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

Citation: *A. A. v Minister of Employment and Social Development*, 2019 SST 289

Tribunal File Number: AD-19-159

BETWEEN:

A. A.

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 21, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, A. A., was born in Ukraine in 1950. For more than a decade, he lived and worked in Poland. From there, he immigrated to Canada, arriving as a landed immigrant in January 2013.

[3] In February 2015, the Applicant applied for a pension under the *Old Age Security Act* (OASA). In December 2016, the Respondent, the Minster of Employment and Social Development Canada (Minister), refused the application because it found that the Applicant had not resided in Canada for a total of at least 10 years, as required under section 3(2) of the OASA. The Minister, also found that the Applicant had continued to make contributions to the Polish social security system during some of his time in Canada and was therefore "subject to the legislation" of Poland under the Agreement on Social Security Between Canada and the Republic of Poland (Canada-Poland Agreement). The Minister affirmed its decision in a reconsideration letter dated July 24, 2017.

[4] The Applicant appealed the Minister's decision to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated November 30, 2018, dismissed the appeal, finding that the Minister had correctly interpreted the OASA and the Canada-Poland Agreement when it applied the law to the facts.

[5] On March 1, 2019, the Applicant submitted an application requesting leave to appeal from the Appeal Division, alleging that that the General Division had committed various errors in reaching its decision, specifically:

- The General Division dismissed the appeal even though Minister offered no "calculations" to support its claim that the Applicant's periods in Poland and Canada overlapped;

- The General Division favoured the Minister by not inviting a representative from his department to the hearing, thereby relieving it from having to justify its decision to deny the Applicant his OAS pension; and
- The General Division refused to consider a significant part of the Applicant's submissions.

[6] Having reviewed the General Division's decision against the underlying record, I have concluded that the Applicant 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 the Applicant has an arguable case based on the following questions:

Issue 1: Did the General Division base its decision on an erroneous finding that the Applicant's periods in Poland and Canada overlapped?

Issue 2: Did the General Division fail to observe a principle of natural justice by favouring the Minister?

Issue 3: Did the General Division fail to consider a significant part of the Applicant's submissions?

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

ANALYSIS

Issue 1: Did the General Division base its decision on an erroneous finding that the Applicant's periods in Poland and Canada overlapped?

[9] The Applicant disagrees with the General Division's decision to deny him a partial OAS pension. However, he has never disputed the following facts:

- The Applicant became a landed immigrant on January 10, 2013;
- Although the Applicant moved to Canada, he continued to travel to Poland to lecture for a Polish University on contract;
- Polish authorities later advised the Minister that the university had made contributions on the Applicant's behalf to the Polish social security system from February 1, 2002 to September 16, 2016.

[10] The applicable sections of the Canada-Poland Agreement say:

> [I]f a person is subject to the legislation of the Republic of Poland during any period of presence or residence in the territory of Canada, that period shall not be considered as a period of residence in Canada for that person…[4]
>
> [A] person shall be considered to be subject to the legislation of the Republic of Poland during a period of presence or residence in the territory of Canada only if that person makes compulsory contributions pursuant to that legislation during that period by reason of employment or self-employment.[5]

Like the Minister, the General Division found that the Applicant remained "subject to the legislation of Poland" under the Canada-Poland Agreement from January 10, 2013 to September 16, 2016. In doing so, the General Division found that the Applicant's contributions to Polish social security rendered his years in Canada as invalid for the purpose of qualifying for Canadian benefits under the OASA.

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[4] Canada-Poland Agreement, Article 10(1)(b).
[5] Canada-Poland Agreement, Article 10(2)(b).

[11] I can see no arguable case that the General Division erred in how it applied the terms of the Canada-Poland Agreement to the Applicant's circumstances.

Issue 2: Did the General Division fail to observe a principle of natural justice by favouring the Minister?

[12] The Applicant suggests that it was unfair of the General Division to subject him to questioning at the hearing but not require the same of the Minister, who did not have to explain the logic he used to deny him his pension.

[13] Again, I do not see an arguable case on this point.

[14] First, a negative outcome is not by itself an indicator of unfairness. In the absence of any specific evidence to support a breach of natural justice, broad allegations of misconduct are an insufficient basis of appeal.

[15] Second, the record shows that the General Division notified both parties about the hearing.[6] However, the Minister exercised his right not to attend or send a representative—a right that also belonged to the Applicant.

[16] Finally, the case law is clear that the burden of proof lies lies with the person claiming entitlement to OAS benefits.[7] The onus is on the Applicant to prove that he is entitled to the OAS pension; it is not the job of the Minister or the General Division to prove that he is not. In any event, I see that the Minister offered detailed written reasons for its decision on several occasions—in its initial denial letter, on reconsideration, and again shortly before the General Division hearing.

Issue 3: Did the General Division fail to consider a significant part of the Applicant's submissions?

[17] The Applicant does not specify what part of his submissions were ignored, but I see that the thrust of his argument at the General Division was that the university he worked for in

[6] See notice of hearing dated November 2, 2018, GD0.
[7] *De Carolis v Canada (Attorney General)*, 2013 FC 366.

Poland went bankrupt. He claimed that, even though the university made contributions to the Polish social security system on his behalf, he was not paid for the work that he did there.[8]

[18] My review of the record indicates that the General Division did not ignore the circumstances behind the Applicant's Polish contributions; in fact, it referred to them in its decision, although it ultimately gave them little relevance:

> He was making compulsory contributions according to the Polish Social Security system by reason of employment. I have been given no reason to doubt the Polish government's records of his contributions. I am not persuaded that these payments did not apply because the university did not pay him.[9]

[19] As finder of fact, the General Division is entitled to weigh the evidence as it sees fit within the limits of section 58(1) of the DESDA. In concluding that the Applicant made compulsory contributions to Polish social security, the General Division was acting within its jurisdiction to make a finding based on its assessment of the evidence before it. Hence, I do not see how this proposed ground of appeal has a reasonable chance of success, arising out of the fact that the General Division chose to place less weight on some of the evidence than what the Applicant submits was appropriate. In *Simpson v Canada*,[10] the Federal Court of Appeal held:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[20] The Applicant also claims that he has been the victim of administrative malfeasance, accusing the Minister and his department of deliberately delaying the processing of his claim in order to deprive him of "the opportunity to learn much early [*sic*] about overlapping creditable periods in Poland and interrupt [his] employment relationship in Poland."

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[8] Applicant's request for reconsideration dated March 4, 2017, GD2-11.
[9] General Division decision, para 16.
[10] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[21] I do not see an arguable case here either. Again, the General Division addressed the Applicant's submissions on this point in its decision, finding—correctly—that it did not have jurisdiction to consider allegations of erroneous advice or administrative error.[11]

CONCLUSION

[22] Since the Applicant 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:	A. A., self-represented

[11] *Pincombe v Canada (Attorney General.)*, [1995] F.C.J. No. 1320 (FCA).