Social Security Tribunal of Canada
Tribunal de la sécurité sociale du Canada
[TRANSLATION]

Citation: *K. Z. and N. Z. v. Minister of Employment and Social Development*, 2018 SST 924

Tribunal File Number: AD-18-447

BETWEEN:

K. Z.

Applicant

and

Minister of Employment and Social Development

Respondent

and

N. Z.

Added Party

Tribunal File Number: AD-18-448

BETWEEN:

N. Z.

Applicant

and

Minister of Employment and Social Development

Respondent

and

K. Z.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Jude Samson

Canada

Date of Decision: September 18, 2018

DECISION AND REASONS

DECISION

[1] Leave to appeal is granted.

OVERVIEW

[2] N. Z. (Applicant) came to Canada on January 15, 1990, to continue his postgraduate studies at the X. When he arrived, N. Z. was accompanied by his spouse, K. Z. (Applicant). In 2014 and 2015, N. Z. and K. Z. applied for pensions under the *Old Age Security Act* (OAS Act). The Respondent, the Minister of Employment and Social Development (Minister), approved some of their applications, and their pension amounts were calculated based on the years of residence that each of them had accumulated in Canada.

[3] For N. Z., the Minister initially awarded him a partial Old Age Security (OAS) pension at 23/40ths of a full pension. In its decision, the Minister acknowledged that N. Z. had resided continuously in Canada since he arrived in the country in January 1990. However, in assessing K. Z.'s file, the Minister determined that the couple's Canadian residence had not been established when they arrived in Canada but rather when N. Z. finished his studies.[1] Therefore, K. Z.'s pensions were calculated using this date, but the Minister had to change the initial decision it had made for N. Z.'s file. N. Z. saw his partial OAS pension reduced from 23/40ths to 20/40ths of a full pension.

[4] The couple asked the Minister to reconsider its decision about their Canadian residence during the period of N. Z.'s studies, but the Minister upheld its initial decision. The Applicants then appealed the reconsideration decisions to the General Division, but it dismissed their appeals.

[5] Before these matters can go any further, the Applicants need leave to appeal the General Division decision. Leave is granted for the reasons set out below.

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[1] The period in dispute was originally from January 15, 1990, to April 1, 1993, but the Minister then extended the period of recognized Canadian residence. According to the Minister's submissions before the General Division, the period in dispute is now from January 15, 1990, to December 21, 1992.

ISSUES

[6] The Applicants have raised several arguments in support of their leave to appeal applications. However, I do not have to consider all of them in this decision. Leave to appeal must be granted if I agree that there is at least one ground of appeal on which the appeals might succeed.[2]

[7] As a result, I have concentrated on the following issue: In alleging that the General Division made an error of law in assessing the Applicants' residence, have the Applicants raised an arguable ground on which the appeals might succeed?

ANALYSIS

The Appeal Division and its Legal Framework

[8] At the Appeal Division, the focus is on determining whether the General Division made at least one of the three errors (or grounds of appeal) set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act). In general terms, did the General Division make one of the following errors:

a) breaching a principle of natural justice or erring in jurisdiction;

b) erring in law; or

c) basing 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?

[9] Most appeals to the Appeal Division must follow a two-stage process: the leave to appeal stage and the assessment on the merits stage. These appeals are currently at the leave to appeal stage, which means that the Tribunal must grant permission for the appeals to continue. This preliminary step is intended to filter out appeals that have no reasonable chance of success.[3] At

[2] *Mette v. Canada (Attorney General)*, 2016 FCA 276.
[3] DESD Act, s. 58(2).

this point, applicants have only one minimal legal test to meet: Is there an arguable ground on which the appeals might succeed?[4]

Is there an arguable case that the General Division made an error of law in assessing the Applicants' residence?

[10] The Applicants submit that determining an individual's residence, according to the OAS Act, is a question of mixed fact and law that requires an examination of the whole context of the individual and that cannot be determined based on the individual's intentions.[5]

[11] However, the Applicants argue that the General Division based its decision solely (or almost solely) on the Applicants' intention. For example, the General Division referred many times to the couple's intentions to settle permanently in Canada. Furthermore, the General Division acknowledged that the Applicants were able to make many ties with Canada, but, on the other hand, this appeared to be only one factor. In K. Z.'s file, the General Division stated the following: [translation] "The Tribunal cannot ignore the fact that [K. Z.] indicated that she had not intended to live in Canada permanently when she arrived in Canada and that it was only in 1992 that she made that decision and that they applied for a [Québec Selection Certificate]…."[6]

[12] The Applicants further submit that the General Division failed to fully consider their situation. Instead, the General Division referred to certain factors without adequately and rigorously reviewing or considering them for an intelligible, justified, and reasonable decision. They say that other factors were completely ignored, such as:

a) social ties to Canada (for example, N. Z.'s memberships in a student association and a union);

b) other ties to Canada (for example, applying for and getting Social Insurance Numbers, contributing to the Employment Insurance program, and filing provincial and federal tax returns);

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[4] *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Ingram v. Canada (Attorney General)*, 2017 FC 259.
[5] *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, at para. 58; *Canada (Minister of Human Resources Development) v. Chhabu*, 2005 FC 1277, at para. 19; *Duncan v. Canada (Attorney General)*, 2013 FC 319.
[6] General Division decision (GP-17-1789), at para. 22.

c) regularity and length of stay in Canada and the frequency and length of absences from Canada; and

d) the Applicants' lifestyle (for example, their involvement in society).

[13] In light of the Federal Court's teachings, I find that the Applicants have raised an arguable ground, under s. 58(1)(*b*) of the DESD Act, on which the appeals might succeed. If the General Division made an error of law in assessing the Applicants' residence, this could lead to setting aside the decisions under review.

Next Step: Assessment on the Merits

[14] Although I have noted that there is an arguable ground on which the appeals might succeed, this decision does not presume the result at the second step of this process—that is, the assessment on the merits. Furthermore, it is worth stressing that the scope of these appeals is not restricted by the fact that I examined only one of the Applicants' several arguments in this decision.

[15] At the second stage of the process, the Applicants must establish that it is more likely than not that the General Division made at least one of the alleged errors. This second hurdle is higher than the one they have just met.

[16] Because leave is granted, the parties now have the opportunity to provide submissions on the merits of the appeal. In these submissions, the parties are invited to address the following points:

a) Did the General Division refuse to exercise its jurisdiction on the issue raised by N. Z.—that is, the question as to whether the Minister had the authority to change its initial decision dated November 20, 2014?[7] Alternatively, did the General Division make an error of law by assuming that the Minister had this authority?

[7] See N. Z.'s submission (GD3-19), at para. 32; the Minister's submissions (GD6-10), at para. 30; and *B. R. v. Minister of Employment and Social Development*, 2018 SST 844 (which will soon be published on the Tribunal's website).

b) Did the General Division make an error of law in that the reasons for its decision were inadequate?

c) Which of the remedies offered under s. 59(1) of the DESD Act is the most appropriate based on the facts of the case?

d) Should the Appeal Division schedule a hearing at the second stage of this process? For example, the Tribunal could conduct a hearing by teleconference, by videoconference, or in person.

CONCLUSION

[17] The applications for leave to appeal are granted.

Jude Samson
Member, Appeal Division

REPRESENTATIVES:	K. Z., self-represented N. Z., self-represented