Federal Court of Appeal | Cour d'appel fédérale

Date: 20190924

Docket: A-168-18

Citation: 2019 FCA 238

CORAM: **RENNIE J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

ROSA FANNY PEREZ FLORES

Applicant

and

ZENAIDA HULL and
ATTORNEY GENERAL OF CANADA

Respondents

Heard by video-conference at Ottawa, Ontario, Gatineau, Quebec and Dawson Creek, British Columbia on September 5, 2019.

Judgment delivered at Ottawa, Ontario, on September 24, 2019.

REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	WOODS J.A. LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The applicant, Rosa Fanny Perez Flores, seeks judicial review of a decision of the Social Security Tribunal (Appeal Division) dated March 20, 2018, dismissing her appeal of a decision of the Social Security Tribunal (General Division). In that decision, the General Division found that Ms. Perez was not the common-law partner of the deceased contributor and was therefore

not entitled to the survivor's pension payable under section 58 of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP).

[2] At issue is the allocation of the survivor's pension payable to the survivor of a deceased contributor under section 58 of the CPP. The CPP defines a "survivor" as the common-law partner of the contributor at the time of the contributor's death, or the person married to the contributor at the time of the contributor's death if there is no common-law partner (s. 42(1)). The CPP defines a "common-law partner" as a person who is living with the contributor in a conjugal relationship at the time of the contributor's death, and who has been so continuously living with the contributor for at least a year prior to the contributor's death (s. 2(1)).

[3] Ms. Perez applied for the survivor's pension as the common-law partner of the deceased contributor Duwayne Hull on January 22, 2013. The Minister of Employment and Social Development granted her application and Ms. Perez began receiving the survivor's pension. However, on February 7, 2013, Zenaida Hull also applied for the survivor's pension as Mr. Hull's wife. The Minister denied Ms. Hull's application and upheld that decision upon reconsideration.

[4] Ms. Hull appealed the Minister's reconsideration decision to the General Division of the Social Security Tribunal. General Division hearings are *de novo*; accordingly, Ms. Perez and Ms. Hull each submitted new evidence. On January 20, 2017, the Tribunal sent the parties a letter stating that it intended to make a decision on the basis of the documents and submissions filed because there were no gaps in the information in the file and no need for clarification. The letter

noted that this method respected the requirement under the *Social Security Tribunal Regulations*, SOR/2013-60, to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The record before the General Division included bank account statements, income tax returns, a separation agreement between Mr. Hull and Ms. Hull, a marriage certificate between Mr. Hull and Ms. Hull, a divorce decree issued after Mr. Hull's death, information regarding Mr. Hull's hospitalization, records of funeral expenses, and letters from family members, friends, and colleagues (General Division Decision, at paras. 8-25).

[6] The General Division found that while the evidence confirmed Ms. Perez had been living with Mr. Hull, Ms. Perez had not established that she and Mr. Hull were in a common-law relationship for at least one year prior to his death (at paras. 35, 38).

[7] In reaching this decision, the General Division considered the factors indicative of a common-law conjugal relationship articulated by the Federal Court in *McLaughlin v. Canada (Attorney General)*, 2012 FC 556 at para. 15, 408 F.T.R. 286. The General Division found that Ms. Perez had not submitted evidence indicative of sexual relations, an attitude of fidelity, mutual assistance with problems or during illness, mutual service in household maintenance and domestic matters or provision of support (at para. 36). It also considered Mr. Hull's sale of his share of the family home to Ms. Perez prior to his death, Mr. Hull's decision to change the beneficiary under his life insurance policy from Ms. Perez to his daughter, Mr. Hull's travel to Peru without Ms. Perez before his death, Ms. Hull's travel to Peru to attend to Mr. Hull during

his illness, and letters stating that Ms. Perez and Mr. Hull were merely roommates (at paras. 33-34, 37-38).

[8] Ms. Perez obtained leave to appeal the General Division's decision. The Appeal Division granted leave on the ground that the General Division may have failed to observe a principle of natural justice because it did not hold an oral hearing with an interpreter.

[9] On March 20, 2018, the Appeal Division dismissed Ms. Perez's appeal on the grounds that the General Division had observed the principles of natural justice and considered all of the evidence before it.

[10] On the first issue, the Appeal Division considered that Ms. Perez had corresponded with all parties and filed materials in English, that she had not indicated that she was unable to understand any documents or correspondence in the file, and that neither she nor her representative requested an interpreter. The Appeal Division therefore found that any limitations Ms. Perez had in English did not impair her ability to present her case or to understand and answer the case against her (at para. 8). It also found that an oral hearing was not required to assess credibility, because the General Division had made no findings on credibility (at para. 15).

[11] On the second issue, the failure to consider all of the evidence, the Appeal Division found that the General Division had summarized the evidence and specifically referred to several documents presented by Ms. Perez and had not overlooked or misconstrued any important evidence (at para. 13). In response to Ms. Perez's argument that she would have provided further

evidence had she known the factors used to establish a common-law relationship, the Appeal Division found the Ms. Perez's lack of knowledge of the legal test did not constitute an error on the part of the General Division (at para. 9). The Appeal Division declined to consider new documentary evidence presented by Ms. Perez on the basis that new evidence is not admissible before the Appeal Division (at para. 10).

[12] Ms. Perez also sought to introduce new evidence before this Court. Her motion was dismissed before the hearing, nevertheless, Ms. Perez's materials included an affidavit with exhibits, including tax statements, bank statements, utility invoices, insurance documents, marriage and death certificates, hospital records, and letters, which were not before the Tribunal.

I. Positions of the Parties

[13] Ms. Perez essentially asks this Court to reconsider the General Division's analysis and the Appeal Division's review with the assistance of new evidence, and to reach the conclusion that she was Mr. Hull's common-law partner and is therefore entitled to the survivor's pension.

[14] The respondent Attorney General argues that the General Division did not breach a principle of natural justice in not holding an oral hearing because credibility was not at issue, because Ms. Perez had a good command of English, and because it was properly within the Tribunal's discretion to decide not to hold an oral hearing. The respondent also argues that the Appeal Division reasonably determined that the General Division had considered all the evidence before it and accordingly had no basis to intervene in light of the grounds of appeal

under subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA). Finally, the respondent argues that the new evidence Ms. Perez sought to introduce before this Court is inadmissible because it does not fall within any of the exceptions to the rule against new evidence.

II. Analysis

[15] I will deal with the fresh evidence issue first. This Court has already disposed of this issue via the order of Justice Nadon on November 27, 2018. However, because Ms. Perez's memorandum does contain new evidence and because the respondent's memorandum provides arguments on this issue, I will address it briefly here.

[16] As this Court held in *Sharma v. Canada (Attorney General)*, 2018 FCA 48, 288 A.C.W.S. (3d) 790, new evidence is generally not admissible on judicial review. There are three recognized exceptions to this rule. New evidence may be admitted where it provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits; it highlights the complete absence of evidence before the administrative decision-maker on a particular finding; or it brings to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker (*Sharma* at para. 8). The list of exceptions may not be closed, but exceptions exist only where the receipt of evidence is consistent with the differing roles of the reviewing court and the administrative decision maker

(*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para. 20, 428 N.R. 297).

[17] The new evidence in Ms. Perez's materials, which goes to the merits of the case and could have been submitted before the General Division, does not fall within any of the exceptions to the rule against new evidence and is therefore inadmissible.

[18] Turning to the issue of procedural fairness, the appropriate question to ask is whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors (*Canadian Pacific Railway Company v. Canada (Attorney General*), 2018 FCA 69 at para. 54, [2019] 1 F.C.R. 121). This requires an application of the correctness standard (*Canadian Pacific* at para. 34).

[19] As the Supreme Court held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 33, 174 D.L.R. (4th) 193 (S.C.C.), an oral hearing is not necessary to ensure a fair hearing in every case. As the Appeal Division found, Ms. Perez was able to effectively correspond with the Tribunal and the respondents and provide written submissions in support of her position. The General Division advised the parties of its decision to proceed in writing and invited further submissions, allowing the applicant the opportunity to provide all of the evidence she wished to put before the Tribunal, to express a desire for an oral hearing, and/or to communicate her need for an interpreter. This afforded Ms. Perez sufficient procedural fairness in the circumstances.

[20] I turn to the second challenge to the decision – whether it was reasonable.

[21] The standard of review applicable to decisions of the Appeal Division is reasonableness (*Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 3, 292 A.C.W.S. (3d) 564).

[22] Ms. Perez essentially asks the Court to reconsider the analysis of the General Division and the review of that analysis on appeal by the Appeal Division with the assistance of new evidence, and to find that she was Mr. Hull's common-law partner. As restated recently in *Sharma* (at para. 9) and in *Mackey v. Canada (Attorney General)*, 2019 FCA 168 at para. 8, 306 A.C.W.S. (3d) 196, the role of this Court on judicial review is to review the decision of the Appeal Division based on the facts before it and determine if that decision was reasonable. Its role is not to re-weigh the evidence that was before the Tribunal (*Sharma* at para. 13), nor should judicial review be used to correct deficiencies in the applicant's submissions before the General Division.

[23] There is no reviewable error in the Appeal Division's decision. The Appeal Division upheld the General Division's decision on the basis that the General Division's findings did not meet the threshold required for intervention set out in subsection 58(1) of the DESDA (Appeal Division Decision, para. 2). The Appeal Division also declined to re-weigh the evidence before the General Division on the basis that it is not the proper role of the Appeal Division to do so (Appeal Division Decision, para. 14). Given the evidence before the Appeal Division and the role it plays in reviewing decisions of the General Division, both of these decisions satisfy the criteria of transparency, justification and intelligibility.

III. Conclusion

[24] For these reasons, I would dismiss the application, but make no order as to costs.

"Donald J. Rennie"
J.A.

"I agree
Judith Woods J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE SOCIAL SECURITY TRIBUNAL OF CANADA APPEAL DIVISION DATED MARCH 20, 2018.

DOCKET:	A-168-18
STYLE OF CAUSE:	ROSA FANNY PEREZ FLORES v. ZENAIDA HULL and ATTORNEY GENERAL OF CANADA
PLACE OF VIDEO-CONFERENCE:	OTTAWA, ONTARIO, GATINEAU, QUEBEC AND DAWSON CREEK, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 5, 2019
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	WOODS J.A. LASKIN J.A.
DATED:	SEPTEMBER 24, 2019

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