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

Citation: *A. S. v. Minister of Employment and Social Development*, 2018 SST 872

Tribunal File Number: AD-17-952

BETWEEN:

A. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: September 6, 2018

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, A. S., was born in X in 1940 and immigrated to the United States in 1966. She entered Canada as a permanent resident in April 2001.

[3] In November 2011, the Appellant applied for an Old Age Security (OAS) pension, claiming that she had resided in Canada for at least 10 years. The Respondent, the Minister of Employment and Social Development (Minister), approved the application and determined that, based on the Appellant's declared period of residency in Canada, she was entitled to a partial OAS pension at 10/40ths of a full pension, effective May 2011.

[4] The Appellant applied for a Guaranteed Income Supplement (GIS) in August 2012.

[5] In September 2014, following an investigation into the Appellant's eligibility for an OAS pension, the Minister determined that she did not meet the residency requirements under the *Old Age Security Act* (OASA) for entitlement to a partial OAS pension. It also determined that, because the Appellant was not entitled to an OAS pension, she was also not entitled to the GIS. The Minister ordered the Appellant to repay the OAS pension she had received since May 2011: more than three years of benefits.

[6] The Appellant appealed the Minister's determination to the General Division of the Social Security Tribunal of Canada. In a decision dated September 7, 2017, the General Division dismissed the Appellant's appeal, finding that she had not resided in Canada for an aggregate period of at least 10 years.

[7] On December 15, 2017, the Appellant applied for leave to appeal from the Tribunal's Appeal Division. Accompanying her application was a brief alleging numerous errors on the part of the General Division, specifically:

- The General Division erred in its interpretation of s. 21(1)(*a*) of the *Old Age Security Regulations* (Regulations) when it found that the Appellant's time in Canada amounted to mere presence, not residence.
- The General Division offered no reasonable explanation for why it preferred the Minister's evidence over the Appellant's.
- In paragraph 24 of its decision, the General Division referred to the investigator's report dated July 17, 2014, in which the Appellant purportedly said that she did not have any U.S. bank accounts. In fact, she never made such a statement and disclosed such accounts.
- In paragraph 39, the General Division wrote: "A person cannot make their home and 'ordinarily live' in more than one country at a time." The Appellant never stated that she had been living in more than one country at a time.
- The General Division made no reference to a glaring contradiction in the Minister's evidence: its own investigation into the Appellant's OAS entitlement concluded that she had "no residency issue."[1]
- The Appellant was denied a fair hearing because the General Division should have noticed the aforementioned contradiction and alerted her former legal representative.

[8] In my decision dated February 28, 2018, I granted leave to appeal because I saw a reasonable chance of success for at least one of the Appellant's submissions. I made no finding on the Appellant's remaining grounds of appeal but permitted unrestricted discussion of them during the hearing.

[9] Having now reviewed the parties' oral and written submissions, I have concluded that none of the Appellant's reasons for appealing have sufficient merit to warrant overturning the General Division's decision.

[1] See Report of Investigation by Fatema Kazi, July 23, 2014, GD2-42–44.

PRELIMINARY MATTER

[10] On April 16, 2016, following my leave to appeal decision, the Appellant submitted a 111-page package of documents, including testimonial letters and bank statements, which it appears were intended to demonstrate her residence in Canada. From what I can gather, none of this material was ever presented to the General Division.

[11] For reasons that I explained at the outset of the hearing, I have declined to admit new evidence for this appeal. According to the Federal Court's decision in *Belo-Alves v. Canada*,[2] the Appeal Division is not a forum in which new evidence can ordinarily be introduced, given the constraints of the *Department of Employment and Social Development Act* (DESDA), which does not give the Appeal Division authority to consider evidence on its merits.

ISSUES

[12] According to s. 58 of the DESDA, there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[13] The issues before me are as follows:

Issue 1: How much deference should the Appeal Division show the General Division?

Issue 2: Did the General Division interpret the Regulations correctly*?*

Issue 3: Did the General Division explain its preference for the Minister's evidence over the Appellant's?

Issue 4: Did the General Division err when it found that the Appellant had denied ever having U.S. bank accounts?

Issue 5: Did the General Division err when it found that the Appellant had been living "in more than one country at a time?"

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[2] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100.

Issue 6: Did the General Division err by failing to notice that the Minister's own investigation found that the Appellant had "no residency issue?"

Issue 7: Did the General Division deny the Appellant a fair hearing by failing to alert her former legal representative about the alleged contradiction between the Minister's investigation and its decision to terminate her OAS benefits?

ANALYSIS

Issue 1: How much deference should the Appeal Division show the General Division?

[14] In *Canada v. Huruglica*,[3] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance in determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent…."

[15] Applying this approach to the DESDA, one notes that ss. 58(1)(*a*) and (*b*) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of s. 58(1)(*c*) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be based on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before [the General Division]." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Issue 2: Did the General Division interpret the Regulations correctly?

[16] Subsection 3(2) of the OASA requires a claimant to have at least 10 years of residence in Canada but, as the General Division noted, "residence" is more than just physical presence in Canada. Subsection 21(1) of the Regulations distinguishes between the two states: a person

[3] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93.

resides in Canada if they make their home and ordinarily live in any part of Canada, but a person is present if they are merely physically within Canadian territory.

[17] In its decision, the General Division corrected stated the applicable statutory law, but it was also obliged to follow the body of jurisprudence that has arisen around this issue. In *Canada v. Ding* and *Singer v. Canada*,[4] the Federal Court held that residence—whether someone makes his or her home and ordinarily lives in Canada—is a question of fact that depends on the circumstances of each case and requires consideration of a number of factors, including, but not limited to: (i) ties in the form of bank accounts, credit cards and personal property such as land, businesses, furniture or cars; (ii) social ties in Canada, such as participation in professional organizations; (iii) other ties, such as health insurance, a driver's license, rent, a lease, a mortgage, property tax statements, insurance policies, contracts, passport declarations, and provincial or federal tax returns; (iv) ties to another country; (v) regularity and length of stay in Canada and the frequency and length of absences from Canada; and (vi) whether the claimant's mode of living Canada is sufficiently deep-rooted and settled.

[18] Although the General Division did not specifically cite *Ding* or *Singer*, it is clear from its decision that it did consider a number of factors in assessing whether the Appellant was a resident of Canada, including:

- The Appellant lived in trailers or motor homes in various Ontario communities from 2001 to 2012;
- Utility statements indicated that she lived in Ontario only seasonally;
- Her telephone numbers, vehicle registrations, and travel itineraries show her X address;
- The only properties that she owns are in X;
- She receives rental income from her X properties, as well as a U.S. Social Security pension;
- She has filed income tax returns in the U.S. for many years, but none in Canada;

[4] *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76 and *Singer v. Canada (Attorney General)*, 2010 FC 607, confirmed 2011 FCA 178.

- While she is registered for public health insurance in Ontario, she has also received U.S. healthcare services under Medicare.

[19] The Appellant further alleges that the General Division selectively ignored information supporting her residency claim and "cherry-picked" evidence to support a preferred hypothesis. I will address this submission under the next heading.

Issue 3: Did the General Division explain its preference for the Minister's evidence over the Appellant's?

[20] The Appellant submits that the General Division failed to address evidence that supported her position, such as the fact that her children live in Canada and her own testimony explaining her itinerant lifestyle.

[21] In my view, this argument has little merit. The Federal Court of Appeal has held that administrative tribunals, such as the General Division, are permitted a fair amount of discretion in how they consider the evidence before them. In *Simpson v. Canada*,[5] the claimant's counsel argued that the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted selected items of documentary evidence. In dismissing the application for judicial review, the Court wrote:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[22] In this case, it is clear that the General Division considered the Appellant's submissions, even if it did not refer to every aspect of them in its analysis proper. However, in its summary of the evidence, the General Division noted the Appellant's evidence that she:

- Spends more than 60 percent of the year in Canada;
- Has lived at her step-daughter's property while in Canada;

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

- Has made regular use of the Ontario Health Insurance Plan since 2007; and
- Has held Canadian bank accounts for many years.

[23] The Appellant's representative also objected to what he described as an "adverse inference" from his client's failure to provide—at the Minister's request—records of her movements from Canada Border Services and U.S. Customs and Border Protection. I am skeptical that this can be a valid ground of appeal. First, this submission does not neatly fall under any of the errors categorized under s. 58(1) of the DESDA. Second, I am not sure that the General Division did, in fact, draw an adverse inference—the General Division merely noted the Appellant's failure to provide the requested records in its summary of the evidence; it made no reference to them in its analysis. Finally, even if the General Division did draw such an inference, the burden of proof lies with the person claiming entitlement to OAS benefits—and this is true even when the Minister has, as in this case, suspended or terminated a pension that it had previously approved. Under s. 23 of the OASA, the Minister may, at any time, launch an investigation into a recipient's eligibility and require him or her to furnish further evidence that he or she is a resident of Canada. Accordingly, the onus has always been on the Appellant to show that she was entitled to the pension, and the General Division was within its authority to note that she did not substantiate her claim to have spent most of her time in Canada. The Appellant pointed to evidence in the file that she had attempted—unsuccessfully—to obtain the requested information, but the fact remains that her quest failed, leaving a significant gap in the evidentiary record. The General Division was entitled to base its decision on that gap.

[24] While the Appellant may not agree with the General Division's decision, it is open to an administrative tribunal to weigh the evidence, determining what facts, if any, it chose to accept or disregard, before ultimately coming to a decision based on its interpretation and analysis of the material before it. In arriving at its conclusion that the Appellant had never been resident in Canada, the General Division followed the law and undertook what I regard as a good-faith assessment of the available evidence.

Issue 4: Did the General Division err when it found that the Appellant had denied ever having U.S. bank accounts?

[25] The Appellant objects to paragraph 24 of the General Division's decision, which relied on the investigator's report dated July 17, 2014, to find that the Appellant had denied that she had any U.S. bank accounts. The Appellant states that she never made such a statement and disclosed such accounts.

[26] I see no basis for this submission. The investigator's report (at GD2-43) does, in fact, say: "A. S. [*sic*] advised that they do not have any bank accounts in the States." The General Division therefore did not err on this point of fact. It was open to the Appellant to challenge the investigator's finding at the hearing, and it appears that she did just that, insisting that she and her husband had U.S. bank accounts both before and after they immigrated to Canada.

[27] Why she wanted to do so is unclear, because on the face of it, the existence of American bank accounts undermined her claim to Canadian residence. In any case, it does not appear that this matter played any great part in the General Division's decision, which did not refer to bank accounts in the analysis proper.

Issue 5: Did the General Division err when it found that the Appellant had been living "in more than one country at a time?"

[28] The Appellant takes issue with paragraph 39 of the General Division's decision, in which it wrote: "A person cannot make their home and 'ordinarily live' in more than one country at a time." The Appellant denies that she ever made a statement to this effect.

[29] In my view, this submission has no merit; the Appellant has apparently mistaken analysis for a finding of fact. The context of the disputed passage makes it clear that the General Division was not attributing words to the Appellant but rather offering its own interpretation of the law. As it happens, I see nothing wrong with the General Division's understanding of residence as a legal concept; use of the phrase "ordinarily" in s. 21(1) of the Regulations implies that, for the purpose of OAS eligibility, one cannot be a resident of any country other than Canada.

Issue 6: Did the General Division err by failing to notice that the Minister's own investigation found that the Appellant had "no residency issue"?

[30] The Appellant alleges that the General Division failed to notice a "glaring contradiction" between the Minister's investigation dated September 18, 2014, which found that she was a resident of Canada, and its subsequent suspension of her pension, which was based on a finding that she was not.

[31] The report that emerged from the Minister's investigation into the Appellant's Canadian residency status presumably played at least some role in the decision to terminate her OAS pension and seek recovery of previously remitted funds. The Appellant is correct to note that the investigator, who personally interviewed her and reviewed her documents, found that she had "residential ties to Canada" and recommended that the Minister "continue [the Appellant's] Old Age Security entitlement at the current rate…."

[32] However, I am unsure whether the Minister did, in fact, contradict itself and, even if it did, whether the General Division was permitted to take the contradiction into account. A handwritten notation in the investigator's report seems to indicate that someone—possibly a more senior official—decided, without explanation, to overrule the investigator and declare the Appellant a non-resident. I can understand how upsetting it must have been for the Appellant to discover how close she came to saving her pension, but the Minister's decision to disregard its own investigation is ultimately irrelevant to the question of eligibility. The General Division does not have the authority to review the internal processes by which the Minister adjudicates applications for benefits. Under s. 28 of the OASA and s. 54 of the DESDA, the General Division's mandate is to consider all available evidence and make a fresh assessment of the claim's merits.

[33] The Appellant is probably correct that the General Division failed to notice the Minister's decision to reject the investigator's finding of residence. There was no mention of it in the audio recording of the hearing, and it played no part in the General Division's eventual written decision. Even so, it does not matter. The General Division cannot be faulted for failing to consider a factor that was, in any event, properly irrelevant to its decision. Moreover, while the Minister may have overruled the conclusions of the investigation, no one has disputed the facts that were established by that investigation, the centerpiece of which was a lengthy and detailed interview with the Appellant at her home. The General Division relied, in part, on those same

facts to conclude that the Appellant was non-resident, and I see nothing to suggest that it misinterpreted or misrepresented them in any way.

Issue 7: Did the General Division deny the Appellant a fair hearing?

[34] The Appellant submits that she was denied a fair hearing because she was the victim of "ineffective representation."

[35] Again, I see no basis for this argument, which goes back to the Minister's decision to reverse the investigator's finding of residence. As discussed, what the Appellant characterized as a "contradiction" was no more than a reflection of tensions in the Minister's internal decision-making process and therefore beyond the General Division's purview. The Appellant's former representative cannot be criticized for neglecting to make an argument that had no legal basis: had he attempted to make an issue of the reversal, the General Division would have been justified in disregarding it for lack of jurisdiction.

[36] The Appellant may have been dissatisfied with her legal representation, but that does not mean she was denied natural justice. On the contrary, the General Division conducted an impartial hearing on the relevant issues and allowed the Appellant to adduce evidence, make arguments, and testify at length about her case.

CONCLUSION

[37] For the reasons discussed above, the Appellant has not demonstrated to me that, on balance, the General Division committed an error that falls within the grounds listed in s. 58(1) of the DESDA.

[38] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	August 24, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. S., Appellant Eddie Kadri, Representative for the Appellant Carole Vary, Representative for the Respondent