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

Citaion: *K. S. and V. S. v. Minister of Employment and Social Development*, 2018 SST 238

Tribunal File Numbers: AD-17-956
AD-17-958

BETWEEN:

K. S. and
V. S.

Applicants

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 15, 2018

DECISION AND REASONS

DECISION

Leave to appeal is refused.

OVERVIEW

[1] This application for leave to appeal involves overlapping claims for benefits paid under the *Old Age Security Act* (OASA). It raises questions about the jurisdiction of the General Division of the Social Security Tribunal in cases where the Minister has combined decisions made on first instance and on reconsideration.

JOINING OF APPLICATIONS

[2] As these two requests for leave to appeal share a common question of law (with only immaterial differences in their respective facts), I think it is appropriate to deal with them jointly, as permitted under section 13 of the *Social Security Tribunal Regulations*. In taking this action, I am satisfied that no injustice will be caused to any party.

BACKGROUND

[3] The essential facts in this case are not in dispute. The Applicants, K. S. and V. S., are a husband and wife who were born in India in X X and X X, respectively. K. S. immigrated to Canada in May 1969 and his wife followed in February 1970.

[4] In X X, the month he turned 65, K. S. applied for a pension and Guaranteed Income Supplement (GIS) under the OASA. His benefits were approved effective the following month, and he received them uninterrupted for the next nine years. V. S. began receiving an OAS pension and GIS after she turned 65 in X X.

[5] In September 2013, the Respondent, the Minister of Employment and Social Development (Minister), suspended K. S. and V. S.' benefits after it received information that they were residing in X, India. Following a two-year investigation, the Minster advised K. S. and

V. S., in letters dated September 23, 2015, and August 28, 2015, respectively, that they were entitled to full OAS pensions. Their benefits were reinstated with back payments.

[6] At the same time, the Minister decided that K. S. and V. S. had ceased to reside in Canada as of November 2012 and were now residents of India. Because the OASA prohibits payment of the GIS to persons more than six months after they have ceased to reside in Canada, the Minister deemed the K. S. and V. S. ineligible to receive the GIS after May 2013 and assessed an overpayment for the GIS that they had received from June to August 2013.

[7] K. S. and V. S. requested reconsideration of the decision regarding their GIS entitlement, claiming not to have left Canada until October 2013. In September 2015, they re-entered Canada and provided evidence which, at the time, satisfied the Minister that they intended to resume residence here. In January 2016, their GIS benefits were approved to resume effective September 2015.

[8] In letters dated June 14, 2016, and June 16, 2016, the Minister advised K. S. and V. S. that it had reconsidered its position and determined that they had not become residents of India until October 2013, thereby entitling them to receive the GIS up to April 2014. At the same time, the Minister decided that their presence in Canada from September 2015 was only a visit and that they were therefore not entitled to receive the GIS that had been paid to them until June 2016.

[9] K. S. and V. S. appealed the June 2016 reconsideration decisions to the General Division of the Social Security Tribunal. In its submissions to the General Division, the Minister reverted to its former position that K. S. and V. S. had ceased to reside in Canada as of November 2012. It also reiterated its position that K. S. and V. S. had never resumed residence in this country.

[10] In separate decisions dated October 4, 2017, the General Division dismissed the appeals, agreeing with the Minister that K. S. and V. S. had stopped residing in Canada in November 2012, rending them ineligible to receive the GIS after May 2013. It also determined that it lacked jurisdiction to decide (i) V. S.' entitlement to the GIS for any time after August 28, 2015, and (ii) K. S.'s entitlement to the GIS for any time after September 23, 2015.

APPLICANTS' SUBMISSIONS

[11] On December 18, 2017, K. S. and V. S. made separate, but essentially identical, applications for leave to appeal to the Tribunal's Appeal Division. Accompanying their applications was a brief that alleged various errors on the part of the General Division, among them:

- The June 2016 reconsideration letters were the subject of the appeal to the General Division, but the record shows that the Minister withdrew those letters and replaced them with "other facts," of which K. S. and V. S. claim they were given no prior notice. Given those withdrawals, the General Division exceeded its jurisdiction and violated the principles of natural justice by taking *suo moto* notice of a non-existent issue. The Minister acknowledged as much in an October 2017 letter, which stated:

  > With regards to our letter dated June 14, 2016 in which you were advised of the overpayment of GIS for the period September, 2015 to June, 2016, in the amount of $5072.95, it has come to our attention that you were not given the correct appeal rights with regard to this decision.

- The General Division also did not take into consideration material evidence. The Minister concealed certain facts, and the General Division assigned too little weight to others in deciding the appeal. For example, K. S. was present in Canada for 3,070 days out of a total of 3,650 days, as confirmed by certified copies of his passports, from April 1, 2004, to April 1, 2014. This period encompasses the period under appeal—June 2013 to April 2014—and is more than enough to meet the residence requirement under paragraphs 11(7)(*c*) and (*d*) of the OASA.

[12] In a letter dated December 27, 2017, K. S. and V. S. amplified their earlier submission that the General Division had abused its authority. They noted that the June 2016 letters, which were the basis of the appeals to the General Division, were in two parts: The first, relating to the period from June 2013 to April 2014, favoured their interests in finding that they were residents of Canada until October 2013. The second, relating to the period from September 2015 to June 2016, countered their interests in finding that, since they had not been residents since

October 2013, they had been wrongly paid nine months of GIS. K. S. and V. S. argued that the General Division exceeded its jurisdiction by making an order, which they never sought, pertaining to the first question. At the same time, they allege that the General Division refused to consider the second question, for which they *were* seeking an order.

ISSUES

[13] 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 grants leave to appeal,[1] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[14] My task is to determine whether any of the grounds that K. S. and V. S. have put forward fall into the categories specified in subsection 58(1) of the DESDA and whether there is an arguable case for any of them.

ANALYSIS

[15] Having carefully examined the Applicants' submissions, the General Division's decision, and the documentary record in the context of the applicable law, I have identified no plausible grounds of appeal under subsection 58(1) of the DESDA.

General Division's Jurisdiction

[16] As the General Division rightly noted, recourse to the Tribunal is a right created by statute. Under subsection 27.1(1) of the OASA, a person who "is dissatisfied with a decision or determination made under this Act" may ask the Minister to reconsider the decision. Subsection 27.1(2) of the OASA requires the Minister, on receiving such a request, to reconsider

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

the decision and either confirm or vary it. The Minister must communicate its reconsideration decision, along with reasons for it, to the person who made the request. Under subsection 28(1) of the OASA, a person who is dissatisfied with a decision of the Minister made under section 27.1—that is, a reconsideration decision—may appeal the decision to the Tribunal.

[17] The effect of these provisions is that the Tribunal cannot consider an appeal except where there has been an initial decision and then a request for reconsideration, followed by a reconsideration decision, made under section 27.1 of the OASA. This interpretation of the law has been reinforced by the Federal Court decision *Canada v. Bannerman,*[4] which held that there is no direct right of appeal from an original determination of the Minister without having first applied for redetermination and having received a decision flowing from that request. A request for reconsideration under subsection 27.1(2) and a decision on the request for reconsideration are conditions to the right of appeal.

[18] In this case, there were two simultaneous ministerial adjudications. The first related to the Minister's decision to suspend K. S. and V. S.' OAS pension and GIS. The Minister's initial decisions, on August 28, 2015, and September 23, 2015, restored their benefits, recognizing their Canadian residency up to November 2012. On reconsideration, the Minister varied that decision in the letters of June 14, 2016, and June 16, 2016, recognizing their Canadian residency up to October 2013.

[19] A problem arose when the Minister used its June 2016 letters to communicate a decision about a second adjudication. This involved the Minister's reversal of its earlier decision to pay K. S. and V. S. a GIS as of September 2015, thereby deeming any time that they had spent in Canada after that date as nothing more than visits. The General Division regarded this matter as distinct and separate from the Minister's decision to restore K. S. and V. S.' OAS pension and GIS up to May 2013. The first adjudication eventually generated a reconsideration decision, but the second one never did—a fact that the General Division recognized after a careful review of the record. I see no arguable case that the General Division based its decision on an erroneous finding that the issue in the second adjudication—whether K. S. and V. S. were residents of

[4] *Canada (Attorney General) v. Bannerman*, 2003 FCT 208.

Canada after September 2015—was never the subject of a reconsideration decision and thus could not be appealed to the General Division.

Ministerial Error

[20] In combining a reconsideration decision (regarding the restoration of K. S. and V. S.' OAS pension and GIS up to April 2014) and an initial decision (regarding the termination of the GIS they had been receiving since September 2015) in its June 2016 letters, the Minster appears to have misled K. S. and V. S. into filing appeals on an issue over which the General Division had no jurisdiction (the cancellation of the GIS from September 2015) while, in the process, reopening the issue of their residence in 2012–2013 and imperiling the 11 additional months of benefits that they had won from the Minister.

