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

Citation: *A. D. v. Minister of Employment and Social Development*, 2017 SSTADIS 455

Tribunal File Number: AD-16-1337

BETWEEN:

**A. D.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Janet Lew

Date of Decision: September 15, 2017

Canada

## REASONS AND DECISION

## OVERVIEW

[1] The Applicant seeks leave to appeal the General Division's decision dated September 6, 2016, which determined that the Applicant was not eligible for an Old Age Security pension under the *Old Age Security Act*, as it found that he had failed to meet the residency requirements under subsections 3(1) and (2) of the *Old Age Security Act*.

## ISSUE

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

## ANALYSIS

[3] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

[4] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General)*, 2015 FC 1300. The Applicant filed a series of submissions in support of his application.

### (a) Material evidence

[5] The Applicant argues that the General Division was "criminal[ly] negligent," as it ignored material facts that supported his application. Subsequent submissions indicate that these material facts include evidence that the Applicant provided after the hearing of his appeal.

Evidence at the hearing

[6] The Applicant claims that the General Division ignored the fact that he was "self-employed for an Ontario-registered company representing various Ontario residents" and that he had also served as a missionary outside of Canada. He argues that his employment by an Ontario-registered company that represented Ontario residents from 1993 to 2011 should have been sufficient to prove residency, and that his employment by an Ontario company rendered his travel outside of Canada irrelevant. He argues that if his credibility was not at issue, the General Division should have unequivocally accepted his evidence.

[7] Ignoring material facts may well result in an erroneous finding of fact, but it alone does not result in criminal negligence.

[8] The Applicant claims that the General Division ignored material facts, largely that he had been employed by an Ontario-registered company and that he had served as a missionary outside of Canada. The General Division was aware of this evidence. At paragraph 16, the General Division referred to the Applicant's evidence that he had purchased a farm in Costa Rica in 1993, that he had a company in Ontario and that he had also been a missionary.

[9] The General Division summarized the Respondent's submissions. At paragraph 19, the General Division wrote that the Applicant's absences "do not fall under the provisions for 'special circumstances' as provided for under Section 21 of the *OAS Regulations*, as he was neither in the employ of a Canadian agency or corporation nor was he performing services as a missionary."

[10] The General Division concluded that it found that the Applicant's absences did not fall within the special circumstances provided for in subsection 21(5) of the *OAS Regulations.*

[11] There was evidence before the General Division regarding, for instance, the Applicant's missionary work, his employment by a Canadian agency or corporation and his travel dates. The General Division appears to have seemingly not addressed this evidence in its analysis section, yet concluded that it Applicant's absences did not fall within the special circumstances provided for in subsection 21(5) of the *OAS Regulations*. Given that it is not readily apparent whether the General Division considered the Applicant's claims that he did missionary work with any religious group or organization, or was a worker in lumbering, harvesting, or other seasonal employment, or was legitimately employed by a Canadian firm or corporation, and whether he returned to Canada within six months after the end of his employment or engagement out of Canada, for this reason, I am satisfied that there is an arguable case and that the appeal has a reasonable chance of success.

Post-hearing documents

[12] After the hearing of the appeal, the Applicant filed no fewer than 28 documents with the Social Security Tribunal. The Applicant suggests that the General Division should have considered these post-hearing documents. Most of these documents had been filed before the General Division rendered its decision. I am unconcerned about the documents that the Applicant filed after the General Division rendered its decision. After all, the member was unaware that the Applicant would be continuing to file documents and submissions, and so was entitled to proceed with rendering a decision on the basis of the evidence before her.

[13] Post-hearing documents should be allowed only under exceptional circumstances, where it is in the interests of justice to do so, where it would assist the member and where it would not cause substantial or irreparable prejudice to the other party. There are other considerations as well.

[14] It is clear that the member was aware of these documents. At paragraph 3 of her decision, the member referred to these documents and indicated that she did not consider them, as she found that she had "all the necessary evidence to make a determination based on the documents submitted before the hearing and the evidence at the hearing." Yet, the Applicant suggests that these documents, filed after the hearing of the appeal, were critical to his appeal.

