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

Citation: *L. L. v Minister of Employment and Social Development*, 2020 SST 314

Tribunal File Number: AD-19-786

BETWEEN:

L. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: April 16, 2020

Canada

DECISION AND REASONS

DECISION

[1] I am allowing the Claimant's appeal and sending his file back to the General Division for reconsideration.

OVERVIEW

[2] The Claimant applied for an Old Age Security (OAS) pension in May 2014. He later applied for the Guaranteed Income Supplement (GIS) too. The amount of the Claimant's OAS pension depends on the years that he resided in Canada between his 18th and 65th birthdays. To be eligible for the GIS, the Claimant had to continue residing in Canada after his 65th birthday.[1]

[3] The Minister of Employment and Social Development spent about 15 months reviewing the Claimant's applications and asking him follow-up questions. Then, in August 2015, the Minister approved the Claimant's applications, concluding that he was eligible for both benefits.

[4] Just a few months later, however, the Minister started a review of the Claimant's residence in Canada. In May 2016, the Minister said that it would stop paying the GIS to the Claimant. Then, in October 2016, the Minister changed its initial approval decision. The Minister decided that the Claimant was not entitled to the GIS benefits that he had received from July 2014 to May 2016. As a result, the Minister demanded that the Claimant repay over $15,000 in benefits. The Minister maintained that decision in November 2017.

[5] The Tribunal's General Division agreed with the Minister's decision. The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. I have decided that the General Division decision contains errors of law and jurisdiction and needs to be set aside. I have also decided to send the file back to the General Division for reconsideration.

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[1] In this context, residing in Canada has a very specific meaning. Section 21(1) of the *Old Age Security Regulations* (OAS Regulations) says that a person resides in Canada if they make their home and ordinarily live in any part of the country. This is different from a person who is just present in Canada.

PRELIMINARY ISSUES

[6] Three issues are worth discussing in a preliminary way.

The Appeal Division Hearing Went Ahead on March 11, 2020

[7] The Appeal Division hearing was supposed to start on January 29, 2020. But when the parties met on that day, they agreed to delay its start.

[8] Since the Minister's October 2016 decision, the Claimant has often alleged that the Minister made a mistake when approving his GIS application. The General Division noted that the Minister has a discretionary power to remit (or waive) overpayments that are caused by an administrative error.[2] Therefore, at the start of the hearing in January, I asked whether the Minister had yet decided whether to exercise this discretionary power. Much to the Claimant's frustration, the Minister's representative answered no to this question.

[9] The Minister's representative was hopeful, however, that the Minister could make that type of decision within about six weeks. He also confirmed that the Minister would not deduct any amounts from the Claimant's other benefits as long as this appeal was ongoing.

[10] In the circumstances, the parties agreed to postpone the hearing for six weeks.

[11] Between hearing dates, the Claimant became upset to learn that the Minister had reassessed his residence in Canada once again, and it was now affecting his OAS pension too.[3] On February 19, 2020, the Minister decided that the Claimant was not entitled to the full OAS pension that he had been receiving since July 2014. Instead, the Claimant was entitled to receive only 32/40ths of a full OAS pension.

[12] This decision created an additional overpayment (or debt) of nearly $8,000 on the Claimant's account. The Minister said that it would recover this amount by reducing the Claimant's OAS pension to less than $300 per month, starting in April 2020.

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[2] The Minister's discretionary power is set out in section 37(4) of the *Old Age Security Act* (OAS Act).
[3] Document AD5 contains an email from the Claimant and the Minister's decision letter dated February 19, 2020.

[13] I am mentioning the Minister's February 19, 2020, decision by way of background only. That decision, including the amount of the Claimant's OAS pension, is not before the Tribunal at this time. If the Claimant wants to challenge that decision, he should follow the instructions starting on page AD5-3, under the heading "If you disagree with our decision".

[14] When the hearing resumed on March 11, 2020, I began by asking the Minister's representative whether the Minister had yet decided whether to use its discretionary powers to waive some or all of the Claimant's debt. It had not. I also asked the Minister's representative whether he could provide any sort of update on when that decision might be made. He could not.

[15] Nevertheless, the Minister's representative suggested that a further adjournment might be appropriate to give the Minister more time to decide this issue.

[16] In response, the Claimant repeated his frequent complaints about bloated governments, along with their callous and unending bureaucracy. He said that he was struggling to understand and cope with the number of decisions the Minister was making in his file. He also asked how anyone could survive on the small amount that the Minister said it would pay him.[4]

[17] In the circumstances, I decided that the hearing should go ahead on March 11, 2020. I based that decision on:

a) the Claimant's concerns about delay and the Tribunal's need to conduct appeals as quickly as possible;[5]

b) the lack of a clear timeline as to when the Minister might exercise its discretionary power to waive some or all of the Claimant's debt; and

c) the number and complexity of the outstanding issues concerning the Claimant's OAS benefits.

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[4] I thought it might be of some help if I tried to summarize the decisions that the Minister has made in the Claimant's file. My summary is attached as an appendix to this decision. Unfortunately, there could be other decisions or updates of which I am not aware.

[5] Section 3(1)(a) of the *Social Security Tribunal Regulations* says that the Tribunal must conduct proceedings as informally and quickly as the circumstances and considerations of fairness and natural justice permit.

[18] Shortly after the hearing, the Minister's representative did provide an update on the timing of the Minister's discretionary decision to waive some or all of the Claimant's debt.[6] Then, on March 26, 2020, the Minister denied that an administrative error had occurred in this case and refused to waive any of the Claimant's debt.[7]

[19] Again, I cannot review the Minister's March 26, 2020, decision as part of this appeal. If the Claimant wants to challenge that decision, he can follow the instructions on page AD11-2, under the heading "If you disagree with the decision".

The Appeal Division's Ability to Raise New Issues

[20] In its written and oral submissions, the Minister was very critical of my earlier decision in this case.[8] Specifically, the Minister alleges that I committed errors of law and jurisdiction by granting leave to appeal on an issue that the Claimant had not raised and by shifting the burden of proof from the Claimant to the Minister.

[21] If the Minister had wanted to challenge my earlier decision, it could have asked the Federal Court to review it. It did not. As a result, that decision is final.[9] There is little more that I can, or should, say about that decision except that it has provided the parties with a fair opportunity to comment on the issues discussed below.

The Minister's New Evidence

[22] As part of its submissions to the Appeal Division, the Minister included the Affidavit of Elizabeth Charron, a legislative officer within the Minister's OAS Policy Division.[10] This is new evidence that the Minister had not filed at the General Division level. However, the Appeal Division's limited role means that new evidence is usually irrelevant to the issues that I need to decide. As a result, I do not normally consider new evidence.

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[6] Document AD6.
[7] Document AD11.
[8] On November 28, 2019, I decided to grant the Claimant an extension of time to bring his appeal and leave (or permission) to appeal.
[9] See section 68 of the *Department of Employment and Social Development Act* (DESD Act) and the Federal Court's decision in *Canada (Attorney General) v O'Keefe*, 2016 FC 503.
[10] Pages AD3-498 to 502.

[23] In the end, I do not need to decide this issue. Since I am returning the file to the General Division for reconsideration, the General Division will be free to consider the Charron Affidavit as part of that process.

ISSUES

[24] When reaching my decision, I focused on the following issues:

a) Did the General Division commit errors of law and jurisdiction by assuming that the Minister had the power to change its August 2015 approval decision?

b) If so, what is the best remedy in this case?

ANALYSIS

[25] I must follow the law and procedures set out in the *Department of Employment and Social Development Act* (DESD Act). As a result, I can intervene in this case only if the General Division committed a relevant error.[11]

[26] In this case, I focused on whether the General Division made a jurisdictional error by failing to decide all of the relevant issues and whether its decision contains an error of law.[12] Based on the wording of the DESD Act, any error of these types could allow me to intervene in this case.[13]

Issue 1: Did the General Division commit errors of law and jurisdiction?

[27] Yes, the General Division incorrectly assumed that the Minister had the power to change its August 2015 approval decision. The scope of the Minister's powers were at issue in this case, but the General Division never decided the issue.

[28] To begin, I recognize that the Claimant has repeatedly asked a number of questions about the OAS program. Not all of the Claimant's questions are directly relevant to this decision. In the

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[11] The relevant errors, formally known as grounds of appeal, are listed under section 58(1) of the DESD Act.
[12] Section 58(1)(a) of the DESD Act gives me the power to intervene in a case if the General Division exceeds its powers. Section 58(1)(b) of the DESD Act gives me the power to intervene in a case if the General Division misapplies the law, whether or not the error appears on the face of the record.
[13] The focus on the words of the DESD Act is explained in *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.

paragraphs below, I will nevertheless try to provide some additional background information about the *Old Age Security Act* (OAS Act) and its requirements. However, there are some questions that I cannot answer, like when the Minister might have changed its forms. I do not have this type of information because the Minister and the Tribunal are independent from one another.

[29] The Claimant's questions touch on two important requirements under the OAS Act:

a) **Residence in Canada**: A person resides in Canada if they make their home and ordinarily live in the country.[14] There is no hard and fast rule about how many days a person must spend in the country to reside here. Instead, it is one of many factors to be considered when assessing a person's residence.[15] Practically speaking, however, the less time a person spends in Canada, the less likely they are to be residing in this country.

b) **Absences from Canada of more than six months**: A person can lose their entitlement to certain OAS benefits if they remain outside of the country for more than six months at a time.[16]

[30] The Claimant has received two OAS benefits: an OAS pension and the GIS. The requirements above have different implications depending on the benefit at issue.

[31] The number of years that a person resided in Canada will determine whether they are eligible for an **OAS pension** and the amount of that pension.[17] A person, like the Claimant, who has 20 or more years of residence in Canada is entitled to a permanent (or portable) OAS pension.[18] This means that they can continue receiving their OAS pension no matter where they reside, and regardless of the length of their absences from Canada.

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[14] The term "residence" is defined in section 21(1) of the OAS Regulations.
[15] For a list of relevant factors, see *De Carolis v Canada (Attorney General)*, 2013 FC 366 at para 32.
[16] See sections 9(1) and 11(7)(c) of the OAS Act.
[17] Sections 3(1) and 3(2) of the OAS Act define who is entitled to full and partial OAS pensions. Sections 3(3) to 3(5) describe how the amount of a partial pension is calculated.
[18] The Minister referred to the Claimant's OAS pension as "portable" on page GD2R-98.

[32] Only OAS pension recipients can receive the **GIS**. In addition, that person must maintain their residence in Canada and must not be absent from the country for more than six months at a time. In other words, the GIS never becomes permanent. The two requirements above apply to GIS recipients, meaning that their eligibility can change over time.

[33] None of what I have written above has changed between the time when the Claimant applied for his OAS benefits and now. However, the questions on the Claimant's OAS application form may have caused some confusion in this case because they are not perfectly aligned with the requirements of the OAS Act.[19]

[34] I return now to the specific issues in this appeal. As mentioned above, this appeal is about the Claimant's GIS only. In particular, the Minister concluded that the Claimant was not entitled to the GIS benefits that he had received from July 2014 to May 2016. The Minister based this decision on its reassessment of the Claimant's residence in Canada.

[35] In fact, at the time of his application, the Claimant did not seem to think that he would be eligible for the GIS. However, a Service Canada agent encouraged him to apply anyway, and so he did.

[36] Indeed, the Minister had concerns about the Claimant's residence in Canada, so it investigated the issue.[20] The Minister's questions were sometimes difficult for the Claimant to answer because he has moved around a lot.[21]

[37] Ultimately, the Minister approved the Claimant's application on August 12, 2015.[22] The Minister confirmed its decision in a letter to the Claimant dated August 18, 2015, which said that the Claimant would receive a full OAS pension, with the GIS, starting from July 2014.[23]

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[19] See, for example, question "14. Residence history" on page GD2R-5. The question may suggest that a person's residence in Canada will be maintained as long as they never leave the country for more than six months at a time.
[20] See the Minister's notes and letter at pages GD9-4 and GD2R-11.
[21] See pages GD2R-12 to 15.
[22] Page GD2R-6.
[23] Pages GD2R-33 to 36. July 2014 is the month after the Claimant's 65th birthday and the month when he first became eligible for OAS benefits.

[38] But within three months of this letter, the Minister began investigating the Claimant's residence in Canada once again.[24] In June 2016, the Minister suspended the Claimant's GIS benefits.[25]

[39] Then, on October 27, 2016, the Minister changed its August 2015 approval decision: The Claimant was never entitled to the GIS and should reimburse all of the benefits that he had received from July 2014 to May 2016.[26] The Minister took about a year to reconsider its decision, but ultimately came to the same conclusion.

[40] The General Division agreed: It found that the Claimant had not resided in Canada since 1999.[27]

[41] However, the General Division did not consider the Minister's power to change its August 2015 approval decision in the first place. In my view, the General Division committed an error of law by overlooking that issue. I reached this conclusion for three reasons:

a) The Claimant's arguments, read generously, raised this issue at the General Division level;

b) Justice required the General Division to raise the issue, even if the Claimant had not done so; and

c) The General Division made no mention of the Appeal Division's decision in *BR v Minister of Employment and Social Development*.[28]

[42] The Minister argues that the Claimant advanced no arguments challenging the Minister's ability to change its approval decisions. It also argues that the Tribunal should follow a more

[24] See the investigation request at pages GD2R-39 to 70.
[25] Pages GD2R-89 to 90.
[26] Page GD2R-95.
[27] General Division decision at para 13. Parenthetically, the question the General Division needed to decide to determine the Claimant's eligibility for the GIS was whether he had resided in Canada after July 2014. Therefore, it is unclear why it discussed the Claimant's residence since 1999. That discussion could have also affected the Claimant's OAS pension, even though that benefit was not before the General Division.
[28] *BR v Minister of Employment and Social Development*, 2018 SST 844.

adversarial (or court-like) model, where the issues are defined based only on the pleadings (or written arguments) of the parties.[29]

[43] The courts have already rejected the more adversarial model that the Minister is proposing in this case. Instead, the courts have told this Tribunal to avoid taking a mechanistic approach to the pleadings.[30] Indeed, even the case the Minister relied on—which concerns the role of the Federal Court and not of this Tribunal—says that a party's arguments must be read generously.[31]

[44] Read generously, the Claimant's arguments did challenge the Minister's ability to change its approval decision. For example:

a) In his reconsideration request, the Claimant emphasized how it was one thing for the Minister to stop his GIS payments going forward, but quite another thing for the Minister to demand that the amounts already paid be reimbursed. He urged the Minister to take responsibility for its decision and said that he should not be made to pay for the Minister's mistakes;[32]

b) In his Notice of Appeal to the General Division, the Claimant said that he could live with the Minister cutting off his GIS benefits but that it was an injustice to demand that he repay any benefits received because of a poorly made decision.[33]

[45] The Claimant's arguments may be inelegant at times. They are not expressed in a lawyerly way. Nevertheless, the General Division should have seen that the Claimant was attacking the Minister's ability to change its approval decision and demand the repayment of benefits, even if the earlier decision was poorly made.

[46] The Claimant's overpayment and repeated references to the Minister's error might have led the General Division to think of the Minister's power to waive an overpayment under

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[29] In support of this point, the Minister relies on *Duverger v 2553-4330 Québec Inc. (Aéropro)*, 2015 FC 1071 at para 19.
[30] This point was made by the Federal Court in cases like *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10 and *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20.
[31] *Duverger*, *supra* note 29 at para 19.
[32] Page GD2R-96.
[33] Pages GD1-3 to 11.

section 37(4) of the OAS Act. But the General Division should not have restricted the Claimant's arguments to that provision alone.

[47] The Claimant took aim at the Minister's ever-changing decisions.[34] First, he was awarded the GIS. Later, his GIS was suspended. And finally, the Minister demanded that it all be reimbursed. He urged the Minister to take responsibility for its decision and objected particularly to having to repay amounts that the Minister had already decided he was entitled to receive.

[48] The General Division should have recognized that the Claimant's arguments about a poorly made decision do not fit entirely within the notion of "administrative error", as described under section 37(4) of the OAS Act. He was also attacking the Minister's ability to go back on its previous decisions.

[49] Even if the Claimant did not directly challenge the Minister's ability to change its approval decision, he did invoke the notion of justice. Indeed, the General Division has a duty to raise new issues when justice requires it.[35]

[50] In this case, the Minister has taken the position that it can reassess the Claimant's residence in Canada whenever it wants and however many times it wants. Such broad powers are extraordinary. Justice required that the General Division look into this issue and question the source of these powers. Justice also required that the General Division clearly define the periods during which it could reassess the Claimant's residence in Canada.

[51] The Minister's ability to change its approval decision goes to the very heart of the Claimant's concerns. If the Minister was unable to change its approval decision, then the Minister went beyond its powers by asking the Claimant to reimburse all of the GIS benefits that he had ever received. Instead, the Minister (and the Tribunal's) powers would be limited to reassessing the Claimant's residence in Canada only for the period after August 18, 2015.

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[34] Page GD1-3.
[35] See, for example, *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65-71, and *Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at para 89.

[52] Based on the interests of justice, the General Division should have considered these possible limits on the powers of the Minister, and of this Tribunal, but they were overlooked.

[53] In fact, I ruled that the Minister does not have the power to change its approval decisions in a case called *BR v Minister of Employment and Social Development*.[36]

[54] I recognize that the General Division was not obliged to follow *BR*. However, *BR* raises an important issue that limits the powers of the Minister and of the Tribunal. And the Minister never challenged *BR* in the courts. Therefore, *BR* potentially applies in every case where the Minister revisits an earlier approval decision.

[55] In my view, if the General Division was not going to follow *BR*, then it should have at least explained why.[37] Indeed, the Supreme Court of Canada recently stressed the importance of consistent decision-making: Like cases should generally be treated alike.[38] Perfection is not required. However, decision-makers should use their reasons to explain why they are departing from other decisions.

[56] For all of these reasons, I concluded that it was an error of law under section 58(1)(b) of the DESD Act for the General Division to assume that the Minister had the power to change its August 2015 approval decision.

[57] Viewed from a different angle, the Minister's power to change its August 2015 approval decision was an issue that the General Division needed to decide, but it failed to do so. This can also be seen as a jurisdictional error, as described under section 58(1)(a) of the DESD Act.

Issue 2: What is the best remedy in this case?

[58] I have decided to send this file back to the General Division for reconsideration.[39]

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[36] *Supra* note 28. I recently reaffirmed that decision in *MA v Minister of Employment and Social Development* (27 March 2020), AD-19-643 (SST).
[37] *Canada (Attorney General) v Bri-Chem Supply Ltd.*, 2016 FCA 257 at para 44.
[38] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 129-131.
[39] Once I have decided that an error was made, section 59(1) of the DESD Act sets out the powers that I have to try to fix that error.

[59] In reaching this decision, I realize that the Claimant might consider me to be part of the "gargantuan workings of the Canadian Government"[40] and might even accuse me of contributing to the psychological warfare that he feels the government is waging against him.

[60] I sympathize with the Claimant's circumstances. The Minister's numerous investigations into the Claimant's residence in Canada and ever-changing decisions about his residence in Canada have created an ongoing saga and perpetual stress from which the Claimant is desperate to escape. In the circumstances, he urged me to come to a final decision in his case. I regret that I am unable to do so.

[61] I must balance the Claimant's situation against what is fair to the Minister. In that respect, the Minister argued that it did not realize that this case was raising the issue of the Minister's powers to change an approval decision. And if that issue is indeed at play, then the Minister would need to return to the General Division so that it could advance more evidence (even beyond the Charron Affidavit).[41]

[62] In fairness to the Minister, therefore, I am returning this file to the General Division for reconsideration. As part of that process, the General Division will have to decide whether the Minister had the power to change its approval decision. This will affect the relevant period during which the Claimant's residence in Canada can be reassessed.

[63] I sincerely hope that the Minister will start to gather its additional evidence right away and would urge the General Division to proceed with this matter as quickly and efficiently as the parties desire and fairness allows.

[64] That said, it might be possible for the General Division to consider all of the issues surrounding the Claimant's residence in Canada at the same time. For that to happen, however, the Claimant would have to ask the Minister to reconsider its decision dated February 19, 2020, concerning his OAS pension.[42] Should the Minister's reconsideration decision be unfavourable,

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[40] Page GD5-4.
[41] Audio recording of the March 11, 2020, hearing (Part 2) at approximately 1:23:05 to 1:24:35.
[42] Pages AD5-3 to 4.

the Claimant would then have to appeal that decision to the Tribunal's General Division. The General Division might then be able to join the two files together.

CONCLUSION

[65] I am allowing this appeal. I concluded that the General Division committed errors of law and jurisdiction and that its decision should be set aside. I also decided to return the matter to the General Division for reconsideration, with the following directions:

a) To avoid any concern of bias, the file should be assigned to a different General Division member;

b) The General Division must clearly define the period during which it is reassessing the Claimant's residence in Canada. If the General Division is only deciding the Claimant's entitlement to the GIS, then its reassessment could start from June 2014 at the earliest. However, the General Division will also have to decide whether the Minister had the power to change its August 2015 approval decision. If not, then the General Division's reassessment should start from the date of the approval decision.

Jude Samson
Member, Appeal Division

HEARD ON:	March 11, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. L., Appellant Marcus Dirnberger, Representative for the Respondent

APPENDIX

Date	Minister's Decision	Recourse/Status
October 27, 2016 and November 27, 2017	The Claimant has 40 years of residence in Canada but spent little time in Canada from March 2005 to February 2015. As a result, the Claimant must reimburse all of the GIS benefits that he received from July 2014 to May 2016 ($15,009.10). The Minister plans to recover this debt by withholding a portion of the Claimant's remaining OAS pension.	This is the decision that is currently before the Tribunal. Both parties have 30 days to ask the Federal Court of Appeal to judicially review this decision. Otherwise, the file will be returned to the General Division for reconsideration.
February 19, 2020	The Claimant does not have 40 years of residence in Canada. Instead, he has resided in Canada for 32 years and 101 days. As a result, the Minister reduced the Claimant's monthly OAS pension and added a $7,925 overpayment (or debt) to his account. The Minister plans to recover this debt by withholding a portion of the Claimant's remaining OAS pension.	Within 90 days of receiving the February 19, 2020 letter, the Claimant can ask the Minister to reconsider its decision. (See pages AD5-3 to 4.) This decision is not before the Tribunal at this time.
March 26, 2020	No administrative error occurred in the Claimant's case. As a result, the Minister refused to waive some or all of the Claimant's OAS and GIS overpayments. The Minister will start to collect on its debt in May 2020.	Within 30 days of receiving the March 26, 2020 letter, the Claimant can ask the Federal Court to judicially review the Minister's decision. (See page AD11-2.) The Tribunal has no power to review this type of decision.
	As discussed at the Appeal Division hearing, the Minister also has the power to waive some or all of the Claimant's debt due to financial hardship.	It is unclear whether the Claimant has yet requested this form or relief.