Citation: *LC v Minister of Employment and Social Development*, 2022 SST 964

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	L. C.
Representative:	E. C.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated May 30, 2022 (GP-21-1518)

Tribunal member:	Neil Nawaz
Decision date:	September 30, 2022
File number:	AD-22-625

Decision

[1] Permission to appeal is refused. This appeal will not be going forward.

Overview

[2] The Applicant has lived in Canada since June 1996. She turned 65 in August 2015. She could have applied for an Old Age Security (OAS) pension at that time, but she did not. She waited until July 2020.

[3] The Minister approved her application. Based on her 19 years of Canadian residence at age 65, the Minister granted the Applicant a partial pension at the rate of 19/40^{ths} of the full amount, with payment effective as of September 2020, as she had requested. The Minister also increased the amount of the pension by an actuarial factor of 36 percent because the Applicant had waited five years to apply.[1]

[4] The Applicant thought her pension should be higher. She appealed the Minister's assessment to the Social Security Tribunal. She argued that the Minister should have given her credit, not just for deferring her pension until 2020, but also for the five years of Canadian residence that she accumulated between her 65th birthday and her pension application.

[5] The General Division held a hearing by videoconference and dismissed appeal. It agreed with the Minister that the Applicant could get credit for additional residence, or benefit from deferral, but she could not do both.

[6] The Applicant is now asking for permission to appeal the General Division's decision. She maintains that she is entitled to a higher OAS pension and alleges that the General Division made the following errors:

- It failed to justify its decision in light of the general factual matrix of the case; failed to take into account the laws of Canada; failed to consider relevant evidence: relied on irrelevant stereotypes; interpreted the scope of delegated

[1] Under section 7.1(2) of the *Old Age Security Act*, a monthly OAS pension is increased by 0.6 percent for each month after the age of 65 until the time the application is approved.

authority more broadly than the legislature intended; and failed to attend to the language chosen by Parliament to delineate the limits of that authority;

- It refused to address issues raised by the Applicant;
- It misapplied section 64(1) of the *Department of Employment and Social Development Act* (DESDA);
- It refused to apply the common judicial procedure of default judgment when the Minister failed to appear at the hearing;
- It incorrectly stated that the Applicant never expressed a preference between two pension payment options offered by the Minister; and
- Its actions during the hearing and its subsequent decision raised a reasonable apprehension of bias.

Issue

[7] There are four grounds of appeal to the Appeal Division. An applicant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[3] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[4] This is a fairly easy test to meet, and it means that a Applicant must present at least one arguable case.[5]

[8] I have to decide whether the Applicant has an arguable case.

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[2] *See of Employment and Social Development Act* (DESDA), section 58(1).
[3] See DESDA, sections 56(1) and 58(3).
[4] See DESDA, section 58(2).
[5] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Analysis

[9] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Applicant does not have an arguable case.

There is no arguable case that the General Division failed to justify its decision

[10] The Applicant broadly accuses the General Division of ignoring evidence, law and basic rules of procedural fairness. She does so using phrases that closely mirror the language of a recent Supreme Court of Canada decision called *Vavilov*.[6]

[11] At heart, *Vavilov* is a case about what makes a decision reasonable. Among other things, *Vavilov* says that administrative decision-makers, such as the members of this Tribunal, must consider all the circumstances of a case and apply relevant law.[7] Their decisions must be transparent, intelligible, and justified and must show an internally coherent and rational analysis that is defensible on the facts and the law.[8]

[12] In short, it is an error of law, as well as violation of the rules of procedural fairness, for a tribunal to decide a matter without providing good reasons for its decision. However, I don't see an arguable case that the General Division fell short of the standard set out in *Vavilov*. From my perspective, the General Division more than justified its decision to dismiss the Applicant's appeal.

[13] In the reasons for its decision, the General Division relied on certain undisputed facts: the Applicant turned 65 in August 2015 and did not apply for the OAS pension until five years later. The General Division applied these facts to unambiguous statutory provisions[9] and found that the Applicant's pension amounted to $396.34, if calculated using the 36-percent actuarial adjustment, or $368.12, if calculated using an additional

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[6] See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, particularly paragraphs 108-110, 126.
[7] *Vavilov*, paragraphs 73–75.
[8] *Vavilov*, paragraphs 81–86, 99.
[9] See sections 3(3), and 7.1 of the *Old Age Security Act.*

five years of Canadian residence (that is, at an unadjusted rate of 24/40^{ths}).[10] Contrary to the Applicant's allegation, I could find no indication that the General Division relied on stereotypes or otherwise treated her unfairly in its proceedings.

[14] An applicant must do more than simply disagree with the General Division's decision. An applicant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the four grounds of appeal permitted under the law. In this case, the Applicant did not point to any specific deficiencies in the General Division's decision but instead criticized it in vague and sweeping terms. That is not enough to succeed at the Appeal Division.

There is no arguable case that the General Division ignored the Applicant's issues

[15] The Applicant alleges, without elaboration, that the General Division failed to address all of her issues.

[16] I don't see an arguable case for this submission. In her notice of appeal to the General Division, the Applicant raised three issues:[11]

- The Minister's supposed failure to recognize 24 years of residence;
- The Minister's assessment of her monthly pension ($368.12) was too low; and
- The Minister's requirement to inform Service Canada if the Applicant leaves the country for more than six months.

[17] From what I can see, the General Division thoroughly addressed the first two issues in its decision. The third issue was no more than an extension of the first two. It arose because of a standard caution that the Minister includes in all her approval letters where an OAS partial pension recipient, such as the Applicant, has been found to have resided in Canada for less than 20 years. In such cases, the recipient cannot receive

[10] See General Division decision, paragraphs 16 and 17.
[11] See Applicant's notice of appeal to the General Division dated July 11, 2021, GD1-5.

the pension if they move outside Canada.[12] In seeking recognition of 24 years of Canadian residence for OAS purposes, the Applicant was evidently trying to protect her right to keep her pension, should she decide to relocate abroad.

[18] There was no indication anywhere in the file that the Applicant had left, or intended to leave, Canada for more than six months. For that reason, I don't see how the General Division can be faulted for not directly addressing this secondary issue in its decision.

There is no arguable case that the General Division misapplied or misinterpreted the DESDA

There is no arguable case that the General Division erred by failing to find the Minister in default

[19] The Applicant flatly alleges that the General Division incorrectly applied section 64(1) of the DESDA and failed to apply an appropriate remedy for the Minister's non-appearance at the hearing.

[20] I don't see an arguable case on these points.

[21] In its written reasons, the General Division determined that it could not make default judgments or award the Applicant damages. Citing section 64(1), the General Division wrote, "My jurisdiction (authority) is limited to the powers granted by the Tribunal's enabling legislation."[13]

[22] In my view, this is an accurate statement of the law, one that has been affirmed many times in various cases.[14] Moreover, the General Division was correct to say that the DESDA gives it no power to make default judgments or award damages. In any

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[12] See Minister's initial approval letter dated August 31, 2020, GD2-12. The 20-year residency restriction can be found in section 3(2)(b) of the *Old Age Security Act*.
[13] See General Division decision, paragraph 20.
[14] See for instance *R. v Conway*, 2010 SCC 22 and *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.

event, as the General Division rightly noted, the Minister could not be said to be in "default" since she did file written arguments with the Tribunal.[15]

There is no arguable case that the General Division disregarded the Applicant's choice of pension payment

[23] When the Minister approved the Applicant's OAS pension, she began paying it at the higher, actuarially adjusted amount of $396.34. In the letter notifying the Applicant of the approval, the Minister added:

> However, according to the information on your file, you could have received a monthly pension amount of $368.12 at your effective date based on increased residence.
>
> If you wish to receive the lower amount, please send your request in writing to the address at the end of this letter as soon as possible to avoid a possible overpayment situation.[16]

[24] In its decision, the General Division wrote that, unless a person decides otherwise, the Minister bases her pension amount on "whichever of these two options gives the higher amount." The General Division also wrote the Applicant never indicated whether she wanted to receive the lower amount.[17] The Applicant says that these findings were "simply not true."

[25] Again, I don't see a reasonable chance of success for this argument.

[26] In her application for the OAS pension, the Applicant indicated that she wanted her pension to start in September 2020.[18] Since the Applicant had applied for her pension after she became qualified to receive a partial monthly pension, the Minister turned to section 7(2) of the *Old Age Security Act*. That section directs the Minister to calculate a pension amount in accordance with section 3(3) at the time that an applicant **becomes qualified** for the pension. Note that the section says "becomes qualified," not

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[15] See Minister's written submissions dated January 28, 2022, GD9.
[16] See Minister's initial decision letter dated August 31, 2021, GD2-12.
[17] See General Division decision, paragraph 18.
[18] See application for OAS benefits dated July 30, 2020, GD2-4.

“is approved.” In this case, the Applicant **became qualified** for her partial pension when she turned 65, not later.

[27] The Minister then applied section 7.1(3), which directs her to pay a pension in the highest of the following amounts:

> (i) the full monthly pension, if the applicant is qualified for it;
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> (ii) the amount of the partial pension as calculated under section 7.1(2); and
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> (iii) the amount of the partial pension as calculated under section 3(3) when the application is approved.

[28] As noted, option (ii) produced a figure in the amount of $396.34, while option (iii) produced $368.12. In the absence of a request otherwise, the Minister had no choice but to grant the Claimant the higher amount.

[29] The Applicant has not pointed to anything to show that she requested the lower pension amount. My own review of the file reveals nothing like that either. Nor is it clear to me why she would have chosen the lower amount, since she has insisted, from the beginning, that she was entitled to a much higher amount — one that factored in both the actuarial adjustment **and** her five additional years of residence. However, that is not possible under the law.

[30] The General Division found no error in how the Minister determined the Applicant’s pension amount. I don’t see an arguable case that, in making this finding, the General Division committed either a factual or legal error.

There is no arguable case that the General Division displayed bias

[31] The Applicant alleges that the General Division’s conduct raised a reasonable apprehension of bias. However, she has not offered anything to substantiate this allegation other than the fact that the General Division disagreed with her. That is not enough. Bias suggests a state of mind that is predisposed to a particular result. The threshold for a finding of bias is high, and the burden of establishing bias lies with the

party alleging its existence. More than just suspicion is needed to support a case for bias.[19]

[32] I have reviewed the case file and listened to the recording of the hearing, and I've seen and heard nothing to suggest impartiality. It is true that the proceedings were at times contentious and that the Applicant's husband and representative was clearly unhappy to have to prove something that he regarded as self-evident. However, based on what I heard, the presiding General Division provided the Applicant's representative with ample opportunity to present his case and betrayed no hint that she had her mind made up. In the end, the member ruled against the Applicant, but that hardly means she was predisposed toward the Minister.

Conclusion

[33] The Applicant has not identified any grounds of appeal that have a reasonable chance of success.

[34] Permission to appeal is therefore refused.

Member, Appeal Division

[19] The Supreme Court of Canada has stated the test for bias as, "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" See *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.