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

Citation: *B. A. v. Minister of Employment and Social Development*, 2017 SSTADIS 655

Tribunal File Number: AD-16-1341

BETWEEN:

B. A.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: November 17, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] What is your date of birth? This is a frequent question that most Canadians have little difficulty answering. But, since 2013, the Applicant in this case has gone to great lengths to prove that he was born in 1947, rather than in 1956. This nine-year difference is significant because it affects when he is eligible to receive his Old Age Security pension (OAS Pension).[1]

[2] The Applicant previously believed that he had been born on May 5, 1956, a date that appears on numerous official documents. In 2008, however, he learned that he might have been born earlier. After much effort, the Applicant is now convinced that he was born on July 16, 1947, but officials in his country of birth, Ghana, are unable to confirm this date saying that at the relevant time there was no registration facility at the place where he was born. To complicate matters even further, the Applicant has changed his name and does not have the same last name as either of his parents.

[3] So, when the Applicant applied for his OAS Pension in 2013, he declared being born on July 16, 1947. The Respondent (Minister) nevertheless denied his application at the initial and reconsideration levels because May 5, 1956, was the date of birth that the Applicant had used previously, and the Minister was not convinced by the evidence that a different date should be used instead. In September 2016, the Applicant's appeal to the General Division of the Social Security Tribunal of Canada (Tribunal) was dismissed. While sympathetic, the General Division Member concluded that the Applicant had failed to show, on a balance of probabilities, that he was at least 65 years old.

[4] In December 2016, the Applicant filed this application for leave to appeal with the Tribunal's Appeal Division. For the reasons described below, I have decided that leave to appeal should be refused.

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[1] Pursuant to section 3 of the *Old Age Security Act*, a person must be 65 years old or more to obtain an OAS Pension.

THE LEGAL FRAMEWORK

[5] The Tribunal is created and governed by the *Department of Employment and Social Development Act* (DESD Act). The DESD Act establishes a number of important differences between the Tribunal's General Division and its Appeal Division.

[6] First, the General Division is required to consider and assess all of the evidence that has been submitted, including new evidence that was not considered by the Minister at the time it made its earlier decisions. In contrast, the Appeal Division is generally prohibited from considering any new evidence and is more focused on particular errors that the General Division might have made. More specifically, the Appeal Division can interfere with a General Division decision only if one of the errors set out in subsection 58(1) of the DESD Act has been established, namely:

a) Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction?

b) Did the General Division err in law in making its decision, whether or not the error appears on the face of the record?

c) Did the General Division base 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?

[7] A second important difference created by the DESD Act is that most appeals before the Appeal Division must follow a two-step process:

a) The first step is known as the application for leave to appeal stage. This is a preliminary step that is intended to filter out those cases that have no reasonable chance of success.[2] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the proposed appeal might succeed?[3]

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[2] DESD Act at s. 58(2).
[3] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at para. 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at para. 16.

b) If leave to appeal is granted, the file moves on to the second step, which is known as the merits stage. It is at the merits stage that appellants must show that it is more likely than not that the General Division committed at least one of the three possible errors described in subsection 58(1) of the DESD Act. The expression "more likely than not" means that appellants have a higher legal test to meet at the second stage as compared to the first.

[8] This appeal is now at the leave to appeal stage, meaning that the question I must ask myself is whether there is any arguable ground on which the proposed appeal might succeed. It is the Applicant who has the responsibility of showing that this legal test has been met.[4]

ANALYSIS

[9] The Applicant's representative submits that leave to appeal should be granted because:

a) the Minister's office lost original documents that have never been found or returned to the Applicant;

b) there is new evidence that ought to be taken into account (AD1-21 to 26); and

c) the Applicant has been the victim of numerous errors, cultural and family circumstances, and local practices that are entirely out of his control. In reaching its conclusion, the General Division ought to have considered the Applicant's circumstances, the particular challenges that he has faced in trying to prove his date of birth and the lengths that he has gone to in order to do so.

[10] The Minister has not filed any submissions at this stage of the proceeding.

Lost Documents

[11] In the documents before the General Division, the Minister acknowledged that it was unable to retrieve: the Applicant's original OAS application; a letter sent to the Applicant on December 23, 2013, requesting clarification regarding his date of birth; and a statutory

[4] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 31; *Griffin v. Canada (Attorney General)*, 2016 FC 874, at para. 20.

declaration received from the Applicant on January 14, 2015, confirming that he was born on July 16, 1947 (GD5 and GD8 at paragraphs 4–6). In addition, the Applicant claims in his application requesting leave to appeal that certain citizenship documents may also have been lost (AD1-3). I interpret this argument as suggesting that the General Division might have failed to observe a principle of natural justice or have based its decision on an important error of fact.

[12] The General Division Member was alive to the issue of lost documents, but ultimately concludes at paragraph 38 that "[…] no material or relevant evidence is unavailable as a result of the Respondent's error." In particular:

a) though no copies of the application form could be found, the decisions of the Minister and of the General Division Member turn strictly on the Applicant's age and date of birth. It has been acknowledged throughout that the Applicant declared on the application form that he had been born on July 16, 1947. The Applicant does not contend that any other relevant information was overlooked as a result of the misplaced application form;

b) while the Minister's letter of December 23, 2013, ought to have been preserved, it contains no substantive information that would have affected the outcome of the Applicant's case; and

c) the Applicant kept copies of his statutory declaration and of the other citizenship documents that the Minister misplaced, and copies of all these documents were submitted to the Tribunal after the hearing (GD10). While there is a question as to whether the Minister considered these documents properly, any possible error was fixed by the fact that these documents were put before the General Division Member, who thoroughly reviewed and assessed all of the evidence. In addition, there is no indication that the General Division Member discounted any of the Applicant's documents because they were copies rather than originals.

[13] I too am satisfied, therefore, that no material or relevant evidence was lost as a result of the Minister's error and find that this argument does not have a reasonable chance of success under paragraph 58(1)(*a*) or (*c*) of the DESD Act.

New Evidence

[14] As part of the leave to appeal materials, the Applicant's representative has submitted new documents, including:

a) a letter to Ghana's "Counsel General" in Toronto describing the process that the Applicant has been through thus far and requesting a letter that explains the difficulties associated with obtaining official documents from Ghana (AD1-21); and

b) proof of M. A.'s death (AD1-25 to 26). Based on what the Applicant's mother told him before her death, he understands that he and Ms. M. A. were born on the same day.

[15] The three possible errors set out in subsection 58(1) of the DESD Act are sufficiently narrow that new evidence is, as a general rule, irrelevant to the assessment that the Appeal Division must undertake. While there are some exceptions to the rule against considering new evidence, none of those exceptions applies to the facts of this case, and I have not taken these additional documents into account.[5]

[16] In addition, the Federal Court confirmed in *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 73, that new evidence is not, in and of itself, a reason for granting leave to appeal.[6]

[17] I am satisfied, therefore, that this argument does not engage any of the possible errors set out in subsection 58(1) of the DESD Act, meaning that it has no reasonable chance of success.

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[5] *Marcia v. Canada (Attorney General)*, 2016 FC 1367, at paras. 20 and 34; *Paradis v. Canada (Attorney General)*, 2016 FC 1282, at paras. 20–25.
[6] See also *Tracey*, note 4, at paras. 28-29; *Canada (Attorney General) v. O'Keefe*, 2016 FC 503, at para. 28.

The Applicant's Personal Circumstances

[18] The Applicant says that he is on welfare and unable to work. He also says that he faces a very unique set of circumstances that he has gone to great lengths to try and overcome. Since the Minister lost his original documents, the Applicant also claims that he is now unable to travel.

[19] While I am extremely sympathetic to the Applicant's plight, I view these statements as a request that I reweigh and reassess the evidence through a particular lens. Unfortunately, this is not part of the Appeal Division's role.[7] Indeed, reassessing or rehearing the evidence is not allowed by the DESD Act. Since this argument also has no basis in the possible errors set out in subsection 58(1) of the DESD Act, it too has no reasonable chance of success.

CONCLUSION

[20] In my view, none of the arguments raised by the Applicant's representative in the application for leave to appeal amount to an arguable ground upon which the proposed appeal might succeed.

[21] Nevertheless, I am mindful of Federal Court decisions in cases such as *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para. 10 and *Griffin*, note 4, at para. 20. As such, I have also gone beyond the four corners of the application requesting leave to appeal and considered whether the General Division Member might have failed to properly account for any of the evidence.

[22] Based on my review of the documentary record and of the decision under appeal, I am satisfied that the General Division Member neither overlooked nor misconstrued relevant evidence. In my view, the General Division Member accurately summarized the key aspects of the evidence. She analyzed the evidence and explained why she did or did not find it to be persuasive. The General Division Member also applied the correct legal test when concluding that the evidence was insufficient to prove the Applicant's allegation that he was born in 1947.

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[7] *Marcia*, note 5, at paras. 34 and 37; *Tracey*, note 4, at para. 46.

[23] It is also clear that the General Division Member went out of her way to ensure that this matter proceeded fairly, that she had all of the relevant documents before her, and that the effect of the Minister's loss of any relevant documents had been remedied or at least minimized. For example, the General Division Member allowed the Applicant to file additional documents after the hearing and granted an extension of time so that his representative could reply to the Minister's supplementary submissions (GD10, GD11 and GD14).

[24] As a result, I am satisfied that the Applicant has not raised a possible error under the DESD Act that has a reasonable chance of success on appeal and that the application for leave to appeal should be refused.

Jude Samson
Member, Appeal Division