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

Citation: *DK v Minister of Employment and Social Development*, 2020 SST 1217

Tribunal File Number: GP-20-1002

BETWEEN:

D. K.

Applicant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Pierre Vanderhout

Date of decision: December 4, 2020

Canada

INTRODUCTION

[1] The Applicant was born in April 1954. He lives in the United Kingdom (the "UK"). He lived in Canada for 11 years and 128 days between May 1974 and October 1985. He has lived in the UK since then. As he no longer resides in Canada, he does not have the 20 years of Canadian residence needed to receive a partial OAS pension outside Canada.[1] However, he maintains that his residence in the UK ought to count toward his eligibility for an OAS pension.

[2] On July 12, 2019, the Tribunal's General Division found that the Applicant was not entitled to a partial Old Age Security ("OAS") pension (the "Original Decision"). The Original Decision considered whether a social security treaty with the UK (the "Canada-UK Treaty")[2] allowed the Applicant to accumulate at least 20 years of Canadian residency. In particular, the Original Decision explained how he could not use Article 8 of the Canada-UK Treaty to count his UK residency as Canadian residency. The Original Decision made that finding after concluding he was not an "insured", as defined in Article 1 of the Canada-UK Treaty.

[3] The Original Decision was "on the record". This means the previous Tribunal Member considered the written documents and evidence in the Applicant's appeal record to decide the appeal. This was the process requested by the Applicant.[3]

[4] After the Original Decision, the Applicant exhausted his potential remedies at the Tribunal's Appeal Division. This included an application to rescind or amend the Appeal Division's refusal to grant leave to appeal. He then applied to rescind or amend the Original Decision on July 8, 2020, under s. 66 of the *Department of Employment and Social Development Act* (the "DESD Act"). He submitted evidence that he wishes to characterize as "new facts".

[5] The Applicant's current argument can be roughly summarized as this: The UK increased his UK state pension amount because he had resided in Canada for a time. If the Canada-UK Treaty is "reciprocal" rather than "bilateral," he says the Minister must also use the Applicant's UK residence to increase his residency in Canada for OAS pension purposes.

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[1] See s. 3(2) of the *Old Age Security Act*. The Applicant also concedes this at RA5-3.
[2] The full name is the *Convention on Social Security Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland*. It is also known as Social Security Treaty #E102220.
[3] GD1-2

ISSUES

[6] I must decide if the Applicant's evidence proves a new material fact that could not have been discovered before the original hearing with the exercise of reasonable diligence. If so, I must determine the impact on the Original Decision.

DOCUMENTS SUBMITTED AS NEW FACTS

[7] The Applicant submitted the following documents in support of his application:

(1) A letter dated October 1, 2019, from the UK pension authority. This letter increased his UK State Pension because of his prior residence and employment in Canada.[4]

(2) An e-mail exchange between the Applicant and Global Affairs Canada ("Global Affairs") about the Canada-UK Treaty. The Applicant sent his e-mail on November 28, 2019. Global Affairs sent its reply on December 16, 2019.[5]

ANALYSIS

[8] An application to rescind or amend on the basis of new facts is an exceptional process. It is an exception to the principle of finality that characterizes judicial and quasi-judicial decisions. The "rescind or amend" process exists to ensure procedural fairness.[6]

What is the test for rescinding or amending a decision?

[9] I can only rescind or amend the Original Decision under certain conditions. The test set out in the DESD Act has two parts.[7]

[10] First, the Applicant must present a **new** fact that must **not** have been **discoverable** with the exercise of reasonable diligence. This fact must have existed at the time of the original hearing.[8] Exercising reasonable diligence means taking the steps that a reasonable person would

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[4] AD1C-11
[5] ADRA1-39 and RA6-5 (question 5).
[6] See *Canada (Attorney General) v. Jagpal*, 2008 FCA 38, at paragraph 27.
[7] S. 66(1)(b) of the DESD Act.
[8] *Canada (Attorney General) v. Macrae*, 2008 FCA 82. This concerned s. 84(2) of the *Canada Pension Plan*, which applied before s. 66(1)(b) of the DESD Act came into force in 2013.

take to find evidence to support their case. The idea is that a person applying to rescind or amend a decision cannot rely on evidence that was readily available and could have been presented at the original hearing. The Applicant should give evidence of what steps he took before the original hearing, if any, to find evidence to support the fact he is now trying to prove. He should also explain why he could not have presented evidence of that fact at the original hearing.[9]

[11] Second, the fact must be **material**. A fact is material if it could have affected the outcome of the original hearing.[10]

[12] The test balances two important interests. The first interest is the fairness of adjudicating benefit eligibility. The second interest is securing the finality and enforcement of previous decisions.[11]

[13] The Applicant submits that there are two new facts:

> 1. On October 1, 2019, the UK pension authority decided to increase his UK state pension, in light of his Canadian residence between 1974 and 1985.[12]
>
> 2. On December 16, 2019, Global Affairs said they had no *travaux préparatoires*[13] showing Canada's intentions about the Canada-UK Treaty. At the same time, Global Affairs told him that they considered the Canada-UK Treaty "reciprocal" as opposed to "bilateral".[14]

[14] I will begin my analysis with the "discoverability" test.

First part of the new fact test: were the facts not discoverable with the exercise of reasonable diligence at the time of the original hearing?

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[9] See *Carepa v. Canada (Minister of Social Development)*, 2006 FC 1319.
[10] *Canada (Attorney General) v. Macrae*, 2008 FCA 82.
[11] See *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297, paragraphs 37 to 39
[12] RA1-3, at paragraph 3.
[13] "*Travaux préparatoires*" (literally "preparatory works") are the documents used during the negotiation and drafting of a treaty.
[14] RA1-4, at paragraphs 4 and 5.

[15] Yes. The new facts meet the discoverability part of the test. I find that the facts were not discoverable by exercising due diligence at the time of the original hearing.

[16] In a letter dated October 1, 2019, the UK pension authority increased the Applicant's UK state pension because of his residence and work in Canada.[15] They based their decision on information filed by the Applicant on September 13, 2019. They requested this information on September 10, 2019.[16]

[17] The information supplied on September 13, 2019, was simply the fact of the Applicant's Canadian residency. This information had existed for many years before the original hearing. Had the UK pension authority been aware of it, they could have adjusted his future UK state pension accordingly. However, he was not permitted to apply for the UK state pension before July 7, 2019. He applied on July 12, 2019.[17] I find that the Applicant's increased UK state pension entitlement (or at least the reason for it) existed at the time of the original hearing, but it was not discoverable with reasonable diligence by then.

[18] As for the second new fact, the Applicant did not contact Global Affairs until November 28, 2019.[18] He said he contacted Global Affairs because he wanted to obtain independent confirmation of his belief that the Canada-UK Treaty was "reciprocal". He thought Global Affairs was in the best position to interpret the Canada-UK Treaty.[19] He also asked for all Canadian Parliamentary debates and *travaux préparatoires* leading up to the Canada-UK Treaty.

[19] The Applicant received a reply from Global Affairs on December 16, 2019.[20] Global Affairs said they did not have any *travaux préparatoires* on file for the Canada-UK Treaty.[21] Global Affairs also said it considered the Canada-UK Treaty a "reciprocal agreement". The Applicant says a "reciprocal agreement" imposes the same obligations on both parties. He distinguishes this from a "bilateral agreement," which is just an agreement between two parties.[22]

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[15] AD1C-11
[16] AD1C-10. See also the Applicant's narrative description at AD1C-5 to AD1C-6.
[17] See RA6-4 to RA6-5 and RA6-7 to RA6-14.
[18] ADRA1-30, ADRA1-39, and RA6-5 (Question 5 and Answer 5).
[19] RA6-5 to RA6-6.
[20] ADRA1-30 and ADRA1-39.
[21] RA1-4, at paragraph 5.
[22] ADRA1-39

[20] I find that the information contained in the December 16, 2019, Global Affairs e-mail would likely have existed by the original hearing. I also accept that it was not discoverable with reasonable diligence. It would not be reasonable for the Applicant to pursue information on the Canada-UK Treaty before he knew that his Canadian residence increased his UK state pension.

[21] While the new facts meet the "discoverability" part of the test, this is not the end of the matter. The Applicant must also show that he meets the "materiality" part of the test.

Second part of the new facts test: are the new facts material?

[22] No. The new facts are not material. They would not have affected the outcome of the original hearing.

[23] To determine whether the new facts are material, I must look at the basis of the Original Decision. Article 8 of the Canada-UK Treaty says that a person "insured" under the *Canada Pension Plan* ("CPP") can use periods of UK residence to count as Canadian residence, when calculating his OAS pension amount. In his original General Division proceeding, the Applicant argued that he qualified as an "insured" for the purposes of Article 8. In particular, he suggests he was "insured" ever since his 1985 return to the UK, as he paid into the CPP before then and eventually started receiving a CPP pension in 2014.

[24] However, the Applicant's interpretation of the term "insured" is irrelevant. Article 1 of the Canada-UK Treaty explicitly defines the term "insured". The Original Decision said that the Applicant did not meet that definition.[23] Article 1 says a person is "insured" when he pays contributions (or contributions are payable) under the CPP. The Applicant has never suggested that he paid into the CPP after his 1985 return to the UK.

[25] The "new facts" could not reasonably affect the Original Decision's application of the word "insured". Even if the General Division had been aware of the new facts, it would still have applied the Article 1 definition of "insured" to Article 8 of the Canada-UK Treaty. In fact, the Original Decision explicitly states that Articles 1 and 8 must be read together.[24]

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[23] See, in particular, paragraphs 6-7 and 16-19 of the Original Decision.
[24] See paragraph 16, 17, and 19 of the Original Decision.

[26] Knowing that Global Affairs was unable to find *travaux préparatoires* about the Canada-UK Treaty would have no reasonable impact on the Original Decision's application of the term "insured" in the Canada-UK Treaty. Nor would Global Affairs' description of the Canada-UK Treaty as "reciprocal," or the increase of the Applicant's UK state pension due to his prior residency in Canada. These facts do not help establish that the Applicant paid into the CPP (or that contributions were payable) during his residency in the UK. This means the "new facts" are not "material," even if they existed by the original hearing.

Comments on the Applicant's submissions

[27] The Applicant relies extensively on the Vienna Convention on the Law of Treaties (the "Convention").[25] However, I could only look at the Convention if I had decided that I could reopen the Original Decision. As the new facts are not material, the Applicant has not met both parts of the new facts test. This means I cannot interfere with the Original Decision. As a result, it is not necessary to apply the Convention.

[28] I also note that the Applicant appears to be trying to re-argue the issues decided in the Original Decision. However, an application to rescind and amend is not the way to achieve this. If he thinks the law has been misinterpreted, the remedy is an appeal to the Appeal Division. Unfortunately, for the Applicant, the Appeal Division refused leave to appeal on October 23, 2019. The Applicant also applied to rescind and amend the Appeal Division's refusal to grant leave to appeal. The Appeal Division dismissed that application on June 30, 2020.

What is the impact on the findings made in the Original Decision?

[29] The information submitted by the Applicant does not qualify as material new facts. This means I cannot interfere with the Original Decision.

CONCLUSION

[30] The Applicant's evidence did not meet the new facts test. As a result, the evidence cannot be considered new facts. The Application to Rescind or Amend is dismissed.

Pierre Vanderhout

[25] See, in particular, paragraphs 7 through 9 (including extensive footnotes) at RA1-4 to RA1-5.

Member, General Division - Income Security