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

[TRANSLATION]

Citation: *M. E. v Minister of Employment and Social Development*, 2018 SST 943

Tribunal File Number: AD-17-343

BETWEEN:

M. E.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: September 24, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, M. E., was born in Haiti in 1943, came to Canada in 1970, and received his permanent residency status in 1971. Soon after his 65th birthday, the Appellant applied for an Old Age Security (OAS) pension and applied for the Guaranteed Income Supplement (GIS) the following year. However, the Respondent, the Minister of Employment and Social Development (Minister), denied the claim, finding that the Appellant had not satisfied the minimum residence requirement associated with an OAS pension. Since he was not entitled to an OAS pension and no longer lived in Canada, the Appellant was not entitled to the GIS either. The Appellant asked the Minister to reconsider its decision, but it upheld its initial decision.

[3] The Appellant appealed the reconsideration decision to the General Division, but it dismissed his appeal. The Appellant then requested leave to appeal the General Division decision, which I granted in January. I was particularly concerned about the possibility that, in dismissing the appeal, the General Division may have overlooked certain important elements. However, I did not restrict the scope of the appeal.

[4] After having read the parties' submissions and heard their oral arguments, I allow the appeal for the following reasons.

PRELIMINARY MATTERS

[5] During the hearing, the Appellant's representative wanted to rely on an additional decision she had not referred to earlier.[1] This decision was sent to the Tribunal the day of the

[1] *A. C. v Canada Employment Insurance Commission*, 2016 SSTADEI 239.

hearing and to the Minister the day after. The Minister was given until August 10, 2018, to file submissions in response to that decision.[2]

ISSUE

[6] Did the General Division base its decision on an erroneous finding of fact in noting that there was no evidence that the Appellant was a resident of Canada after June 1987?

[7] Although other issues were raised in the appeal, I did not need to address all of them because of my response to this first issue.

ANALYSIS

[8] For an appellant to succeed at the Appeal Division, they must show that the General Division made at least one of the three errors (grounds of appeal) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). In general, did it:

a) fail to observe a principle of natural justice or otherwise err in jurisdiction;

b) render a decision that contains an error of law; or

c) base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[9] When considering the degree of scrutiny with which I should review the General Division decision, I have focused on the language set out in the DESD Act.[3] As a result, I find that not all erroneous findings of fact can justify my intervention.

[10] For an erroneous finding of fact to justify my intervention, the finding must be one that the General Division decision is based on and one that the General Division made in a perverse or capricious manner or without regard for the material before it. According to the Federal Court

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[2] AD15.
[3] *Department of Employment and Social Development Act*, s 58(1); *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93; *Canada (Attorney General) v Jean*, 2015 FCA 242.

of Appeal, a finding of fact that conflicts sharply with or is not supported by the evidence constitutes an erroneous finding of fact under section 58(1)(c) of the DESD Act.[4]

Issue: Did the General Division base its decision on an erroneous finding of fact in noting that there was no evidence that the Appellant was a resident of Canada after June 1987?

[11] The Appellant has satisfied me that the General Division based its decision on an erroneous finding of fact under section 58(1)(c) of the DESD Act.

[12] In short, the OAS pension is a monthly benefit provided under the *Old Age Security Act* (OAS Act) to seniors aged 65 and older who meet the requirements for Canadian legal status and residence. A person may be entitled to a full or partial pension, depending on the years of Canadian residence accumulated. Furthermore, the GIS is a monthly benefit provided to OAS pension recipients who live in Canada and have low incomes. It follows that those who are not entitled to an OAS pension are not entitled to the GIS either.

[13] After the Appellant submitted his OAS pension application, the Minister determined that the Appellant had accumulated 16 years and 149 days of Canadian residence, from February 2, 1971, to June 30, 1987. However, because the Minister found that the Appellant was no longer residing in Canada, the Appellant had to prove that he had accumulated at least 20 years of residence in Canada to be entitled to a partial OAS pension.[5]

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

> **21 (1)** For the purposes of the Act and these Regulations,
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> **(a)** a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and
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> **(b)** a person is present in Canada when he is physically present in any part of Canada.

[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.
[5] *Old Age Security Act*, s 3(2)(b).

[15] In deciding the Appellant's residence issue based on the OAS Act and the *Old Age Security Regulations*, the General Division relied on the non-exhaustive list of factors stated in *De Carolis v Canada*.[6] This list of relevant factors, which can guide the Tribunal when it must decide on a person's Canadian residence, has been expressed in a number of ways, but I prefer to use a slightly more developed version than the list the Court stated in *De Carolis*:[7]

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

b) Social ties to Canada (for example, participation in organizations, associations, or a professional association);

c) Other ties to Canada (for example, insurance policies; driver's licence; rental, lease, or 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, federal and provincial income tax returns);

d) Ties in another country;

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

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

[16] The test for residence is fluid in the sense that the weight given to each factor can vary from case to case.[8] Furthermore, the Federal Court's teachings indicate that determining a

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[6] *De Carolis v Canada (Attorney General)*, 2013 FC 366.
[7] *E. T. v Minister of Employment and Social Development*, 2016 SSTGDIS 44, 2016 CanLII 106356 at para 59; *S. L. v Minister of Employment and Social Development*, 2016 SSTGDIS 1, 2015 CanLII 105348 at para 63; *J. R. E. v Minister of Human Resources and Skills Development*, 2014 SSTGDIS 10, 2014 CanLII 86721 at para 22.
[8] *Singer v Canada (Attorney General)*, 2010 FC 607, conf by 2011 FCA 178.

person's residence is a largely factual question that requires an examination of the individual's whole context.[9]

[17] At the General Division hearing, the Appellant claimed an additional period of Canadian residence from 1987 to 2003.[10] However, after its own assessment of the evidence, the General Division agreed that the Appellant's Canadian residence period was the one the Minister retained, from February 2, 1971, to June 30, 1987, and it dismissed the appeal as a result.

[18] The General Division's analysis of the Appellant's Canadian residence is found largely in paragraph 31 of its decision:

> [translation]
> The Tribunal acknowledges that the appellant left Canada for business trips, as the Appellant submitted, but **there is no evidence that the Appellant was a resident of Canada after June 1987.** The Tribunal has considered the fact that the Appellant received social assistance from January 28, 2003, to June 30, 2003. In addition, the Tribunal has considered the fact that the Appellant indicated on a questionnaire signed March 13, 2014, residential addresses in Canada from June 1970 to November 2014 and that he indicated having lived in a house he owned, in a rented apartment or house, and with friends when he was in Canada. Furthermore, a letter from the Régie de l'assurance maladie du Québec dated December 5, 2013, indicates that the Appellant was no longer domiciled in Quebec after November 19, 2003. However, this evidence did not convince the Tribunal that the Appellant was a Canadian resident after June 1987. As specified, the Appellant produced tax returns only between 1978 and 1984 and in 1987. He stored property, such as clothing, office items, and bedroom accessories from July 2000 to October 2001. He then had a business called X, but the first financial results were for the year 2013. In September 2009, he called the Respondent's call centre and stated that the Quebec address on the documents was his sister's and that he lived in Haiti. The Appellant had medical visits from February 1983 to March 1987 and then a single medical visit in September 1990. [emphasis added]

[19] On one hand, the Appellant claims that the General Division failed to consider important evidence in arriving at its finding. Specifically, the following evidence concerned the Appellant's

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[9] *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 19; *Duncan v Canada (Attorney General)*, 2013 FC 319.
[10] General Division decision at para 19.

family obligations and life in Quebec, and it concerned the short duration of his absences from Canada during the period at issue:

a) A sworn affidavit signed by the Appellant's daughters;[11]

b) The Appellant's testimony and written explanations.[12]

[20] Furthermore, the Appellant argues that his credibility was not questioned and that that evidence was not contradicted in any way.[13] However, the General Division dismissed the evidence without any explanation. The General Division [translation] "relied solely on the documentary evidence on file that [the Minister] submitted, as if the Appellant had never testified and as if he had never presented his daughters' sworn statements."[14]

[21] On the other hand, the Minister argues that the General Division is not required to discuss each piece of evidence and that it is presumed to have considered and weighed all the evidence.[15] Although the Minister acknowledges that it might have been preferable for the General Division to mention other evidence, that evidence is not sufficiently important for the omission to become fatal. The Minister points out that the statement from the Appellant's daughters is not supported by the documentary evidence and that, given the daughters' young ages during the period in question, their statement was made based largely on hearsay evidence and not on personal knowledge.

[22] The Minister also states that this case is comparable to *De Carolis* where the Federal Court concluded the following:

a) The Review Tribunal did not mention an affidavit submitted into evidence, but this omission was not fatal;

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[11] GD1-10.
[12] See, for example, GD1-7. The audio recording of the General Division hearing is not available because of technical difficulties. However, at the page and AD1-5, the Appellant summarizes some of what he said during his testimony.
[13] A representative for the Minister did not attend the General Division hearing.
[14] AD9-4.
[15] *Simpson v Canada (Attorney General)*, 2012 FCA 82 at para 10; *Yantzi v Canada (Attorney General)*, 2014 FCA 193 at para 4.

b) The burden of proof was on the appellant;

c) The evidence Mr. De Carolis submitted in support of his case was very incomplete.

[23] I accept the Minister's arguments that the General Division is presumed to have considered and weighed all the evidence before it. However, this presumption can be set aside because of evidence to the contrary.[16] In this case, this contrary evidence exists in the form of a finding that the General Division expressed in unambiguous terms: [translation] "[...] there is no evidence that the Appellant was a resident of Canada after June 1987."[17] In light of this finding, the Appellant's claims are established: the General Division declared that there was no evidence of the Appellant's Canadian residence for the period after June 1987, while this evidence was clearly present in the file.

[24] In my opinion, the evidence about the Appellant's familial responsibilities and life in Quebec relate to his mode of living and showed to what extent he was deeply rooted and well established in Canada. Furthermore, the fact that he was absent from Canada very little was a second positive factor in favour of his Canadian Residence. The General Division's finding was therefore erroneous, and the General Division reached that finding without regard for the evidence before it. Furthermore, this finding is closely connected to the resolution of the case.

[25] From another point of view, the General Division disregarded relevant evidence that contradicted its finding on the Appellant's Canadian residence. However, it did not explain why. It did not conduct a meaningful analysis of the evidence.[18]

[26] Furthermore, I am not satisfied that this case and *De Carolis* are as similar as the Minister would have us believe. For example:

a) In *De Carolis*, the affidavit that the tribunal did not mention just repeated in general other people's testimonies, which the tribunal had already considered.[19] In contrast, the evidence that the General Division overlooked in this case is not a simple repetition of

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[16] *De Carolis*, *supra* note 6 at para 31.
[17] General Division decision at para 31.
[18] *Canada (Attorney General) v Ryall*, 2008 FCA 164; *Bellefleur v Canada (Attorney General)*, 2008 FCA 13 at para 7.
[19] *De Carolis*, *supra* note 6 at para 31.

things that appear elsewhere in the evidence. By ignoring this evidence, the General Division also seems to have neglected two pieces of relevant evidence that it should have evaluated during its assessment, including the regularity and length of stay in Canada and the Appellant's mode of living.

b) Unlike *De Carolis*, the Appellant in this case provided explanations for the absence of supporting documentary evidence: he was [translation] "in a sort of [fiscal] hibernation,"[20] he had taken over caring for his two daughters and was therefore doing little work outside the home, and his assets and papers had been destroyed because of vandalism at a warehouse in X.[21] These explanations are part of the Appellant's "whole context," but the General Division did not mention them.

c) In *De Carolis*, the evidence showed close ties between Mr. De Carolis and his country of origin. In this case, however, even though the Appellant may have had difficulty providing strong documentary evidence of his attachment to Canada, there was no longer evidence of close ties with Haiti (at least until he separated from his wife around the year 2000).

[27] I therefore find that the General Division based its decision on an erroneous finding of fact under in section 58(1)(c) of the DESD Act.

[28] Of the remedies available to me under section 59(1) of the DESD Act, the Appellant asks that the file be returned to the General Division for a new hearing by a different member. I agree with this request, especially since the audio recording of the December 6, 2016, hearing before the General Division is not available because of technical difficulties. The file is therefore incomplete, which prevents me from giving the decision that the General Division should have given.

[20] GD2-152.
[21] GD1-7.

CONCLUSION

[29] The appeal is allowed, and the matter is sent back to the General Division for a new hearing by a different member.

Jude Samson
Member, Appeal Division

HEARD ON:	August 2, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. E., Appellant Catherine Mercille, Counsel for the Appellant Nathalie Pruneau (paralegal), Representative for the Respondent