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

Citation: *R. R. v Minister of Employment and Social Development*, 2019 SST 1291

Tribunal File Number: AD-19-669

BETWEEN:

R. R.

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: October 28, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] The Applicant, R. R., who was born in 1950, is a Finnish national now living in Sweden. November 2015, he applied for an Old Age Security (OAS) pension under the Agreement on Social Security between Canada and Sweden, claiming that he had lived in this country on a temporary work permit between June 1987 and July 1989.

[3] The Respondent, the Minister of Employment and Social Development (Minister), asked the Applicant for proof of his status in Canada during that period. It also asked him to complete a questionnaire and a consent to release information from Citizenship and Immigration Canada (CIC).

[4] The Applicant returned these items to the Minister, as requested, along with copies of the following:

- a letter dated February 9, 1987 to the Canadian embassy in Sweden from X, the Applicant's former employer, requesting a transfer to its Canadian subsidiary office in the Montreal area;
- the Applicant's application for temporary entry into Canada dated February 25, 1987; and
- a letter dated June 14, 1989 from Movers International confirming that the Applicant's employer had engaged them to move his possessions from Canada to Finland on June 22-24, 1989.

[5] In a letter dated January 24, 2017, the Minister refused the Applicant's OAS application because, in its view, he had failed to provide evidence that he had ever lived in Canada legally. On reconsideration, the Minister confirmed its position, advising the Applicant that he needed to

provide a certified copy of the Temporary Resident Visa (Work Permit) that was valid on the date of his departure from Canada. The Minister added that CIC had been unable to verify the Applicant's status in Canada.

[6] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated July 7, 2019, dismissed the appeal. The General Division found that the Applicant had failed to meet the burden of proving that he had ever been legally resident in this country. The General Division specifically cited the Applicant's failure to produce a Temporary Resident Visa that was valid on the date of his departure from Canada.

[7] The Applicant then requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division erred in arriving at its decision, in particular, by ignoring evidence that he had spent two years working in Canada for a multinational company. The Applicant suggested that Canadian immigration authorities would have likely prosecuted his employer and removed him from the country had he not had legal status. The Applicant included with his application for leave to appeal a copy of a record of employment indicating that he was employed by X in X, Quebec from June 1, 1987 to June 23, 1989.

[8] Having reviewed the Applicant's submissions against the record, I have concluded that this is not a suitable case in which to grant leave to appeal.

ISSUES

[9] 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.

[10] 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

[1] DESDA at ss 56(1) and 58(3).
[2] *Ibid*. at s 58(1).

Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

[11] I must determine whether the Applicant has raised an arguable case on the following questions:

Issue 1: Did the General Division ignore evidence?
Issue 2: Can the Appeal Division consider new evidence?

ANALYSIS

Issue 1: Did the General Division ignore evidence?

[12] I do not see an arguable case for this submission.

[13] It is important to keep in mind that the burden of proof lies with the person claiming entitlement to OAS benefits.[4] The onus is on the Applicant to prove that he is entitled to OAS benefits; it is not the job of the Minister or the General Division to prove that he is not. By the time the Applicant appeared before the General Division, he had had more than three years to gather evidence showing that he had been a legal resident of Canada for two years in the 1980s.

[14] I appreciate the difficulty in proving something that happened more than 30 years ago. Even so, the Applicant was able to produce only three items of documentary evidence in support of his residency claim and, as the General Division noted, none of them, strictly speaking, proved that he had actually lived in Canada or had done so legally. It is not clear why CIC had no record of any visa issued to the Applicant. It is possible that the record was lost; it is also possible that the Applicant was never issued a visa in the first place. Whatever the cause, it nevertheless remains a fact that the record lacked clear evidence of the Applicant's status in 1987–89. In that sense, it cannot be said that the General Division based its decision on an erroneous finding of fact that was "made in a perverse or capricious manner" or "without regard for the material before it."

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[3] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[4] *De Carolis v Canada (Attorney General)*, 2013 FC 366.

[15] Even so, I did have one concern as I reviewed the record. When it rejected the Applicant's claim, the Minister suggested that a certified copy of a Temporary Resident Visa was required to establish residence for the purpose of claiming OAS benefits. That is inaccurate. In fact, a finding residence can be established, not just by visas, but by other evidence that leaves a paper trail, such as property records, leases, bank and credit card statements, utility bills, and income tax records. If the General Division had based its decision solely on the absence of a visa, then the Applicant might have had an arguable case that whatever evidence he did provide had been ignored. However, the General Division's reasons indicate that it gave due consideration to the Applicant's testimony, as well as the documentation surrounding his move, but did not find either compelling.

[16] The Applicant may disagree with the General Division's interpretation of the evidence, but it is owed a measure of deference in its role as trier of fact.[5] In this case, the General Division reviewed all the evidence available to it, including the aforementioned letters and the Applicant's oral and written statements, and concluded that the Applicant had failed, on balance, to prove that he had ever legally resided in Canada.

Issue 2: Can the Appeal Division consider new evidence?

[17] Included with the Applicant's leave to appeal application was a copy of his record of employment from the 1980s, which the Applicant said he had obtained from his former employer. This item of evidence was not before the General Division when it held its hearing last July and, for this reason, I cannot consider it.

[18] My authority is limited. The Appeal Division is permitted to determine only whether any of an applicant's submissions fall within the grounds specified under section 58(1) of the DESDA and whether any of them have a reasonable chance of success. I do not have any authority to assess the substance of an OAS claim. I cannot reassess existing evidence or accept new evidence and substitute my judgment for the General Division's.

[5] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

[19] However, one avenue remains open to the Applicant. Once a hearing has concluded, there is a restrictive mechanism by which new or additional information can be raised. A claimant may apply to the General Division to rescind or amend its decision on the basis of new facts, but it must do so within one year of the issuance of the decision. The claimant must also demonstrate that the allegedly new facts are material and that they could not have been discovered at the time of the hearing with the exercise of reasonable diligence.[6]

CONCLUSION

[20] Since the Applicant has not identified any grounds of appeal under section 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave is refused.

Member, Appeal Division

REPRESENTATIVE:	R. R., self-represented

[6] The precise criteria to rescind or amend a decision are set out in section 66 of the DESDA.