Federal Court  Cour fédérale

Date: 20130321

Docket: T-770-12

Citation: 2013 FC 286

Ottawa, Ontario, March 21, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NITZA TABRY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of a decision by a Review Tribunal (the tribunal) dated February 14, 2012, holding that the applicant was not entitled to full Old Age Security (OAS) benefits due to not residing in Canada on July 1, 1977.

[2] The applicant seeks an order quashing the tribunal's decision and granting her full OAS benefits.

Background

[3] The applicant immigrated to Canada on December 27, 1977. She applied for an OAS pension on May 22, 2009.

[4] After an exchange of correspondence, the Minister determined on February 19, 2010, that her application had been approved for an OAS pension at the rate of 24/40ths.

[5] The applicant requested in a letter dated May 8, 2010, that the Minister reconsider on the basis that she had originally applied to immigrate to Canada in February 1974 but had been delayed due to an error in her application.

[6] On June 9, 2010, the Minister denied the requested on the basis that the applicant did not meet the requirements under the *Old Age Security Act*, RSC 1985 c O-9 (the Act).

[7] The applicant appealed the Minister's decision to the tribunal, which held a hearing on December 14, 2011. Both the applicant and her husband, who represents her with leave of the Court in this application, gave testimony.

The Decision

[8] The tribunal, sitting as a three member panel, denied the appeal in reasons dated February 14, 2012. It identified the question at issue as whether an exception can be made to rule that in order

to receive a full OAS pension despite not having lived in Canada for 40 years between ages 18 to 65, an applicant must have been residing in Canada on or before July 1, 1977 (in addition to other conditions).

[9] The tribunal described the evidence of the applicant and her husband. They applied to immigrate in February 1975. Her husband erroneously entered $23,000 as being a liability instead of an asset and their application was refused. They ultimately received visas in November 1977. The applicant's husband blamed the misleading form and argued but for his mistake, they would have arrived in Canada before July 1, 1977. The couple would benefit from a transition period for those who missed the deadline by just a few months.

[10] The applicant's submissions were that her application should be granted because the immigration form was poorly designed, the federal government should have advised them of the changes to OAS in 1978, the transition exception should apply and she needed the money to spend time with her grandchildren.

[11] The Minister, as respondent, argued the applicant had resided in Canada for 24 years and was therefore entitled to 24/40ths of the OAS pension. She did not reside in Canada on July 1, 1977, and there is no exception to this rule.

[12] The tribunal noted the onus was on the applicant and that there was no dispute as to the facts. The tribunal held there was no exception to the rule, relying on *Singer v Canada (Attorney General)*, 2010 FC 607, [2010] FCJ No 724 (affirmed in 2011 FCA 178, [2011] FCJ No 768). The

tribunal rejected the argument that the immigration form mistake delayed the couple by six months, as there was no evidence regarding normal processing time.

[13] The tribunal held that the government had no obligation to notify the applicant of legislative changes and that notice in 1978, when the law was adopted, would not have helped the applicant avoid its retroactive effects. There is no transition period or consideration of special circumstances. Need for the money is not a valid ground and the applicant would be entitled to the Guaranteed Income Supplement. The tribunal dismissed the appeal.

Issues

[14] I would phrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the tribunal err in denying the appeal?

Applicant's Written Submissions

[15] The applicant disputes several factual elements of the tribunal's reasons. The applicant argues she returned to Canada from Israel in 1990, not 1992. Her immigration form was never corrected; if this had happened the visas would have been issued in 1975.

[16] The applicant relies on her husband's testimony that he was told by a Service Canada employee in 2001 that he would have qualified for a full OAS pension if he had arrived in

September 1977. The applicant also puts emphasis on the alleged statement by counsel for the Minister at the tribunal hearing that since there was no transition period in the Act, the employee would have been referring to an internal memo. The applicant points out it took two years, eight months and 12 days for their visas to be granted.

Respondent's Written Submissions

[17] The respondent argues that reasonableness is the appropriate standard of review. In order to qualify for a full pension under paragraph 3(1)(b) of the Act, the applicant must demonstrate that she resided in Canada on or before July 1, 1977, or that she possessed a valid immigration visa at that time. The respondent argues the tribunal did not err in finding that the applicant did not qualify.

[18] The respondent argues that this Court decided in *Singer* above, that there is no exception to the deadline of July 1, 1977, in section 3 of the Act. This was also the holding in *Canada (Attorney General) v Pike*, 90 FTR 65 (TD), [1995] FCJ No 15.

[19] The respondent argues that residency is a factual issue, as defined in paragraph 21(1)(a) of the *Old Age Security Regulations*, CRC, c1246. This Court held in *Singer* above, that physical presence in Canada at some point in time is an essential element of the definition of residence.

[20] The respondent argues the tribunal properly framed the issue before it, reviewed the relevant facts and submissions and provided clear and fulsome analysis of its decision. Even if the tribunal erred in respect of the applicant's husband's years of residency or the applicant's testimony

regarding financial need, such errors are irrelevant to the determination of eligibility under section 3. The applicant has provided no legislative or jurisprudential basis for her argument that no transition period exists under section 3. The tribunal is a creature of statute and has no equitable jurisdiction that would allow it to ignore the clear language of the Act. The fact that the applicant's husband made an error in their visa applications is irrelevant given the clear language of the legislation.

Analysis and Decision

[21] **Issue 1**

What is the appropriate standard of review?

While this Court has previously reviewed the tribunal's determinations of questions of law on a correctness standard (see *Singer* above, at paragraph 17), this approach was recently questioned by Mr. Justice Sean Harrington in *Flitcroft v Canada (Attorney General)*, 2012 FC 782 at paragraphs 9 to 11, [2012] FCJ No 811.

[22] Whether courts should follow standard of review analysis that precedes the Supreme Court's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, when such analysis conflicts with the very standard of review framework set out in that decision, is an uncertain matter. This "tension" was acknowledged by the Supreme Court in paragraphs 19 to 23 of *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471. This issue was also discussed by Madam Justice Mary Gleason in *Qin v Canada (Minister of Citizenship and Immigration)*, 2013 FC 147 at paragraphs 10 to 13, [2013] FCJ No 167, where she

queried whether past jurisprudence applying the correctness standard to questions of law had determined the standard of review in the "satisfactory manner" required by *Dunsmuir* at paragraph 62.

[23] Following its direction from *Dunsmuir*, the Supreme Court, in two recent decisions, parted from previous case law to apply the reasonableness standard to a tribunal's interpretation of its home statute (see *Human Rights Commission* above, case as well as the recent decision of *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paragraphs 166 to 168. Reasonableness was appropriate as the legal questions did not fall into the four categories described at paragraphs 58 to 61 of *Dunsmuir* above: constitutional questions, true questions of jurisdiction, questions of central importance to the legal system that are outside the tribunal's expertise and questions regarding the jurisdictional lines between two tribunals.

[24] For the purposes of this case, I need not decide this issue as I believe the tribunal's decision was correct and hence, it follows that it must also be reasonable.

[25] **Issue 2**

Did the tribunal err in denying the appeal?

I agree with the tribunal's comment that "[w]hen a law is adopted with a deadline, there will always be applicants who fail by a few days, and some who would qualify by a few days." (at paragraph 17 of its reasons). While any applicant who narrowly misses such a deadline is deserving of sympathy, given the language of the statute and the binding precedent of the Court of Appeal, there is simply no way for this Court to act on that sympathy.

[26] This Court held in *Singer* above, at paragraphs 29 and 62, there simply is no exception to the July 1, 1977 rule:

> 29 July 1, 1977 was chosen as the threshold date to define all exceptions to the intended general rule set out in subsection 3(1) of the Act. Therefore, any applicant had to meet the criteria listed at paragraph 3(1)(b) of the Act, on July 1, 1977, in order to be granted a full old age security pension. There is no grace period applicable here.
>
> . . .
>
> 62 The legislator made a clear policy decision when he chose to apply a threshold date. The Court cannot and should not interfere with such a decision. The liberal and purposive construction of the Act is meant to enable the Court to construe the statute in accordance with Parliament's intention. It is not meant as a tool to change the will of the legislator.

[27] This decision was endorsed by the Court of Appeal, and the applicant has raised no legal argument for departing from its reasoning.

[28] If the applicant were right that an internal memo described a grace period relating to the July 1, 1977 rule, this would still not help her cause as a memo does not trump the language of the Act. Any factual errors in the tribunal's reasons would similarly not change the outcome, which is that the applicant does not qualify for a full OAS pension.

[29] I also agree with the tribunal that there was no duty on the Minister to warn the applicant of the amendments to the Act adopted in 1978 and retroactive to July 1, 1977.

[30] In summary, I am of the view that the tribunal was correct in its assessment of subsection 3(1) of the Act and its application for the facts of this case.

[31] The application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Old Age Security Act*, RSC 1985, c O-9**

3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to	3. (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux personnes suivantes :
(a) every person who was a pensioner on July 1, 1977;	a) celles qui avaient la qualité de pensionné au 1er juillet 1977;
(b) every person who	b) celles qui, à la fois :
(i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,	(i) sans être pensionnées au 1er juillet 1977, avaient alors au moins vingt-cinq ans et résidaient au Canada ou y avaient déjà résidé après l'âge de dix-huit ans, ou encore étaient titulaires d'un visa d'immigrant valide,
(ii) has attained sixty-five years of age, and	(ii) ont au moins soixante-cinq ans,
(iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved; and	(iii) ont résidé au Canada pendant les dix ans précédant la date d'agrément de leur demande, ou ont, après l'âge de dix-huit ans, été présentes au Canada, avant ces dix ans, pendant au moins le triple des périodes d'absence du Canada au cours de ces dix ans tout en résidant au Canada pendant au moins l'année qui précède la date d'agrément de leur demande;
(c) every person who	c) celles qui, à la fois :
(i) was not a pensioner on July 1, 1977,	(i) n'avaient pas la qualité de pensionné au 1er juillet 1977,
(ii) has attained sixty-five years of age, and	(ii) ont au moins soixante-cinq ans,

(iii) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least forty years.

(iii) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins quarante ans avant la date d'agrément de leur demande.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-770-12
STYLE OF CAUSE:	NITZA TABRY - and - ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 4, 2013
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	March 21, 2013

APPEARANCES:

John Tabry	FOR THE APPLICANT
Benoit Laframboise	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John Tabry Oakville, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT