Date: 20071105

Docket: T-481-07

Citation: 2007 FC 1141

Ottawa, Ontario, November 5, 2007

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

MILDRED BUCHAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mildred Buchan, a landed immigrant to Canada (the "Applicant"), seeks judicial review of the October 10, 2006 decision of the delegate of the Minister of Human Resources and Social Development Canada (the "Minister") who refused to re-open a previous decision of the Minister dated August 10, 2005 that she was not eligible to receive full pension benefits under the *Old Age Security Act* (the "OAS Act") because she had not established she was living permanently in

Canada within the meaning of the *OAS Act* and that, moreover, she was obligated to repay the Minister the Old Age Security (OAS) benefits she had received from October 1995 to July 2005.

[2] The Minister refused to re-open his August 10, 2005 decision because: “In order for a case to be re-opened after the 90 day appeal period has passed, it must be re-opened on the basis of “new facts”. The “new facts” must (a) not have been previously discoverable by you with reasonable diligence and (b) must be material to your case”.

[3] In her refusal letter to the Applicant, the delegate of the Minister referred to the Applicant’s letter of June 27, 2006 and stated that letter “does not illuminate any information that would have been unknown to you at the time your account was under investigation and the department was requesting residence information that could have been material to your case. Nor did you provide any of the information prior to the expiration of the appeal period. We have examined the documents you recently provided with your letter of June 27, 2006. There are no grounds to review or change our decision. This decision is not subject to appeal”.

[4] The Minister’s October 10, 2006 decision was purportedly made pursuant to subsection 84(2) of the *Canada Pension Plan* (the “CPP”) which, under the heading “Rescission or amendment of decision” provides “The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.”

[5] I allowed the Applicant's son, Eric Bruns, to represent her at the hearing before the Court on the authority of the Federal Court of Appeal's decision in *Scheuneman v. Attorney General of Canada*, 2003 FCA 439.

[6] On another preliminary matter, I received in evidence the August 13, 2007 letter from the Applicant's physician, notwithstanding it was not before the decision-maker. In my view, this letter was simply confirmatory of what the Applicant had told the Minister in her undated letter to the Minister received on August 21, 2006.

The Statutory and Regulatory Scheme

[7] Before dealing with the facts of this case, a brief description of the statutory and regulatory scheme governing the eligibility to receive OAS benefits is appropriate.

[8] Eligibility to receive such benefits is set out in the *OAS Act* which provides, in section 3, the residence requirements governing a person's eligibility to receive a full or partial monthly pension. This *OAS Act* is intertwined with the *Canada Pension Plan* (CPP) which is a separate statute providing not only for contributory pension benefits but also disability payments. The *OAS Act* and the CPP are administered by the same Minister.

[9] The *OAS Act* is supplemented by the *Old Age Security Regulations* which, in particular, provide in section 21 for the purposes of the Act and the Regulations (a) a person resides in

Canada if he makes his home and ordinarily lives in any part of Canada; and (b) a person is present in Canada when he is physically present in any part of Canada.

[10] The *OAS Act* and the CPP have another point of commonality – the Review Tribunal. Subsection 28(1) of the *OAS Act* provides that a person who makes a request under subsection 27.1(1) of that Act and who is dissatisfied with the decision of the Minister in respect of the request, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal under subsection 82(1) of the *CPP*. The request in section 27.1(1) is a request to the Minister for reconsideration of his initial decision.

[11] Paragraph 27.1(1) of the *OAS Act* provides "a person who is dissatisfied with a decision or determination made under this Act that no benefit may be paid to that person, or respecting the amount of any benefit that may be paid to that person may, within ninety days after the day on which the person is notified in the prescribed manner of the decision or determination, or within such longer period as the Minister may either before or after the expiration of those ninety days allow, make a request to the Minister in the prescribed form and manner for a reconsideration of that decision or determination." [Emphasis mine.]

[12] Section 82 of the *CPP* provides for the constitution of the Review Tribunal and creates the Office of the Commissioner of Review Tribunals. Subsection 82(1) provides that "a party who is dissatisfied with a decision of the Minister made under section 81 or subsection 84(2), or a person who is dissatisfied with a decision of the Minister made under subsection 27.1(2) of the

Old Age Security Act, or, subject to the regulations, any person on their behalf, may appeal the decision to a Review Tribunal in writing within 90 days, or any longer period that the Commissioner of Review Tribunals may, either before or after the expiration of those 90 days, allow, after the day on which the party was notified in the prescribed manner of the decision or the person was notified in writing of the Minister's decision and the reasons for it." [Emphasis mine.]

Facts

[13] I set out the material facts underlying this judicial review application.

[14] The Applicant was born in Canada in 1927 and lived here until April 1951 when, at the age of 24, she moved to the United States, married, became a U.S. citizen and raised her family there. After her first husband's death, she became the sole owner of the family home in Belmont, California.

[15] In June 1987, she returned to Canada as a landed immigrant and on January 2, 1988 married Frank Buchan. In her letter of June 27, 2006 to Human Resources Development Canada (HRDC), the Applicant indicated the home in California became a winter home for her second husband and herself. After her marriage to Frank Buchan, they first lived in Saskatoon. In 1997, the Saskatoon house was sold and they moved to Victoria, B.C.

[16] In July 1992, the Applicant inquired about OAS benefits and it was in October of 1995 that she was approved for full OAS benefits.

[17] In October 2002, the Applicant separated from Frank Buchan; they divorced in July 2004.

[18] In October 2003, HRDC sent to the Applicant at her address in Victoria a pension declaration which was returned undeliverable. Upon inquiry at her Canadian Bank, the Department was advised of her U.S. address. A letter was sent to her on December 15, 2003 indicating that it had received information “in our Old Age Security Pension Office that you are now residing at the above address in Belmont, California”. A questionnaire was enclosed for her to fill out which she did in January 2004. On September 17, 2004 HRDC wrote to the Applicant at her Victoria address asking for further information. The Applicant mailed her response to the Department from her Belmont, California home.

[19] In early 2005, the Department decided to investigate whether the Applicant resided in Canada. The investigator began obtaining information from various sources and communicated with the Applicant. The Applicant decided to retain legal counsel in Victoria. On April 8, 2005, the investigator wrote to the Applicant care of her legal counsel in Victoria advising that residence in Canada was one of the three primary eligibility factors under the *Old Age Security Act* pointing out to the Applicant that residence under the Act is more than physical presence in Canada and that residence, for this purpose, was determined by establishing where the person

makes their home and ordinarily lives, the primary assumption being that an individual can only be a resident in any one country at any given time.

[20] This letter advised the country of residence will be the one in which an applicant for OAS benefits has the most significant attachment. The April 8, 2005 letter indicated HRDC had determined the Applicant had been outside of Canada for some time and that further investigation showed she may not have severed ties with the U.S. when she came to Canada in 1987. She enclosed a residence questionnaire for completion with a request for back up documents.

[21] Legal counsel responded to the investigator on May 3, 2005. He did not enclose the required completed questionnaire but set out his client's position stating she had lived in Canada for more than twenty years since she was age 18 and provided certain facts on the Applicant's stays in Canada and the U.S.

[22] On May 13, 2005, the investigator wrote the Applicant and her counsel to say the Department needed further information in order to determine that the periods of time the Applicant had spent in Canada were periods of residence. She enclosed a second copy of her questionnaire and requested its filing within the thirty days. The Applicant's solicitor responded on May 20th stating: "It is our position that our previous correspondence provides you with the information necessary to confirm that our client qualifies for the Old Age Security benefit on an

ongoing basis". He added she was prepared to confirm the information provided in the May 3, 2005 letter in a statutory declaration "if that is what your enforcement policy suggests".

[23] On May 25, 2005 the investigator wrote to the Applicant care of her solicitor. She informed them that the information provided was not sufficient to confirm the Applicant qualified for OAS benefits on an ongoing basis. The investigator added that what was needed to be confirmed was the time spent in Canada from 1987 to the present should be considered as residence in Canada or whether it should considered as presence in Canada. She provided definitions of both of these terms and indicated the proposed statutory declaration would not be satisfactory. She again requested the Applicant complete the OAS resident's questionnaire with appropriate back up documents. In that letter, the Applicant and her solicitor were advised that failure to send the requested information in full "will result in our evaluating the client's eligibility for OAS benefits based upon the information we currently have on file".

[24] The record before the Court shows the requested questionnaire was not returned by the Applicant or her solicitor to the investigator. The result was that the Department forward to the Applicant and to her solicitor its August 10, 2005 letter which has been referred to earlier on in these reasons denying OAS benefits. The August 10th letter indicated, if there was disagreement with the decision, reconsideration could be requested and in order to ask for reconsideration, a request should be made within ninety days after receiving the letter. Neither the Applicant nor her solicitor requested the Minister to reconsider his August 10, 2005 decision.

[25] What transpired thereafter may be summarized as follows:

1) On February 24, 2006, the Applicant was advised by the International Operations Section of HRDC she was not eligible to receive an OAS pension under the Agreement on Social Security between Canada and the United States for the reason that she did not meet all of the eligibility requirements of the *Old Age Security Act*. She was advised that if she disagreed with the decision she could ask for reconsideration.

2) The Applicant wrote to HRDC on April 13, 2006, the first paragraph of which reads: “Please consider this letter a declaration of dispute the decision that I do not fully qualify for the OAS in Canada.” It would appear from the record that this letter was sent by the Applicant after she had received a response from the Canadian Consulate in San Francisco on her inquiry as to her eligibility for OAS benefits.

3) On May 9, 2006, the Applicant wrote to the official at the International Operations Section concerning the February 24, 2006 decision. Her request was: “Please consider this a respectful request to review your decision to discontinue my Old Age Security pension.” In her letter, she set out facts which would support her contention she was a resident of Canada during the relevant time period.

4) On June 29, 2006, the Applicant was advised her application for reconsideration of OAS benefits under the Canada and U.S. Social Security Agreement had been denied on a review of her eligibility under the *Old Age Security Act*. HRDC's response appears to be in response to the Applicant's letter of May 9, 2006.

5) On June 27, 2006, the Applicant wrote to HRDC essentially setting out similar facts as had been communicated by her to the Department on April 13, 2006.

6) On July 24, 2006 an official at the International Operations Section of HRDC wrote to the Applicant stating that the Section had received her letter of June 27th regarding her eligibility for an Old Age Security pension under the Agreement on Social Security between Canada and the United States. The official advised her letter had been sent to the Office of the Commissioner of Review Tribunals because: "This has been your second request for further review of your application." (Respondent's Record, Volume 1, page 14). Attached to that letter was an indication that the Applicant had the right to appeal the decision to the Review Tribunal but in order to do so the Applicant had to write to the Review Tribunal within ninety days after receiving the letter. The Applicant did not ask for a review by the Review Tribunal

7) In an undated letter sent by the Applicant from Belmont, California, she wrote to the official concerning his letter of July 24, 2006: "Informing me of the opportunity

> to present my case at a tribunal." She stated there may be a misunderstanding in what she was trying to accomplish. She wrote she understood the decision she did not qualify for OAS benefits under the reciprocal U.S./Canada Agreement. She added: "My contention is that I am entitled to receive OAS due to my years of residency in Canada and I would like to have the case re-opened for an appeal process in British Columbia". She continued by writing she regretted she did not appeal the letter of August 10, 2005 informing her that she was not eligible for OAS. She stated: "When I received that letter, I was on the verge of an emotional collapse and, quite honestly, I only glanced over the first page. Only upon receiving the letter of March 2, 2006, did I become fully aware that I had missed the appeal window and was being asked to repay monies." She continued writing: "A great injustice will be done if the appeal process is not re-opened and the information supporting my position (my letter of June 27, 2006) is not heard". (Respondent's Record, Volume 1, page 30).

[26] It is apparent from the record HRDC interpreted this undated letter from the Applicant received by it on August 21, 2006 as a formal request by the Applicant to re-open the decision communicated to her on August 10, 2005. As noted, the Department based its decision upon the authority purportedly conferred upon the Minister under subsection 84(2) of the *Act*.

Analysis

[27] This judicial review application cannot succeed. It also illustrates the perils of a litigant representing herself.

[28] The Applicant's submission to the Court was premised on the assumption her case could be appealed *de novo* to this Court, that the Court had the power to render a decision without regard to the Minister's decision of October 10, 2006 and that the Court had the power to substitute its decision for that of the Minister.

[29] Unfortunately, the Applicant's approach is not consistent with judicial review. On judicial review the Court is not empowered to revisit or reweight anew the facts of an administrative decision which HRDC's October 10, 2006 is. The Applicant's had to demonstrate some legal error made by HRDC in respect of its October 10, 2006 decision. The Applicant did not attempt to do so. In any event, on the face of the record, the evidence which the Applicant presented the Court or in its June 27, 2006 letter were not new facts. The Applicant put forth as new facts: her B.C. health card, her bank card, her B.C. driver's licence, her landlord's completed questionnaire on the Applicant's periods of stays in Victoria, her library card and her volunteer service card at the Royal University Hospital. Clearly, these are not new facts. These could have and should have been provided by the Applicant to HRDC with due diligence when requested.

[30] On this basis the Court cannot intervene.

[31] The Court raised an issue with counsel for the Minister. The question was whether the Minister could rely upon subsection 84(2) of the *CPP* to re-open or vary his decision under section 27.1(1) of the *OAS Act*. I raised this issue because subsection 84(2) appears to be confined to a decision of the Minister made under this Act [emphasis added] meaning the CPP which is a different statute than the *OAS Act* under which the Minister makes decisions regarding OAS benefits with a right of appeal to the Review Tribunal pursuant to section 28 of the *OAS Act*.

[32] Counsel for the Minister suggested to me subsection 84(2) was available to the Minister because the *OAS* and the *CPP* were meshed together and that the availability of section 84(2) of the *CPP* was to the Applicant's benefit because if she had presented new facts (new evidence not previously available) the Minister would have re-opened his August 10, 2005 decision. She also argued the common law supported her approach but, could not immediately cite case law which did not surprise the Court because the Court and not the Applicant had raised the issue at the hearing. In the circumstances it would be unwise to decide the point.

[33] It appears to the Court that the only recourse the Applicant now has is to request the Minister for an extension of time to reconsider the August 10, 2005 decision.

JUDGMENT

THIS COURT ADJUDGES that this judicial review application be dismissed without costs.

"François Lemieux"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-481-07
STYLE OF CAUSE:	MILDRED BUCHAN v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 23, 3007
REASONS FOR JUDGMENT AND JUDGMENT:	Lemieux J.
DATED:	November 5, 2007

APPEARANCES:

Mr. Eric Bruns for his mother Mildred Buchan	FOR THE APPLICANT
Ms. Sandra Gruescu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT