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

Citation: *D. C. v. Minister of Employment and Social Development*, 2017 SSTADIS 416

Tribunal File Number: AD-16-1107

BETWEEN:

D. C.

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: August 17, 2017

REASONS AND DECISION

INTRODUCTION

[1] On June 25, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the evidence fails to demonstrate that the Applicant was ordinarily resident in Canada and that, therefore, he does not qualify for an Old Age Security (OAS) pension.

[2] The Applicant filed a typed letter, which the Tribunal's Appeal Division treated as an application for leave to appeal (Application) on September 7, 2016.

[3] On September 9, 2016, the Tribunal asked the Applicant to provide additional information, as his Application was incomplete.

[4] The Applicant filed further information on October 7, 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 erred in law in making its decision.

b) The error in law is the reliance on "unsubstantiated undocumented hearsay and unfounded innuendos" that the Respondent had provided. None of the material that the Respondent had submitted had come from a government agency.

c) The Respondent did not meet its burden of proof using its evidence.

d) The Respondent's evidence was inadmissible.

e) The Respondent or the General Division could have obtained his income tax returns and other government records, but neither of them did so.

f) The General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

g) Paragraphs 49 and 50 of the General Division decision draw unsubstantiated conclusions.

h) The Applicant seeks to introduce new documents into evidence.

[11] It is noted that the Applicant incorrectly refers to the General Division as the Respondent in its materials. (The Tribunal and the Respondent are not the same entity.) This decision does not turn on any of the incorrect references.

ANALYSIS

[12] The Applicant had applied for the OAS pension in March 2013. The Respondent denied the application initially on the basis that the Applicant did not meet all the eligibility requirements, specifically that the Applicant did not meet the residence requirements, having substantial ties to the USA.

[13] The Applicant requested a reconsideration of this decision. The Respondent maintained its decision upon reconsideration on the basis that the Applicant did not meet the residence requirements.

[14] The Applicant appealed that decision to the Tribunal's General Division. 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 but had filed written submissions.

[15] The issue before the General Division was whether the Applicant has resided in Canada for a sufficient number of years to qualify for an OAS pension.

[16] 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.

[17] In the Application and enclosed documents submitted to the Appeal Division, the Applicant argues that he has remained a resident of Canada since 1978 and, therefore, he is eligible for an OAS pension.

[18] The General Division stated the correct legislative basis and legal tests. It found that the Applicant had had stronger ties to the USA than to Canada. It set out the evidence presented and

pertaining to his ties to Canada and his ties abroad. The General Division was not satisfied that the evidence demonstrated that the Applicant resided in Canada.

[19] For the most part, the Application repeats the Applicant's submissions before the General Division (that he has remained a resident of Canada and that the Respondent's documentary evidence does not come from a government agency). The General Division decision mentions the arguments set out in paragraph 10 (points "b" to "e") above.

[20] The Applicant also seeks to introduce two documents dated in August 2016, i.e. after the General Division decision, namely:

a) a letter from the secretary of Alexander's Pizza Inc., in X, Wisconsin, dated August 1, 2016; and

b) a letter from A. P., Fire Chief of the X Volunteer Fire Department, dated August 1, 2016.

[21] New evidence is not a ground of appeal under section 58 of the DESD Act. These two documents were not adduced before the General Division, and their authors were not witnesses at the General Division hearing. The Applicant seeks to introduce these documents now to answer the General Division's "doubt and concern that [he] could own a business in Wisconsin and be a member of the X Volunteer Fire Department without jeopardizing [his] resident status in Canada."

[22] It was incumbent upon the Applicant, prior to and at the hearing, to submit to the Respondent and the General Division any evidence he had. At this stage of the proceedings, new evidence is usually not accepted. While there may be exceptional circumstances in which the Appeal Division can receive new evidence, this matter is not one that warrants application of an exception. The Respondent repeatedly asked the Applicant for further information to determine his residency and advised the Applicant that it was his responsibility to provide this information.

[23] The Applicant has argued throughout this matter that the Respondent or the Tribunal should have obtained access to his files at Revenue Canada or Canada Customs. The General Division correctly stated that the onus lies on the Applicant to establish that he meets the

eligibility requirements for an OAS pension and that the Respondent is not required to seek evidence on his behalf.

[24] As to the Applicant's argument that the Respondent's evidence was inadmissible because it does not come from a government agency, he made similar arguments before the General Division. The General Division decision referred to the documents to which the Applicant objected at paragraph 15: they include articles published from 1991 to 2011, in U.S. media, which mention the Applicant, and excerpts from a book that the Applicant had authored and that had been published in October 2005. These documents are not "hearsay and innuendo." They were disclosed to the Applicant many years ago and are in the appeal record, and he has had ample opportunity to respond and challenge them with his own evidence. These documents were admissible into evidence before the General Division, and there was no error of law committed in accepting them into evidence or referring to them in its decision.

[25] I note that the General Division found that the Applicant was not a credible witness, and the General Division member explained the reasons why the Applicant and his evidence lacked credibility (see paragraphs 45 and 46 of the decision). The determination of a witness' credibility and the credibility of the evidence he or she gives lies with the General Division member and not with the Appeal Division.

[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