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

Citation: *D. K. v Minister of Employment and Social Development*, 2020 SST 570

Tribunal File Number: AD-20-599

BETWEEN:

D. K.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 30, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application to rescind or amend the Appeal Division decision is refused.

BACKGROUND

[2] The Applicant is a 66-year-old Canadian citizen who lived and worked in this country from 1974 to 1985. He has resided in the United Kingdom since 1985.

[3] The Applicant applied for an Old Age Security (OAS) pension in April 2018. The Respondent, the Minister of Employment and Social Development, refused the application because it found that the Applicant had not resided in Canada long enough to receive the pension while living abroad.[1] It also found that the Social Security Convention between Canada and the United Kingdom (Canada-U.K. SSC) did not help him qualify for the pension.

[4] The Applicant appealed the Minister's refusal to the Social Security Tribunal. On July 12, 2019, the Tribunal's General Division dismissed the appeal, finding that the Applicant had not shown sufficient residence in Canada to be able to receive a partial OAS pension while living abroad.

[5] The Applicant then turned to the Tribunal's Appeal Division. In a decision dated October 23, 2019, one of my colleagues on the Appeal Division refused leave to appeal because, in her view, none of the Applicant's arguments had a reasonable chance of success. In particular, the Appeal Division found no arguable case that the General Division had disregarded a principle of natural justice or committed an error of law.

[6] On April 8, 2020, the Applicant applied to rescind or amend the Appeal Division's decision in light of what he claimed were new material facts. In his application and in an accompanying brief,[2] the Applicant alleged that the Appeal Division (i) wrongly denied the General Division's finding that he should have been making Canada Pension Plan contributions

[1] Under section 9(2) of the *Old Age Security Act*, an applicant must show that he or she had resided in Canada for at least 20 years after reaching age 18 in order to receive a pension outside of Canada,

[2] Applicant's written submissions dated April 8, 2020, RA1-25.

from 1985 to 2014 and (ii) mischaracterized the Canada-U.K. SSC as a bilateral, rather than a reciprocal, agreement.

[7] The Applicant included with his application the following documents:

- Convention on Social Security between the Government of Canada and the Government of Great Britain and Northern Ireland, 1997;
- United Kingdom Social Security (Application of Reciprocal Agreements with Australia, Canada and New Zealand) (EEA States and Switzerland) Regulations, 2015;
- United Kingdom Social Security (Canada) Order, 1995; and
- Email to the Applicant from an official at Global Affairs Canada dated December 16, 2019 confirming that the Canada-U.K. SSC is regarded as a reciprocal agreement.

[8] The Minister filed written submissions arguing that none of the information submitted by the Applicant meets the legal test for new facts.[3] The Applicant then asked for an extension of time in which to file additional written submissions.[4] The Tribunal granted the request and, on June 20, 2020, the Applicant submitted a response to the Minister.[5]

[9] The *Social Security Tribunal Regulations* allow the Tribunal to proceed as informally and quickly as circumstances, fairness, and natural justice permit. With that in mind, I have decided that the record is sufficiently complete to enable me to make an informed decision without an oral hearing. I will proceed by way of documentary review.

ISSUE

[10] I have to decide whether any of the Applicant's information establishes a new material fact that would justify rescinding or amending the Appeal Division's decision dated October 23, 2019.

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[3] Minister's written submissions dated May 14, 2020, RA2.
[4] Applicant's email dated May 18, 2020, RA3.
[5] Applicant's submissions dated June 20, 2020, 2020, RA6.

ANALYSIS

[11] I have reviewed the Applicant's submissions and concluded that none of his information meets the test for new material facts. Section 66(1)(b) of the *Department of Employment and Social Development Act* (DESDA)[6] reads as follows:

> (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> (b) […] a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[12] Under this provision, an application to rescind or amend a decision succeeds if an applicant submits new information that was not readily accessible at the time of hearing. The new information must also be material—that is, it could reasonably be expected to have affected the outcome of the decision had the Tribunal known about it at the time.[7] Under section 66(4) of the DESDA, an application to rescind or amend a decision can be made only to the same division of the Tribunal that originally issued the decision.

[13] An application to rescind or amend is not an appeal, nor is it an opportunity to reargue the merits of a Applicant's claim. Instead, it is a tool designed to allow the Tribunal to reopen one of its decisions if new and relevant evidence emerges but, for whatever reason, was previously undiscoverable. In this case, the Applicant has submitted a number of documents that existed and were readily available to him, as well as to the General Division and Appeal Division, in previous proceedings.

[14] In his submissions, the Applicant makes much of the distinction between a bilateral agreement and a reciprocal agreement, and he argues that the Appeal Division's alleged failure to appreciate the difference between the two amounts to a new material fact. I have to disagree. First, the Applicant has already argued before the Appeal Division that the Canada-U.K. SSC is a reciprocal agreement.[8] It therefore cannot be said that he is now presenting information that

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[6] From his submission, it appears that the Applicant was under the impression that the *Department of Human Resources and Skills Development Act* and the *Department of Employment and Social Development Act* are separate pieces of legislation. In fact, they are the same statute. The former was amended, and its name changed, in 2013.
[7] *Canada (Attorney General) v MacRae*, 2008 FCA 82.
[8] See Applicant's written submissions requesting leave to appeal to the Appeal Division dated October 9, 2019, AD1C-3-4.

could not have been discovered, with the exercise of reasonable diligence, at the time of the first Appeal Division hearing. Second, I am not sure whether the Applicant's new information is material. The Applicant himself has described the Canada-U.K. SSC as both bilateral *and* reciprocal,[9] and the Appeal Division has never denied that the convention obliges both countries to recognize each other's benefits eligibility criteria.

[15] In his most recent submission, the Applicant argues that the phrase, "at the time of hearing" in section 66(1)(b) of the DESDA, refers in his case to the date on which the General Division issued its decision to refuse him a partial OAS pension:

> Following logic and the case law the Respondent itself has presented, I submit that the *original hearing* date is when the GD made its decision to refuse my OAS pension application on 12 July 2019. That is the guillotine point in time. It follows that any new information must be assessed as to whether it was discoverable before 12 July 2019 with due diligence… [emphasis in original][10]

[16] The Applicant then specifies the new material facts that he believes could not have been discovered by exercise of reasonable diligence when the General Division issued its decision last year:

> In my application for leave to appeal to the AD dated 9 October 2019 I presented as new fact that the UK pension authority – the Department for Work and Pensions ('DWP') - decided to increase my UK State Pension in light of my Canadian residence and work period. This fact could not have been ascertained and proven by me with evidence with any amount of due diligence before the GD's decision in July 2019 because by that time the DWP had provided me with no formal notification as proof that it will actually take into account my Canadian work/residency period. The DWP's written confirmation reached me only on 1 October 2019 – 80 days **after** the *original hearing* by the GD on 12 July 2019… [emphasis in original][11]

[17] These passages suggest that the Applicant misunderstands the process set out in section 66 of the DESDA. He has made an application to the Appeal Division to reopen one of its decisions. Under section 66(4), I have the authority only to revisit the Appeal Division's October 23, 2019, leave to appeal decision in light of new, previously undiscoverable information.

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[9] Applicant's written submissions dated October 9, 2019, ADC1-3.
[10] Applicant's brief dated June 20, 2020, paragraph 3, RA6-3.
[11] Applicant's brief dated June 20, 2020, paragraph 4, RA6-3.

However, I do not have any authority to hear arguments that the decision was unreasonable or incorrectly decided. Only a court can do that. Most of the Applicant's supposedly new information was available to the Appeal Division when it considered his appeal last year, and what was not available was certainly discoverable. For that reason, the Applicant's application cannot succeed. If the Applicant wanted to reopen the General Division's decision of July 12, 2019, then he would have been better off bringing an application to rescind or amend to the General Division.[12] If the Applicant wanted to overturn the Appeal Division's decision of October 23, 2019, then he should have applied for judicial review at the Federal Court.

[18] In the end, the Applicant's submissions contain nothing new and convey little more than variations of arguments that he has already presented to the General Division and the Appeal Division. On leave to appeal, the Appeal Division saw no arguable case that the General Division had erred in arriving at its decision. I don't see how its reasoning would have been any different if it had had access to the information that the Applicant is now seeking to place on the record.

CONCLUSION

[19] I find that the material submitted by the Applicant does not meet the test for new material facts set out in section 66(1)(b) of the DESDA. As a result, I see no reason to rescind or amend the Appeal Division's leave to appeal decision of October 23, 2019.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	D. K., self-represented Viola Herbert, representative for the Respondent

[12] As of this writing, the Applicant still has an opportunity to make a rescind or amend application to the General Division. Under section 66(2) of the DESDA, the deadline to do so is one year after the General Division's decision is communicated to the applicant.