Federal Court

Cour fédérale

Date: 20161230

Docket: T-381-16

Citation: 2016 FC 1417

Ottawa, Ontario, December 30, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

EL-SAYED MAGDY HUSSEIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review brought by El-Sayed Magdy Hussein [the Applicant], pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made on November 30, 2015 [SST-AD Decision] by the Social Securities Tribunal – Appeal Division [SST-AD]. The SST-AD, acting , pursuant to s. 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [*DESDA*], refused the Applicant leave to appeal a decision of the Social Securities Tribunal – General Division [SST-GD] which denied the Applicant's

request to have his Canada Pension Plan [CPP] disability benefits extended retroactively [SST-GD Decision].

[2] The application is dismissed for the following reasons.

I. Facts

[3] The Applicant is a self-represented, 70-year-old father with mental health issues who seeks a retroactive application of his CPP disability benefits on the ground of incapacity under subsections 60(8) to (10) of the *Canada Pension Plan Act*, RSC 1985, c C-8 [*CPP Act*]. The Applicant has been receiving CPP disability payments since July 2010. He claims to be entitled to an additional benefits going back to 2006 because he was suffering from severe mental illness throughout that period.

[4] The Applicant came to Canada as a landed immigrant in 1997. Before arriving in Canada, he worked as an engineer both in Egypt and the United Arab Emirates, for a period of approximately 20 years. His education in Egypt is equivalent to a four-year bachelor degree in Engineering from a “reputable Canadian university”.

[5] Upon arriving in Canada, the Applicant was unfortunately unable to secure a job as an engineer, and eventually found a job as a clerk working the night shifts at a convenience store in a “bad area of town.” He worked there from 2005 to 2010, two times a week, from 11 p.m. to 7 a.m., for a total of 16 hours a week. The Applicant states that he was often the victim of robbery or attempted robbery while working his scheduled shifts at the convenience store and

was, in fact, injured during one such robbery attempt. He also states that he missed many shifts due to his mental illness. The Applicant states that the only reason he was able to secure and maintain the job at the convenience store was because a friend of his worked as the store manager. On March 2, 2010, shortly after his friend ceased working at the convenience store, the Applicant was terminated by the store's new management.

[6] The Applicant began seeing a psychiatrist in 2003. In an April 2005 letter regarding the Applicant's Ontario Disability Support Program [ODSP] application, the psychiatrist reported that when he saw the Applicant in March, 2005, the Applicant's condition had deteriorated to the point that he "met the criteria for major depression and psychosis":

> He was experiencing insomnia, depressed mood and mood congruent auditory hallucinations suggesting that there was "no hope, you must die." Appetite was also poor. He was despondent and agitated, and a GAF would fall below 50. As such, I would consider that his medical condition is severe and serious and, given the chronicity/refractoriness of his symptomatology, the likelihood of his becoming employable in the foreseeable future has to be minimal to negligible.

[7] The psychiatrist's report indicates that the Applicant suffered from auditory hallucinations and that the Applicant had a "very poor" prognosis.

[8] Despite being on antipsychotic medications, it was only in late 2010 that the Applicant was finally prescribed medication to control the voices in his head. Before that, the Applicant's mental state was in flux.

[9] The Applicant alleges that he did not want to rely on income support or social assistance and worked hard to avoid such reliance. He says the voices in his head told him that receiving social assistance was bad. Instead, and over time, he borrowed $48,000 from a relative to supplement his income from the convenience store to support his wife and child. He wishes to repay these loans.

[10] Notwithstanding his unwillingness to accept social assistance, the Applicant finally applied for ODSP assistance in 2005, with the help of staff of his MPP. The Applicant says his application for ODSP was filed against his will. His ODSP application was initially refused, however he pursued the matter and his ODSP application was approved as of June 10, 2005.

[11] The Applicant withdrew from ODSP on February 23, 2006. The Applicant alleges the voices in his head convinced him to withdraw from ODSP. He alleges these voices told him: "[y]ou are an Engineer, and it would be a great shame to request this sort of assistance".

[12] However, on June 26, 2007, the Applicant advised the ODSP that he wished to reapply for disability benefits. To this end, an appointment was scheduled for August, 2007, but he cancelled this appointment.

[13] On July 11, 2011, after applying for CPP benefits, the Applicant again contacted the ODSP to request that his application be completed. An appointment was scheduled for September 23, 2011. On that date, the Applicant attended at the ODSP office and completed the application. He was granted disability benefits, effective September 23, 2011, as a member of a

prescribed class (being in receipt of CPP disability benefits). He then applied for and received regular Employment Insurance [EI] benefits from July 11, 2010 to January 29, 2011. He was also awarded CPP disability benefits with an onset date of March 2010. The Applicant began receiving these payments as of July 2010 due to the four-month legislated waiting period. During this time, he also attempted to find another source of employment.

[14] The Applicant alleges that his CPP disability benefits should be extended retroactively to February 23, 2006, the date that he voluntarily withdrew from ODSP. Accordingly, he applied for reconsideration on August 3, 2011, requesting the onset date be retroactively extended. He submitted a Declaration of Incapacity signed by his psychiatrist.

[15] On November 24, 2011 the Applicant's application for reconsideration and retroactive CPP disability benefits was denied. The Applicant appealed this decision to the Officer of the Commissioner of Review Tribunals, but because his appeal was not heard before April 1, 2013, his appeal was transferred to the Social Securities Tribunal pursuant to section 257 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

The SST-GD Decision (February 24, 2015)

[16] On February 12, 2015, the Applicant's appeal to the SST-GD was heard by videoconference. The SST-GD found the application could not be deemed to have been received earlier pursuant to subsections 60(8) to (10) of the *CPP Act*.

[17] In coming to its conclusion, the SST noted that the Applicant met the criteria for CPP disability and was in receipt of his disability pension since March 2010; therefore, the issue was "whether the [Applicant's] application can be deemed to have been received at an earlier date due to inability to form or express the intent to apply as defined by the CPP". The SST-GD noted the Applicant had been able to participate in many activities that suggested his incapacity was not continuous:

> [30] The Tribunal is in agreement with the Respondent that the [Applicant] claims to have been incapacitated years before he requested his appeal; however during that time he was able to sign and date his questionnaire, application and authorization form for HRSDC. He also consented to various medical procedures over this period and continued to work. The evidence presented to the Tribunal by the [Applicant] is certainly difficult to hear; however the Tribunal is unable to find that the Appellant was incapacitated during the seven plus years that he claims to have been incapacitated.

[18] The SST-GD characterized the medical evidence provided by the Applicant in regards to his mental state as "meager", and concluded that the evidence provided was such that the SST-GD was not able to corroborate the Applicant's allegation that he was lacked the necessary intent continuously throughout the period in question. Of particular note,

> … the Tribunal is unable to find that these mental issues were long in duration and extended for the entire seven plus years that the [Applicant] claims.

[19] The SST-GD accepted, however,

> …that the [Applicant] was indeed stating the correct evidence that his mental state was in flux for seven plus years and that his current medication in fact has helped him stop hearing voices. The Tribunal basis [sic] this on the [Applicant's] bizarre behaviour of applying for provincial assistance and then having this decision

> revoked. This showed the Tribunal that the Appellant was unable to make rational decisions.

[20] The SST-GD considered the Applicant's mental state, his employment record and the fact he had sought help from a legal aid lawyer to help him with his ODSP benefits. Guided by *Slater v Canada (Attorney General)*, 2008 FCA 375 at para 7 ("…it was necessary to look at both the medical evidence and the relevant activities of the individual concerned…which cast light on the capacity of the person concerned during that period of so "forming and expressing" the intent"), leave to appeal refused, SCC docket 33055 (21 May 2009) [*Slater*], the SST-GD concluded:

> …although the [Applicant] was suffering from a mental illness during his period of time and his medications were not helping him deal with these issues, he was able to maintain some type of work schedule and was able to be aware of the ability to apply for ODSP benefits and find a legal aid lawyer to assist him in that process. While the [Applicant] may have been unable during some point of the seven years in forming or expressing an intent these events show the Tribunal that he was not incapacitated during the entire period. As per the *CPP*, the [Applicant] needs to be found incapacitated during the entire period and it is for this reason that the Tribunal finds that the Appellant was not incapacitated as per the CPP.

[21] The Applicant applied for leave to appeal the SST-GD Decision to the SST-AD. In this connection, the Applicant requested an extension of time to file certain additional documents, including letters from his MPP and the psychiatrist. The SST-AD granted the extension.

II. <u>Decision</u>

[22] On November 30, 2015, the SST-AD dismissed the leave application. The issue before the SST-AD was whether the proposed appeal had a reasonable chance of success.

