Federal Court  Cour fédérale

Date: 20110112

Docket: T-955-09

Citation: 2011 FC 26

BETWEEN:

NASEEM HUSSAINI
AND SYED HUSSAINI

Applicants

and

MINISTER OF SOCIAL DEVELOPMENT

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

Introduction

[1] Mrs. Naseem Hussaini (the "Applicant") and Mr. Syed Hussaini (collectively the "Applicants") seek judicial review of a decision made on May 11, 2009 by the Canada Pension Plan/Old Age Security Review Tribunal (the "Review Tribunal"). In that decision, the Review Tribunal dismissed the Applicant's appeal from a review decision which determined that the Applicant did not qualify for an Old Age Security ("OAS") pension as of July 2005.

Facts

[2] The facts are taken from the affidavit of Mr. Trevor Bank, including the attached exhibits. The relevant materials from the Minister of Social Development Canada's (the "Minister") department are attached as exhibits to the affidavit of Mr. Bank.

[3] The Applicants were born in India. The female Applicant claims that she was born on June 8, 1939 but all her documentation issued prior to 2007 indicates that she was born on June 10, 1948.

[4] The female Applicant met Mr. Hussaini when her family was living in a building with his family. Her marriage was arranged to Mr. Hussaini following her father's death. Although the dates seem to be contested, the Applicants' marriage certificate indicates that they were married on June 4, 1966. At the hearing before the Review Tribunal, the female Applicant testified that she was between the ages of 17 and 19 when she married Mr. Hussaini. The Applicants' first son was born in India on May 25, 1967 and their second son was born in Canada on June 1, 1974.

[5] The female Applicant was issued an Indian passport on February 18, 1970. This document records that her date of birth is June 10, 1948. Her Canadian Immigration Identification Record of January 28, 1974, her certificate of Canadian Citizenship dated 1977 and her application for a Canadian Social Insurance Number card dated September 7, 1973 all show that her date of birth is June 10, 1948. The female Applicant made two attempts to amend her Canadian Immigration

Identification Record but these were denied. Her Canadian passport was issued on May 11, 2005 with a birth date of June 10, 1948.

[6] At the hearing before the Review Tribunal, the female Applicant testified, and confirmed her testimony, that she was unaware of her true birth date until 2005.

[7] On March 29, 2005, the female Applicant applied for an OAS pension, using the birth date of June 8, 1939. On February 21, 2006, she was granted a full OAS pension and Guaranteed Income Supplement ("GIS") effective July 2004, using June 8, 1939, as her birth date.

[8] The Minister advised the Applicant on April 18, 2007, that she did not qualify for the OAS as of June 2004, and as a result had been overpaid a total of $21,016.46. The female Applicant requested a review of that decision. She submitted, among other documents, marriage certificates obtained in March 2005, affidavits from herself, her aunt, and her uncle dated February 2005, and a letter dated April 4, 2007, from Argosy Securities Inc. verifying the age of the female Applicant and the fact that she receives a monthly Life Income Fund payment from that company.

[9] The Minister rejected the Applicants' request for a review on June 4, 2007 on the basis that the female Applicant's Canadian Citizenship card, Canadian Passport, and Canadian Immigration Identification Record tended to show that the female Applicant was born in June 1948.

[10] The Minister did not file materials pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), as she was of the opinion that all the Review Tribunal material was in

the possession of the Applicants. That material was provided as appendixes to affidavits filed on behalf of the Applicants and the Minister.

[11] The female Applicant submitted a Notice of Appeal to the Review Tribunal on September 5, 2007. Together with her Notice of Appeal, she submitted letters from a Dr. De Souza and a Dr. Lacy dated November 27, 2007 and August 9, 2007, respectively. These letters say that the Applicant was born in 1939. Dr. Lacy, the Applicants' family doctor for twenty years, indicated that there was no reason to doubt that the female Applicant was 68 years old in 2007. Her income tax records for 2006 and 2007 also reflected a birth date in 1939.

[12] The Review Tribunal hearing was held on January 27, 2009. The Review Tribunal dismissed the appeal on May 11, 2009, finding that the female Applicant's date of birth was June 10, 1948.

[13] Mr. Hussaini also appealed a decision of the Minister. His appeal was heard together with his wife's appeal, but a separate decision was rendered and the within application for judicial review does not address the decision relative to Mr. Hussaini.

Discussion and Disposition

Preliminary Issues

[14] The Minister has raised a couple of preliminary issues. The first issue relates to the Affidavit of Mr. Hussaini dated December 21, 2009. This Affidavit is not sworn and it is not commissioned.

Further, the Minister says that the exhibits are not accurately identified in accordance with Rule 80(3) of the Rules.

[15] The Minister argues that the Affidavit is liable to be found inadmissible, relying upon the decision in *Huang v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 106 (QL). As well, the Minister submits that much of the Affidavit contains argument and opinion. The Minister argues that it should be struck in its entirety.

