Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *J. B. v Minister of Employment and Social Development*, 2019 SST 1000

Tribunal File Number: AD-19-140

BETWEEN:

J. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: October 9, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] In 2015, J. B. (Applicant) applied for the Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS).

[3] In this case, the number of years of residence in Canada the Applicant accumulated before his 65th birthday determines the amount of the partial OAS pension to which he is entitled. Furthermore, the Applicant is not eligible for the GIS unless he maintains his Canadian residence after his 65th birthday. The Applicant claims to be entitled to both benefits because he has resided in Canada continuously since September 13, 1980.

[4] Following an investigation, the Minister of Employment and Social Development acknowledged that the Applicant had resided in Canada for more than 23 years. The Applicant was therefore entitled to 23/40 of a full OAS pension beginning the month after his 65th birthday, in December 2015. However, since the Minister deemed that the Applicant no longer resided in Canada, the Minister found that he was not eligible for the GIS.

[5] The Applicant disputed the Minister's decision, but the General Division dismissed his appeal.

[6] I find that the General Division made a material error concerning the facts of the case. Accordingly, I can give the decision that the General Division should have given. I find that the Applicant resided in Canada from September 13, 1980, to October 31, 2009, and from April 28, 2015, to February 9, 2017. Therefore, the Applicant is entitled as of December 2015 to a greater partial OAS pension and is eligible for the GIS.

ISSUES

[7] As part of this decision, I focused on the following questions:

a) In finding that the Applicant stated that he left Canada in June 2005, did the General Division base its decision on an erroneous finding of fact?

b) Of the possible remedies, which is the most appropriate based on the facts in this case?

c) During which periods did the Applicant establish his Canadian residence?

ANALYSIS

[8] The *Department of Employment and Social Development Act* (DESD Act) assigns the Appeal Division a limited role. More specifically, the Appeal Division may intervene in a decision of the General Division, only if it is established that at least one of three relevant errors has been committed.[1] Furthermore, the Appeal Division cannot grant remedies other than those set out in the DESD Act.[2]

[9] In this case, I have focused on whether the General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[3]

[10] For an erroneous finding of fact to justify my intervention, the finding must have been one on which the General Division decision is based and one that the General Division made in a perverse or capricious manner or without regard for the material before it. For example, a finding of fact that squarely contradicts or is unsupported by the evidence constitutes an erroneous finding of fact, as set out in section 58(1)(c) of the DESD Act.[4]

---

[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) specifies the three relevant errors (also known as grounds of appeal).
[2] The remedies possible are those set out in section 59(1) of the DESD Act.
[3] DESD Act, s 58(1)(c).
[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.

Issue 1: Did the General Division base its decision on an erroneous finding of fact?

[11] Yes, by finding that the Applicant had stated that he left Canada in June 2005, the General Division based its decision on an erroneous finding of fact under section 58(1)(c) of the DESD Act.

[12] The issue before the General Division was whether the Applicant resided in Canada or Haiti during the periods at issue. To answer this question, the General Division had to assess numerous factors and decide to which country the Applicant's ties were stronger.

[13] At paragraph 15 of its decision, the General Division made the following finding: [translation] "As stated, the Appellant indicated in his May 2015 application for OAS benefits that he had arrived in Canada on September 13, 1980, and left in June 2005." The Applicant firmly denies that he left Canada definitively in June 2005 and states that he would never have admitted such a thing.[5]

[14] During the General Division hearing, the Tribunal member asked for clarification of the Applicant's answer to the question at issue, which is question 14 entitled [translation] "Residence history."[6] In response to that question, the Minister's representative acknowledged that an analyst had regrettably added information to the form.[7] What is more, the analyst's notes were written in red ink, although that is not clear from the black and white copy the Minister gave the Tribunal.

[15] Based on the colour copy of the application form the Minister's representative had before her, she confirmed that the Applicant stated that he had resided in Canada from September 13, 1980, to the date he applied, on May 6, 2015.

[16] The period of Canadian residence claimed by the Applicant on his OAS pension application is therefore from September 13, 1980, to May 6, 2015. However, the General Division noted that the Applicant had stated that he had left Canada in June 2005. This

[5] AD1-6.
[6] GD2-12.
[7] Audio recording of General Division hearing around 00:33:30.

observation is untenable given the Minister's clarifications. The General Division therefore made an erroneous finding of fact without regard for the material before it.

[17] The Minister argues that the General Division decision was not based on that error but on all of the evidence and the Applicant's testimony. As a result, I should not intervene based on that omission.

[18] I cannot accept the Minister's argument on this topic. The General Division found that the Applicant had not resided in Canada since August 2005. In support of its decision, the General Division noted that the Applicant had admitted that he left the country in June 2005.

[19] I acknowledge that the General Division's decision was not entirely based on that erroneous finding. I find however that section 58(1)(c) of the DESD Act does not need to be interpreted so restrictively. Instead it is sufficient that the General Division made an erroneous finding of fact within the meaning of section 58(1)(c) and that this error could have had an impact on the decision in question.[8]

[20] In other words, this provision does not oblige the Appeal Division to decipher how much the General Division based its decision on one piece of evidence in comparison with another. It is enough that the erroneous finding of fact that satisfies the requirements of section 58(1)(c) is one on which the General Division decision is based, which is the case here.

Issue 2: Of the possible remedies, which is the most appropriate based on the facts in this case?

[21] I have decided to give the decision that the General Division should have given, as the Applicant asked.

[22] The Minister acknowledges that the evidence on file is complete. However, the Minister asks that the matter be referred back to the General Division because the reconsideration of the file requires an analysis of all the evidence.

[8] *Marlowe v Canada (Attorney General)*, 2009 FCA 102 at para 11.

[23] I find that I have the authority and the information needed to give a final decision in this case.[9] Furthermore, I analyzed all the documents on file and listened to the audio recording of the hearing that took place on October 22, 2018. As a result, it would be of little benefit to refer this matter back to the General Division for another Tribunal member to review the file.

Issue 3: During which periods did the Applicant establish his Canadian residence?

[24] I find that the Applicant was resident of Canada from September 13, 1980, to October 31, 2009, and then from April 28, 2015, to February 9, 2017. The Minister maintains the right to examine the issue of the Applicant's Canadian residence after that date.

[25] In short, the OAS pension is a monthly payment available under the *Old Age Security Act* (OAS Act) to seniors aged 65 or older who meet the legal status and residence requirements. A person may be entitled to a full or a partial pension, depending on the number of years of residence accumulated in Canada.

[26] Furthermore, the GIS is a monthly benefit available to Old Age Security pension recipients who have a low income and live in Canada.

[27] The concept of Canadian residence is therefore essential under the OAS Act. The expression is defined in section 21(1) of the *Old Age Security Regulations*, which makes a distinction between residence and presence in Canada:

> **21 (1)** 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.

---

[9] Section 59(1) of the DESD Act gives me the power to give the decision that the General Division should have given. See also section 64(1) of the DESD Act and the Federal Court of Appeal decision *Nelson v Canada (Attorney General)*, 2019 FCA 222.

[28] To decide the issue of the Applicant's residence, I considered the factors below:[10]

a) ties in the form of personal property (for example, house, business, furniture, automobile, bank account, or credit card);

b) social ties in Canada (for example, participation in organizations, associations, or a professional order);

c) other ties in Canada (for example, insurance policies, driver's licence, rental, lease, loan, or mortgage agreement, property tax statements, electoral voter's list, contracts, utility bills, public records, immigration and passport records, provincial social services records, public and private pension plan records, or federal and provincial income tax records);

d) ties in another country;

e) regularity and length of stay in Canada and the frequency and length of absences from Canada; and

f) the person's lifestyle, or whether the person living in Canada is sufficiently deep-rooted and settled.

[29] The test for residence is fluid in the sense that the weight given to each factor can vary from case to case.[11] Furthermore, the Federal Court's teachings indicate that determining a person's residence is largely a factual issue that requires an examination of the individual's whole context.[12]

[30] In this case, the Minister recognizes that the Applicant was a resident of Canada as of his initial entry (September 13, 1980) until July 31, 1996, and then from June 1, 1998, until July 31,

---

[10] These factors have been quoted with approval by the Federal Court in *De Carolis v Canada (Attorney General)*, 2013 FC 366 at para 32 and *De Bustamante v Canada (Attorney General)*, 2008 FC 1111 at para 38 (among others). However, in the interest of clarity, I have added some additional examples.
[11] *Singer v Canada (Attorney General)*, 2010 FC 607, confirmed by 2011 FCA 178.
[12] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 at para 58; *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277 at para 32; *Duncan v Canada (Attorney General)*, 2013 FC 319.

2005. The periods at issue are therefore those from August 1, 1996, to May 31, 1998, and from August 1, 2005.

<u>August 1, 1996, to May 31, 1998</u>

[31] According to the Applicant's testimony, he lived with a cousin during this period. He had a cell phone but no other utility in his name. Since 1981, the Applicant has always filed his federal income tax returns as a Canadian resident.[13] Furthermore, his six children all live in Canada.

[32] On the one hand, the Applicant stated that he held a Canadian passport, a Canadian social insurance number, a health insurance card, and a Québec driver's licence.[14] On the other hand, he did not maintain Haitian official documents.

[33] As far as he recalled, the Applicant travelled to Haiti during that period, but his absences from Canada never lasted more than three months.

[34] The Minister argues that [translation] "the Canadian residence [of the Applicant during that period] is not supported by any evidence."[15] This observation was made before the Applicant's sworn testimony, which constitutes material evidence.

[35] Moreover, I note that the Applicant was living in poverty. I recognize of course that the minimum residence requirement set out by the OAS Act applies to all applicants, regardless of their financial means. However, the Applicant's financial status is part of that person's "whole context" and among the considerations I must take into account when assessing his residence.

[36] All applicants cannot be expected, for example, to have a house or a vehicle or even a lease in their own name. Even the conservation of documents may be difficult for those who need to rely on their friends and family for a place to live.

[13] GD2-49.
[14] GD2-101.
[15] GD4-10.

[37] In cases like this one, it may therefore be particularly useful to consider the strength of the Applicant's ties to Canada in comparison with the strength of the ties to his country of origin.

[38] In this case, it is clear that the Applicant maintain ties to Haiti. For example, he has brothers and sisters who live there. However, I find that the Applicant's ties with Canada were stronger than the Applicant's ties to Haiti.

[39] On the whole, I am therefore satisfied that the Applicant was able to prove his Canadian residence for the period from August 1, 1996, to May 31, 1998.

August 1, 2005, to February 9, 2017

[40] I find that the Applicant resided in Canada from August 1, 2005, to October 31, 2009. However, his Canadian residence was interrupted from November 1, 2009, to April 27, 2015. The Applicant's Canadian residence was then re-established as of April 28, 2015.

[41] The Applicant's ties to Canada since August 1, 2005, are similar to those of the previous period. In addition to the above, there are the following factors:

a) the Applicant worked and contributed to the Québec Pension Plan (QPP) in the years 2005 and 2007;[16]

b) Québec granted him last-resort financial assistance from May to September 2008, May to November 2009, May 2010 to March 2011, and October 2016 to February 2017.[17] Another request for last-resort financial assistance was denied in March 2016;

c) the Applicant has received a QPP pension since 2014 (at least);[18]

d) he applied for the OAS pension in May 2015 and for the GIS in June 2015;

e) he applied for affordable housing in December 2015;[19] and

[16] GD2-99.
[17] GD2-39; GD1-26.
[18] GD2-21; GD2-35; GD2-100.
[19] GD1-32.

f) he has had a bank account in Canada since July 2016 (at least).[20]

[42] Although the Applicant's movements were not precisely known during that period, I am satisfied that the Applicant resided in Canada from August 1, 2005, to October 31, 2009.

[43] However, for the subsequent period, considerable evidence contradicts the Applicant's claims regarding his Canadian residence, including the following:

a) the Applicant got married in Haiti on November 14, 2009, and the marriage certificate specifies that the Applicant is domiciled in Delmas in Haiti;[21]

b) as of the wedding date, the Applicant lived with his wife during his stays in Haiti and helped in the small restaurant she operated;[22] and

c) from 2010 to 2015, the Applicant's trips are more precisely known, and it is clear that the length and regularity of his stays in Canada declined significantly.[23]

[44] I therefore find that the Applicant did not reside in Canada from November 1, 2009, to April 27, 2015.

[45] Before the General Division, the Applicant relied on section 21(4) of the OAS Regulations. This legislative provision sets out that temporary absences of less than a year do not interrupt a period of Canadian residence.[24]

[46] I find that this provision does not apply to the Applicant because his absences from Canada were frequent and lengthy. In other words, the Applicant's absences from Canada were not temporary.

[47] Nevertheless, I observe that the Applicant's situation changed more recently. The Applicant entered Canada on April 28, 2015, and his ties to Canada seem to have strengthened since that date. I especially note the fact, that in May and June 2015, the Applicant applied to the

---

[20] GD1-19 to GD1-24.
[21] GD2-103.
[22] GD2-29.
[23] GD2-76, GD2-77, GD4-14, and GD4-15.
[24] *Duncan*, *supra* note 12 at para 26.

Minister for benefits, he applied for social assistance in March and October 2016, and he applied for affordable housing in December 2015.

[48] Furthermore, although the Applicant's absences from Canada during that period were not precisely known, several pieces of evidence suggest that they were rather short. For example:

a) the Applicant entered Canada on October 13, 2015, but the date of his departure from the country is now known. However, he could not have left Canada before August because he had prescriptions filled on August 4, 2015;[25]

b) in March 2016, the Applicant responded promptly to the Minister's requests for information;[26]

c) in May 2016, he had an interview with the Minister's investigator;[27] and

d) he made several bank transactions between July 2016 and February 2017.[28]

[49] I therefore find that the Applicant demonstrated the reinstatement of his Canadian residence as of April 28, 2015.

[50] In the absence of recent evidence, I find that the Tribunal's statement must focus on the period preceding the last decision given by the Minister, that is before February 9, 2017. Consequently, the Minister can decide on the Applicant's Canadian residence after that date. I note however that it would be useful to gather more recent information before addressing this issue, if appropriate.

CONCLUSION

[51] On the whole, I have found that the General Division based its decision on a material error regarding the facts of the case. Since that error was committed, I have the authority to reassess the matter and give the decision that the General Division should have given.

---

[25] GD2-78, GD6-4.
[26] GD2-52 to GD2-58.
[27] GD2-29.
[28] GD1-19 to GD1-24.

[52] I am satisfied that the Applicant resided in Canada from September 13, 1980, to October 31, 2009, and from April 28, 2015, to February 9, 2017. However, the Applicant was not able to satisfy me that he resided in Canada from November 1, 2009, to April 27, 2015. The Minister retains the right to decide the issue of the Applicant's Canadian residence after February 9, 2017.

[53] The Applicant is therefore entitled to a greater partial OAS pension and is eligible for the GIS as of December 2015. It is now up to the Minister to recalculate the exact sums to which the Applicant is entitled based on the periods of Canadian residence accepted by the Tribunal and any other relevant factor.[29]

[54] The appeal is allowed in part.

Jude Samson
Member, Appeal Division

HEARD ON:	August 14, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. L., Appellant Francklin Ulysse, Representative for the Appellant Stéphanie Pilon, Representative for the Respondent

[29] For example, the sum of the GIS to which the Applicant is entitled also depends on the Applicant's and his wife's incomes. If the couple's incomes are too high, the Applicant may not be able to receive the GIS.