Federal Court of Appeal | Cour d'appel fédérale

Date: 20211209

Docket: A-105-21

Citation: 2021 FCA 239

CORAM: **GAUTHIER J.A.**
DE MONTIGNY J.A.
LEBLANC J.A.

BETWEEN:

PETER WILLIAM MUDIE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on November 29, 2021.

Judgment delivered at Ottawa, Ontario, on December 9, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: GAUTHIER J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This application for judicial review is the culmination of a long series of proceedings following an application first made by the applicant on August 13, 2015 for a partial Old Age Security (OAS) pension. Pursuant to subsection 3(1) of the *Old Age Security Act*, R.S.C. 1985, c. O-9 (the Act), persons having attained 65 years of age are eligible to receive such a pension provided that they meet certain legal requirements and that they have the required years of

residence in Canada. Individuals with less than the required years of residence may be entitled to a partial pension (s. 3(2) of the Act).

[2] The applicant was born in South Africa in 1941. He immigrated to Canada in 1975, and became a Canadian citizen in 1978. He then immigrated to the United States in 1979, and lived in various countries until 2012, when he claims to have settled in Nova Scotia. His initial application for a partial OAS pension was predicated on his understanding that he was only considered a resident of Canada beginning in 2015, the year in which he acquired a permanent home in the country.

[3] On February 1, 2018, the applicant withdrew his initial application. Relying on a finding by the Canada Revenue Agency that he had recommenced residency in 2012 when he returned to Canada with the intention of settling permanently in Nova Scotia, the applicant applied for a full monthly OAS pension on September 12, 2018.

[4] On August 29, 2019, Service Canada advised the applicant that he did not meet the residence requirements to qualify for an OAS pension, but that his application had been sent to the International Operations Office for further review to determine whether he would nevertheless meet the residency conditions under the *U.S.-Canadian Social Security Agreement*, 11 March 1981, CTS 1984 No. 38 (as amended by a supplementary agreement signed 10 May 1983, entered into force 1 August 1984, and by a second supplementary agreement signed 28 May 1996, entered into force 1 October 1997).

[5] On September 16, 2019, Service Canada (International Operations) advised the applicant that he was entitled to a partial OAS pension, and explained that he could choose to receive it at a lower amount as of October 2017 or at a greater amount as of July 2018, or delay the entitlements so that he could receive a full OAS pension as of February 2024. The letter asked that he choose one of those options by completing the attached form and returning it to Service Canada.

[6] The applicant disagreed with the Minister of Employment and Social Development's (Minister) residency determination and he did not return the attached form. Instead, he filed a reconsideration request of the August 29, 2019 and September 16, 2019 letters with the Minister. On December 12, 2019, Service Canada informed the applicant by telephone that his reconsideration request would be withdrawn for prematurity as no final decision had yet been made.

[7] On April 28, 2020, the applicant filed a petition for a writ of *mandamus* with the General Division of the Social Security Tribunal (General Division). He argued that he had a statutory right to a reconsideration, that the withdrawal of his request was an abuse of process that barred him from challenging Service Canada's determinations, and that Service Canada was trying to coerce him into accepting less than that to which he was entitled. On the same day, the Secretariat of the Tribunal advised the applicant that it would close his file because Employment and Social Development Canada (ESDC) had not yet issued a reconsideration decision.

[8] On May 21, 2020, the applicant filed an appeal of that decision with the Appeal Division of the Social Security Tribunal (Appeal Division). Once again, he was advised that the Tribunal could not entertain his appeal because a reconsideration decision had not yet been made in his file.

[9] However, both parties were advised on July 31, 2020 that the applicant's application to the Appeal Division had not been processed due to an oversight, and a case management conference was held on August 14, 2020. During the conference, the Minister agreed to issue a reconsideration decision under subsection 27.1 of the Act "as soon as possible". Months later, the Appeal Division granted the applicant leave to appeal the lower decision on the basis that there existed at least an arguable case that the General Division committed a jurisdictional error in refusing to consider the applicant's request. While agreeing that only a decision on a reconsideration request could be appealed to the General Division, the Appeal Division noted that the General Division had in the past determined that a refusal by Service Canada to issue a reconsideration decision was itself a reviewable decision.

[10] Following a third case management conference before the Appeal Division, the Minister issued a reconsideration decision on December 11, 2020, and found that the applicant did not resume residence in Canada until April 6, 2019. In light of the Minister's reconsideration decision, the Appeal Division dismissed the applicant's appeal on March 10, 2021, finding that the question of whether the General Division had committed a jurisdictional error was moot. It is the Appeal Division's decision that this Court must now review.

[11] I should add to this brief review of the facts that Mr. Mudie's 2018 OAS pension application has generated a large volume of submissions, emails, letters, case conferences and incidental proceedings before both the General and the Appeal Divisions. Indeed, it is fair to say that no stone has been left unturned during the three years Mr. Mudie's application has spanned so far. Additionally, two other applications for judicial review were commenced before the Federal Court (file numbers T-624-20 and T-1513-20) but were eventually dismissed for mootness. That being said, as noted above, the only decision that is properly before this Court is the Appeal Division decision of March 10, 2021.

[12] The Appeal Division dismissed the appeal because the matters raised by the applicant were either moot, beyond its authority or outside of its jurisdiction.

[13] According to the Appeal Division, the question of whether a reconsideration decision was required could have no practical effect on the parties; even if it were to agree with the applicant that a reconsideration decision was required, the finding would serve no purpose since Service Canada had already issued such a decision. The Appeal Division also refused to exercise its discretion to address the issue despite its mootness, on the grounds that its decision would not be binding on the Minister in other cases and would not force Service Canada to modify its practices.

[14] The Appeal Division further determined that it had no authority to grant the other relief the applicant sought, as it could only exercise the powers prescribed by subsection 59(1) of the

Department of Employment and Social Development Act, S.C. 2005, c. 34 (DESDA), those being that:

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.	59 (1) La division d'appel peut rejeter l'appel, rendre la décision que la division générale aurait dû rendre, renvoyer l'affaire à la division générale pour réexamen conformément aux directives qu'elle juge indiquées, ou confirmer, infirmer ou modifier totalement ou partiellement la décision de la division générale.

[15] Where the Appeal Division substitutes its own decision for that of the General Division or sends the matter back to the General Division for reconsideration with directions, it cannot go beyond the General Division's powers. Those are prescribed by subsection 54(1) of the DESDA:

54 (1) The General Division may dismiss the appeal or confirm, rescind or vary a decision of the Minister or the Commission in whole or in part or give the decision that the Minister or the Commission should have given.	54 (1) La division générale peut rejeter l'appel ou confirmer, infirmer ou modifier totalement ou partiellement la décision visée par l'appel ou rendre la décision que le ministre ou la Commission aurait dû rendre.

[16] On that basis, the Appeal Division found that it could not refer the matter back to the Minister with procedural directions. Indeed, neither the Appeal Division nor the General Division has the power to refer a matter back to, nor direct the procedures of the Minister; they only have the power to replace the Minister's decision with that of their own. In the same vein, the Appeal Division determined that it could not award costs or damages against the Minister; there is no explicit power in the DESDA to order costs against a party or to award damages, and neither the *Canadian Bill of Rights*, S.C. 1960, c. 44 (Bill of Rights) nor the *Canadian Charter of*

Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, s. 91(24) (Charter) expand the Tribunal's jurisdiction.

[17] Finally, the Appeal Division concluded that it did not have jurisdiction to consider the Minister's reconsideration decision, because it can only hear appeals of General Division decisions. The Appeal Division therefore directed the applicant to appeal the reconsideration decision to the General Division, which he did on March 8, 2021 (Applicant's Record, Exh. 94, at p. 294).

[18] The applicant is obviously displeased with the conclusion of the Appeal Division and seeks judicial review of its decision. While I can readily appreciate that the choices Service Canada presented him with on September 16, 2019, were at best bewildering and could be interpreted as an implicit acceptance of the Minister's residency determination, that does not constitute a ground upon which this Court may intervene with regard to the Appeal Division's decision. On judicial review, the role of this Court is to assess whether the decision of the Appeal Division is reasonable, both in its reasoning process and in its outcome. We are not tasked to decide the issue ourselves according to our own yardstick, but to approach the reasons provided by the Appeal Division with "respectful attention", with a view to understanding both the chain of analysis and the conclusion: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 83-84; *Parks v. Canada (Attorney General)*, 2020 FCA 91, [2020] F.C.J. No. 618 at para. 8; *Balkanyi v. Canada (Attorney General)*, 2021 FCA 164, 2021 CarswellNat 3029 (WL Can) at para. 13.

[19] There is no doubt in my mind that the Appeal Division could reasonably conclude that the Minister's December 11, 2020, reconsideration decision rendered moot the issue of whether Service Canada's August and September 2019 residency determinations were "a decision or determination" as defined in subsection 27.1(1) of the Act. The applicant himself acknowledges as much (Applicant's Record, Memorandum of Fact and Law, at para. 4(b), p. 666). The best the applicant could hope for was a finding that a reconsideration decision was required; as such a decision had been made by the time the Appeal Division ruled on his appeal, there no longer existed a live controversy between the parties.

[20] Furthermore, I have not been convinced by the applicant that the Appeal Division acted unreasonably in refusing to exercise its discretion to address the issue despite its mootness. As it noted, a decision on the narrow issue raised by the applicant could be of no precedential value; in those circumstances, the importance of an adversarial context, the need to conserve scarce resources and respect for the traditional adjudicative role of courts and tribunals militate in favour of not exercising the discretion to address a moot issue.

[21] It is to be hoped, however, that the Minister will take note of the applicant's predicament and, no doubt that of many other vulnerable seniors who deal with Service Canada, with respect to their OAS pension applications. Mr. Mudie can certainly be excused for having been confused when he received the options letter from Service Canada, and for having mistakenly concluded that choosing one of the options put to him would inevitably preclude him from later challenging the residency determination underlying these options. Like the Appeal Division, I share the

applicant's concern and strongly encourage the Minister to clarify this matter when communicating with OAS pension applicants.

[22] I am also of the view that the Appeal Division did not err in concluding that it could not deal with the December 2020 reconsideration decision. A statutory tribunal is only empowered to adjudicate the type of cases over which it has been granted jurisdiction. Under the DESDA, Service Canada makes the reconsideration decisions and an appeal of those decisions must be brought to the General Division (DESDA, at s. 52(1)). The Appeal Division only hears appeals of decisions from the General Division, and the grounds of appeal are limited (DESDA, at s. 58(1)). It is true that section 64 of the DESDA grants both Divisions the power to decide "any question of law or fact that is necessary for the disposition of any application made under [the DEDSA]". But as the Appeal Division aptly noted, this broad power must be exercised within the scope of each Division's subject-matter jurisdiction.

[23] As mentioned earlier, the applicant has filed an appeal of the reconsideration decision before the General Division, and counsel for the Attorney General confirmed at the hearing that Mr. Mudie will have an opportunity to address all of the issues he wishes to raise with respect to his residency requirement in that appeal. Considering the protracted history of this file, it is to be hoped that the appeal of Mr. Mudie's OAS pension application will be heard and decided as expeditiously as possible.

[24] Finally, the Appeal Division could also reasonably conclude that it did not have the authority to refer the matter back to the Minister, to direct the Minister's actions, nor to order

costs or damages. Once again, an administrative tribunal cannot exceed its statutory grant of power: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 35; Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis, 2017), at 129. Neither the General Division nor the Appeal Division has been granted the power to refer a matter back to the Minister nor to direct the Minister's procedures. Pursuant to the DESDA, the General Division is empowered to give the decision that the Minister should have given (s. 54(1)), and the Appeal Division may similarly replace the General Division's decision or return it to the General Division with any directions it considers appropriate (s. 59(1)). Neither the Bill of Rights nor the Charter expand the Tribunal's jurisdiction: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 at paras. 81-82.

[25] For all of the foregoing reasons, I would therefore dismiss this application for judicial review. From the moment the Minister issued a reconsideration decision, the live controversy between the parties as to whether the General Division failed to exercise its jurisdiction disappeared. As for the merits of the reconsideration decision, I trust that it will be dealt with appropriately, as it should, by the General Division.

[26] The respondent did not seek costs, and none will be awarded.

[27] The style of cause shall be amended to reflect that the Attorney General of Canada is the only properly named respondent in this matter.

"Yves de Montigny"
J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
René LeBlanc J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-105-21
STYLE OF CAUSE:	PETER WILLIAM MUDIE v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	NOVEMBER 29, 2021
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	GAUTHIER J.A. LEBLANC J.A.
DATED:	DECEMBER 9, 2021

APPEARANCES:

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