[15] The member indicated at paragraph 26 in her decision that there were gaps in the evidence and in the witnesses' oral testimony. Yet, she also determined at paragraph 3, without considering the post-hearing documents and without aessing whether they had any probative value, that she had all the necessary evidence to make a determination on the Applicant's residency. These two statements seem to be at some odds with one another.

[16] I have reviewed each of the post-hearing documents. These 28 documents largely consist of additional argument, as the Applicant felt that he had insufficient time to present his case at the hearing of the appeal. He also indicated that he would be providing copies of his Canadian income tax returns for several years between 1997 and 2015, as he argued that they should be determinative of his Canadian residency. Some of his documents included correspondence and a banking statement that showed a Canadian address. In his email of August 25, 2016, the Applicant indicated that he was in Guyana for business and to visit his son, but an email prepared by the Applicant would not have been determinative of residency. At best, these particular documents and submissions were of marginal probative value. The member was already aware of the Applicant's claims that he had a company in Canada and that he had left Canada for business and family reasons.

[17] Notwithstanding the fact that the Applicant could have made an application[1] to rescind or amend the General Division's decision under section 66 of the DESDA and thereby could have filed any new facts (though this is not to suggest that he would have necessarily succeeded in such an application), there is an arguable case to be made that

[1] The Applicant filed an application to rescind or amend but subsequently withdrew it, in favour of an application requesting leave to appeal to the Appeal Division.

the General Division should have at least reviewed the post-hearing documents that the Applicant considers relevant. Failing to at least review these post-hearing documents may have resulted in a breach of procedural fairness.

**(b) Fair hearing**

[18] The Applicant has raised additional issues relating to alleged breaches of natural justice.

[19] The Applicant alleges that he was denied natural justice, as he was deprived of a fair hearing. In particular, he claims that he was not provided with the opportunity to fairly present his case: one, he did not have sufficient time to locate documents prior to the hearing; two, the General Division member failed to inform him at the hearing that he had insufficient evidence to prove his case; and three, he was denied the chance to cross-examine the Respondent, along with officials who processed his application. It should be noted that the hearing of the appeal before the General Division was by teleconference, and that the Respondent had chosen not to attend the hearing.

[20] The Applicant further argues that the Respondent had failed to provide him with a copy of the *Old Age Security Act*, as he would have then learned about and understood the requirements for an Old Age Security pension.

[21] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his case, that he has a fair hearing and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias.

Obtaining copies of the *Old Age Security Act*

[22] The Applicant's allegations against the Respondent that it should have provided him with a copy of the *Old Age Security Act* suggest that there might not have been any issue over meeting the residency requirements, had the Applicant been informed of them, as he would have then fully complied with them. However, it is a well-known and widely accepted principle that ignorance of the law does not excuse non-compliance.

[23] It is unclear when the Applicant suggests that the Respondent should have provided him with a copy of the *Old Age Security Act*, but there is no duty on the Respondent to provide prospective applicants with a copy of the legislation. Copies of the *Old Age Security Act* are publicly and widely available. In any event, this submission does not speak to any of the grounds of appeal under subsection 58(1) of the DESDA.

Cross-examination of witnesses

[24] There also is no requirement for any of the parties, including the Respondent, to attend any hearings before the Tribunal. As such, there is no absolute right for a party to cross-examine the other, though there is some precedent in other jurisdictions (notably British Columbia) in which a party is entitled under the rules of court to cross-examine an adverse party. The Applicant theoretically could have called the Respondent or any witness who is adverse in interest and, if a witness failed to attend proceedings, the Applicant could have requested that the General Division draw an adverse interest against that witness. However, this presupposes in this case that the Respondent had any evidence to give. If the Applicant disagreed with the Respondent's submissions, properly the Applicant should have addressed them in his own submissions.

Document production

[25] The Applicant claims that he did not have sufficient time to locate documents prior to the hearing. While that may be, I do not see any indication in the hearing file that the Applicant ever sought an adjournment of the hearing on the basis that he required additional time to locate documents and, that being the case, the General Division cannot be faulted for having proceeded with the hearing of the appeal.

[26] Indeed, the Applicant wrote to the Tribunal on December 18, 2015, and on January 27, 2016 (GD7 and GD8), and sought to have his appeal determined as soon as possible. The Tribunal issued a Notice of Hearing on April 6, 2016, informing the parties that a hearing had been scheduled for July 12, 2016, and that they could file additional documents by May 11, 2016, and any response documents, by no later than June 10, 2016. The Tribunal

also indicated that, ultimately, the General Division member would determine whether to accept any documents filed after these dates.

[27] The Applicant contacted the Tribunal again on April 12 and 25, 2016, and on May 16, 2016, requesting an earlier hearing date. At no time during any of his communications with the Tribunal did the Applicant ever convey the need for additional time so that he could locate documents. At most, the Applicant contacted the Tribunal, on June 6, 2016, to advise that he would be delivering a new document shortly. He filed submissions on June 7, 2016, in response to the Respondent's submissions; he indicated that he had just received the Respondent's submissions and that he had found that there was insufficient time for him to respond, and then he proceeded to write approximately 30 pages of argument, followed by copies of pages from his passport and the first page of his 2014 income tax return. On June 15, 2016, the Applicant provided additional submissions and documents, totaling over 120 pages (GD15).

[28] Although the filing dates set out by the Tribunal in the Notice of Hearing had passed, the Applicant continued to file documents, up to the hearing date. On June 23, 2016, the Applicant filed a 227-page document (GD16) in which he wrote that "from the years 1993 to 2012 I was managing the teak farm in Costa Rica, and from 1995 to 2012 I was supervising the harvesting for thinning and processing lumber of the teak tress." He concluded that he was in Costa Rica "for a variety of purposes. Health, work...and because I needed physical therapy which I couldn't afford in Canada. So either my person or my physical absence from Canada my person both still qualifies for the full [Old Age Security pension] [*sic*]."

[29] The Applicant has not identified what documents he purportedly needed to locate before the hearing of the appeal before the General Division, but as I have indicated, as he did not seek an adjournment of the proceedings, and as the General Division was unaware that the Applicant intended to locate other documents (given the Applicant's persistence in moving his claim forward), I see no error on the part of the General Division in proceeding with the hearing of the appeal on the basis of the evidence and submissions before it.

## CONCLUSION

[30] I am prepared to grant leave to appeal, although this decision of course is not determinative of whether the appeal itself will succeed.

[31] The appeal shall be restricted to the two issues upon which I have granted leave to appeal, namely, that the General Division: (1) may have erred in failing to consider his employment and/or missionary work; and (2) may have erred in failing to consider the post-hearing documents.

[32] However, the Applicant should be prepared to refer me to the evidence before the General Division that supports his allegations. For example, other than his oral testimony, what documentary evidence was there before the General Division to establish that he had been involved in missionary work? This does not call for a reassessment or a rehearing.

[33] The Applicant should also be prepared to address certain points, in regards to any post-hearing documents, namely:

i. that any evidence could not have been obtained with reasonable diligence for use at the hearing of the appeal before the General Division;

ii. that the evidence is such that, had it been accepted, would probably have an important influence on or be a determining factor in the outcome of the appeal; and

iii. that the evidence must be credible.

[34] In accordance with subsection 58(5) of the DESDA, the application for leave to appeal hereby becomes the notice of appeal. Within 45 days after the date of this decision, the parties may: (a) file submissions with the Appeal Division; or (b) file a notice with the Appeal Division stating that they have no submissions to file. The parties may make submissions regarding the form the hearing of the appeal should take (e.g. by teleconference, videoconference, in person or on the basis of the parties' written submissions), together with submissions on the merits of the appeal.

Janet Lew
Member, Appeal Division