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

Citation: *S. G. v Minister of Employment and Social Development*, 2019 SST 518

Tribunal File Number: AD-18-535

BETWEEN:

S. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision on Request for Extension of Time by: Neil Nawaz

Date of Decision: May 30, 2019

DECISION AND REASONS

DECISION

[1] An extension of time and leave to appeal are refused.

OVERVIEW

[2] The Applicant, S. G., was born in India in 1932, and he entered Canada as a permanent resident in January 1996. In December 2005, he applied for an Old Age Security (OAS) pension, claiming that he had resided in Canada for nearly 10 years and had never been absent from this country for more than six months. At the same time, the Applicant also submitted an initial application for the Guaranteed Income Supplement (GIS).

[3] The Respondent, the Minister of Employment and Social Development (Minister), approved both applications and determined that, based on the Applicant's declared period of residence in Canada, he qualified for a partial OAS pension at 10/40^{ths} of a full pension, effective February 2006.

[4] In June 2014, the Minister launched an investigation into the Applicant's status after it received information that the Applicant had misrepresented his marital status on his annual GIS applications. In January 2015, the Minister reassessed the Applicant's eligibility for OAS benefits and determined that he had left Canada for India in February 2007 and had ceased to be a resident of this country after that date. The Minister demanded repayment of OAS and GIS benefits totalling nearly $108,000 that the Applicant had received between September 2007 and December 2014—a decision that it maintained upon reconsideration.

[5] In October 2016, the Applicant appealed the Minister's reassessment to the General Division of the Social Security Tribunal. The General Division scheduled an in-person hearing and, in a decision dated April 19, 2019, dismissed the appeal, finding that, while the Applicant retained ties to Canada, he had ceased to be resident of this country in February 2007. The General Division ordered the Applicant to repay the full amount of the overpayment assessed by the Minister.

[6] On August 20, 2018, after the 90-day time limit set out in the *Department of Employment and Social Development Act* (DESDA), the Applicant submitted an application for leave to appeal to the Appeal Division, alleging that the General Division ignored material facts and made erroneous findings in coming to its decision. The Applicant acknowledged that he frequently travelled to India to visit relatives and to mark family milestones, but he maintained that he was nonetheless a resident of Canada.

[7] In a letter dated April 4, 2019, the Tribunal reminded the Applicant of the permissible grounds of appeal to the Appeal Division and asked him to provide additional reasons for appealing. On May 8, 2019, the Applicant replied that he visited India every year due to family obligations and always made sure to return to Canada within 180 days. He said that the Minister's demand for repayment of "charity" was unethical and insisted that, when he was in Canada, he spent the entire amount of his OAS pension on lodging and maintenance.

[8] I have reviewed the record and concluded that, since the Applicant's reasons for appealing would no have reasonable chance of success, this is not a suitable case in which to permit an extension of time.

ISSUES

[9] I must decide the following related issues:

Issue 1: Should the Applicant receive an extension of time in which to file his application for leave to appeal?

Issue 2: Does the Applicant have an arguable case that the General Division erred according to the grounds of appeal permitted by the DESDA?

ANALYSIS

Issue 1: Should the Applicant receive an extension of time?

[10] According to section 57(1)(b) of the DESDA, an application for leave to appeal must be made to the Appeal Division within 90 days after the day on which the decision was communicated to the applicant. The Appeal Division may allow further time within which an

application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the applicant.

[11] The record indicates that the General Division issued its decision on April 19, 2018. The Appeal Division did not receive the Applicant's application for leave to appeal until August 20, 2018—123 days later. Even allowing for a 10-day delivery period, the Applicant's application was approximately three weeks late.

[12] Having reviewed the submissions, I have come to the conclusion that a further extension of time is not warranted in this case. In *Canada v Gattellaro*,[1] the Federal Court set out four factors to consider when deciding whether to allow further time to appeal:

(i) whether there is a reasonable explanation for the delay;
(ii) whether the applicant demonstrates a continuing intention to pursue the appeal;
(iii) whether allowing the extension would cause prejudice to other parties; and
(iv) whether the matter discloses an arguable case.

[13] The weight to be given to each of the *Gattellaro* factors may differ from case to case, and other factors may be relevant. However, the overriding consideration is that the interests of justice be served.[2]

(i) Reasonable explanation for the delay

[14] In a letter dated April 4, 2019,[3] the Tribunal advised the Applicant that his application was filed more than 90 days after the date on which he was presumed to have received the General Division. Among other things, the Tribunal asked the Applicant to explain why his appeal was late. In his subsequent correspondence, the Applicant did not address this question.

[15] I find that the Applicant did not offer a reasonable explanation for missing the deadline.

