

Federal Court



Cour fédérale

Date: 20190820

Docket: T-1717-18

Citation: 2019 FC 1081

Ottawa, Ontario, August 20, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

FOROOZAN SAVODJI

Appellant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision of the Social Security Tribunal (SST)'s Appeal Division (Appeal Division) dismissing the Applicant's appeal of a decision of the SST's General Division (General Division). The General Division summarily dismissed the Applicant's appeal of a decision of the Minister of Employment and Social Development (the Minister) determining that she was not eligible for a *Canada Pension Plan* (CPP) survivor's pension because her

husband had not contributed to the CPP for ten years and the Appeal Division "... dismissed the appeal because the General Division made no errors upon which the appeal could succeed."

[2] For the following reasons, this application is dismissed.

II. Facts

[3] The Applicant's husband was born in Iran on January 31, 1965. The Applicant and her husband married in Iran on February 8, 1993. Her husband had worked in Iran for 18 years as an engineer before they moved to Canada in 2008 with their two teenage sons. From 2011 to 2015, the Applicant's husband worked and contributed to the CPP after taking a two-year course at SAIT Polytechnic where he received his APEGA license. After living in Canada for 8 years, her husband worked in UAE from 2015 until his death in July 2016.

[4] On August 12, 2016, the Applicant applied for a CPP survivor's benefit. . The Minister refused her initial application and her reconsideration application because her husband had not contributed to the CPP for the minimum contributory period. Canada does not have a social security agreement with Iran which would allow the recognition of his work history prior to coming to Canada.

[5] The Applicant appealed the Minister's decision to the General Division. She argued that her husband had paid \$8,242.63 to CPP, a sum which should be paid to his survivors. , Given that the Applicant's husband did not have sufficient contributions to the CPP, the Division summarily dismissed the appeal because it had no reasonable chance of success.

[6] The General Division noted that under s. 44(3) of the CPP, the minimum qualifying period for the survivorship benefit is the lesser amount of (a) one third of the total number of years within the contributor's contributory period, not less than three years, or (b) at least ten years. In this case, the Applicant's husband's contributory period was 34 years from the month after he turned 18 years old (February 1983) until the month in which he passed away (July 14, 2016). One third of 34 years would be 11 years and three months. As such, the lesser amount of ten years was the minimum qualifying period in his case. The Applicant's husband had only made valid CPP contributions for five years.

[7] The General Division noted the Applicant's arguments that the contributory period should only count based on when her husband arrived in Canada and that she was a single parent who would be left in financial hardship without the benefit. However, the General Division noted that the Tribunal is not empowered to exercise any form of equitable power. The General Division also noted the Applicant's argument that if Canada does not have a social security agreement with Iran, she should be entitled to the amount that was deducted from her husband's salary to contribute to the CPP. The General Division found that it only had the powers granted to it by its governing statute, and as such, not have the power to order the Respondent to do so.

[8] The Applicant appealed the decision on the basis that the General Division failed to observe a principle of natural justice.

[9] The Appeal Division dismissed the Applicant's appeal, without holding an oral hearing, as one was neither requested, nor was it necessary in this situation.

[10] The Appeal Division noted that under the *Department of Employment and Social Development Act (DESDA)*, SC 2005, c 34, there are only three grounds of appeal: 1) that the General Division failed to observe a principle of natural justice or made a jurisdictional error, 2) made an error in law, or 3) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[11] The Appeal Division found that the Applicant did not dispute any of the facts on which the General Division based its decision. The Appeal Division said that the Applicant argued, as she did before the General Division, that the law should be changed, because her husband was not present in Canada for ten years before he died and therefore could not have met the minimum period under the legislation. The Applicant further argued that the appeal should be allowed on the basis of compassion or extenuating circumstances.

[12] The Appeal Division found that the General Division was created by legislation and does not have authority to change the legislation or to allow an appeal based on compassion or extenuating circumstances. The Appeal Division held that, for the same reasons, it could not allow the appeal.

[13] The Applicant has represented herself throughout these proceedings and indicates she has worked for the Calgary Board of Education since 2015 as a language interpreter. She has two sons (aged 21 and 17) and they live in Calgary.

III. Relevant Provisions

Canada Pension Plan RSC 1985, c.C8,

Calculation for other supplementary benefits

44(3) For the purposes of paragraphs (1)(c), (d) and (f), a contributor is deemed to have made base contributions for not less than the minimum qualifying period only if the contributor has made base contributions during their contributory period

(a) for at least one third of the total number of years included either wholly or partly within their contributory period, excluding from the calculation of that contributory period any month in a year after the year in which the contributor reaches 65 years of age and for which the contributor's base unadjusted pensionable earnings were equal to or less than the contributor's basic exemption for that year, but in no case for less than three years; or

(b) for at least ten years

Calcul dans le cas des autres prestations supplémentaires

44(3) Pour l'application des alinéas (1)c, d) et f), le cotisant n'est réputé avoir versé des cotisations de base pendant au moins la période minimale d'admissibilité que s'il a versé des cotisations de base au cours de sa période cotisable :

a) soit pendant au moins trois années, représentant au moins le tiers du nombre total d'années entièrement ou partiellement comprises dans sa période cotisable, celle-ci ne comprenant pas tout mois dans une année qui suit l'année où il atteint l'âge de soixante-cinq ans et à l'égard de laquelle ses gains non ajustés de base ouvrant droit à pension étaient égaux ou inférieurs à son exemption de base pour cette année;

b) soit pendant au moins dix années.

Social Security Tribunal Regulations SOR/2013-60

Summary Dismissal

Notice to appellant

22 (1) Before summarily dismissing an appeal pursuant to subsection 53(1) of the Act, the General Division must give notice in writing to the appellant and allow the appellant a reasonable period of time to make submissions.

Rejet sommaire

Avis

22 (1) Avant de rejeter de façon sommaire l'appel en vertu du paragraphe 53(1) de la Loi, la division générale avise l'appellant par écrit et lui donne un délai raisonnable pour présenter des observations.

Department of Employment and Social Development Act, SC 2005, c 34

Appeal to Tribunal — General Division

Dismissal

53(1) The General Division must summarily

Appel au Tribunal — division générale

Rejet

53(1) La division générale rejette de façon

dismiss an appeal if it is satisfied that it has no reasonable chance of success.

Appeal

(3) The appellant may appeal the decision to the Appeal Division.

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Criteria

(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success

sommaire l'appel si elle est convaincue qu'il n'a aucune chance raisonnable de succès.

Appel à la division d'appel

(3) L'appelant peut en appeler à la division d'appel de cette décision.

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants:

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

Critère

(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès.

IV. Issue

Was it reasonable of the Appeal Division to dismiss the Applicant's appeal of the General Division's summary dismissal decision?

[14] In *Garvey v Canada (Attorney General)*, 2018 FCA 118, Justice Gleason wrote for the Court in examining the case of an applicant seeking to set aside the decision of the SST Appeal

Division. Justice Gleason affirmed that the Appeal Division's Decision may be set aside only if it is unreasonable, "that being the applicable standard of review to be applied by this Court as was held in *Atkinson v Canada (Attorney General)*, 2014 FCA 187 (CanLII) at paras. 24-32". The standard of review for this matter is reasonableness.

V. Analysis

[15] The Applicant questions how her husband could possibly contribute to the CPP for ten years when he only lived in Canada for eight years. She notes that he contributed to the CPP for five out of the eight years when he was living here, which is more than one third of the total period and not less than three years. The Applicant also questions the status of the \$8,242.63 in CCP contributions that her husband did make and believes they should be paid back to her.

[16] The Applicant asks for justice in her case as she did not receive any benefit from her husband's contributions in Iran or Canada. She says that when people such as themselves come to Canada once they are older, they cannot work the minimum of ten years and that the law should take this into consideration as this is unjust. The Applicant also argued it takes a long time to transition to a professional job in Canada, as her husband was an APEGA licensee after working for 18 years as an engineer in Iran.

[17] Section 53(1) of the *DESDA* provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. In this case the General Division gave notice to the Applicant and the Applicant filed submissions before a decision was made. This complied with s. 22(1) of the *Social Security Tribunal Regulations*, cited above.

[18] Section 58 of the *DESDA* sets out limited grounds of appeal, as cited above. None of the grounds were argued by the Applicant. Without any ground of appeal under s. 58(1) of the *DESDA*, the Appeal Division had no basis to intervene in the General Division decision. But, given that the Applicant submitted the result was unjust, even if I assess whether there was any procedural unfairness, I am unable to find any as the Applicant provided submissions and they were considered.

[19] As well, though not specifically argued by the Applicant but as part of the unjust argument she raised, I can confirm that the Applicant's s.15 *Charter* rights are not violated by the calculation of contributory periods for the CPP when the country they immigrated from does not have an agreement in place. (*Lezau v Canada (Social Development)*, 2008 FCA 99).

[20] It was confirmed at the hearing that the facts were not in dispute, but rather that the system is not just and in this case the Applicant felt there should be an exception considering her situation. Sadly for the Applicant there is no exception or discretion provided for in the legislation related to CPP and survivor's benefits.

[21] The Applicant argued that in the past, the Government had made changes to the qualifications for CPP and that this was proof that changes happen and that her situation should prompt a change. It is not the role of the Court to initiate or enact legislation and in this judicial review I will only be reviewing the decision on a reasonableness standard.

[22] I find that the General Division properly concluded that it did not have jurisdiction to allow an appeal based on compassion or extenuating circumstances. Nor can the tribunals change the legislation to suit factual situations that evoke compassion. With this in mind, s. 53(1) of the *DESDA* provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success and that is what occurred in this situation.

[23] The Appeal Division reasonably found that the General Division applied this test and did not fail to observe the principles of natural justice and dismissed the appeal as the General Division made no errors that would allow the appeal to succeed.

[24] Nor is there any provision to allow the repayment of CPP contributions. The Respondent explained to the Applicant that in some ways CPP is like insurance: you pay in and if you meet the qualifications for a claim then you receive payments, but you cannot receive your insurance contributions back if you do not make a claim. Another analogy is Employment Insurance (EI) premiums that are paid by Canadians: if we do not access the EI benefits there is no provision to have all of our contributions repaid to us or our survivors. The money her husband contributed to CPP cannot be repaid to her or to her children as survivors.

[25] In sum, the Applicant asked the SST and is asking the Court to make an order contrary to the limits on survivorship benefits set out in the CPP. It was reasonable of the Appeal Division to uphold the General Division's finding that they could not do so. As such, this application for judicial review is dismissed.

[26] The Respondent is not seeking costs and none are awarded.

THIS COURT'S JUDGMENT in T-1717-18 is that:

1. The application is dismissed;
2. No costs are awarded.

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1717-18

STYLE OF CAUSE: SAVODJI v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: AUGUST 14, 2019

JUDGMENT AND REASONS: MCVEIGH J.

DATED: AUGUST 20, 2019

APPEARANCES:

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FOR THE APPELLANT
(Self-Represented)

Christian Malciw

For The Respondent

SOLICITORS OF RECORD:

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FOR THE RESPONDENT