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

Citation: *A. K. and A. E. v Minister of Employment and Social Development*, 2019 SST 552

Tribunal File Numbers: AD-19-215
AD-19-216

BETWEEN:

A. K.
A. E.

Appellants

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Decision by: Neil Nawaz

Date of Decision: June 7, 2019

REASONS AND DECISION

DECISION

[1] The appeals are allowed.

BACKGROUND

[2] The Appellants, A. E. and A. K., are a married couple who applied for Old Age Security (OAS) pensions in March 2008. In their respective applications, A. E. stated that he had resided in Canada from February 1969 to January 1978, and A. K. said that she had resided in Canada from March 1969 to January 1978.

[3] In a letter dated January 23, 2008, the Respondent, the Minister of Employment and Social Development (Minister), approved A. E.'s application and granted him a pension at a rate of 8/40. On June 4, 2008, the Minister also approved A. K.'s application at 8/40. Both approval letters advised the Appellants that, if they disagreed with the Minister's decisions, they could request reconsideration in writing within 90 days.

[4] In a letter dated February 2, 2008, A. E. objected to the Minister's calculation of his pension amount. He said that he had lived in Canada from March 1969 to January 1978, "which amounts to 8 years and 10 months, not just 8 years."[1] The Minister did not respond to this letter.

[5] More than ten years passed. On July 11, 2018, the Minister received a letter from the Appellants claiming that they had resided in Canada for a total of nine years.[2]

[6] In separate replies dated August 21, 2018,[3] the Minister acknowledged the Appellants' letter and deemed it a request for consideration. The Minister advised both Appellants that it could not consider their applications because their respective 90-day deadlines to request reconsideration had come and gone long ago.

[7] On September 21, 2018, the Appellants filed appeals with the General Division of the Social Security Tribunal. They both claimed that they had no memory of receiving the Minister's

[1] File No. AD-19-216 – GD2-13.
[2] File No. AD-19-215 – GD2-5; File No. AD-19-216 – GD2-7.
[3] File No. AD-19-215 – GD2-3; File No. AD-19-216 – GD2-5.

notices of approval in 2008. They also insisted that they had resided in Canada for more than eight years and were therefore entitled to higher OAS pensions.

[8] In separate decisions dated February 25, 2019, the General Division declined to extend time for the Appellants to request reconsideration from the Minister. The General Division found that, in refusing to reconsider the Appellants' OAS entitlements, the Minister had ignored relevant factors and thus failed to exercise its discretion judicially. However, the General Division then gave the decision that, in its view, the Minister should have given, dismissing the appeal because the Appellants had not offered reasonable explanations for the delay or demonstrated a continuing intention to request reconsideration in the previous ten years.

[9] On March 28, 2019, the Appellants requested leave to appeal from the Tribunal's Appeal Division. In his submissions, which A. K. endorsed, A. E. stated that he was late in requesting reconsideration because he had mislaid relevant documents until he happened to come across one of them by chance. He said that he had responded to all of the Minister's letters as soon as he was in a position to do so. He noted that, as an older person, he is subject to memory lapses and found the application and appeals process confusing. He added that he and his wife wished to continue with their appeals because they had understated the length of their residence in Canada when they applied for OAS pensions in 2008.

[10] In a decision dated April 17, 2019, I granted leave to appeal because I saw an arguable case that the General Division had erred in arriving at its decision. Having found that the Minister improperly exercised its discretion to refuse the Appellants an extension of time to request reconsideration, the General Division then itself misused its discretion to refuse such an extension.

[11] In a letter dated May 17, 2019, the Minister conceded that the General Division had erred when it disregarded A. E.'s letter of February 2, 2008 and the fact that it was received within the 90-day time limitation to request reconsideration. The Minister recommended that the appeals be allowed and urged the Appeal Division to give the decision that the General Division should have given—that is, grant the Appellants' request for an extension of time for reconsideration.

[12] I have decided that an oral hearing is unnecessary for this appeal. I am proceeding solely based on the documentary record because there are no gaps in the file and there is no need for clarification.

[13] Having reviewed the record and considered the parties' written submissions, I have concluded that the General Division's decision should be overturned and the Appellants given an extension of time to seek reconsideration of the Minister's assessment of their OAS entitlements.

ISSUE

[14] According to section 58 of the *Department of Employment and Social Development Act* (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 before it.

[15] I must decide whether the General Division erred when it exercised its discretion to refuse the Appellants extensions of time to file reconsideration requests.

ANALYSIS

[16] Since the Appellants' appeals are linked and, with only minor exceptions, share facts and issues, I will discuss them as if they were a single proceeding.

[17] Under section 29.1(1) of the *Old Age Security Regulations* (OASR), the Minister has the discretion to allow an Appellant more time to request reconsideration if it is satisfied that (i) there is a reasonable explanation for the delay and (ii) the Appellant has demonstrated a continuing intention to request reconsideration. Under section 29.1(2) of the OASR, if a request for reconsideration is made more than 365 days after the initial decision was communicated in writing to the Appellant, the Minister must also be satisfied that (i) the request for reconsideration has a reasonable chance of success and (ii) no prejudice would be caused to any party by allowing a longer period to make the request.

[18] When it declined the Appellants' request for reconsideration in August 2018, the Minister provided no reason for doing so except the supposedly missed deadlines. There was no indication that the Minister took into account any of the four factors listed above, as it is required to do by law. The General Division favoured the Appellants when it found that the Minister failed to exercise its discretion judicially and, naturally enough, they have not challenged this aspect of the decision. I am satisfied that the General Division correctly followed the law on this issue.

[19] However, I find that the General Division itself failed to exercise its discretion judicially when it decided not to extend the time for filing reconsideration requests.

[20] In its decision, the General Division considered the four factors set out in section 29.1 of the OASR but found no cause to grant the Appellants extensions to request reconsideration because they had not provided a reasonable explanation for the delay or demonstrated a continuing intention to appeal. The General Division properly cited *Canada v Purcell*,[4] in which the Federal Court held that a discretionary power is not exercised judicially if it can be established that the decision-maker

- acted in bad faith;
- acted for an improper purpose or motive;
- took into account an irrelevant factor;
- ignored a relevant factor; or
- acted in a discriminatory manner.

However, it is not sufficient to merely cite the law correctly; it must also be applied correctly. Although the Appellants did not specifically make this argument, I find that the General Division diverged from *Purcell* by ignoring a relevant factor in refusing an extension to request reconsideration. As noted, the record indicates that, following the Minister's initial letter dated January 23, 2008, A. E. replied with a letter dated February 2, 2008, registering his disagreement with the pension amount. The Minister apparently ignored this letter, even though it was filed within the 90-day deadline, and while the letter did not specifically request reconsideration, that was obviously its intention.

[21] The General Division was certainly aware of the February 2, 2008 letter, but it assigned it little significance except as proof that A. E. had received the Minister's decision letter:

> Since the Claimant referred to the January 23, 2008 decision letter in his correspondence to Service Canada dated February 2, 2008, I find that he had received the decision letter by that date. He had until May 2, 2008 to request reconsideration. The Minister did not receive the reconsideration request until July 11, 2018, which was more than 10 years after the decision letter was sent to him.[5]

[4] *Canada (Attorney General) v Purcell*, [1996] 1 FCR 644, 1995 CanLII 3558 (FCA).
[5] File No. AD-19-215 – General Division decision, para 7.

The General Division did not ask why the February 2, 2008 letter itself could not have been regarded as a request for reconsideration. I note that ten years later, A. E.'s letter dated July 11, 2018 was deemed by the Minister to be a request for reconsideration, even though it, like its predecessor, did not mention the word "reconsideration."

[22] The Federal Court of Appeal has held that setting aside a discretionary order requires an appellant to prove that the decision-maker committed a "palpable and overriding error."[6] I n my view, the General Division committed such an error by disregarding evidence that A. E. had, indeed, met the 90-day deadline to request reconsideration back in 2008.

REMEDY

[23] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[24] Under section 3 of the *Social Security Tribunal Regulations*, the Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow. I could return this matter back to the General Division for a fresh hearing, but that would only delay the final disposition of a claim that is now more than ten years old. Fortunately, the Minister is recommending that I simply give the decision that the General Division should have given and grant the Appellants an extension of time in which to seek reconsideration.

[25] I agree. Had the General Division recognized the significance of A. E.'s February 2, 2008, letter, it would have likely exercised its discretion more judiciously and come to a different conclusion than it did. My own assessment of the record satisfies me that the Appellants deserve to have their case reconsidered, even at this late date. First, the Appellants had a reasonable explanation for the delay: the Minister ignored their original request for reconsideration and, for more than ten years, they assumed their claim was extinguished. Second, I am satisfied that the Appellants had a continuing intention to request reconsideration: although their original request

[6] *Imperial Manufacturing Group Inc. v Decor Grates Incorporated*, 2015 FCA 100; *Horseman v Horse Lake First Nation*, 2015 FCA 122; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139.

for reconsideration was ignored, they retained the paperwork relating to their claim for more than a decade, presumably with a thought of someday reviving it. Third, I see a reasonable chance of success for the Appellant's request for reconsideration if, indeed, they have found documentary evidence to substantiate their claim that they resided in Canada for more than eight years, Finally, I do not think the Minister will suffer any prejudice if the reconsideration deadline is extended, not least because its representative has already consented to such an extension.

CONCLUSION

[26] I am allowing this appeal. The General Division refused the Appellants an extension of time to request reconsideration without considering evidence that the Minister ignored their initial request for reconsideration more than ten years ago. In doing so, the General Division based its decision on an erroneous finding of fact without regard for the material before it.

[27] Having decided that there was sufficient evidence on the record to permit me to give the decision that the General Division should have given, I am granting the Appellants an extension of time in which to seek reconsideration of the Minister's initial assessment of their OAS entitlement. The Minister is hereby ordered to review whatever evidence that the Appellants have to offer pertaining to their respective periods of residence in Canada.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	A. E. and A. K., self-represented Susan Johnstone, for the Respondent