[23] The SST-AD summarized the relevant sections of the *CPP Act* and the relevant jurisprudence. It said subsections 60(8) to (10) are "contentious area of CPP legislation":

> [17] CPP subsection 60(8) allows the Minister to deem an application as having been made earlier than the date on which it was actually made where it is established that the applicant for the benefit was incapable of making the application <u>on the date on which</u> it was actually made. The legislation provides two possible retroactive dates: either in the month preceding the first month in which the relevant benefit could have commenced to be paid; or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
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> [emphasis in original]

[24] The SST-AD found the SST-GD had correctly considered the Applicant's medical records, his activities during the claimed period of incapacity and his oral testimony. The SST-GD had also properly applied the case law to the facts of the Applicant's case. In conclusion, the SST-AD stated:

> [23]…The General Division neither misapprehended the law, nor the facts of the Applicant's case, nor did the General Division arrive at a decision without regard to the facts before it. The crucial factor is whether the Applicant lacked the capacity to form the intent to apply for CPP disability benefits and these paragraphs of the decision make it very clear that the General Division addressed this issue in the context of the totality of the evidence about the Applicant's circumstances. That the General Division came to a conclusion different from that which the Applicant desired is not by itself an indication that the General Division erred in any way.
>
> [24] Further, the additional information submitted by the Applicant does little to alter this finding. It does contain a letter form Dr. Charles Chamberlaine of the London Health Sciences Centre, however, Dr. Chamberlaine's letter does not expand on the information he had already provided. It merely reiterated information he had previously provided and which had been placed before the General Division. Accordingly, the Appeal Division is not satisfied that the appeal has a reasonable chance of success.

[25] It is from this Decision that the Applicant seeks judicial review.

III. Issues

[26] The only issue in this case is whether the SST-AD reasonably decided that the Applicant's proposed appeal did not have a reasonable chance of success. The Applicant also alleges the SST-AD breached its the duty of procedural fairness by not considering all his submissions before rendering its decision; however, this allegation while put forward in his Notice of Application was not pursued thereafter. I see no basis for this alleged procedural fairness argument, and conclude it was advanced due to the Applicant's use of a "boilerplate" Notice of Application; I will not deal with it further.

IV. Standard of Review

[27] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined that a decision of the SST-AD granting or denying leave to appeal a decision of the SST-GD is reviewable on a standard of reasonableness: *Tracey v Canada (Attorney General)*, 2015 FC 1300 at para 17; *Canada (Attorney General) v O'keefe*, 2016 FC 503 at para 17 [*O'keefe*]; *Bergeron v Canada (Attorney General)*, 2016 FC 220 at para 6; *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 13. In addition, "substantial deference" is owed to the SST-AD in these cases: *O'keefe* at para 17.

[28] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> 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. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. Relevant Provisions

[29] As correctly stated by both Divisions below, in order for the SST-AD to grant leave to appeal, it must be satisfied that the appeal would have a reasonable chance of success: that is the wording of Parliament in subsection 58(2) of *DESDA*. The Federal Court of Appeal has equated a reasonable chance of success with an arguable case: *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Fancy v Canada (Attorney General)*, 2010 FCA 63. An applicant must therefore provide some arguable ground upon which the proposed appeal might succeed: *Kerth v Canada (Minister of Human Resources Development)*, [1999] FCJ No 1252 (FC).

[30] Under subsection 58(1) of *DESDA*, there are only three grounds on which an appeal to the SST-AD may be based:

Grounds of appeal	**Moyens d’appel**
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	**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

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.	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.

VI. Analysis

[31] The Applicant's claim is that his CPP disability benefits should be granted retroactive to February 2006 because he was incapacitated and unable to make a proper decision (that is, was unable to form or express an intention to apply for CPP benefits) throughout the several years he struggled with his mental health issues before he became eligible in 2010. He relies on subsections 60(8) to (10) of the *CPP Act*:

DIVISION C **Payment of Benefits: General Provisions** **60 …** **Incapacity** **(8)** Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been <u>incapable of forming or expressing an intention to make an application</u> on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to	**SECTION C** **Paiement des prestations: dispositions générales** **60 …** **Incapacité** **(8)** Dans le cas où il est convaincu, sur preuve présentée par le demandeur ou en son nom, que celui-ci <u>n'avait pas la capacité de former ou d'exprimer l'intention de faire</u> une demande le jour où celle-ci a été faite, le ministre peut réputer cette demande de prestation avoir été faite le mois qui précède celui au cours duquel la prestation aurait pu commencer à être

have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

payable ou, s'il est postérieur, le mois au cours duquel, selon le ministre, la dernière période pertinente d'incapacité du demandeur a commencé.

Marginal note: Idem

(9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that

Note marginale : Idem

(9) Le ministre peut réputer une demande de prestation avoir été faite le mois qui précède le premier mois au cours duquel une prestation aurait pu commencer à être payable ou, s'il est postérieur, le mois au cours duquel, selon lui, la dernière période pertinente d'incapacité du demandeur a commencé, s'il est convaincu, sur preuve présentée par le demandeur :

(a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,

a) que le demandeur n'avait pas la capacité de former ou d'exprimer l'intention de faire une demande avant la date à laquelle celle-ci a réellement été faite;

(b) the person had ceased to be so incapable before that day, and

b) que la période d'incapacité du demandeur a cessé avant cette date;

(c) the application was made

cessé avant cette date;

(i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or

(i) au cours de la période — égale au nombre de jours de la période d'incapacité mais ne pouvant dépasser douze mois — débutant à la date où la période d'incapacité du demandeur a cessé,

(ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that

(ii) si la période décrite au sous-alinéa (i) est inférieure à trente jours, au cours du mois qui suit celui au cours duquel la période d'incapacité du

person had ceased to be so incapable, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.	demandeur a cessé.
Marginal note: Period of incapacity	**Période d'incapacité**
(10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed. [emphasis added]	**(10)** Pour l'application des paragraphes (8) et (9), une période d'incapacité doit être continue à moins qu'il n'en soit prescrit autrement. [soulignements ajoutés]

[32] The Federal Court of Appeal has provided guidance on the interpretation of "capacity" under section. 60. The relevant capacity is not high: "it does not require consideration of the capacity to make, prepare, process or complete an application for disability benefits, but only the capacity…of 'forming or expressing an intention to make an application'". *Canada (Attorney General) v Danielson*, 2008 FCA 78 [*Danielson*]. Furthermore,

> … the capacity to form the intention to apply for benefits is not different in kind from the capacity to form an intention with respect to other choices which present themselves to an applicant. The fact that a particular choice may not suggest itself to an applicant because of his worldview does not indicate a lack of capacity.
>
> *Sedrak v Canada (Minister of Social Development)*, 2008 FCA 86

[33] As stated above, *Slater* requires that both medical evidence as well as relevant physical activities be considered when determining whether an applicant lacks capacity to form or express an intention to apply for benefits.

[34] In my respectful view, the SST-AD reasonably stated and applied the legal tests in this case. It had to decide if there was a reasonable chance of success on any of the grounds set out in subsection 58(1). It found none and in my view its decision is reasonable.

[35] This case turns entirely on the evidence. To succeed, the Applicant had to show that he has a reasonably chance of success on an appeal to the SST-AD. In order to do that, he had to show that he was incapable of forming or expressing the intent to apply for CPP benefits continuously from February, 2006 until 2010 when he became eligible for CPP disability benefits. He was not required to show he could not fill out or complete the forms; he needed to show he was "incapable of forming or expressing an intention to make an application," and that he was continuously in this state throughout the period in question.

[36] While the Applicant presented evidence that he was incapable of forming or expressing an intention to make an application at some times in the period between February 2006 and 2010, it was reasonable for the SST-AD to conclude, as it did, that at other times he was not in that condition.

[37] Throughout this period, for example, the Applicant was working 16 hours a week at a convenience store. He was making all sorts of daily decisions concerning his life. There was no

evidence of a Power of Attorney nor that the Public Trustee was making financial decisions for him. The SST-GD also reasonably observed on the record before it that the Applicant did not require supervised living arrangements (long-term care), and that during this time period he had consented to various medical procedures.

[38] The SST-GD had the evidence of the psychiatrist before it. But, and with respect, in this connection it is noteworthy that the psychiatrist, who had treated the Applicant for more than 10 years, did not provide evidence bearing directly on whether the Applicant was “incapable of forming or expressing an intention to make an application.”

[39] The SST-GD certainly recognized that the Applicant had mental health issues. But it found, as the record in my view amply demonstrates, that the Applicant's “mental state was in flux”:

> [30] The Tribunal is in agreement with the Respondent that the Appellant claims to have been incapacitated years before he requested his appeal; however during that time he was able to sign and date his questionnaire, application and authorization form for HRSDC. He also consented to various medical procedures over this period and continued to work. The evidence presented to the Tribunal by the Appellant is certainly difficult to hear; however the Tribunal is unable to find that the Appellant was incapacitated during the seven plus years that he claims to have been incapacitated.
>
> [31] The evidence indicates that the Appellant was diagnosed with mood disorder with psychotic features as well as obsessive compulsive disorder. The Appellant also experienced auditory hallucinations and required antipsychotic medication for over a decade. The evidence also indicates that the Appellant worked at a convenience store for over five years but only worked nights and only one or two shifts per week. A review of the Appellant’s wages indicated that he had wages of $4,969 in 2005; $4,823 in 2006; $5,142 in 2007; $6,223 in 2008 and $7,504 in 2009. Finally, the evidence indicates that the Appellant made a strange request to

have his ODSP benefits cancelled, which were granted to him in June of 2005 and revoked in February 2006. These three pieces of evidence indicate to the Tribunal that, while the Appellant was indeed functioning like the Respondent indicates, it was not of a logical or healthy nature.

[32] The Appellant testified to the Tribunal that during this seven-year period his psychiatrist was unable to prescribe the proper medications in order to help his mental state. He indicated that the voices in his head were not controlled correctly by medication until late 2010. The Tribunal reviewed the meager medical evidence regarding the Appellant's mental state and was unable to corroborate the Appellant's story through medical evidence; however the Tribunal is satisfied that the Appellant was indeed stating the correct evidence that his mental state was in flux for seven plus years and that his current medication in fact has helped him stop hearing voices. The Tribunal basis [sic] this on the Appellant's bizarre behaviour of applying for provincial assistance and then having this decision revoked. This showed the Tribunal that the Appellant was unable to make rational decisions.

[33] While the Tribunal finds that the Appellant did, in fact, have some mental issues for a period of time, the Tribunal is unable to find that those mental issues were long in duration and extended for the entire seven plus years that the Appellant claims. The Appellant was able to work during this period of time and while he testified that this work was due to the good nature of a friend of his, he still was able to make a meager living during this period of time. The evidence presented to the Tribunal both from the Appellant's testimony and on file shows an individual who certainly suffered from a severe mental illness but there is no indication that the Appellant was incapacitated such that he was incapable of forming or expressing an intention to make an application for CPP disability benefits.

[34] While the amount of work that the Appellant did during this time certainly was limited, as the financial records indicate, the picture that is painted of the Appellant does not portray him as someone who was incapacitated. The Appellant did exhibit bizarre behaviour in the example of his decision to turn down the ODSP benefits, which were granted to him in June of 2005 and revoked in February 2006 at the request of the Appellant; however the Tribunal was unable to find evidence that would indicate that Appellant's incapacity.

[emphasis added]

[40] I wish to emphasize this key finding: the Applicant's “mental state was in a state of flux”. That is, as the record shows, his mental condition changed from time to time over the period in question. Had his condition been continuous, the decision would have been different. But it was not continuous, it was in a state of flux as the SST-AD reasonably found on the evidence before it. That being the case, the AD reasonably found the Applicant's proposed appeal had no reasonably chance of success: he lacked an arguable case.

[41] In my very respectful view, the SST-AD also considered and applied the proper jurisprudence in refusing leave. Furthermore, it properly reviewed and assessed the decision of the SST-GD, as seen in the following passage:

> [22] In the Appellant’s case, the General Division Member examined his medical records as required by *Slater*. The Member also examined the Applicant’s activities during the claimed period of incapacity, including his decision to withdraw from the ODSP programme. Also considered was the Applicant’s oral testimony, which made reference to his work situation; his injuries; his employment history in Canada; and his mental health condition. The Appeal Division finds that the General Division Member properly applied the case law referred to earlier. The pertinent passages of the General Division decision are paragraphs 33 to 35:
>
> > …
> >
> > [35]…
> >
> > In arriving at its decision, the Tribunal took into account the Appellant’s mental state, his employment record and the fact that he had employed a legal aid lawyer to help him with his appeal with ODSP benefits. The Tribunal finds that, although the Appellant was suffering from mental illness during this period of time and his medications were not helping him deal with these issues, he was able to maintain some type of work schedule and was able to be aware of the ability to apply for ODSP benefits and find a legal aid lawyer to assist him in that process. While the Appellant

> may have been unable during some point of his seven years in forming or expressing an intent these events show the Tribunal that he was not incapacitated during the entire period. As per the *CPP*, the Appellant needs to be found incapacitated during the entire period and it is for this reason that the Tribunal finds that the Appellant was not incapacitated as per the *CPP*.

> [23] The Appeal Division finds that no error arises from the General Division's application of the law to the facts of the Applicant's case. The General Division neither misapprehended the law, nor the facts of the Applicant's case, nor did the General Division arrive at a decision without regard to the facts before it. The crucial factor is whether the Applicant lacked the capacity to form the intent to apply for CPP disability benefits and these paragraphs of the decision make it very clear that the General Division addressed this issue in their context of the totality of the evidence about the Applicant's circumstances. That the General Division came to a conclusion different from that which the Applicant desired is not by itself an indication that the General Division erred in any way.

> [24] Further, the additional information submitted by the Applicant does little to alter this finding. It does contain a letter from Dr. Charles Chamberlaine of the London Health Sciences Centre, however, Dr. Chamberlaine's letter does not expand on the information he had already provided. It merely reiterated information he had previously provided and which had been placed before the General Division. Accordingly, the Appeal Division is not satisfied that the appeal has a reasonable chance of success.

[42] I wish to note that the SST-AD granted the Applicant extra time to file material and also considered the new evidence he filed from his psychiatrist, as is clear from the last paragraph (para 24) of its reasons just quoted. In this connection, the Applicant claimed there was "extensive evidence and further facts that need to be examined". He wrote of "powerful evidence" to come:

> Simply put, I was unable to put in front of the Tribunal the most powerful evidence in support of my case, which in turn has led to

> the Tribunal misunderstanding the full breadth of my situation. I only discovered this when I read the details of the decision.

[43] The Applicant however, did not provide evidence that is either extensive or powerful. The new psychiatric evidence was unpersuasive to the SST-AD, which, and in my view acting reasonably, rejected it concluding that it “merely reiterated information he had previously filed.” There is no merit to the suggestion that the Applicant was “unable” to put this powerful new evidence to the SST-AD - in fact his application was accepted and the new evidence was in fact considered although found wanting.

[44] The central problem with the Applicant's case is the lack of evidence to support his claim. The weighing and assessment of evidence lies at the heart of the SST-GD's mandate and jurisdiction. Its decisions are entitled to significant deference. This is particularly the case where, as here, the SST-GD holds an oral hearing at which the Applicant gave evidence.

[45] I understand clearly that the Applicant disagrees with the weighing and assessing of evidence carried out by the SST-GD and reviewed by the SST-AD, but that is not an issue for this Court to revisit. Rather, the issue before this Court is whether the decision of the SST-AD is reasonable.

[46] In this case, the reasonableness of the SST-AD decision is determined by asking if the SST-AD acted reasonably in finding that the Applicant's proposed appeal did not have a reasonable prospect of success. In my view it acted reasonably because the proposed appeal did not have a reasonable chance of success; it did not raise an arguable case. Furthermore, the

reasons of the SST-AD meet the test laid out in *Dunsmuir*: they are transparent, intelligible and justified. They fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law in this case. They are therefore reasonable, and accordingly judicial review must be dismissed.

VII. The Record

[47] At the hearing the Respondent asked the Court to strike out Exhibit C-15 of the Applicant's Record, namely, a letter dated November 2, 2012 from the University of Toronto, Comparative Education Service which was not before either the SST-GD or the SST-AD. This motion is granted in accordance with the rules against filing new evidence on judicial review: *Assn of Universities and Colleges of Canada v Copyright Licensing Agency*, 2012 FCA 22.

VIII. Costs

[48] Neither party seeks costs.

IX. Conclusion

[49] In the result, this application for judicial review must be dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Exhibit C-15 to the Applicant's Record, namely a letter dated November 2, 2012, from the University of Toronto Comparative Education Service, is struck from the Applicant's Record.
2. This application for judicial review is dismissed.
3. There is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-381-16
STYLE OF CAUSE:	EL-SAYED MAGDY HUSSEIN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 7, 2016
JUDGMENT AND REASONS:	BROWN J.
DATED:	DECEMBER 30, 2016

APPEARANCES:

El-Sayed Magdy Hussein (self-represented)	FOR THE APPLICANT
Laura C. Dalloo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-Represented	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT