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

Citation: *J. L. v Minister of Employment and Social Development*, 2019 SST 64

Tribunal File Number: AD-18-893

BETWEEN:

J. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Valerie Hazlett Parker

Date of Decision: January 29, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] J. L. (Claimant) applied for an Old Age Security pension in 2013. She claimed that she has been residing in Canada since 2001. The Minister of Employment and Social Development granted her a partial pension of 3/40ths of a whole pension based on what it determined to be her years of residence in Canada. The Claimant disagreed with the Minister's decision regarding how long she has resided in Canada and appealed this decision to the Tribunal. The Tribunal's General Division held a hearing and, in November 2016, decided that she had resided in Canada since April 23, 2009, and not May 12, 2009. This resulted in an increase in her Old Age Security partial pension to 4/40ths.

[3] The Claimant appealed this decision to the Tribunal's Appeal Division. The Claimant and the Minister then agreed that the General Division had made a reviewable error and that the appeal should be referred back to the General Division for reconsideration. The General Division reconsidered the appeal and, on September 18, 2018, decided that the Claimant was not resident in Canada before May 12, 2009.

[4] The Claimant's application for leave to appeal the second General Division decision to the Appeal Division is refused because the General Division did not make an error in law when it applied the legal principles from *Canada v Ding*,[1] and it did not base its decision on any erroneous finding of fact.

ISSUES

[5] Does the appeal have a reasonable chance of success because Service Canada delayed or erred in its handling of this matter?

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[1] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.

[6] Does the appeal have a reasonable chance of success because the General Division made an error in law when it considered the *Old Age Security Regulations*?

[7] Does the appeal have a reasonable chance of success because the General Division was without legal authority to overturn the first General Division decision?

[8] Does the appeal have a reasonable chance of success because the General Division erred when it applied the *Ding* test to the facts before it?

[9] Does the appeal have a reasonable chance of success because the General Division based its decision on an erroneous finding of fact?

ANALYSIS

[10] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[2] In addition, leave to appeal is to be refused if the appeal has no reasonable chance of success.[3] The Claimant's grounds of appeal are considered below in this context.

Issue 1: Delays or errors by Service Canada

[11] The first ground of appeal that the Claimant presents is that Service Canada delayed and made errors in its consideration of her application for the Old Age Security pension. This may or may not be so. Under the DESD Act, however, the Tribunal has no legal authority to consider any such errors. Therefore, leave to appeal cannot be granted on this basis.

Issue 2: *Old Age Security Regulations*

[12] The Regulations provide that, in some circumstances, a person may be absent from Canada and still be considered a resident for Old Age Security pension purposes. In her

[2] DESD Act, s 58(1).
[3] DESD Act, s 58(2).

application for leave to appeal, the Claimant referred to section 21(5.3) of the Regulations. This section states that a person who is subject to the legislation of another country under an agreement between that country and Canada is not to be considered resident in Canada. The Minister argued that this provision did not apply to this appeal because the Claimant made no contributions to the United States social security program during the period in question and produced a statement of contributions that supported this.[4] Although the Claimant filed documents with the Tribunal and attended a hearing after this submission was received, she produced no contradictory evidence.

[13] The General Division decision refers to section 21(1) of the Regulations, which differentiates between presence and residence in Canada.[5] This section applies in this case. The General Division considered the Claimant's presence in Canada and decided, based on the law and the evidence, when the Claimant resided in Canada. Therefore, leave to appeal cannot be granted on the basis of an error in law for failing to consider section 21(5.3) of the Regulations.

Issue 3: the General Division's legal authority

[14] Another ground of appeal that the Claimant presented is that the General Division did not have legal authority to overturn the previous General Division decision. The appeal does not have a reasonable chance of success on this basis. The General Division made its first decision in November 2016. The Claimant requested leave to appeal this decision and it was granted. The Minister then conceded that the General Division had made an error in law and that the appeal should be returned to the General Division for reconsideration. The General Division was not restricted in any way in its reconsideration of the appeal. It therefore had legal authority to consider the entire appeal afresh and make a decision based on the law and the facts. Leave to appeal is not granted on this basis.

Issue 4: Application of the legal principles from *Ding*

[15] The Federal Court made the *Ding* decision. The decision is binding on the Tribunal, which means that the Tribunal must apply its findings in appeals where it must decide whether a

[4] IS4.
[5] General Division decision at para 15.

claimant was resident in Canada for enough time to receive an Old Age Security pension. Therefore, the Claimant's argument that it was not necessary for the General Division to conduct a *Ding* analysis does not point to any error that the General Division might have made.

[16] The General Division decision states that there are a number of factors that are relevant when deciding whether a person makes their home and ordinarily lives in Canada, including:

- Ties in the form of personal property (e.g. house, business, furniture, automobile, bank account, or credit card);
- Social ties in Canada (e.g. membership with organizations or associations or professional memberships);
- Other ties in Canada (e.g. hospital and medical insurance coverage, driver's licence, rental, lease, loan, or mortgage agreement, property tax statements, electoral voter's list, life insurance policies, contracts, public records, immigration and passport records, provincial social services records, public and private pension plan records, or federal and provincial income tax records);
- Ties in another country;
- Regularity and length of stay in Canada and the frequency and length of absences from Canada; and
- The person's mode of living (namely, whether their living in Canada is substantially deep-rooted and settled).[6]

The General Division conducted a detailed analysis of each of these factors and gave reasons for its decision. The Claimant's disagreement with the conclusions reached is not a ground of appeal under the DESD Act, and leave to appeal cannot be granted on this basis.

[17] The Claimant disagrees specifically with a number of the General Division's conclusions on these factors. Her arguments are addressed below.

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[6] General Division decision at para 16.

a) The Claimant's entry to Canada in 2009 and cash receipts for this period

[18] The General Division decision details the Claimant's evidence regarding her entry to Canada by train in April 2009[7] and that she provided receipts for invoices for various dates in Canada.[8] This evidence was considered with all of the other evidence that was before the General Division.

b) The terms and conditions of the Claimant's presence in Canada from 2001 to 2009 were the same as after this time, so she should be found resident in Canada from 2001.

[19] The General Division specifically considered the Claimant's evidence and argument regarding her residence from 2001 to 2009.[9] It considered that the Claimant first applied to immigrate to Canada in 2003; her application was rejected. She applied again in 2007 and testified that she lived "in limbo" for a long time. It considered whether the terms of her presence in Canada from 2001 to 2009 were the same as for the time period after May 2009 and decided that they were different. The General Division gave reasons for its decision. The Claimant's disagreement with this decision is not a ground of appeal under the DESD Act.

c) Her letter dated June 18, 2018, should be part of the written record before the Tribunal.

[20] This letter is not specifically referenced in the General Division decision. However, it is not necessary for the General Division to refer to each and every piece of evidence that is before it; the General Division is presumed to have considered all of the evidence before it.[10] In addition, the General Division wrote to the Claimant and asked her to clarify whether this letter was her written submission. She confirmed that it was.[11] The General Division is not required to summarize the parties' written arguments in its decision.

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[7] General Division decision at para 47.
[8] General Division decision at para 38.
[9] General Division decision at para 43.
[10] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[11] IS7.

d) The Claimant request that the full name of the bank where she has an account be redacted from the decision

[21] The Claimant requested that the full name of the bank where she held an account not be disclosed if the General Division decision were published. This request is set out in the decision.[12] The copy of the decision that is sent to the parties does not contain any redactions. It is only the decision that is published that has names and other identifying information removed. Even if the General Division failed to agree to the Claimant's request, it would not point to any error made by the General Division.

Issue 5: Erroneous finding of fact

[22] The Claimant disputed a number of findings of fact that the General Division made and repeated information that was before the General Division, including the following:

- The Claimant had registered trademarks in both Canada and the United States.
- She had a corporation registered in Canada; this confirms that she met the Canada Revenue Agency requirements for a permanent establishment in Canada.
- The question of whether she had credit cards was irrelevant to her residence status.
- The issue regarding her right to live in her home in Pennsylvania is not relevant to the issue before the Tribunal.
- Her social ties by membership in a professional or business organization does not indicate anything other than that she paid dues there.
- The General Division knew nothing of where her friends or associates live or work.

The fact that she bought and paid in cash for a home in Montreal points to a greater tie to Canada because of the risk of so doing.

- Simply having medical insurance in the United States does not prove that she was living there.

[12] General Division decision para 11

- Her absence from Canada from 2007 to 2009 was due to problems with immigration, not her desire to reside outside of Canada.

[23] However, to succeed on an appeal on the basis that the General Division based its decision on an erroneous finding of fact, a claimant must prove three things: that the finding of fact was erroneous; that it was made perversely, capriciously, or without regard for the material that was before the General Division; and that the decision was based on this finding of fact. The Claimant's disagreement with a General Division's finding of fact or how the General Division weighed the evidence before it does not satisfy this legal test. The General Division gave logical and intelligible reasons for its findings of fact and for how it weighed the evidence. The General Division did not overlook or misconstrue any important information. Therefore, the appeal has no reasonable chance of success on this basis.

CONCLUSION

[24] Leave to appeal is refused because the Claimant has not presented a ground of appeal on which the appeal has a reasonable chance of success.

Valerie Hazlett Parker
Member, Appeal Division

REPRESENTATIVE:	J. L., self-represented