[16] As well, the Minister submits that the failure of the female Applicant to file an affidavit should lead to the finding of an adverse inference against her, pursuant to Rule 81(2) of the Rules.

[17] The Applicant did not reply to this issue as explained by the Minister.

[18] I agree with the arguments advanced by the Minister. The only affidavit filed by the Applicants on the record before the Court is the Affidavit of Mr. Hussaini. It is signed by him but it is not sworn. In *Huang*, the respondent's objection to an affidavit was dismissed, in part because the objection was raised for the first time at the oral hearing. In the present case, the Minister objected to the admission of the Affidavit in written argument and it was open to the female Applicant to seek leave to file a supplementary affidavit or record.

[19] Since all of the exhibits attached to Mr. Hussaini's Affidavit are unidentified and the Affidavit is largely argumentative, it should be struck. However, this does not mean that it must be physically removed from the record. In this case, it means that it will not be considered.

[20] It is unclear that Rule 81(2) necessarily applies in this case. That Rule provides as follows:

81(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.	81(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[21] This Rule merely grants discretion in the Court to draw an adverse inference where an affidavit is based on belief. This Rule does not necessarily prescribe that the failure by an applicant to file her own affidavit necessarily leads to dismissal of the application. An application for judicial review can proceed without an affidavit being filed on behalf of the applicant or applicants; see *Ominayak v. Lubicon Lake Indian Nation Election (Returning Officer)* (2000), 185 F.T.R. 33, reversed on other grounds (2000), 267 N.R. 96.

[22] In any event, this is an application for judicial review and as such, proceeds on the basis on the record that was before the subordinate decision-maker. In the absence of evidence based on personal knowledge, any error must appear on the face of that record; see *Turcinovica v. Canada (Minister of Citizenship and Immigration)* (2002), 216 F.T.R. 305. The necessary facts are contained in that record, which is attached to an affidavit filed on behalf of the Minister. The necessary facts are accordingly before the Court. The Affidavit of Mr. Hussaini can stand but as noted above, it will not be considered.

[23] The Minister further objects to the manner in which the Applicants have framed the style of cause. The Minister submits that there is only one Applicant, the female Applicant. She was the sole appellant before the Review Tribunal. Mr. Hussaini did not seek judicial review of the Review Tribunal's decision dismissing his appeal and according to the Minister, he is not a proper party in the within proceedings.

[24] As well, the Minister argues that the style of cause should be amended to show the Attorney General of Canada as the Respondent rather than the Minister of Social Development.

[25] Once again, the Applicants did not address these arguments. However, these matters merit some brief comments.

[26] Part 5 of the Rules dealing with applications including applications for judicial review does not contain a definition of "applicant". However, a definition is found in Rule 2 as follows:

The following definitions apply in these Rules.	Les définitions qui suivent s'appliquent aux présentes règles.
…	…
"applicant"	« demandeur »
(a) except in the case of an application that has been certified as a class proceeding, includes a person on whose behalf an application is commenced; and	a) Dans le cas d'une action ou d'une demande autre que celle autorisée comme recours collectif, est assimilée au demandeur toute personne pour le compte de laquelle l'action ou la demande est introduite;
(b) in the case of an application that has been certified as a class proceeding, means	b) dans le cas d'une action ou d'une demande autorisée comme recours collectif :

(i) in respect of the common questions of law or fact, the representative applicant, and	(i) à l'égard des points de droit ou de fait communs, le représentant demandeur,
(ii) in respect of individual questions, the member to whom those questions apply.	(ii) à l'égard des points individuels, le membre concerné.

[27] Paragraph (a) of the above quoted definition applies in this case. The definition is basic and the criterion is that an application has been commenced. Finer questions as to the true status of an "applicant" can be addressed in the context of subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides as follows:

An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

[28] The key factor here is that a person bringing an application is "directly affected by the matter in respect of which relief is sought".

[29] In the present case, Mr. Hussaini was a party to the Applicant's appeal before the Review Tribunal. However, that proceeding is not co-equivalent with the present proceeding. While the quantum of the female Applicant's pension benefits may form part of the family income for the female Applicant and Mr. Hussaini, there is no evidence before me to show that Mr. Hussaini is "directly affected" by the decision under review. Accordingly, in the absence of evidence, I decline to exercise my discretion to recognize him as an appropriate party to this application for judicial review and the style of cause will be amended accordingly.

[30] Rule 303 defines who shall be named as a respondent in an application for judicial review, as follows:

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person	303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
Application for judicial review	Défendeurs — demande de contrôle judiciaire
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.
Substitution for Attorney General	Remplaçant du procureur général
(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the	(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au

Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.	paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

[31] The Minister of Social Development, who is currently named as the Respondent in this application, is not "directly affected" by the relief sought in this application for judicial review, nor is there any requirement in the *Old Age Security Act*, R.S.C. 1985, c. O-9, that he be named as a respondent.

[32] It follows then, that the conditions of Rule 303(1) are not met and that Rule 303(2) applies, meaning that the appropriate respondent is the Attorney General of Canada.

[33] Accordingly, the style of cause will be amended to delete Mr. Hussaini as an applicant and to delete the Minister of Social Development as a respondent and to name the Attorney General of Canada as the sole Respondent (the "Respondent").

[34] The Respondent raises a further issue which is in the nature of a preliminary issue relating to the attempt of the Applicant to introduce new evidence. The so-called new evidence is a picture of Mr. Hussaini as a six-year old boy. According to the submissions filed on behalf of the Applicant, this photograph was discovered, by accident, subsequent to the hearing before the Review Tribunal. The Applicant seeks to have this photograph entered as new evidence, presumably in support of her claim that her correct birth date should be recognized as June 8, 1939.

[35] The two-part test for the introduction of new evidence is set out in *Kent v. Canada (Attorney General)* (2004), 328 N.R. 161, as follows:

> a. the new facts must not have been discoverable with due diligence, and
>
> b. the new facts must be material, in that they would be practically conclusive to the matter.

[36] While the Applicant argues that this test has been met in this case, the Respondent disagrees. In the first place, he says that the Review Tribunal could not have "failed" to admit new evidence as none was placed before it, pursuant to the applicable legislation. Further, he argues that the Applicant cannot now try to introduce new facts that are not the subject of the application for judicial review.

[37] This issue can be disposed of briefly. The Applicant has not met the legal test as set out in *Kent*. Even if I assume that the photograph was discoverable with due diligence, it is not material to the matter at hand. The photograph relates to the birth date of Mr. Hussaini. The Review Tribunal's decision with respect to Mr. Hussaini is not a matter that is before the Court in the present application for judicial review. A photograph of Mr. Hussaini would not conclusively show that the Review Tribunal erred in its factual finding concerning the Applicant's date of birth.

Substantive Issues

[38] Turning now to the merits of this matter, the first issue to be addressed is the appropriate standard of review. Having regard to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, there are now only two possible standards of review,

correctness or reasonableness. The standard of correctness will apply to questions of law and issues of procedural fairness.

[39] The Applicant raises an alleged procedural error by the Review Tribunal in failing to request a forensic report. This matter was raised in the written submissions filed on behalf of the Applicant. At the Review Tribunal hearing, Mr. Hussaini testified that he had hired Anaya Solutions Inc. to forensically confirm the age of the Applicant's family records, but provided no written documentation from Anaya. The Review Tribunal described this evidence as hearsay and gave it little weight. The Applicant now argues that the Review Tribunal erred by failing to have inquired about the forensic report during the hearing.

[40] In reply, the Respondent submits that the Applicant's failure to present a forensic report at the hearing before the Review Tribunal was her own choice and cannot be considered to be an error by the Review Tribunal.

[41] The Applicant characterizes this alleged error as a breach of procedural fairness. With respect, I disagree.

[42] No authority has been provided to show that the duty of fairness requires the Review Tribunal to seek evidence, in general or expert evidence, when an appeal proceeds before it. In my opinion, the Review Tribunal did not breach the duty of fairness owed to the Applicant by failing to demand that she produce a forensic report to authenticate the family records.

[43] The standard of reasonableness will apply to questions of fact and questions of mixed fact and law. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 47, the Supreme Court held that the standard of reasonableness applies to both the decision-making process and the outcome of the decision:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

[44] In my opinion, the central question arising in this application is whether the Review Tribunal made an error of fact in its finding as to the Applicant's date of birth. This is a matter of fact and reviewable on the standard of reasonableness.

[45] The Applicant argues that the Review Tribunal failed to assess her family records that indicate she was born in 1939 and further that the Review Tribunal failed to consider the medical opinion regarding her age. She suggests that the Review Tribunal improperly focused on the Canadian Immigration Identification Records and failed to recognize that those records were based on incorrect passports. Finally, she argues that the Review Tribunal erred in finding that she was between the ages of 17 and 19 when she married Mr. Hussaini.

[46] For his part, the Respondent submits that the Review Tribunal's decision is reasonable having regard to the evidence that was submitted. The Applicant's Social Insurance Number showed a birth date of June 10, 1948 and was only amended two years after the Applicant applied

for the OAS pension. The Applicant applied for that pension in 2005 and sought to amend her Social Insurance Number in 2007.

[47] The issue before the Review Tribunal was the Applicant's birth date, for the purpose of determining her eligibility for the OAS pension. A birth date is essentially a question of fact and accordingly reviewable on the standard of reasonableness. The Review Tribunal considered the admissible evidence that was tendered by the Applicant.

[48] In the result, I am satisfied that the decision of the Review Tribunal is reasonable, having regard to the evidence before it.

[49] In conclusion, this application for judicial review is dismissed. In the exercise of my discretion, and having regard to Rule 400(1) of the Rules, I make no order as to costs.

"E. Heneghan"

Judge

Ottawa, ON
January 12, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Dhimy Egalite	FOR THE APPLICANTS
Bahaa Sunallah Christine Langill	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Egalite Law Office Ottawa, ON	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT