Federal Court  Cour fédérale

Date: 20210831

Docket: T-1168-19

Citation: 2021 FC 904

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 31, 2021

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

EDIB ALIEFENDIC

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Edib Aliefendic applied for an old age security pension, which was only partially granted. Service Canada considered that since he arrived in Canada in 1991, he had accumulated only 25 of the 40 years of residence required to qualify for a full pension under subsections 3(2) and (3) of the *Old Age Security Act*, RSC 1985, c O-9 [the Act].

[2] Mr. Aliefendic applied for a reconsideration of this decision, taking the position that he met the requirements of paragraph 3(1)(b) of the Act and was therefore entitled to a full pension. When Service Canada refused to change its original decision, Mr. Aliefendic appealed to the General Division of the Social Security Tribunal.

[3] The General Division initially informed him that it intended to dismiss his appeal summarily as being bound to fail, but asked him to submit his written submissions in this regard. Mr. Aliefendic responded that he was of the view that 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 [the Charter] guaranteed him the same rights, benefits and privileges as all Canadians, and that he was entitled to a full pension without distinction based on length of residency in Canada after age 18. The General Division then informed him of the procedure for making a constitutional argument based on the Charter and the need to send the Notice of Constitutional Question under subsection 20(1) of the *Social Security Tribunal Regulations*, SOR/2013-60. It also informed him that if it did not receive the notice within the time limit, the appeal would be dealt with without regard to the constitutional issue.

[4] Mr. Aliefendic failed to deliver the Notice of Constitutional Question and he stated in paragraph 9 of his Memorandum of Fact and Law before the Court:

> [TRANSLATION]
>
> On June 5, 2018, at a pre-hearing conference held by teleconference, I explained to the General Division that I did not need to file a notice in accordance with section 20(1) a of the Regulations because I had already invoked the Charter (referring to the provision, section 15) and I did not want to raise a constitutional question.

[5] Mr. Aliefendic was then advised that without a Notice of a Constitutional Question, his appeal would be treated as a [TRANSLATION] "regular" appeal.

[6] The General Division dismissed his appeal on the basis that Mr. Aliefendic did not meet the conditions set out in paragraph 3(1)(b) of the Act. The General Division referred to the fact that Mr. Aliefendic had invoked the provisions of the Charter but had chosen not to submit the Notice of Constitutional Question.

[7] Mr. Aliefendic did not seek leave to appeal this decision to the Appeal Division of the Social Security Tribunal, but rather asked the General Division to rescind or amend its decision, pursuant to paragraph 66(1)(b) of the *Department of Employment and Social Development Act*, SC 2005, c 34. He reiterated the same arguments raised in his original appeal, namely that section 15 of the Charter guaranteed him the same rights, benefits and advantages as those conferred on all Canadians by the Act, and that the requirement of 40 years of residence in Canada to qualify for a full pension was discriminatory.

[8] The General Division dismissed the application to rescind or amend its original decision on the basis that Mr. Aliefendic had not submitted any evidence that established a new and material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[9] Mr. Aliefendic has filed an application for leave to appeal to the Appeal Division from this latest decision, citing significant errors of fact and a failure of the General Division to

observe the principles of natural justice. Again, he argued that the Act is discriminatory because it requires 40 years of residence in Canada after age 18 to qualify for a full pension.

[10] The Appeal Division found that Mr. Aliefendic's application for leave had no reasonable chance of success because his application to rescind or amend the original decision of the General Division was not accompanied by any evidence establishing a new and material fact. The Appeal Division added that there was no evidence that the General Division overlooked or misinterpreted any material evidence, failed to observe the principles of natural justice, or exceeded or declined to exercise its jurisdiction. In short, the Appellate Division concluded that Mr. Aliefendic's appeal was doomed to fail and should be dismissed. It is this decision that is the subject of this application for judicial review.

II. Issues and standard of review

[11] This application for judicial review raises only one issue, namely, whether the Appellate Division erred in dismissing the application for leave to appeal the General Division's refusal to rescind or amend its original decision.

[12] The standard of review applicable to this issue is reasonableness (*Cameron v Canada (Attorney General)*, 2018 FCA 100 at para 3 [*Cameron*]), with none of the exceptions to that standard, enumerated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 69, applying in this case.

III. Analysis

[13] Before the Court, the applicant argued that the Social Security Tribunal erred in its interpretation of paragraph 3(1)(b) of the Act, which reads as follows:

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 :
. . .	. . .
(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	(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;

> day on which that person's application is approved;

[14] In his view, this provision applies to him and entitles him to a full pension since, although he was not a pensioner in Canada as of July 1, 1977, he held a valid immigrant visa (when he arrived in Canada in 1991).

[15] In addition, he argued that the Social Security Tribunal failed to consider his ground of appeal based on section 15 of the Charter and the fact that the requirement of 40 years of residence in Canada to qualify for a full pension is discriminatory.

[16] First, appeals from decisions of the General Division to the Appeal Division of the Social Security Tribunal are clearly defined by section 58 of the *Department of Employment and Social Development Act*:

58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte

manner or without regard for the material before it.	des éléments portés à sa connaissance.
Criteria (2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	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.

[17] The issue before the Court, therefore, is whether it was reasonable for the Appeal Division to conclude that the applicant's appeal had no reasonable prospect of success. In other words, did the applicant raise, in his or her application for leave to appeal, "some arguable ground upon which the proposed appeal might succeed" (*Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12)?

[18] And the issue before the Appeal Division was whether the application to rescind or amend its original decision was accompanied by evidence of a new material fact within the meaning of paragraph 66(1)(b) of the *Employment and Social Development Act*.

[19] The procedural history of this case clearly shows that the applicant has presented the same factual elements from the beginning (he arrived in Canada in 1991 and had accumulated only 25 of the required 40 years of Canadian residency at the time of his application for a pension in 2016) and he raised the same arguments: he is entitled to a full pension since he meets the conditions set out in paragraph 3(1)(b) of the Act, and the obligation to accumulate 40 years of Canadian residency in order to be entitled to the full pension is discriminatory and contrary to section 15 of the Charter.

[20] Since no new material facts were raised before the General Division, the Division was justified in denying the applicant's application to rescind or amend. Since there was no error in that decision, it was reasonable for the Appeal Division to deny the applicant's application for leave.

[21] Rather the demonstrating that the General Division erred in finding that he had not presented any new material facts in support of his application to rescind or amend, the applicant reiterates before the Court the same arguments he has been making since his initial application to the General Division.

[22] While I do not have to respond to these arguments on this application for judicial review, I propose to do so in order to enlighten the self-represented applicant.

[23] The General Division did not err in concluding that the applicant does not meet the conditions set out in paragraph 3(1)(b) of the Act as these conditions are cumulative. In other words, they must all be met in order to qualify for a full pension. The applicant does not meet the condition in subparagraph (i) because on July 1, 1977, he did not reside in Canada and had not resided in Canada for any period after the age of 18 or possessed a valid immigrant visa. It is not enough for the applicant to have possessed a valid immigrant visa in 1991; he had to have possessed one in 1977, the reasoning being that he had to have a connection to Canada in 1977 but had none. Therefore, he does not fall within any of the situations for which a full pension is payable.

[24] As for the constitutional issue, the applicant does not appear to have understood that he himself waived submitting one by refusing to comply with the procedural requirement to provide advance notice of the constitutional issue under subsection 20(1) of the *Social Security Tribunal Regulations*. Throughout the proceedings before the Court, the applicant appears to have made a distinction between his Charter argument and the constitutional question. However, they are the same issue. In order to argue that the Act violates section 15 of the Charter (the constitutional issue), the applicant had to give notice. Otherwise, the General Division was justified in not considering this argument. The Appeal Division was also correct in finding no error on the part of the General Division.

IV. Conclusion

[25] Since the applicant has not raised any error by the Appeal Division and has merely reiterated the same arguments raised and analyzed by the General Division in its initial decision, the Court's intervention is not required and the application for judicial review will be dismissed. However, it will be dismissed without costs.

JUDGMENT in T-1168-19

THIS COURT'S JUDGMENT is as follows:

1. The applicant's application for judicial review is dismissed.

2. No costs are awarded.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1168-19
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APPEARANCES:

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