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

Citation: *M. H. v Minister of Employment and Social Development*, 2019 SST 917

Tribunal File Number: AD-19-249

BETWEEN:

M. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 27, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for a new hearing.

OVERVIEW

[2] The Appellant, M. H., was born in Trinidad in 1939 and entered Canada as a permanent resident in February 1986. In January 2005, she applied for an Old Age Security (OAS) pension, claiming that she had resided in Canada for 18 years and 11 months. On her OAS application, the Appellant indicated that, since arriving in Canada, she had never been absent from this country for more than six months. A few months later, the Appellant 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 Appellant's declared period of residence in Canada, she qualified for a partial OAS pension at 18/40ths of a full pension, effective January 2005.

[4] In August 2011, the Minister launched an investigation into the Appellant's status after it received information that the Appellant had misrepresented her marital status on her annual GIS applications. In April 2014, the Minister reassessed the Appellant's eligibility for OAS benefits and determined that she did not have the requisite 10 years of residence to qualify for a partial pension. The Minister demanded repayment of OAS and GIS benefits totalling nearly $90,000 that the Appellant had received between January 2005 and January 2012—a decision that it maintained upon reconsideration.

[5] In June 2016, the Appellant appealed the Minister's reassessment to the General Division of the Social Security Tribunal. The General Division elected not to hold an oral hearing and instead came to a decision based solely on a review of the existing documentary record. In January 2019, the General Division dismissed the appeal, finding that, while the Appellant had

ties to Canada, she had never resided in this country. The General Division ordered the Appellant to repay the full amount of the overpayment assessed by the Minister.

[6] On April 17, 2019, the Appellant applied for leave to appeal from the Tribunal's Appeal Division. Accompanying her application was a brief alleging numerous errors on the part of the General Division, among them:

- The General Division did not consider the Appellant's submissions and ignored evidence that: (i) she did not bring most of her personal property to Canada when she left Trinidad; (ii) she has mostly lived rent-free with one of her sons since then; and (iii) she and her husband were separated for many years, although they reunited in 2008.
- The General Division did not address the fact that one of the Minister's investigators recommended that the Appellant's OAS pension and GIS be reinstated.[1]
- The General Division, like the Minister, ignored a principle from *Canada v Ding*,[2] which held that a claimant's intentions do not determine residency.
- The General Division misinterpreted the provisions of the Agreement on Social Security between Canada and the Republic of Trinidad and Tobago.
- The General Division found that it was barred from applying the "principles of fairness or equity."[3] This is an error of law, since the General Division is bound to follow the principles of natural justice, which encompass concepts of fairness.
- The General Division chose to render its decision on the record, thereby denying the Appellant an opportunity to fully explain how she met the requirements of Canadian residency.

[7] On May 22, 2019, I granted leave to appeal because I saw at least an arguable case for several of the Appellant's reasons for appealing.

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[1] Integrity Branch Report of Investigation by Wendy Stanhope dated March 13, 2013, GD2-20.
[2] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.
[3] General Division decision, para 23.

[8] In a letter dated June 27, 2019, the Minister's representative conceded that the General Division's refusal to hear testimony from the Appellant was a breach of procedural fairness. As a result, the subsequent Appeal Division hearing did not focus on the General Division's errors but on the best way to remedy those errors.

[9] As I indicated at the hearing, I agree with the parties that the General Division denied the Appellant's right to be heard. Under the circumstances, I think the most appropriate remedy is to return the matter to the General Division for another hearing—one that includes testimony.

ISSUE

[10] According to section 58(1) 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.

[11] Since both parties agree that the General Division failed to observe a principle of natural justice when it declined to hear oral testimony, I will limit my remarks to that issue.

ANALYSIS

[12] The Appellant's ties to Canada came under scrutiny, in part, because of her husband's ties to Trinidad, where he has a high profile as a X and businessperson. The Appellant insists that she and her husband were separated in the years after she landed in Canada and that her marriage was effectively over after 1986. In its reasons, the General Division did not make any specific findings about the Appellant's marriage but pointedly noted that, since her initial entry into Canada, her husband had continued to live in Trinidad and operate a X there.

[13] The Appellant alleges that, in electing to hear her appeal exclusively by way of documentary review instead of permitting some form of testimony, the General Division breached a principle of natural justice by denying her right to be heard. I am ordinarily reluctant to interfere with the discretionary authority of the General Division to decide on an appropriate form of hearing, but there is reason to make an exception here.

[14] The Appellant has a complicated story to tell. She claims to have split with her husband but reconciled with him later. She argues that she has been a resident of Canada, even if she lacks the kind of "paper trail" that would have definitively established her ties to this country. She submits that her oral evidence would have been a relevant and valuable supplement to the documentary record.

[15] I agree. A hearing before the General Division is ordinarily the final opportunity for the evidence to be assessed on its merits. In OAS claims, an applicant's credibility is, on some level, almost always an issue, The best way to assess credibility is by hearing testimony, refined through the give and take of informed questioning. In this case, I am satisfied that the General Division's refusal to hear the Appellant's testimony resulted in a breach of procedural fairness.

REMEDY

[16] 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.

[17] 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 but, in this case, I feel my only option is to refer this matter back to the General Division for rehearing.

[18] Although the Appellant's legal representative urged me expedite matters by substituting my decision for the General Division's, I do not think that the record is complete enough to allow me to decide this matter on its merits. The General Division failure to observe a principle of natural justice led to the exclusion of an entire category of evidence that, had it been considered, might have produced a different outcome. Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is better

positioned than I am to hear the Appellant's testimony and to explore whatever avenues of inquiry that may arise from it.

CONCLUSION

[19] For the above reasons, I find that the General Division failed to observe a principle of natural justice. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a new hearing.

[20] To avoid any appearance of bias, I am directing the General Division to assign this matter to a member other than the member who it in the first instance. I am also directing the General Division to conduct the hearing by way of teleconference, videoconference, or personal appearance.

Member, Appeal Division

HEARING DATE	July 29, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. H., the Appellant A. H., representative for the Appellant Sandra Doucette, representative for the Respondent