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

Citation: *F. B. v. Minister of Employment and Social Development*, 2018 SST 260

Tribunal File Number: AD-17-911

BETWEEN:

F. B.

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: March 22, 2018

DECISION AND REASONS

DECISION

Leave to appeal is refused.

OVERVIEW

[1] The Applicant, F. B., was born in Malta. He has resided there his entire life, except for a six-year interval, from August 1972 to November 1978, when he lived and worked in Canada.

[2] In April 2013, F. B. applied for a pension under the *Old Age Security Act* (OASA). The Respondent, the Minster of Employment and Social Development Canada (Minister), refused the application because he had continued to make contributions to the Maltese social security system during most of his time in Canada and was therefore "subject to the legislation" of his country of origin. The Minister deemed F. B. not to have been a resident of Canada, for the purpose of determining entitlement under the OASA, citing subsection 21(5.3) of the *Old Age Security Regulations* and article VII(b) of the Agreement on Social Security Between Canada and the Republic of Malta. The Minister affirmed its decision in a reconsideration letter dated June 8, 2017.

[3] F. B. submitted an appeal to the General Division of the Social Security Tribunal on September 21, 2017, beyond the 90-day limit set out in paragraph 52(1)(*b*) of the *Department of Employment and Social Development Act* (DESDA). On October 30, 2017, the General Division issued a decision in which it determined that F. B.'s appeal was late. It refused to permit an extension of time after finding that F. B. had failed to present an arguable case on appeal.

[4] On November 28, 2017, F. B. submitted an application requesting leave to appeal from the Appeal Division. He alleged that the General Division had made a mistake, insisting that had lived and worked in Canada from 1972 to 1978.

[5] The Tribunal asked F. B. to elaborate on his reasons for appealing. In a letter dated December 30, 2017, he replied that that the law did not state that a claimant would be penalized if he made contributions in two countries. He alleged that the General Division based its decision

on an erroneous finding that he did not reside in Canada between August 1972 and November 1978, even though his passport indicated that he did. He said that, during the six years he lived in Canada, he made sure his contributions were up to date.

[6] Having reviewed the General Division's decision against the underlying record, I have concluded that F. B. has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[7] According to section 58 of the 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]

[8] I must determine whether F. B. has an arguable case based on the following questions:

Issue 1: Was F. B.'s appeal to the General Division filed late?
Issue 2: Did the General Division follow the law in determining whether to permit F. B. an extension of time?
Issue 3: Did F. B. put forward an arguable case on appeal?

ANALYSIS

Issue 1: Was F. B.'s appeal to the General Division filed late?

[9] The General Division determined that, since F. B. received the Minister's reconsideration decision on June 14, 2017, he had until September 14, 2017, to file an appeal in accordance with the 90-day deadline established in paragraph 52(1)(*b*) of the DESDA. The General Division

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

found that F. B.'s notice of appeal did not find its way to the General Division until September 21, 2017—seven days after the deadline.

[10] Having reviewed the record, I see no indication that the General Division committed a factual error when it determined that F. B.'s appeal was several days late.

Issue 2: Did the General Division follow the law in deciding whether to extend time?

[11] Under subsection 52(2) of the DESDA, the General Division has the discretion to allow further time within which to bring an appeal. In deciding whether to extend the deadline for F. B., the General Division weighed the four factors set out in *Canada v. Gattellaro*:[4]

(a) Whether the appellant demonstrated a continuing intention to pursue the appeal;
(b) Whether there was a reasonable explanation for the delay;
(c) Whether there was prejudice to the other party in allowing the extension; and
(d) Whether the matter disclosed an arguable case.

[12] I see no argument that the General Division misstated, misinterpreted or misapplied the four factors, and I note that the General Division also correctly cited another leading case on this subject, *Canada v. Larkman*,[5] which requires decision-makers to ensure, when deciding whether to grant an extension, that the interests of justice be served.

[13] In making this assessment, the General Division was acting within its jurisdiction as finder of fact to weigh the evidence and make a decision based on its interpretation of the law and analysis of the material before it. Although the General Division determined that the first three *Gattellaro* factors favoured F. B., it ultimately concluded that his failure to present an arguable case outweighed other considerations and militated against the appeal going forward. It is well established that, while all four *Gattellaro* factors must be considered, they do not necessarily have to be given equal weight. In this case, it was within the General Division's discretion to determine that a single factor overwhelmed the others.

Issue 3: Did F. B. put forward an arguable case on appeal?

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[4] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.
[5] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

[14] On the fourth and decisive *Gattellaro* factor, the General Division saw no arguable case that F. B. was entitled to an OAS pension. I, in turn, see no arguable case that the General Division erred in arriving at this conclusion.

[15] In citing lack of an arguable case to justify its refusal to grant an extension of time, the General Division in effect dismissed F. B.'s case on a summary basis. *Fancy*, among other cases, has determined that the threshold for summary dismissal is high: It must be plain and obvious on the record that the appeal is bound to fail. The question is *not* whether the appeal must be dismissed after considering the facts, the case law, and the parties' arguments. Rather, the question is whether the appeal is destined to fail regardless of the evidence or arguments that might be submitted at a hearing.

[16] In this case, I cannot see how the General Division could have arrived at any decision other than the one that it did. Contrary to F. B.'s submissions, the General Division did not deny that he resided and worked in Canada for six years, nor did it disregard his contributions to Canadian social security programs. Instead, it, like the Minister, found that F. B.'s simultaneous contributions to Maltese social security rendered all but one of his years in Canada as invalid for the purpose of qualifying for Canadian benefits under the OASA. In doing so, the General Division correctly found that F. B. remained "subject to the legislation of Malta" under the Agreement on Social Security Between Canada and the Republic of Malta. I can see no arguable case that the General Division erred in applying this treaty to F. B.'s circumstances.

[17] Even if the treaty had been inapplicable, F. B.'s application and appeal would still have inevitably failed. As the General Division noted, under subsection 3(2) of the OASA, a partial OAS pension can be paid only to a claimant who has at least 10 years of residence in Canada. For a claimant who resides abroad, the residence requirement is even more onerous—20 years. F. B., who currently resides in Malta and who, in a best-case scenario, has no more than six years of residence in Canada, falls far short of the minimum threshold.

CONCLUSION

[18] Since F. B. has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	F. B., self-represented