Appellant contends that the "functional and pragmatic analysis of the relevant facts ought to unilaterally conclude towards a finding of Canada as the country of ordinary residency." In fact, the Federal Court found, among other things, that the Review Tribunal had failed to address the issues surrounding Mrs. Chhabu's passport and Indian

bank accounts. As the Court held, it "was not open to the Review Tribunal to simply ignore these factors relied on by the Minister without some explanation as to why it discounted them." The Court found that the reasons did not adequately discharge the Review Tribunal's statutory duty to analyze the evidence before it.

[10] The Respondent denies that the General Division found that gaps in the banking and medical records alone established that the Appellant could not have been resident in Canada. The Respondent submits that the General Division considered the medical and banking records as part of the "totality of evidence" regarding the Appellant's residency in Canada and that "not one piece of evidence was determinative on the issue." Rather, the outcome was determined based on an analysis of how the evidence fit together. The Respondent argues that it is clear that the General Division was guided by *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76 when it assessed whether the Appellant was resident in Canada, as it considered several factors, in addition to the Appellant's banking and medical records. For instance, the Respondent points to paragraphs 34, 35 and 36, which show that the General Division also considered the Canada Border Services Agency (CBSA) report.

[11] The Respondent maintains that the General Division considered the factors set out in *Ding* and that, more importantly, it assessed the evidence in a holistic manner and did not rigidly use the medical and banking records in isolation without consideration or regard for other factors, such as the CBSA report. The Respondent further submits that the Appellant held the burden of proof to establish residency in Canada, so if the evidence overall was inconclusive, then she failed to meet the burden upon her.

ANALYSIS

[12] As I noted in my leave to appeal decision, the Federal Court has held that residency is a factual issue that requires an examination of the whole context of the individual under scrutiny.

[13] The Appellant suggests that the General Division failed to consider the evidence before it, other than for her banking and medical records. Although the General Division appears to have relied largely on the banking and medical records, the Appellant's allegation that the General Division failed to consider all the evidence before it is not borne out. For instance, at paragraph 32, the General Division indicated that it had considered the factors set out in *Ding*, including the Appellant's personal property ties, social ties and other fiscal ties to Canada, ties in another country and regularity and length of stays in and absences from Canada, as well as her lifestyle and establishment in Canada. The General Division also noted the contradictory evidence. In particular, it referred to the affidavits on file, to witnesses' testimony during the hearing and to a lease agreement. And, as the Respondent points out, the General Division also relied on the CBSA report.

[14] The Appellant suggests that the General Division should have given greater weight to some of the evidence that was favourable to her. But, as I have already indicated in my leave to appeal decision, it was for the General Division, as the trier of fact, to assess the evidence before it and to determine the appropriate amount of weight to assign. As the Federal Court held in *Hussein v. Canada (Attorney General)*, 2016 FC 1417, the "weighing and assessment of evidence lies at the hearing of the [General Division's] mandate and jurisdiction. Its decisions are entitled to significant deference." Furthermore, the issue of the weight to be ascribed to evidence does not fall within any of the enumerated grounds of appeal under subsection 58(1) of the DESDA. The Federal Court of Appeal has declined to interfere with a decision-maker's assignment of weight to the evidence, holding that such an exercise is a matter for "the province of the trier of fact": *Simpson v. Canada (Attorney General)*, 2012 FCA 82. In addition, the Appeal Division does not hear appeals on a *de novo* basis and is not in a position to assess the matter of weight. Accordingly, I would defer to the General Division's assessment of the evidence.

[15] It appears to me that the Appellant attacks the General Division's decision as being unsound and unreasonable, given the facts before it. I queried whether the Appellant was seeking to have the General Division's decision assessed on a reasonableness standard; however, I did not receive an unequivocal response. The Federal Court has, however,

rejected a standard of review analysis for an appellate administrative tribunal such as the Appeal Division: *Canada (Attorney General) v. Jean*, 2015 FCA 242 and *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[16] Had the General Division found that gaps in the medical and banking records alone were determinative of whether the Appellant was residing outside Canada during those periods, I would have determined that that constituted an error. It is clear, however, that the General Division considered the evidence before it, including the evidence that the Appellant claims should have been assigned greater weight, but, as the trier of fact, it was entitled to accept, reject or prefer certain evidence over other evidence. The General Division indicated that it was simply unimpressed with some of the evidence and that it preferred the medical and banking records and the CBSA report. At paragraph 36, the General Division noted that the Appellant's access to medical and banking services appeared to coincide with her return to and entries into Canada from May 2004 to November 2011. As the Respondent set out, the General Division examined her entries into Canada, as well as the medical and banking records, at paragraphs 18, 21, 35and 36. For instance, the Appellant was seen to have been absent from Canada for 20 months between October 2002 and June 2004, during which time she did not access any banking or medical services. It was only after the CBSA report showed that she re-entered Canada in May 2004 that she accessed banking and medical services. Similarly, between April 2006 and May 2008—a span of 23 months—the Appellant did not access any medical or banking services, until after her re-entry into Canada in May 2008.

[17] Clearly, the General Division preferred the banking and medical records and the CBSA report because it found that they were generally consistent, in showing a pattern where the Appellant did not access banking and medical services until after she re-entered the country, whereas, the affidavit and other evidence was somewhat vague and lacking in specificity.

[18] The Appellant has not convinced me that the General Division mechanistically equated the lack of medical attendance or banking transactions with non-residency.

CONCLUSION

[19] Given the considerations above, the appeal is dismissed.

Janet Lew
Member, Appeal Division