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

Citation: *A. S. v. Minister of Employment and Social Development*, 2018 SST 197

Tribunal File Number: AD-17-952

BETWEEN:

A. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: February 28, 2018

Canada

DECISION AND REASONS

DECISION

Leave to appeal is granted.

OVERVIEW

[1] The Applicant, A. S., was born in Iraq in 1940 and immigrated to the United States in 1966. She entered Canada as a permanent resident in April 2001.

[2] In November 2011, Ms. A. S. applied for an Old Age Security (OAS) pension, claiming that she had resided in Canada for at least 10 years. The Respondent, the Minister of Employment and Social Development (Minister), approved the application and determined that, based on Ms. A. S.'s declared period of residency in Canada, she was entitled to a partial OAS pension at 10/40ths of a full pension, effective May 2011.

[3] Ms. A. S. applied for a Guaranteed Income Supplement (GIS) in August 2012.

[4] In September 2014, following an investigation into Ms. A. S.'s eligibility for an OAS pension, the Minister determined that she did not meet the residency requirements under the *Old Age Security Act* (OASA) for entitlement to a partial OAS pension. It also determined that, since Ms. A. S. was not entitled to an OAS pension, she was also not entitled to the GIS. The Minister ordered Ms. A. S. to repay the more than three years of OAS pension she had received since May 2011.

[5] Ms. A. S. appealed the Minister's determination to the General Division of the Social Security Tribunal of Canada. In a decision dated September 7, 2017, the General Division dismissed Ms. A. S.'s appeal, finding that she had not resided in Canada for an aggregate period of at least 10 years.

[6] On December 15, 2017, Ms. A. S. applied for leave to appeal from the Tribunal's Appeal Division. Accompanying her application was a brief alleging numerous errors on the part of the General Division, specifically:

- The General Division erred in its interpretation of paragraph 21(1)(*a*) of the *Old Age Security Regulations* when it found that Ms. A. S.'s time in Canada amounted to mere presence, not residence.

- The General Division offered no reasonable explanation for why it preferred the Minister's evidence over Ms. A. S.'s.

- The General Division made no reference to a glaring contradiction in the Minister's evidence: Its own investigation into Ms. A. S.'s OAS entitlement concluded that she had "no residency issue."[1]

- Ms. A. S. was denied a fair hearing because the General Division should have noticed the aforementioned contradiction and alerted her former legal representative.

- In paragraph 24 of its decision, the General Division referred to the investigator's report, dated July 17, 2014, in which Ms. A. S. purportedly said that she did not have any U.S. bank accounts. In fact, she never made such a statement and disclosed such accounts.

- In paragraph 39, the General Division wrote, "A person cannot make their home and 'ordinarily live' in more than one country at a time." Ms. A. S. never stated that she had been living in more than one country at a time.

[7] Having reviewed the General Division's decision against the underlying record, I have concluded that this appeal stands a reasonable chance of success.

ISSUES

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first

[1] See Report of Investigation by Fatema Kazi, July 23, 2014, GD2-42-44.

grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[9] My task is to determine whether any of the grounds that Ms. A. S. has put forward fall into the categories specified in subsection 58(1) of the DESDA and whether any of them raise an arguable case.

ANALYSIS

[10] At this juncture, I will address only the argument that, in my view, offers Ms. A. S. her best chance of success on appeal.

[11] The reports that emerged from the Minister's investigation into Ms. A. S.'s Canadian residency status form the heart of the case against her, and their contents presumably played at least some role in the decision to terminate and reclaim her OAS pension. Yet Ms. A. S. appears to be correct in noting that the investigator, who personally interviewed her and reviewed her documents, found that she had "residential ties to Canada" and recommended that the Minister "continue A. S.'s Old Age Security entitlement at the current rate…"

[12] However, I am unsure whether there is necessarily a "contradiction" in the Minister's evidence, as Ms. A. S. would have it. A handwritten notation in the same report, dated September 18, 2014, seems to indicate that someone—possibly a more senior official—decided, without explanation, to reject the investigator's recommendation and declare Ms. A. S. a non-resident. It should be noted that the General Division does not have the authority to review the internal processes by which the Minister adjudicates applications for benefits; rather, its jurisdiction under section 27 of the OASA and section 54 of the DESDA is to make a fresh assessment of the substance of the claim and to then either dismiss the appeal or confirm, rescind or vary the Minister's decision.

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[2] DESDA at subsections 56(1) and 58(3).
[3] *Ibid*. at subsection 58(1).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[13] That said, Ms. A. S. has raised an argument that the General Division may have disregarded material evidence in her favour. Although a decision-maker is presumed to have considered all available evidence, it is notable that the General Division did not mention the investigator's conclusion and recommendation in its decision. At this preliminary stage, I have not listened to the audio recording of the hearing that was held on August 30, 2017, so I do not yet know whether the report was brought to the General Division's attention or otherwise discussed.

[14] An administrative tribunal such as the General Division cannot be expected to refer in its decision to each and every aspect of the record, but it must offer at least some reason for choosing to discount material evidence.

[15] I see a reasonable chance of success on appeal for this argument.

CONCLUSION

[16] I am granting unrestricted leave to appeal. Should the parties choose to make further submissions, they are free to offer their views on whether a hearing is required and, if so, what format is appropriate.

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Member, Appeal Division

REPRESENTATIVE:	Eddie Kadri, for the Applicant