Federal Court  Cour fédérale

Date: 20121220

Docket: T-1897-10

Citation: 2012 FC 1532

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

HANNA SARAFFIAN

Applicant

and

THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Hanna Saraffian, applied for an Old Age Security pension in 2007. Her application was approved but only for a partial amount. She appealed that decision to the Office of the Commissioner of Review Tribunals for the Canada Pension Plan and Old Age Security. A hearing was conducted by a Review Tribunal.

[2] The issue on the appeal was whether Ms. Saraffian satisfied the residence requirements necessary to qualify for a full pension; specifically whether she was residing in Canada prior to July 1, 1977. On October 12, 2010 the Tribunal determined that Ms. Saraffian had failed to discharge her burden of proof. In this application, Ms. Saraffian seeks judicial review of that decision. The matter has been unduly delayed as Ms. Saraffian represented herself and requested several extensions of time to complete the preliminary steps.

[3] For the reasons that follow, the application is dismissed.

BACKGROUND:

[4] Ms. Saraffian was born in the former Czechoslovakia and raised in Argentina where she received her education. She moved to the United States in 1963 and was employed there when she met her husband to be, a Montréal resident, on a visit to Quebec City. They married in Montréal in February 1978, separated in 1981 and divorced in 1982. Ms. Saraffian had obtained employment in Montréal and thus chose to remain in Canada living to the present in the former matrimonial home which she had purchased with savings transferred from the United States. She has no pension benefits from her employment in the United States or in Canada.

[5] Ms. Saraffian turned 65 in May 2007 and applied for a Canadian pension. She says that when she was completing the application she telephoned for assistance and was advised by an official to put down the date she had been granted a permanent resident visa, which was April 10, 1978, as the date on which she had established residence in Canada.

[6] Following review of her application, Ms. Saraffian was granted a pension under the *Old Age Security Act*, RSC 1985, c O-9 [OAS] of $358.79 per month, which was at that time 27/40ths of the full pension, as well as a Guaranteed Income Supplement of $583.22 per month. On questioning the pension reduction, which then amounted to approximately $160 per month, Ms. Saraffian was told that she would have to prove that she was living in Canada by July 1, 1977 to receive the full pension.

[7] At the hearing of the appeal and in her affidavits before the Tribunal and the Court, Ms. Saraffian explained that she had met her future husband in 1975. They exchanged visits thereafter in New York and Montréal and after a year he asked her to leave her job in the U.S. to join him in Canada. She said she resigned from her position in New York in April 1976 and moved into his apartment in Montréal as a trial arrangement while considering marriage. She went to New York on a monthly basis to see her mother. In some months her mother would come to see her in Montréal. She left her furniture in a commercial warehouse in New York and opened a bank account in Montréal. In early 1977, she says, she deposited a large sum of money in a bank near her future husband's apartment.

[8] Following their marriage in February 1978, her husband was able to sponsor her. She then regularized her immigration status and brought her belongings to Montréal. Her U.S. passport from that time indicates that she entered Canada on May 11, 1978 as a landed immigrant. At that time, Ms. Saraffian and her husband had loaded her furniture into a "U-Haul" and drove it north to Canada. Ms. Saraffian contends, however, that she had been resident in Canada for at least a year prior to that date.

DECISION UNDER REVIEW:

[9] After reviewing the background facts and the applicable legislation, being s 3 of the OAS and s 21(1) of the *Old Age Security Regulations*, CRC, c 1246 [OASR], the Tribunal cited three decisions of this court as providing assistance and guidance: *Ata v Canada*, [1985] FCJ No 800 (CA) (QL) [*Ata*]; *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 [*Ding*]; and *Perera v Canada (Minister of Health and Welfare)*, [1994] FCJ No 351 (QL) [*Perera*].

[10] The Tribunal first pointed out that the onus is on an applicant to prove that the pension decision was incorrect. It then noted that the applicant had no Canadian lease papers from 1976 to 1978 to demonstrate residence in Canada. It inferred from the record that her furniture had been kept at her mother's house in New York during that period, and that her bank account had not been transferred to Canada until the end of 1977. As well, the Tribunal noted, Ms Saraffian had stated that, prior to marrying in 1978, she did not have a definite intention of settling in Canada. Her ties to the country were therefore not strong enough to establish residency prior to 1978 in the Tribunal's view.

[11] In the absence of substantial evidence demonstrating an earlier date of residence, the 1978 dates of arrival and reception as a landed immigrant were *prima facie* evidence of the date of her arrival in the country. In addition, the Tribunal noted, the applicant's immigration procedures had been initiated from New York and not from Montréal although she claimed to have been residing in Montréal by that time.

[12] The Tribunal stated that the legal test to be met in order to establish residency in Canada for a certain period of time was greater than simple intention to be considered as a resident. According to *Ata*, above, permanent residence is a status to be obtained by compliance with particular provisions of Canadian law, not merely by personal intention and lawful presence, of whatever duration, in Canada.

ISSUES:

The issues which arise in this matter are as follows:

1. Did the Tribunal base its decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the evidence before it?
2. Did the Tribunal correctly apply the legal test for determining residence?

ANALYSIS:

Standard of Review:

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57, the Supreme Court of Canada established that "existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard".

[14] Justice Gauthier, then a member of this Court, addressed the standard of review in *Singer v Canada (Attorney General)*, 2010 FC 607, aff'd 2011 FCA 178, [*Singer*], a pension case raising similar questions to those in this matter. She found, at paragraph 18, that the appropriate standard to

apply to the sufficiency of the reasons and the application of the legal test to the facts of the case was reasonableness. I agree with that conclusion.

[15] As the Supreme Court stated at paragraph 47 of *Dunsmuir*, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. 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. Thus the fact that the Court may have reached a different conclusion on the evidence does not justify interference with the Tribunal's decision if it meets the reasonableness standard.

Did the Tribunal base its decision on erroneous findings of fact made in a perverse or capricious manner and without regard to the evidence before it?

[16] The applicant submits that the Tribunal failed to consider all of the evidence. She points to stamps in her U.S. passport showing her exiting Canada on July 4, 1977 (and re-entering on July 15, 1977) as demonstrating that by that date she was already resident in Montréal, and was heading south for a vacation with her mother in New York. She states that at that time only trips longer than a week were marked by a stamp at the border. This indicates, she submits, that she was not leaving Canada for prolonged periods to live in the U.S. in 1977. She argues that the Tribunal recorded that it had observed those stamps but did not analyze their significance, and therefore it failed to have regard to the evidence.

[17] The applicant further submits that the Tribunal was aware that she had brought money to Canada in 1976 and early 1977, and yet it concluded that she did not transfer her bank account to Canada until the end of 1977, making an erroneous finding of fact.

[18] The applicant also argues that she was living in Montréal by February 24, 1978, when the Sourp Hagop Armenian Apostolic Church solemnized her marriage there, although this was before her status as an immigrant was regularized. The Tribunal should have had regard to this evidence.

[19] There are questionable aspects to the Tribunal's fact-finding. It interpreted the applicant's travel back-and-forth between New York and Montréal as residence in New York and visits to Montréal rather than the reverse. It could have found the contrary from the evidence of the passport stamps in July 1977. Nor does it necessarily follow that the applicant's then boyfriend would have added her name to his apartment lease had they been living together for a year prior to marriage. And it seems plausible that the applicant could have remained uncertain about the marriage in July 1977, eight months prior to its celebration in Montréal in February 1978. Moreover, it is not unlikely that the applicant would have submitted her immigration application from New York rather than Montréal as she was an American citizen at that date.

[20] The difficulty for the applicant, who bore the burden of proof before the Tribunal, is that she did not bring any documentary evidence, other than the passport stamps, to establish her case. She had no witnesses to her life in Montréal before 1978 and failed to complete the consent forms provided to her which would have allowed verification of her history with the U.S. authorities such as the Social Security Administration.

[21] There was no evidence of banking records, driver's license records, medical records or tax records from the U.S. or Canada. There was no evidence from witnesses to describe her lifestyle or establishment in Canada. In contrast, there was the clear documentary evidence of her date of entry to Canada as a landed immigrant in 1978 and the declaration in her OAS application that she had lived in Canada since April 1978. The Tribunal did not disregard the evidence of the passport stamps but did not give it the weight which the applicant believes it deserves. That is not a basis upon which this Court may intervene.

Did the Tribunal correctly apply the legal test for determining residence?

[22] The applicant submits that none of the cases relied upon by the Tribunal are pertinent to the facts of her case. In *Ata*, the applicant's residence in Canada did not count towards pensionable time because he was a diplomat from another country. In *Ding*, the applicant was in Canada on a tourist visa and had not lived for a full ten years in the country. In *Perera*, the applicant voided his permanent residency by returning to his native Sri Lanka for three years.

[23] The Tribunal's purpose in citing these authorities was not to rely upon them for the similarity of their facts but for the legal principles which they state and apply. I can see no legal error in the Tribunal's application of those principles.

[24] The test for determining residence in Canada for the purpose of evaluating pension entitlements is set out at paragraphs 30-37 of *Singer*, above:

> **30** The concept of "residence" is the subject of a full chapter of the *Regulations* starting at section 20. Of particular interest here is the definition found at paragraphs 21(1)(a)[11] and (b):
>
> 21. For the purposes of the Act and these 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.
[Emphasis added]

* *

21. Aux fins de la Loi et du présent règlement,
a) une personne réside au Canada si elle établit sa demeure et vit ordinairement dans une région du Canada; et
b) une personne est présente au Canada lorsqu'elle se trouve physiquement dans une région du Canada.
[mon souligné]

31 This definition has been applied to a variety of circumstances. As noted by Justice James Russell in *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, 268 F.T.R. 111 (*Ding*), one can refer to many factors to determine if a person has made her home and ordinarily lives in Canada as of the date set out in the *Act*.

32 Also, as noted by Justice Carolyn Layden-Stevenson in *Chhabu*, the list of factors enumerated in *Ding* is not exhaustive. There may well be other factors which become relevant according to the particular circumstances of a case.

33 It is important to emphasize however that the use of precedent is dangerous in that weight might be given to a factor in a particular set of circumstance that is inappropriate in a different context. Mrs. Singer appears to have fallen in this "trap" for she referred the Court to various summaries of decisions of the RT to support her position. These really have little precedential value in the present context. For example, she noted that in *W-76940 v. Minister of Human Resources Development* (December 19, 2003), the RT determined that the appellant's Canadian residence began on the day she formalized her intention by applying for permanent residence.

34 However, she fails to mention that in that case, the appellant had lived in Canada under a tourist visa which had been extended several times and the RT was really looking for indicia as to whether she had made Canada her home[12] despite having been absent from the country when her son was working in England.

35 In *S-59142 v. Minister of Human Resources Development* (November 2, 2000), the RT found that the appellant had decided to make her home in Canada when she first extended her visitor's visa in 1990. Again, the appellant had already lived in Canada for a year and she extended her visa four times before applying for landed immigrant status because during that period her son was not in a position to sponsor her.

36 Although each case cited was carefully reviewed by the Court, there is no need to comment further on them for, as mentioned, they do little more than confirm that the

> test is a fluid one. Sometime the fact that a person has obtained or applied for a permanent status will be relevant while in others it will not. This is true for most factors.
>
> **37** However, presence in Canada at some point in time appears to be of particular importance if not crucial in all cases. There is no doubt that continuous presence is not required. The Regulations as a whole make that very clear as does the case law. But it is difficult to imagine how one can be said to "ordinarily live" in Canada if this person has never actually been in Canada.[13] In fact, looking at the overall scheme, including particularly the fact that Parliament thought it appropriate to also provide for a third category of persons in subparagraph 3(1)(b)(i) of the Act that does not rely at all on the concept of residence (those who possess a valid immigrant visa) as well as exceptions in the Regulations for persons as spouses who married a Canadian or permanent resident while they worked outside of the country (paragraph 22(c) in the Regulations), there is little doubt in my mind that presence is, at some point in time, an essential element of this definition.

[25] In the present case, the Tribunal reviewed several factors: the absence of proof of a lease or home ownership in Canada, the failure to authorize the retrieval of government records, the absence of banking records, the ties to the applicant's mother in the U.S. and the corresponding lack of proof of ties to anyone in Montréal before 1978, the absence of proof of the whereabouts of the applicant's furniture prior to spring 1978, the absence of proof of having severed ties with the employer in the U.S., the frequency and length of absences from Canada to visit the U.S., and the absence of proof of lifestyle or establishment in Montréal.

[26] In the absence of any proof of favourable factors, the *prima facie* evidence of the official entry dates and the initial statements on the pension application paperwork convinced the Tribunal that the applicant had not established ordinary residence in Canada prior to July 1, 1977. This was a justified, intelligible and transparent conclusion within the range of possible outcomes acceptable on the facts and the law.

[27] In closing, I wish to note that at several times during the hearing of this application Ms. Saraffian stated that she has the necessary documentary evidence in her possession to prove her claim. If that is the case, and she is still able to produce it, I would suggest that the respondent consider whether there is any basis upon which the application might be reopened on compassionate grounds considering Ms. Saraffian's age and limited income.

[28] I also note that the record discloses that Ms. Saraffian addressed the public servants who were involved in reviewing her application and appeal in a belligerent and offensive manner. I am satisfied that there is no foundation for her complaints about the services she was provided in her preferred official language.

[29] In the circumstances, I will exercise my discretion not to award costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. The parties shall bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1897-10
STYLE OF CAUSE:	HANNA SARAFFIAN AND THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	October 22, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	December 20, 2012

APPEARANCES:

Hanna Saraffian	FOR THE APPLICANT (Self-represented Applicant)
Michael Stevenson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HANNA SARRAFIAN Montreal, Quebec	FOR THE APPLICANT (Self-represented Applicant)
MYLES J. KIRVAN Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT