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

Citation: *B. R. v. Minister of Employment and Social Development*, 2018 SST 590

Tribunal File Number: AD-18-24

BETWEEN:

B. R.

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: May 2, 2018

DECISION AND REASONS

DECISION

[1] The application requesting leave to appeal is granted.

OVERVIEW

[2] The Applicant, B. R., arrived in Canada in August 1992. Roughly a decade later, he applied for and was awarded a partial Old Age Security pension (OAS Pension), along with the Guaranteed Income Supplement (GIS). Both amounts were paid from September 2002, based on his having accumulated 10 years of residence in Canada following his arrival.

[3] In 2010, however, the Minister initiated a review of the Applicant's file and concluded that his residence in Canada had been interrupted by a return to India, his home country, from November 1993 to May 1995. As a result, the Applicant's eligibility date was pushed back by a corresponding period, and the Applicant was asked to repay the OAS Pension and GIS benefits that he had received during that time.

[4] The Applicant appealed the Minister's decision to the Social Security Tribunal's General Division, but it dismissed his appeal.

[5] I am satisfied that the Applicant has raised an arguable ground upon which the appeal might succeed and that leave should be granted. In particular, the Applicant's November 1993 to May 1995 trip to India was declared as part of his initial application, and there is a question as to whether the General Division should have considered the Minister's previous decision regarding that absence from Canada.

ISSUE

[6] Is it arguable that the General Division committed an error of fact by overlooking documents concerning the Minister's earlier decision that the Applicant's residence in Canada was maintained despite his November 1993 to May 1995 trip to India?

ANALYSIS

Legal framework

[7] The Tribunal has two divisions that operate quite differently from one another. At the Appeal Division, the focus is on whether the General Division might have committed one or more of the three reviewable errors (or grounds of appeal) that are set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act). Generally speaking, these reviewable errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

c) based 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.

[8] There are also procedural differences between the Tribunal's two divisions. The Appeal Division's process is in two steps: the leave to appeal stage is first, followed by the merits stage. This appeal is at the leave to appeal stage, meaning that permission must be granted before it can proceed any further. This is a preliminary hurdle that is intended to filter out cases that have no reasonable chance of success.[1] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground upon which the appeal might succeed?[2]

[9] While the Applicant has the responsibility of showing that this legal test has been met, I am not limited to the precise grounds of appeal that he has raised in his written materials. Rather, leave to appeal should normally be granted regardless of any technical problems that might be found in those materials.[3]

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

Is it arguable that the General Division committed an error of fact by overlooking documents concerning the Minister's earlier decision?

[10] At the time of his application for an OAS Pension and GIS benefits, the Applicant had to show (among other things) that he had accumulated at least 10 years of residence in Canada.[4] People only reside in Canada if they make their home and ordinarily live in the country.[5]

[11] There is no dispute that the Applicant established his Canadian residence in August 1992, and that brief absences from the country did not interrupt his Canadian residence. However, the longer the absence from Canada, the more likely it is that the Applicant might have made his home and been ordinarily living elsewhere. In this case, the Applicant returned to India from November 1993 to May 1995, and the question is whether his Canadian residence was interrupted during this period.

[12] According to the Applicant, the Minister decided in 2002 that this trip to India did not interrupt his Canadian residence, and the Minister should not be permitted to revisit that decision nearly a decade later.

[13] In particular, the Applicant's trip to India was declared on his initial application for an OAS pension in 2002.[6] Upon receipt of his application, the Minister asked the Applicant to complete a questionnaire, which included several questions relating directly to this absence.[7] The Applicant explained that he was in India between these dates, searching for suitable spouses for his children. In December 2002, the Applicant's benefits were approved with effect from September 2002, meaning that the Minister had necessarily accepted August 1992 as the Applicant's date of arrival in Canada and that he had resided here continuously after that date.[8]

[14] In its decision, the General Division conducted an assessment of the Applicant's residence between November 1993 and May 1995. Although it had the relevant documents before it, the General Division does not appear, however, to have directly tackled the issues

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[4] *Old Age Security Act*, at subsection 3(2).
[5] *Old Age Security Regulations*, at subsection 21(1).
[6] GD2-414 to 421.
[7] GD2-423 to 432.
[8] GD2-25 to 26.

arising from the Minister's previous decision and whether anything might have prevented it from revisiting that decision.

[15] The Applicant says that the General Division committed an error of fact by overlooking documents concerning the Minister's 2002 decision to approve his OAS Pension and GIS applications, a decision made with full knowledge of his November 1993 to May 1995 absence from Canada. In advancing this argument, I am satisfied that the Applicant has raised an arguable ground upon which the appeal might succeed.

[16] However, I can also see the question of whether the Minister is entitled to revisit an earlier decision as being one of law or a failure by the General Division to exercise its jurisdiction over an issue raised by the Applicant.[9] In other words, all three grounds of appeal described in subsection 58(1) of the DESD Act are potentially engaged by this case.

[17] Related questions on which I would also invite submissions from the parties include the following:

a) Did the Minister revisit an earlier decision, and if so, were there any legal obstacles to doing so (e.g. *res judicata*, *functus officio*, or other)?

b) In the circumstances of this case, did the General Division commit an error of law when it stated that the onus of proof was on the Applicant?[10]

Step two: the merits stage

[18] Though I have confirmed that there is an arguable ground upon which the appeal might succeed, this decision should not be interpreted as guaranteeing that the Applicant will be successful at the second step of the proceeding (i.e. the merits stage).

[19] At the merits stage, the Applicant will have to show that it is more likely than not that the General Division committed at least one of the three reviewable errors listed in subsection 58(1)

[9] The Applicant has been unrepresented throughout these proceedings and has some difficulty communicating his ideas in English. Nevertheless, the Applicant does seem to have raised this issue before the General Division. See, for example, his letters and attached documents marked GD1A and GD3.
[10] General Division decision, at paragraph 40.

of the DESD Act. The expression “more likely than not” means that he has a higher legal test to meet at the second stage as compared to the first.

[20] Since leave is granted, the parties now have an opportunity to file additional submissions on the merits of the appeal. As part of those submissions, the parties might also address the following:

a) Is this an appropriate case for the Appeal Division to give the decision that the General Division should have given?

b) Should the Appeal Division hold an oral hearing before rendering its next decision, and, if so, what is the appropriate form of hearing (i.e. teleconference, videoconference or in-person)?

CONCLUSION

[21] The application for leave to appeal is granted.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	B. R., self-represented