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[1] *Canada (Minister of Human Resources Development) v Gattellaro*, 2005 FC 883.
[2] *Canada (Attorney General) v Larkman*, 2012 FCA 204.
[3] AD1A-1.

(ii) Continuing intention to pursue the appeal

[16] Although the Applicant did not file a complete application for leave to appeal until after the expiry of the statutory limitation, I am willing to assume that he had a continuing intention to pursue the appeal. I note that the Applicant completed and signed his application form on July 31, 2018—just outside the filing deadline and deemed 10-day delivery period. I also note that the Applicant promptly responded to the Tribunal's subsequent request for information.

(iii) Prejudice to the other party

[17] I find it unlikely that permitting the Applicant to proceed with his appeal at this late date would prejudice the Minister's interests, given the relatively short period of time that has elapsed since the expiry of the statutory deadline. I do not believe that the Minister's ability to respond, given its resources, would be unduly affected by allowing the extension of time to appeal.

(iv) Arguable case

[18] An applicant seeking an extension of time must show that they have at least an arguable case on appeal at law. As it happens, this is also the test for leave to appeal. The Federal Court of Appeal has held that an arguable case is akin to one with a reasonable chance of success.[4]

[19] For the reasons that follow, I find that the Applicant has failed to put forward reasons for appealing that would have a reasonable chance of success.

Issue 2: Does the Applicant have an arguable case that the General Division erred according to the grounds of appeal permitted by the DESDA?

[20] Under section 58(1) 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.[5] Leave to appeal will be granted if the Appeal Division is satisfied that the appeal has a reasonable chance of success.[6]

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[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[5] DESDA at ss 56(1) and 58(3).
[6] DESDA at s 58(2).

[21] A significant portion of the Applicant's submissions merely restates evidence that he has already presented to the General Division. However, the Appeal Division is not a forum to reargue one's case on its merits, given the relatively narrow grounds of appeal permitted under the DESDA.

[22] As trier of fact, the General Division was within its jurisdiction to weigh the evidence, determine what to accept or disregard, and ultimately come to a decision based on its interpretation of the law. In *Simpson v Canada*,[7] 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.

[23] As the General Division notes, "residence" is a legal concept that means much more than just physical presence in Canada. The leading jurisprudence[8] has held that residence—whether someone makes his or her home and ordinarily lives in Canada—is a question of fact and may depend on a number of factors, including ties to another country. My review of the General Division's decision satisfies me that it applied the law and appropriately considered the relevant evidence in concluding that the Applicant ceased to be a Canadian resident after February 2007.

[24] It is true that the Applicant is a Canadian citizen and has a son in Canada, and it is also true that he has spent a significant portion of his time in this country over the past decade, but the the General Division found that these factors were outweighed by other considerations, foremost among them:

- The Applicant's spouse moved back to India in 2007;
- The Applicant's other son and extended family live in India;
- The Applicant continues to own a house in India; and
- The Applicant has spent significantly more time in India than Canada since 2007.

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[7] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 and *Singer v Canada (Attorney General)*, 2010 FC 607, confirmed 2011 FCA 178.

[25] Based on the above factors, the General Division concluded that the Applicant retained significant ties to India and had merely been a visitor to Canada since 2007. In the absence of a *prima facie* error under section 58(1) of the DESDA, I see no arguable case to interfere with these findings. The Applicant should be aware that where a claimant *intends* to live is irrelevant in determining residence; what matters are the factual circumstances of his or her way of living. The Applicant should also know that his status as a Canadian resident was not necessarily preserved by ensuring that his trips outside Canada were less than six months. Sections 9(3) and 11(7) of the *Old Age Security Act* say that a pensioner will stop receiving OAS-GIS payments six months after he or she leaves Canada; however, it does *not* say that limiting one's absences from Canada to six months or less will preserve one's entitlement to these benefits. Leaving Canada for an extended visit abroad does not necessarily imperil OAS-GIS entitlement, but ceasing to be a resident of Canada does.

CONCLUSION

[26] Having weighed the above factors, I have determined that this is not an appropriate case to allow an extension of time to appeal beyond the 90-day limitation. The Applicant did not offer a reasonable explanation for the delay, but I presumed that he had continuing intention to pursue his appeal and also thought that the Minister's interests were unlikely to be prejudiced by extending time. However, I could find no arguable case for the Applicant's reasons for appealing, and it was this last factor that was decisive; I see no point in advancing an application that is destined to fail.

[27] In consideration of the *Gattellaro* factors and in the interests of justice, I am refusing this request to extend the time to appeal.

Member, Appeal Division

REPRESENTATIVE:	S. G., self-represented