



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of J. P. v Minister of Employment and Social Development*, 2019 SST 653

Tribunal File Number: AD-19-1

BETWEEN:

The Estate of J. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: July 9, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] During his lifetime, J. P. lived in both Canada and Greece. From November 2009 until his death in May 2016, however, he claimed to have lived permanently in Canada, while still making visits to Greece.

[3] J. P.'s estate has continued these proceedings. For ease of reading, therefore, I will refer to both J. P. and to his estate as the Appellant.

[4] After his return to Canada in November 2009, the Appellant applied to receive the Guaranteed Income Supplement (GIS). The Minister of Employment and Social Development (Minister) approved that application, accepting that the Appellant had made Canada his home once again.

[5] The Minister paid GIS benefits to the Appellant for several years, but then it launched an investigation into the Appellant's file. At the end of that investigation, the Minister decided that the Appellant had not, in fact, re-established his residence in Canada. As a result, the Minister demanded that the Appellant reimburse all of the GIS payments that he had received from November 2009 until June 2013, an amount totalling over \$10,000.

[6] The Appellant appealed the Minister's decision to the Tribunal's General Division, but it dismissed his appeal. The Appellant is now appealing the General Division decision to the Tribunal's Appeal Division. I have concluded that the General Division acted unfairly towards the Appellant. As a result, I am returning this matter to the General Division with specific directions aimed at narrowing the scope of the remaining issues under appeal. These are the reasons for my decision.

ISSUES

[7] As part of this decision, I have asked and answered the following questions:

- a) Did the General Division act unfairly by not telling the Appellant about his ability to file new documents after the hearing?
- b) Did the General Division base its decision on an important error concerning the facts in this case?
- c) What is the appropriate remedy in this case?

ANALYSIS

[8] To succeed at the Appeal Division level, the Appellant must convince me that the General Division committed at least one of the three possible errors described in the *Department of Employment and Social Development Act* (DESD Act).¹

[9] In this case, I have considered whether the General Division proceeding was conducted fairly. If not, the General Division might have breached a principle of natural justice, which is one of the errors that would allow me to intervene in this case.²

[10] I have also considered whether the General Division based its decision on an error concerning the facts of this case. This too is a relevant error under the DESD Act.³ However, not all factual errors can justify my intervention in this case. Rather, the General Division's factual finding must be relevant to its decision and must be clearly contradicted by the evidence or have no evidence to support it.⁴

¹ Section 58(1) of the DESD Act describes the three possible errors (also known as grounds of appeal) that would allow me to intervene in this case. This section, and other relevant legal provisions, can also be found at the end of this decision.

² DESD Act, s 58(1)(a).

³ DESD Act, s 58(1)(c).

⁴ *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.

[11] If I find that the General Division committed an error, then the DESD Act also describes the powers that I have to fix that error.⁵

Issue 1: Did the General Division act unfairly by not telling the Appellant about his ability to file new documents after the hearing?

[12] Yes, the General Division acted unfairly towards the Appellant.

[13] This appeal has a long history. Describing some of that history will help me to explain my answer to this question.

[14] The Appellant first filed this appeal with the Tribunal's General Division in May 2016. The General Division joined this appeal with one filed by the Appellant's wife. The Minister was claiming that it had overpaid GIS benefits to the couple because they had not re-established their residence in Canada at the time that they had written on their application forms.

[15] In October 2017, the General Division dismissed the two appeals. The parties later agreed, however, that the General Division had acted unfairly by deciding the cases without a hearing. On May 7, 2018, therefore, I sent the appeals back to the General Division.

[16] The General Division assigned the appeals to a different Tribunal member, and he held a joint teleconference hearing (for both appeals) on September 12, 2018. A couple of weeks later, the General Division allowed the wife's appeal, but dismissed her husband's. As a result, the Appellant appealed the second General Division decision, which is what brings this matter before me once again.

[17] As part of the first appeal, however, the Appellant's wife filed documents concerning her participation in the Greek community in Canada.⁶ The Appellant said that he would file similar documents, but he never did.⁷

[18] The Tribunal member asked about this during the General Division hearing.⁸ The Appellant's son, who has represented the Appellant throughout the Tribunal's proceedings,

⁵ These powers are set out in section 59(1) of the DESD Act.

⁶ For example, AD1A-122.

⁷ AD1-8; AD1A-9.

⁸ General Division hearing at approximately 1:43:00.

responded with some confusion, saying that he was not quite sure when he was supposed to file those documents.

[19] In its decision, the General Division rejected this explanation.⁹ However, the Appellant's lack of social ties and the fact that there was no documentary evidence supporting the strength of those ties appear to have been important factors in the General Division's decision to dismiss the Appellant's appeal.¹⁰

[20] In the circumstances of this case, therefore, I have concluded that the General Division failed to ensure the fairness of the hearing. Many of the people who appear before the Tribunal have no legal representation and are unfamiliar with the Tribunal's processes. As a result, Tribunal members need to be alert and remain prepared to provide procedural information when fairness requires it.¹¹

[21] The courts have expressed this obligation in different ways. For example:

- a) there is an obligation to direct parties without legal representation to important points of law and procedure;¹² and
- b) parties without legal representation should be given whatever leeway is reasonably possible to allow them to present their case in its entirety, even if it means relaxing strict and technical rules.¹³

[22] In this case, the General Division knew that the Appellant wanted to submit additional documents concerning his involvement with the Greek community in Canada. As a result, the General Division should have at least told the Appellant about the possibility of filing new documents after the hearing. This was an important point of procedure that the Appellant's son was unlikely to know and that would have allowed him to present his case more fully.

⁹ General Division decision dated September 26, 2018, at para 19.

¹⁰ General Division decision dated September 26, 2018, at paras 39 and 43, for example.

¹¹ *Lally v Telus Communications Inc.*, 2014 FCA 214 at para 27.

¹² *Wagg v Canada*, 2003 FCA 303 at paras 32–33.

¹³ *Law v Canada (Citizenship and Immigration)*, 2007 FC 1006 at paras 17–18; *Kohazi v Canada (Citizenship and Immigration)*, 2015 FC 705 at para 12.

[23] Indeed, from the time the Appellant raised the possibility of filing additional documents, I note that none of the Tribunal's letters ever invited him to do so or gave him a deadline by which he would have to file those documents.

[24] In addition, by allowing the Appellant to submit documents after the hearing, the General Division could have then set a deadline for the receipt of those documents. Critically, it could have also decided whether to consider those documents based on all of the relevant factors.¹⁴ By proceeding as it did, however, the General Division effectively rejected the Appellant's documents without even seeing them. It based its decision entirely on a brief answer that the Appellant's son gave to a question from the Tribunal member.¹⁵

[25] I find therefore that the General Division did not give the Appellant reasonable leeway to fully present his case. As a result, the Appellant has proven that the General Division breached a principle of natural justice: it committed an error that allows me to intervene in this case.¹⁶ I will consider how best to fix this error as part of Issue 3, below.

Issue 2: Did the General Division base its decision on an important error concerning the facts in this case?

[26] No, the General Division did not base its decision on an important error concerning the facts in this case.

[27] The Appellant argues that the General Division based its decision on the following facts, which are contradicted or unsupported by the evidence.

- a) In paragraphs 13 and 30 of its decision, the General Division referred to the amounts of time that the Appellant spent in Canada versus Greece. The Appellant argues that the General Division understated the fact that, from November 2009 until his death, he spent more than 70% of his time in Canada.

¹⁴ In *NG v Minister of Employment and Social Development*, 2018 SST 730, I set out a list of factors that the General Division should address when deciding whether to consider documents filed after the hearing.

¹⁵ See note 8, above.

¹⁶ My power to intervene when the General Division breaches a principle of natural justice is set out in section 58(1)(a) of the DESD Act.

- b) In paragraph 17 of its decision, the General Division found that the Appellant had almost no personal property in Canada. The Appellant argues that this is unfair because he was living with his son, so he did not need very much.
- c) In paragraph 18 of its decision, the General Division found that the Appellant was not actively engaged in social activities. I have dealt with these arguments in other parts of this decision.
- d) In paragraphs 19 and 41 of its decision, the General Division made findings concerning the Appellant's loneliness in Canada. The Appellant argues that this is only partially true. He says that he started to feel lonely around 2011, about two years after living some distance from the nearest Greek community.
- e) In paragraph 21 of its decision, the General Division found that the Appellant preferred using his Greek passport over his Canadian passport. The Appellant argues that this fact is irrelevant to the question of his residence in Canada.
- f) In paragraph 22 of its decision, the General Division found that there was little or no evidence of the Appellant having RRSPs or insurance policies in Canada. Given his limited financial means, the Appellant argues that this fact is irrelevant to the question of his residence in Canada.
- g) In paragraph 24 of its decision, the General Division found that the Appellant had "extremely strong ties to Greece." In support of that conclusion, the General Division relied on the amount of time that the Appellant spent in Greece each year, the Appellant's relatives in Greece (including an aunt), and his use of state-subsidized healthcare in Greece. The Appellant disputes this finding because he spent most of his time in Canada (particularly in 2010 and 2011); his strongest family ties were in Canada; he had no aunts living in Greece after November 2009; and the healthcare benefits he received in Greece were associated with his farmer's pension, so there was no reason to give them up.
- h) In paragraph 26 of its decision, the General Division found that the Appellant had relatively significant agricultural income in 2010. The Appellant argues that he could

not have farmed in 2010 since he only spent two months in Greece during that year and was too old to farm.

- i) In paragraph 29 of its decision, the General Division found that the Appellant maintained exceptionally strong ties to Greece, even after November 2009. Instead, the Appellant argues that he cut his ties to Greece in November 2009. In particular, he spent little time in Greece in 2010 and in 2011 (and then less than 50% of his remaining years visiting Greece); he had reunited with his wife, his four sons, and their families (all of whom lived in Canada); and he stopped earning agricultural income from Greece. The Appellant also argues that he re-established his Canadian residence by obtaining provincial healthcare coverage, changing his residence status for tax purposes, and re-establishing his GIS benefits.
- j) In paragraph 33 of its decision, the General Division found that the Appellant could not completely care for himself after November 2009. The Appellant argues that this is only partially true because he was still able to participate in family activities and social events, although on a more limited basis because of his age.
- k) In paragraph 34 of its decision, the General Division contrasted the Appellant's activities in Canada to those of his wife. The Appellant argues that this is unfair because there was an 11-year age gap between the two and because the Appellant did, in fact, regularly engage with family members. The Appellant also points out that his limited financial means did not allow him to live near the local Greek community.
- l) In paragraph 38 of its decision, the General Division concluded that the Appellant did not change his mode of living after entering Canada in November 2009. The Appellant argues that this is untrue because he severely cut his ties to Greece and re-established his ties to Canada, as described above.

[28] I have considered all of these alleged errors. In my view, however, none are of the type that the DESD Act describes.¹⁷ The Appellant has not shown that any of the alleged errors are

¹⁷ As discussed above, section 58(1)(c) of the DESD Act specifies that the only errors of fact that allow me to intervene in a case are ones that the General Division bases its decision on and that it makes in a perverse or capricious manner or without regard for the material before it.

ones on which the General Division decision based its decision or that are contradicted by the evidence. As a result, they cannot justify my intervention in this case.

[29] Indeed, I largely agree with the Minister's submissions in response to each of these points.¹⁸ In some cases, for example, the Appellant does not dispute the accuracy of what the General Division wrote; he just wishes that it had been expressed in a more favourable way. In addition, the strength of the Appellant's ties to Canada does not necessarily contradict the strong ties that he maintained to Greece.

[30] I would also add that, in my leave to appeal decision, I invited the Appellant to be very specific about those portions of the evidence that, in his view, contradict the findings above.¹⁹ To make this job easier, the Tribunal provided the Appellant with an audio recording of the General Division hearing. However, the Appellant never provided the additional details that I requested.

[31] Overall, therefore, I find that the General Division considered relevant factors when assessing the strength of the Appellant's ties to Greece versus Canada.²⁰ Indeed, the Appellant does not claim that the General Division overlooked any relevant ties to Canada. Instead, he disagrees with the relative weight that the General Division gave to the Appellant's ties to Canada and to Greece. But that is not an error that the DESD Act allows me to consider.

[32] In addition, the General Division made some of the findings in question based on its assessment of numerous factors. The General Division was entitled to make those assessments without undue interference by the Appeal Division.²¹

[33] I have concluded therefore that the General Division did not base its decision on an important error concerning the facts of the case.

¹⁸ See the Submissions of the Respondent (ADN2) at paras 35–58.

¹⁹ See my leave to appeal decision, dated February 19, 2019, at paras 26–28.

²⁰ Binding decisions from the courts say that questions of residency are to be determined based on all the circumstances of the particular case. See, for example, *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 at para 58 and *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277 at para 32.

²¹ *Garvey v Canada (Attorney General)*, 2018 FCA 118 at para 6.

Issue 3: What is the appropriate remedy in this case?

[34] I found just one error that justifies my intervention in this case. More specifically, the General Division failed to tell the Appellant that he was able to file new documents after the hearing.

[35] The nature of the error and the Appeal Division's limited ability to accept new evidence have led me to conclude that I must return the matter to the General Division once again.

[36] I have the power to impose directions, however, and intend to use that power to limit the scope of the appeal. By doing so, I hope to ensure that the matter proceeds as quickly as possible. This is not the type of case where an entirely new hearing needs to be held or a completely new decision needs to be written. To be clear, the General Division remains free to decide that the Appellant did or did not reside in Canada at any point between November 11, 2009, and the date of his death.

[37] With those comments in mind, the appeal is referred back to the General Division for reconsideration with these directions:

- a) the scope of the reconsideration is limited to the Appellant's social ties in Canada (for example, his involvement with the Greek Community in Canada) and the impact that any new documents and submissions might have on the General Division decision dated September 26, 2018;
- b) the appeal is to be reassigned to the same General Division member, if possible;
- c) the General Division shall give the Appellant a period of at least three weeks to file new documents and submissions concerning his social ties in Canada;
- d) the General Division may then give the Minister an opportunity to respond to any new documents and submissions that the Appellant might file and may decide whether or not to hold a hearing, as well as what form the hearing should take (either orally or in writing); and

- e) the General Division must then issue a written decision, with reasons, confirming or modifying its decision dated September 26, 2018.

CONCLUSION

[38] On the one hand, I concluded that the General Division committed an error by failing to tell the Appellant that he was able to file new documents after the General Division hearing. On the other hand, I concluded that the General Division did not make any of the factual errors that the Appellant was alleging.

[39] As a result, I am allowing the appeal and sending the matter back to the General Division for reconsideration, but with directions designed to narrow the remaining issues in dispute.

Jude Samson
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVES:	N. P., Representative for the Appellant Stéphanie Pilon, Representative for the Respondent

Relevant Legal Provisions

Department of Employment and Social Development Act

Grounds of appeal

58 (1) The only grounds of appeal are that

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based 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.

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Decision

59 (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

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Powers of tribunal

64 (1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

Social Security Tribunal Regulations

General principle

2 These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.

Informal conduct

3 (1) The Tribunal

- (a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit;