

Federal Court



Cour fédérale

Date: 20120619

**Dockets: T-1324-11
T-1325-11**

Citation: 2012 FC 782

Ottawa, Ontario, June 19, 2012

PRESENT: The Honourable Mr. Justice Harrington

Docket: T-1324-11

BETWEEN:

MATILDA FLITCROFT

Applicant

and

**THE ATTORNEY GENERAL
OF CANADA**

Respondent

Docket: T-1325-11

AND BETWEEN:

BARRIE FLITCROFT

Applicant

and

**THE ATTORNEY GENERAL
OF CANADA**

Respondent

REASONS FOR ORDER AND ORDERS

[1] The issue is whether the Review Tribunal, constituted under the *Old Age Security Act*, got it wrong in awarding the Flitcrofts a partial, rather than a full, pension. Entitlement is based on the number of years of residence in Canada, and not citizenship.

[2] The facts are not in dispute. Barrie Flitcroft left Canada as a young child. He only returned in 1984 with his English wife, Matilda. At that time, he was forty-one years of age and Matilda was forty-three. Thereafter, they were out of the country for some time serving as Christian missionaries in the Philippines and in the United States. However, in accordance with the applicable regulations, those years are calculated as Canadian for pension purposes.

[3] Based on its understanding of the Act, more particularly section 3 thereof, the Tribunal awarded Mr. Flitcroft 23/40th's and Mrs. Flitcroft 21/40th's of a full pension. Both submit that they are entitled to a full pension.

[4] An applicant must meet three requirements to be eligible for a full pension pursuant to subsection 3(1) of the Act. He or she must:

- a. be 65 years of age;
- b. have resided in Canada for the ten years immediately preceding the day the application was approved; and
- c. had to have either resided in Canada on 1 July 1977 or at any period prior thereto, as long as they were then between the ages of 18 and 25.

[5] The Flitcrofts were both 65 years of age and had resided in Canada for the ten years immediately preceding the approval of their applications. The problem is subparagraph 3(1)(b)(i) of the Act. Although all of section 3 is appended hereto, for ease of reference that subsection reads as follows:

3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to

[...]

(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, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,

3. (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux personnes suivantes :

...

b) celles qui, à la fois :

(i) sans être pensionnées au 1^{er} 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,

[6] On 1 July 1977, neither Flitcroft was then a pensioner, both were more than 25 years of age, but neither was then residing in Canada or had resided in Canada at any time between the ages of 18 and 25, and neither possessed a valid immigration visa.

THE DECISIONS

[7] The argument before the Tribunal, and indeed repeated in this Court, is that the words “for any period” in subsection 3(1)(b)(i) refer to any period prior to the ten years immediately preceding the day the application was approved, and not “for any period” prior to 1 July 1977. The Tribunal was of the view that “for any period” meant any period on or before 1 July 1977. Either the Flitcrofts had to have been residing in Canada on that day, which they were not, or they had to have resided here at some period when they were between the ages of 18 and 25, which they had not.

[8] The Flitcrofts’ position is that the decision was both unreasonable and incorrect. They submit that subsection 3(1)(b)(i) is ambiguous, and more particularly that the date of 1 July 1977 only relates to the age requirement as of that date, but does not provide that the applicant had to have resided in Canada at some point prior thereto. The Attorney General submits that there is only one way to interpret subparagraph 3(1)(b)(i). The decision is both correct in law and reasonable. He is, quite understandably, somewhat ambivalent as to the standard of review.

THE STANDARD OF REVIEW

[9] The Review Tribunal was interpreting one of its “home” statutes. As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, this Court should show deference and review on a reasonableness standard where a tribunal is interpreting its own statute or statutes closely connected to its function (para 54). When it comes to questions of law, however, *Dunsmuir* also points out that the correctness standard will apply if the question of law is of central importance to the legal system

and outside the specialized area of expertise of the administrative decision-maker. Nevertheless, at paragraphs 57 and 62 the Court also noted that it was not necessary in every case to re-determine the proper standard of review, as existing jurisprudence may be helpful.

[10] The existing jurisprudence indicates review of pure questions of law, as this surely is, on a correctness standard. Prior to *Dunsmuir*, this Court held that decisions of the Review Tribunal involving statutory interpretation of the *Old Age Security Act* were reviewable on a correctness standard (*Stachowski v Canada (Attorney General)*, 2005 FC 1435, 282 FTR 99 and *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466, [2006] 4 FCR 489). Post-*Dunsmuir*, it was also held by Madam Justice Gauthier, as she then was, that the correctness standard applied (*Singer v Canada (Attorney General)*, 2010 FC 607, 370 FTR 121). That decision was upheld by the Court of Appeal, 2011 FCA 178, 423 NR 212, but it was not necessary for it to consider the standard of review.

[11] However, more recent jurisprudence from the Supreme Court may well suggest that previous decisions are not as relevant as they once were (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654). Mr. Justice Rothstein, with whom Chief Justice McLachlin and Justices LeBel, Fish, Abella and Charron concurred, said at paragraph 34:

[...] it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of “its own statute or statutes closely connected to its function, with which it will have particular familiarity” should be presumed to be a question of statutory interpretation subject to deference on judicial review.

See also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at paragraph 16.

[12] However, I do not have to grapple with this issue. In my opinion, the Review Tribunal's interpretation of section 3 of the Act is correct. A decision which is correct in law cannot be unreasonable for the purposes of judicial review.

[13] I do not find the section vague and so have no need to resort to the history of the statute or to *Hansard*. If I had, I would have relied upon Madam Justice Gauthier's detailed analysis in *Singer*, above, which dealt with a somewhat different issue.

[14] Even if there were any ambiguity in the English text, and I stress that in my opinion there is not, any doubt would be dispelled by the French version. The Flitcrofts note that there is a comma after "resided in Canada". They submit, therefore, that if the person did not reside in Canada on 1 July 1977 they nevertheless fell within the subsection if they thereafter resided in Canada after attaining 18 years of age, as the Flitcrofts did when they were 41 and 43 respectively. However, there is no such comma in the French version so that a person who did not reside in Canada on 1 July 1977 had to, before then, have resided here after attaining the age of 18. Neither Mr. nor Mrs. Flitcroft fall within that category.

[15] The Flitcrofts submit that the decisions are procedurally unfair in that the Tribunal did not adequately rationalize its decisions as per paragraph 47 of *Dunsmuir*. I do not agree. Even if I were to agree, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury*

Board), 2011 SCC 62, [2011] 3 SCR 708, Madam Justice Abella, speaking for the Court, held that inadequacy of reasons was not a stand-alone basis for quashing a decision in judicial review.

Furthermore, at paragraph 15 it was stated that the Court may, if found necessary, look at the record for the purpose of assessing the reasonableness of the outcome. The record includes section 3, which was reasonably interpreted by the Tribunal. Indeed, as aforesaid, in my opinion the interpretation was correct.

[16] Even leaving aside the 40-year residency requirement of subsection 3(1)(c) the Flitcrofts' interpretation of the Act is unreasonable. According to them, applicants 65 years of age who neither resided in Canada on 1 July 1977, nor at any time prior thereto when they were between the ages of 18 and 25 would not be entitled to a full pension if they resided here for exactly 10 years prior to the approval of their application. However, if they resided here 10 years plus one day they would be entitled to a full pension. That interpretation is, in my opinion, unreasonable.

COSTS

[17] The Attorney General does not seek costs, and so none shall be granted.

ORDERS

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The applications for judicial review are dismissed.
2. There shall be no order as to costs.

“Sean Harrington”

Judge

APPENDIX

<p style="text-align: center;"><i>Old Age Security Act</i> <i>Section 3</i></p>	<p style="text-align: center;"><i>Loi sur la sécurité de la vieillesse</i> <i>Article 3</i></p>
<p>3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to</p> <p>(a) every person who was a pensioner on July 1, 1977;</p> <p>(b) every person who</p> <p style="padding-left: 40px;">(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,</p> <p style="padding-left: 40px;">(ii) has attained sixty-five years of age, and</p> <p style="padding-left: 40px;">(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</p> <p>(c) every person who</p>	<p>3. (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux personnes suivantes :</p> <p>a) celles qui avaient la qualité de pensionné au 1^{er} juillet 1977;</p> <p>b) celles qui, à la fois :</p> <p style="padding-left: 40px;">(i) sans être pensionnées au 1^{er} 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,</p> <p style="padding-left: 40px;">(ii) ont au moins soixante-cinq ans,</p> <p style="padding-left: 40px;">(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;</p> <p>c) celles qui, à la fois :</p>

<p style="text-align: center;"><i>Old Age Security Act</i> <i>Section 3</i></p>	<p style="text-align: center;"><i>Loi sur la sécurité de la vieillesse</i> <i>Article 3</i></p>
<p>(i) was not a pensioner on July 1, 1977,</p> <p>(ii) has attained sixty-five years of age, and</p> <p>(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.</p> <p>(2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and</p> <p style="padding-left: 40px;">(a) has attained sixty-five years of age; and</p> <p style="padding-left: 40px;">(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.</p> <p>(3) The amount of a partial monthly pension, for any month, shall bear the same relation to the full monthly pension for that month as the aggregate period that the applicant has resided in Canada after attaining eighteen years of age and prior to the day on which the application is approved, determined in accordance with subsection (4), bears to forty years.</p> <p>(4) For the purpose of calculating the amount of a partial monthly pension under subsection</p>	<p>(i) n'avaient pas la qualité de pensionné au 1^{er} juillet 1977,</p> <p>(ii) ont au moins soixante-cinq ans,</p> <p>(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.</p> <p>(2) Sous réserve des autres dispositions de la présente loi et de ses règlements, une pension partielle est payable aux personnes qui ne peuvent bénéficier de la pleine pension et qui, à la fois :</p> <p style="padding-left: 40px;">a) ont au moins soixante-cinq ans;</p> <p style="padding-left: 40px;">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.</p> <p>(3) Pour un mois donné, le montant de la pension partielle correspond aux $n/40$ de la pension complète, n étant le nombre total — arrondi conformément au paragraphe (4) — d'années de résidence au Canada depuis le dix-huitième anniversaire de naissance jusqu'à la date d'agrément de la demande.</p> <p>(4) Le nombre total d'années de résidence au Canada est arrondi au chiffre inférieur.</p>

<p style="text-align: center;"><i>Old Age Security Act</i> <i>Section 3</i></p>	<p style="text-align: center;"><i>Loi sur la sécurité de la vieillesse</i> <i>Article 3</i></p>
<p>(3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.</p> <p>(5) Once a person's application for a partial monthly pension has been approved, the amount of monthly pension payable to that person under this Part may not be increased on the basis of subsequent periods of residence in Canada.</p>	<p>(5) Les années de résidence postérieures à l'agrément d'une demande de pension partielle ne peuvent influencer sur le montant de celle-ci.</p>

FEDERAL COURT
SOLICITORS OF RECORD

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DATED: JUNE 19, 2012

APPEARANCES:

Barry W. Bussey FOR THE APPLICANTS

Martin Kreuser FOR THE RESPONDENT

Aileen Smith

SOLICITORS OF RECORD:

Barry W. Bussey FOR THE APPLICANTS
V-P Legal Affairs
Canadian Council of Christian
Charities
Elmira, Ontario

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario