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

Citation: *V. P. and the Estate of J. P. v. Minister of Employment and Social Development*, 2018 SST 401

Tribunal File Number: AD-18-25

BETWEEN:

V. P.

Applicant

and

Minister of Employment and Social Development

Respondent

Tribunal File Number: AD-18-26

BETWEEN:

The Estate of J. P.

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: April 11, 2018

Canada

DECISION AND REASONS

DECISION

[1] The applications requesting leave to appeal are granted.

OVERVIEW

[2] The Applicants, V. P. and (the late) J. P., have lived in both Canada and Greece. It is admitted that the couple returned to live in Greece in July 1996 and that V. P. re-established her Canadian residence in September 2005. J. P. claimed to have re-established his Canadian residence in November 2009. Upon returning to Canada, both Applicants applied for the Guaranteed Income Supplement (GIS), and the Respondent, the Minister of Employment and Social Development (Minister), approved their applications.

[3] After the Applicants had been receiving the GIS for some time, the Minister conducted an investigation and concluded that V. P. was unable to establish her Canadian residence after March 2007, and that J. P. was unable to show that he had, in fact, re-established his Canadian residence in November 2009. Since a person must reside in Canada to be eligible for the GIS, the Minister decided that the two had been overpaid significant sums and demanded that those amounts be repaid.

[4] The Applicants asked the Minister to reconsider its initial decisions, but the decisions were upheld. Appeals of the Minister's decisions to the Tribunal's General Division were also unsuccessful. The Applicants are now requesting leave to appeal to the Tribunal's Appeal Division, alleging that the General Division based its decisions on erroneous findings of fact. I have decided to grant leave to appeal for the reasons set out below.

PRELIMINARY MATTERS

[5] These files were joined by the General Division and I consider the Appeal Division files to be joined as well. As a result, I have freely drawn on information from both files. To avoid confusion, I have used the letter "J" as a prefix for any documents from J. P.'s file (AD-18-26) and the letter "V" as a prefix for any documents from V. P.'s file (AD-18-25) (e.g. JGD2 and VGD2).

[6] In support of their arguments in favour of granting leave to appeal, the Applicants have filed a variety of new documents. As a general rule, the Appeal Division does not take new evidence into consideration.[1] While there are some exceptions to that rule, such as when the new evidence supports a claim that the decision-maker was biased or that the principles of natural justice were breached, I am not convinced that any of the relevant exceptions apply in this case.

[7] For clarity's sake, therefore, I did not take the following new documents into account when reaching this decision (regardless of the file in which they appear):

a) a letter dated November 28, 2017, from Stamatis Antonios (accountant) with attached tables;[2]

b) the declarations of seven individuals made in support of V. P.'s appeal;[3] and

c) V. P. federal notices of assessment and reassessment for taxation years 2007 to 2012 and 2015.[4]

ISSUE

[8] My current task is to determine whether the Applicants have raised at least one arguable ground on which the appeal might succeed. Specifically, the Applicants in this case allege that the General Division based its decision on erroneous findings of fact.

ANALYSIS

Legal framework

[9] The Appeal Division's focus is on whether the General Division might have committed one or more of the three possible errors (also known as grounds of appeal) that are set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act). Generally speaking, did the General Division fail to observe a principle of natural justice or

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[1] *Marcia v. Canada (Attorney General)*, 2016 FC 1367, at paragraphs 34 to 41; *Paradis v. Canada (Attorney General)*, 2016 FC 1282, at paragraphs 20–25; *Mette v. Canada (Attorney General)*, 2016 FCA 276, at paragraph 12.
[2] VAD1A-77 to 80.
[3] VAD1A-81 to 88.
[4] VAD1A-92 to 103 and 108 to 109.

commit a jurisdictional error; did it err in law when making its decision; or did it 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?

[10] At the Appeal Division, most cases follow a two-step process:

a) The first step is known as the leave to appeal stage. This means that an Appeal Division member must first give permission before an appeal can proceed. It is a preliminary step that is intended to filter out cases that have no reasonable chance of success.[5] 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?[6]

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 listed 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 than at the first.

[11] These appeals are now at the leave to appeal stage, meaning that the question I have asked myself is whether there is any arguable ground on which the proposed appeals might succeed. While the Applicants have the responsibility of showing that this legal test has been met, I am not limited to the precise grounds of appeal that they have raised in their written materials.[7] Rather, leave to appeal should normally be granted regardless of any technical problems that might be found in those materials.[8]

Is there an arguable case that the General Division based its decision on erroneous findings of fact?

[12] As stated in paragraph 58(1)(*c*) of the DESD Act, it is not any error of fact that will warrant the Appeal Division's intervention. Rather, for the Appeal Division to intervene, the

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[5] DESD Act, at subsection 58(2).
[6] *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12; *Ingram v. Canada (Attorney General)*, 2017 FC 259, at paragraph 16.
[7] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at paragraph 31.
[8] *Griffin v. Canada (Attorney General)*, 2016 FC 874, at paragraph 20; *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at paragraph 10.

General Division's decision must be based on that error and it must be one that is made in a perverse or capricious manner or without regard for the material before it.

[13] The errors of fact alleged by the Applicants primarily target paragraphs 10 to 12 of the General Division's decisions. Those paragraphs, however, simply provide a summary of the evidence, including the investigator's report. The General Division's analysis comes later in the decisions, and the Applicants do not appear to suggest that the alleged errors were repeated there. As a result, I have some difficulty assessing whether the alleged errors are ones on which the General Division's decisions were based, as required by paragraph 58(1)(*c*) of the DESD Act.

[14] Rather, I prefer to focus on the underlined findings of fact below that were made by the General Division and that clearly form part of its analysis. This paragraph is almost identical in both decisions:

> [25] There is no other evidence to demonstrate that the [Applicant] has any other ties in Canada. Rather, as mentioned, he has little to no belongings in Canada, he lives with his son and travels to Greece on a regular basis where he has a home, land and an agricultural enterprise. There is no evidence to substantiate the [Applicant's] claim or to demonstrate that he established residency in Canada after [the relevant date for each Applicant]. (Underlining added)

[15] In this respect, I note that the Applicants had provided evidence on the following topics, which I am concerned the General Division might have overlooked:

a) the Applicants' strong family ties in Canada. Notably, their four sons and grandchildren live in Canada, and V. P. provides caregiving services to three of her grandchildren.[9] It was further alleged that, in 2011, J. P. wanted and needed to live closer to his wife, since his health was deteriorating and she had returned to live in Canada some years earlier;[10]

b) the Applicants' eligibility for provincial health insurance coverage. Notably, the couple applied and were deemed eligible for provincial health insurance coverage and received regular medical services in Canada, including J. P.'s hip surgery in November 2015.[11]

[9] JGD2-5 to 8 and 384.
[10] JGD2-255.
[11] JGD2-15, 254 to 265 and 310 to 316; VGD2-23 to 24 and 35 to 42.

While the General Division recognized that J. P. had had several medical visits from 2009 to 2014, it made no such reference to V. P.'s medical visits;[12] and

c) declarations made by the Applicants to the Canada Revenue Agency regarding the re-establishment of their Canadian residence after 1996.[13]

[16] In the circumstances, I have concluded that there is an arguable ground on which the appeals might succeed. More specifically, the General Division might have based its decisions on erroneous findings of fact that it made without regard to the material before it when it concluded that there was "no other evidence" of ties in Canada and "no evidence" capable of demonstrating that they had re-established their Canadian residence. Alternatively, could it be argued that overlooking these factors amounts to an error of law, as described in paragraph 58(1)(*b*) of the DESD Act?

[17] In addition, I would invite submissions from the parties on whether the General Division might have breached the principles of natural justice or committed an error of law by deciding the appeals on the basis of the documents and submissions already filed. One of the reasons why the General Division decided that it could proceed without a hearing was because "there were no gaps in the information in the file or need for clarification".[14] In this respect, however, I note the following:

a) there were ambiguities and possible inconsistencies in the evidence regarding such issues as the Applicants' farming in Greece and the involvement of each Applicant in those activities. Despite quite a lot of evidence on the point, the General Division also concluded that the Applicants' travel dates to and from Greece between 2007 and 2013 were unclear; and

b) the General Division did not specify the end date of its analysis, so its decision can be interpreted as determining the Applicants' residence up to the date of the decision in October 2017 (or to the date of J. P.'s death). However, it is somewhat unclear to what extent the General Division considered, or had evidence on, any changes that might have

[12] General Division decision, at paragraph 24.
[13] JGD2-272 to 296; VGD5-22 to 73.
[14] General Division decisions, at paragraph 2.

occurred in the Applicants' circumstances between the end of the Minister's investigation in July 2015 and the date of its decision.

CONCLUSION

[18] The applications requesting leave to appeal are granted.

[19] Though I have confirmed that there is an arguable ground on which the appeals might succeed, nothing in this decision should be taken as prejudging the result of the appeals on their merits.

[20] Finally, as part of any additional submissions that the parties might file, they could also address whether an oral hearing is required at the merits stage and, if so, propose the appropriate form of hearing (i.e. teleconference, videoconference, or in-person).

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	N. P., for the Applicants