[21] I am extremely sympathetic to the predicament in which K. S. and V. S. find themselves, but I cannot offer them a remedy. I see no arguable case that the General Division erred in law by either overstepping its jurisdiction or refusing to exercise what jurisdiction it did have. As the General Division noted, the discussion in the June 2016 letters about K. S. and V. S.' GIS entitlement from September 2015 onward was not merely a variance of the earlier decision; it was an entirely new decision concerning their entitlement to a GIS for the 2015–2016 payment year:

> The Appellant ought to have been advised of her right to request reconsideration; instead she was directed to appeal to the Tribunal. As the Minister has never issued a reconsideration decision for the decision to cancel the Appellant's GIS in September 2015, the Tribunal does not have jurisdiction to decide that issue on this appeal.

[22] In giving K. S. and V. S. the impression that their only recourse *on all issues* was to bring an appeal to the Tribunal, the Minister caused K. S. and V. S. to miss the 90-day deadline for requesting reconsideration of the decision to cancel their GIS from September 2015 onward. Unfortunately, neither the General Division nor the Appeal Division have the authority to review the Minister's discretionary power to offer—or not offer—relief where a claimant has received erroneous advice.

[23] If the Minister has not done so already, I trust that it will do the right thing and grant K. S. and V. S. an extension of time in which to request reconsideration.

Minister's Change of Position

[24] When K. S. and V. S. filed their notice of appeal with the General Division, they indicated that they were satisfied with the Minister's revised decision—set out in its June 2016 letters—to recognize their Canadian residence up to October 2013. They were understandably dismayed when the Minister then reversed its position and argued before the General Division that they were resident only up to November 2012. However, as the General Division correctly determined, parties to an appeal have the right to change their positions on the issues up to the time a decision is rendered.

[25] K. S. and V. S. allege that the General Division breached a principle of natural justice by, in effect, denying them a full opportunity to be heard. However, I do not see a reasonable chance of success on this ground. The General Division has wide discretion to hold hearings as it sees fit, and I do not think its choice to decide K. S. and V. S.' appeal on the basis of a documentary review prejudiced their interests, especially since the key facts in this case were not controversial. K. S. and V. S. were given wide latitude to make written submissions, and they availed themselves of every opportunity to do so, setting out their position in numerous letters filed with the Tribunal.

[26] K. S. and V. S. suggest that the Minister, without their knowledge, withdrew the June 2016 letters, and that the General Division unilaterally decided their appeals on irrelevant issues, but my review of the record reveals nothing to support such an allegation. It does appear that the Minister, once it received the General Division's decision, realized that its June 2016 letters had muddied the issues to K. S. and V. S.' detriment. In the October 2017 letter cited by K. S. and V. S., the Minister seems to concede that it misdirected them on their appeal rights, but this document was not before the General Division. Moreover, even if the Minister had admitted to providing erroneous advice prior to the hearing, the General Division would not have been able to offer a remedy since, as noted above, it is barred from ruling on discretionary decisions.

Alleged Failure to Consider Material Evidence

[27] K. S. and V. S. allege that, in finding them non-resident after November 2012, the General Division overlooked material evidence, specifically, the fact that more than 80 percent of their time between April 2004 and April 2014 was spent in Canada.

[28] I see no arguable case on this ground, having found no indication that the General Division ignored, or gave inadequate consideration to, any significant item of evidence. The General Division was well aware that K. S. and V. S. spent the bulk of the 10-year period after 2004 in Canada; at issue were K. S. and V. S.' ties to Canada in the narrower period between November 2012 and September 2015 and whether they were sufficiently strong to establish residence in this country. In any case, it is settled law that an administrative tribunal charged with fact finding is presumed to have considered all the evidence before it.[5] Here, the General Division arrived at its decision after what appears to be a thorough analysis of the relevant evidence and applicable law.

[29] Ultimately, the submissions under this ground amount to a request that I reassess and re-weigh the evidence and come to a conclusion other than the General Division's. I am unable to do this, since my authority under the DESDA permits me to determine only whether any of an applicant's reasons for appealing fall within the grounds specified in subsection 58(1) and whether any of them have a reasonable chance of success. The Appeal Division does not consider residence claims on their merits. It is not sufficient for an applicant to merely state their disagreement with the General Division's decision, nor is it enough to express their continued conviction that they have met the residence requirements of the OASA.

CONCLUSION

[30] Since K. S. and V. S. have not identified any grounds of appeal that would have a reasonable chance of success, the application for leave to appeal is refused.

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

Member, Appeal Division

REPRESENTATIVES:	K. S., self-represented V. S., self-represented