Date: 20071213

Docket: T-1351-06

Citation: 2007 FC 1313

Ottawa, Ontario, December 13, 2007

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

JEDRZEJ H. SELL

Applicant

and

**ATTORNEY GENERAL OF CANADA
and THE MINISTER OF HUMAN
RESOURCES DEVELOPMENT CANADA**

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Jedrzej Sell (the "Applicant") seeks judicial review pursuant to Section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, of a decision made by a Review Tribunal constituted under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "CPP"). In that decision, dated July 5, 2006, the Review Tribunal dismissed the Applicant's appeal from the decision of the Review Tribunal, rejecting his request to be awarded a full pension pursuant to the *Old Age Security Act*,

R.S.C. 1985, c. O-9, as amended (the "Act"). In his Notice of Application, the Applicant describes the relief sought as follows:

> … applicant is requesting to be granted a full *OAS Pension* as well as to strike down or initiate rewriting of the *OAS Act* as being contrary to Subsection 15(1) of the *Charter*.

I. Background

[2] The Applicant was born in Poland on January 3, 1940. He entered Canada as a landed immigrant on November 2, 1979. On March 11, 2004, he applied for an Old Age Security ("OAS") pension pursuant to the Act. On April 22, 2004, Human Resources Development Canada ("HRDC") awarded the Applicant a partial pension at a rate of 24/40ths of the full OAS pension. In a letter dated June 23, 2004, the Applicant requested reconsideration of that decision and sought the award of a full pension.

[3] By letter dated July 9, 2004, HRDC advised the Applicant that it was maintaining the original decision to award a partial, rather than a full pension. However, the amount of the pension was increased from 24/40ths to 25/40ths. HRDC gave the following reasons for its decision:

> On July 1, 1977 the *Old Age Security Act* was amended by the Canadian House of Commons to base the Old Age Security benefits upon the years of residence in Canada. As you did not apply to become a landed immigrant of Canada prior to July 1, 1977 the amount of your Old Age Security pension is determined by the number of years you resided in Canada after the age of 18 until the month of your 65th birthday. We have determined that you will have 25 years and 91 days of Canadian residence on the last day of the

> month of your 65th birthday. Therefore you are entitled to receive
> 25/40ths of an Old Age Security pension.

[4] The Applicant wrote a letter on August 9, 2004, to the Commissioner of Review Tribunals, stating that he was appealing the decision of HRDC as set out in the letters of April 22, 2004 and July 9, 2004. That letter was treated as a "Notice of Appeal" and the appeal was heard before the Review Tribunal on March 29, 2006.

[5] The Applicant represented himself at the hearing of the Review Tribunal. According to his written submissions dated January 20, 2005, the Applicant was challenging the constitutionality of section 3 of the Act on the grounds that this provision was discriminatory, contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (the "Charter"). The Applicant gave notice of a constitutional question as required by section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[6] In written submissions filed before the Review Tribunal, the Respondent HRDC identified three issues:

1) whether the Charter has retrospective application;
2) whether section 3(1) of the OAS breaches the equality guarantee in subsection 15(1) of the Charter; and

3) if subsection 3(1) offends subsection 15(1), is subsection 3(1) of the OAS saved by section 1 of the Charter.

[7] The Respondent HRDC called an expert witness, Mr. Rodney Hagglund. Mr. Hagglund produced a report addressing the residency requirements of the OAS Program, as well as the rationale for those requirements. In the written submissions filed by HRDC before the Review Tribunal, Mr. Hagglund's report was used to demonstrate the justification of the residency requirements pursuant to section 1 of the Charter.

[8] The Review Tribunal delivered its decision on July 5, 2006. A two-member majority of the Review Tribunal dismissed the Applicant's appeal. The Review Tribunal characterized the Applicant's entry to Canada on November 2, 1979, as an "event" which occurred prior to the coming into force of the Charter and it determined that the Charter did not have retrospective application to this event.

[9] As a result of its conclusion with respect to retrospective application of the Charter, the majority found that it was not necessary to determine whether section 3 of the Act infringed the Applicant's rights pursuant to subsection 15(1) of the Charter.

[10] The third member of the Review Tribunal wrote a dissenting opinion, in which he concluded that the Applicant's entry into Canada in 1979 was an "ongoing status". He conducted a section 15 Charter analysis of subsection 3(1) of the Act, and determined that this provision

offended section 15 of the Charter and was not justified pursuant to section 1 of the Charter. He concluded that section 3 of the Act is of no force or effect pursuant to subsection 52(1) of the *Constitution Act, 1982* and declared that the Applicant is entitled to a full pension under the Act.

II. Submissions

A. *The Applicant's Submissions*

[11] The Applicant submits that the majority of the Review Tribunal erred in concluding that the Charter does not have retrospective application in his case. Basing his arguments upon the dissenting opinion, he disputes the characterization of his entry into Canada on November 2, 1979, as an "event". Rather, he submits that the characteristic of having arrived in Canada after July 1, 1977, is held against him in a discriminatory fashion.

[12] The Applicant challenges the Respondents' argument, as adopted by the majority, that the timing of his entry into Canada was a matter of his own personal choice.

[13] The Applicant further submits that the Respondents have shown prejudice against him by arguing that "common sense" suggests that the date of his entry into Canada was a matter of choice. He further submits that the Respondents wrongfully omitted "an important word" in quoting paragraph 54 of the decision in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

[14] The Applicant argues that the majority mistakenly relied on the decision in *R. v. Stevens*, [1988] 1 S.C.R. 1153. He says that this decision deals with retrospective application of section 5, not subsection 15(1), of the Charter.

[15] The Applicant relies on the decision of the dissenting member of the Review Tribunal and urges the Court to allow the application.

B. *The Respondents' Submissions*

[16] The Respondents submit that since this application raises a question of law, that is, the retrospective application of the Charter, the decision of the Review Tribunal should be reviewed upon the standard of correctness.

[17] Next, the Respondents argue that having regard to the evidence before the Review Tribunal and the language of section 3 of the Act, the authors of the majority decision correctly determined that the Applicant's appeal involves the retrospective application of the Charter. The Respondents submit that in light of the fact that the Applicant had entered Canada before the Charter came into force, the Review Tribunal was required to decide whether this entry was an "event" or "ongoing status". The decision of the majority that the Applicant's entry was an "event" is consistent with the jurisprudence, including the decisions in *Benner, Sutherland v Canada*, [1997] F.C.J. No. 3; leave to appeal to the S.C.C. dismissed, [1997] S.C.C.A. No. 377 (QL), and *Bauman v. Nova Scotia*

(Attorney General), [2001] N.S.J. No. 115 (N.S.C.A.); leave to appeal to the S.C.C. dismissed, [2001] S.C.C.A. No. 27 (QL).

[18] In response to the Applicant's argument that the Respondents omitted the word "generally" in quoting paragraph 54 of *Benner* and did not refer to paragraph 56 of that decision, the Respondents submit that the reasons of the majority show that the members understood the law and guiding principles arising from *Benner*. The majority quoted from paragraph 54 of *Benner* and said that characteristics resulting from a choice to take are "more likely" to be classified as events. Further, they submit that the majority's findings, that the Applicant's entry into Canada and the changes to the residency requirements under the Act occurred prior to the Charter, are consistent with paragraph 56 of *Benner*. This shows that the majority was aware of and applied the allegedly "missing" paragraphs of the *Benner* decision.

[19] With respect to the dissenting opinion, the Respondents submit that this opinion is unpersuasive and not determinative of this application for judicial review.

[20] The Respondents raised submissions regarding the Review Tribunal's consideration of the evidence and respect for procedural fairness. First, the Respondents say there is nothing in the decision to suggest that the Review Tribunal failed to consider the evidence or to examine it in the context of the Charter arguments that were advanced. They submit that the Applicant cannot ask the

Court to reweigh the evidence in an application for judicial review. In this regard, the Respondents rely on the decision in *Osborne v. Canada (Attorney General)*, (2005) FCA 412 (QL).

[21] Second, the Respondents submit that there is nothing to show that the Review Tribunal acted with prejudice. The Review Tribunal assisted the Applicant by providing him with copies of Charter jurisprudence at the hearing of the appeal, the Review Tribunal explained the purpose of the hearing and encouraged the Applicant to make submissions and to ask questions during the hearing.

[22] Finally, the Respondents submit that the relief sought by the Applicant cannot be granted by the Court upon an application for judicial review. Should the Court find a reviewable error, the only relief available is an order referring the matter back for a rehearing before a differently constituted Review Tribunal.

III. Discussion and Disposition

[23] The Applicant is arguing that the Tribunal erred in dismissing his appeal on the basis that it would involve a retrospective application of the Charter. Largely because it is so legally driven, it is my view that this issue should be reviewed on a correctness standard.

[24] In *Canada (Minister of Human Resources Development) v. Chhabu* (2005), 280 F.T.R. 296, Justice Layden-Stevenson conducted a pragmatic and functional analysis to determine the standard

on which a Review Tribunal's decision regarding residency under the Act should be reviewed. At paragraphs 20 - 24 of *Chhabu* she wrote:

> The powers of the Review Tribunal are not contained in the Act. Rather, as noted earlier, the Review Tribunal is established under section 82 of the Canada Pension Plan, R.S.C. 1985, c. C-8 (the CPP). There is a privative clause of sorts, contained in subsection 84(1) of the CPP, the strength of which is bolstered by the fact that a decision of the Review Tribunal on an appeal under subsection 28(1) of the Act cannot be further appealed to a Pension Appeals Board (subsection 83(1) of the CPP). Subsection 84(1) of the CPP and subsection 28(3) of the Act do, however, explicitly recognize judicial review of a Review Tribunal's decision. Nonetheless, the presence of this privative clause does suggest deference to a Review Tribunal's decision determining an appeal under the Act.
>
> The issue of residency in relation to OAS eligibility is one that the Review Tribunal is regularly called upon to determine. The factual circumstances of each case call for findings that fall within its expertise and thus militate in favour of deference. In interpreting the definition of residency, however, the Court is equally or better positioned.
>
> The Act confers a benefit to certain individuals and establishes who is entitled to the receipt of benefits and to what extent. To that end, it involves the adjudication of an individual's rights. The conferment of benefits, however, is balanced with the interests of fairness and financial responsibility. The Minister is charged with the administration and integrity of the Act and the public interest in ensuring that applicants are not paid benefits to which they are not entitled. Thus, the Act provides for the adjudication of individual rights but is also polycentric in nature. This factor results in neither a high nor a low degree of deference.
>
> The nature of the question involves applying the correct legal test to various facts and is therefore one of mixed fact and law. It is more factually than legally driven (see: *Ding*, *supra* and *Perera v. Canada (Minister of Health and Welfare)* (1994), 75 F.T.R. 310 (F.C.T.D.) wherein it was determined that residency is a question of fact to be determined in the particular circumstances). This factor favours more deference.

> Having regard to these factors, it is my view that the applicable standard of review is reasonableness. …

[25] In the present case, I would adopt Justice Layden-Stevenson's standard of review analysis with two variations. First, with respect to the second factor, I suggest that this Court has more expertise than the Review Tribunal in interpreting and applying the Charter. This factor thus attracts less deference.

[26] Second, with respect to the fourth factor, I agree that the nature of the question here likewise involves applying the correct legal test to facts and is accordingly, a question of mixed fact and law. However, in the present case, the question in issue is legally driven. The fourth factor attracts less deference. Upon balancing the four factors, I conclude that the applicable standard of review is that of correctness.

[27] The legislation provision at the heart of this application is section 3 of the Act. Subsection 3(1) identifies those persons to whom a full monthly pension may be paid under the Act:

3(1) Subject to this Act and the regulations, a full monthly pension may be paid to (a) every person who was a pensioner on July 1, 1977; (b) every person who (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,	3(1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux personnes suivantes : a) celles qui avaient la qualité de pensionné au 1er juillet 1977; b) celles qui, à la fois : (i) sans être pensionnées au 1er juillet 1977, avaient alors au

had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,
(ii) has attained sixty-five years of age, and
(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 day on which that person's application is approved; and
(c) every person who
(i) was not a pensioner on July 1, 1977,
(ii) has attained sixty-five years of age, and
(iii) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least forty years.

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) ont au moins soixante-cinq ans,
(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;
c) celles qui, à la fois :
(i) n'avaient pas la qualité de pensionné au 1er juillet 1977,
(ii) ont au moins soixante-cinq ans,
(iii) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins quarante ans avant la date d'agrément de leur demande.

[28] Subsection 3(2) identifies those persons to whom a partial monthly pension may be paid:

3(2) Subject to this Act and the regulations, a partial monthly pension may be paid for any

3(2) Sous réserve des autres dispositions de la présente loi et de ses règlements, une pension

month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and (a) has attained sixty-five years of age; and (b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.	partielle est payable aux personnes qui ne peuvent bénéficier de la pleine pension et qui, à la fois : a) ont au moins soixante-cinq ans; b) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins dix ans mais moins de quarante ans avant la date d'agrément de leur demande et, si la période totale de résidence est inférieure à vingt ans, résidaient au Canada le jour précédant la date d'agrément de leur demande.

[29] The Applicant relies on subsection 15(1) of the Charter in making his claim that section 3 of the Act is discriminatory. Subsection 15(1) provides as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[30] The critical facts in this matter are the date of the Applicant's arrival in Canada and the date when the Charter came into force. The Applicant arrived in Canada on November 2, 1979. At that time the OAS imposed a ten year prior residency requirement for the award of a full monthly OAS pension. The Charter came into effect on April 17, 1982. The Review Tribunal identified the retrospective application of the Charter as the principal issue to be determined. In my opinion, the Review Tribunal correctly identified this issue since the Applicant is claiming the benefit of the Charter to support his claim for a full monthly pension. The Charter was not in effect when the OAS was amended in 1977 to introduce the residency requirement for the award of a full monthly pension.

[31] There is a general rule that legislation does not have retrospective application; see *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301. In *Stevens*, the Supreme Court of Canada said that the Charter does not apply retrospectively.

[32] In *Benner*, the Supreme Court of Canada again dealt with the issue of retrospectivity and ruled that the Charter has no retrospective application. It focused on whether a characteristic that arguably attracts the benefits of section 15 is an "event" or an "ongoing status". At paragraph 45, the Court described the difference between these two states in the following terms:

> The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the Charter created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the Charter came into effect?

[33] The majority of the Review Tribunal characterized the date of the Applicant's entry into Canada as an event, that is, a specific, discrete occurrence. It found that this event did not give rise to a retrospective application of the Charter and that the Charter did not apply to the Applicant's complaint. It further concluded that it was not required to consider the application of section 15 in relation to the Applicant's claim that section 3 of the OAS is discriminatory.

[34] On the basis of the jurisprudence cited by the majority, I am of the opinion that the majority correctly interpreted and applied the relevant law. There is no basis for judicial intervention in its decision and this application is dismissed.

[35] In the exercise of my discretion, I make no order as to costs.

ORDER

The application for judicial review is dismissed, no order as to costs.

"E. Heneghan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	Jedrzej H. Sell v. Attorney General of Canada et al.
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