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

Citation: *R. G. v Minister of Employment and Social Development*, 2019 SST 1297

Tribunal File Number: AD-19-487

BETWEEN:

R. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: October 31, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed. This matter is returned to the General Division for a new hearing.

OVERVIEW

[2] The Appellant, R. G., was born in Guyana in 1942 and came to Canada as a landed immigrant in 1976. In 1992, he returned to Guyana, where in spent the next 12 years working in various capacities.

[3] In September 2016, the Appellant applied for an Old Age Security (OAS) pension, claiming that he had been a resident in Canada for at least the minimum requirement of 10 years.[1] The Appellant specifically listed his periods of residence in Canada as March 4, 1976 to September 21, 1992 and March 4, 2004 to the Application date.[2]

[4] The Respondent, the Minister of Employment and Social Development (Minister), asked the Appellant to provide evidence, such as passports and utility statements, to support his claim of Canadian residence. In response, the Appellant's then legal counsel submitted a letter claiming that, while in Guyana, his client had worked for a wholly-owned Canadian corporation from 1994 to 2001.[3] Counsel argued that those seven years should be added to the Appellant's residency calculation, giving him the 20 years required to qualify for an OAS pension. Enclosed with the letter was assorted correspondence from the 1990s and early 2000s indicating that the Appellant was associated with X, a X-based firm.

[5] In 2017, the Minister refused the application, finding that the Appellant had lived in Canada for only 15 years and 315 days since his 18th birthday.[4] Although its refusal letter did not

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[1] Under section 3(2) of the *Old Age Security Act*, a partial OAS pension can be paid only to a claimant who has at least 10 years of residence in Canada. For a claimant who resides abroad, the residence requirement is more onerous—20 years.
[2] Application for pension dated September 8, 2016, GD2-3.
[3] Letter dated April 17, 2017 from Kaisree Chatarpaul, barrister and solicitor, GD2-10.
[4] Minister's initial refusal letter dated June 7, 2017, GD2-8.

say so explicitly, the Minister also suggested that it did not believe the Appellant's claim that he was currently a Canadian resident. The Minister later upheld its refusal on reconsideration.

[6] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated April 23, 2019, dismissed the appeal, finding that Appellant had "failed to prove on a balance of probabilities he was a resident of Canada for a longer period than determined by the Minister."[5] At the same time, the General Division found that the Appellant's seven years of working for a Canadian company while in Guyana did not qualify as residence under the *Old Age Security Act* (OASA) or the *Old Age Security Regulations* (OAS Regulations).

[7] On July 11, 2019, the Appellant applied for leave to appeal from the Tribunal's Appeal Division. Accompanying his application were two written statements alleging numerous errors on the part of the General Division. Among other submissions, the Appellant argued that the General Division had ignored evidence and misinterpreted the law when it found that he had resided in Canada for just under 16 years.

[8] On August 9, 2019, I granted leave to appeal because I saw at least an arguable case for several issues raised by the Appellant. I then scheduled a teleconference to hear arguments on the merits of these issues.

PRELIMINARY MATTER

[9] The Tribunal mailed a notice to the parties informing them that the teleconference hearing would be held on October 21, 2019. The notice also advised the parties that they had 45 days from the date of the leave to appeal decision to make further written submissions.

[10] The Appellant, with the assistance of a law firm based in Guyana, filed documents on September 6, 2016. Among those documents was a letter from the Appellant expressing his preference for a hearing by written questions and answers. The documents also included material that had already been presented to the General Division.

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[5] General Division decision, para 9.

[11] On September 18, 2019, Ms. Doucette, the Minister's representative, requested a 10-day extension of time in which to file documents. I thought the request reasonable and endorsed it. On September 25, 2019, the Appellant registered his objection to the extension of time because, in his view, it would "further delay the final resolution of this dispute."

[12] Meanwhile, in a letter dated September 23, 2019, Ms. Doucette conceded that the General Division had failed to adequately assess the Appellant's residency claims under the OASA. She asked that the matter be returned to the General Division for rehearing.

[13] On October 21, 2019, as scheduled, I convened the hearing. Ms. Doucette joined the teleconference, but the Appellant did not. After confirming that the Appellant had been properly notified of the hearing, I decided to proceed in his absence. In doing so, I relied on section 12 of the *Social Security Tribunal Regulations* (SST Regulations). At that time, there was nothing on the record to indicate that the Appellant could not, or would not, be participating in the hearing, nor was there any indication that he had requested an adjournment.

[14] During the hearing, I asked Ms. Doucette whether her letter of September 23, 2019 continued to represent the Minister's position. Hearing that it did, I expressed my agreement with both parties that the General Division had failed to observe a principle of natural justice when it considered the Appellant's claim for OAS benefits earlier in the year. Ms. Doucette and I then discussed whether the record contained sufficient evidence to allow me to substitute my decision for the General Division's and decide the Appellant's OAS claim on its merits.

[15] In a letter received on October 30, 2019, the Appellant, again assisted by a Guyanese lawyer, objected to the Minister's suggestion that the Appeal Division send his case back to the General Division. He wanted his appeal heard immediately and added:

> The purpose of this letter therefore is to request an update on this matter so that I may be in a better position to decide what is to be done next in order to bring this matter to a satisfactory conclusion. Since you did not favour me with a reply before the scheduled teleconference, it was not possible to initiate the teleconference.

This letter tells me that the Appellant was aware of the October 21 hearing but made a conscious decision not to participate in it. Although he had earlier requested a hearing by written questions

and answers, he should know that, under section 21 of the SST Regulations, the format of a hearing is a matter left to the Appeal Division's discretionary authority.

[16] I decided to proceed by teleconference in this case because I thought the issues would benefit from the give-and-take of an oral discussion. Even when the Minister conceded that the General Division had erred in rendering its decision, I saw no need to reconsider my choice of hearing format because there remained the matter of what remedy would be most appropriate. Under the circumstances, I thought it proper and reasonable to proceed in the Appellant's absence. The Appellant may have disagreed with my decision to hear his appeal by teleconference, but that was not, in my view, a valid reason to skip or boycott the hearing—especially without advance notice. I am not sure whether the Appellant intended his most recent letter to be a request for an adjournment; if so, I am not inclined to grant it.

ISSUES

[17] According to section 58(1) of the *Department of Employment and Social Development Act* (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.

[18] There were two issues in this appeal:

Issue 1: Did the General Division consider the substance of the Appellant's claim?
Issue 2: Did the General Division apply the *OAS Regulations* to the evidence?

ANALYSIS

Issue 1: Did the General Division consider the substance of the Appellant's claim?

[19] I have reviewed the record and considered the Appellant's submissions on appeal. I have concluded that the General Division failed to fully address the Appellant's argument that the Minister had miscalculated his period of residence in Canada. I am basing this conclusion on the following factors:

- The Minister calculated the Appellant's period of residence in Canada as 15 years and 315 days, but I cannot see where this figure came from, based on the information in the record. The only evidence about the Appellant's early years in Canada comes from the Appellant himself, specifically the dates that he disclosed in his application for OAS benefits. However, the time between March 4, 1976 and September 21, 1992 does not amount to 15 years and 315 days but 16 years and 201 days. It is unclear whether the General Division noticed this apparent discrepancy, but it certainly did not raise it at the hearing or address it in its decision.
- The Appellant also claimed to have been continuously living in Canada since March 4, 2004, although I acknowledge that there was considerable evidence on file (for instance, his lack of a permanent Canadian mailing address) to cast doubt on that claim. Still, the General Division did not address this more recent period in its decision, except to baldly assert, without any analysis of the evidence, that the Appellant had "no deep-rooted attachment" to this country.
- A further indication that the General Division may have devoted something less than its full attention to the Appellant's submissions can be seen in the lengths of both the hearing and the decision that resulted from it. The teleconference that took place on April 17, 2019 lasted 12 minutes, of which two minutes were comprised of the presiding member's introductory remarks. The General Division's written reasons, issued a week later, were two pages long.
- Finally, I cannot help but wonder whether the Minister submitted its complete file to General Division's attention. I note that the file does not contain any worksheets that might have explained how the Minister's officials arrived at its residency calculation. I also note that the file includes a 2014 letter from the Appellant's former legal counsel inquiring about an earlier OAS application that her client had supposedly submitted in 2008.[6] The file contains nothing else about such an application, but I would suggest that the gaps described above should have prompted the General Division to ask the Minister whether it had produced all relevant documents.

[6] Letter from Kaisree Chatarpaul dated September 12, 2015, GD2-13.

[20] These lapses suggest that the General Division did not fully engage with the material that was before it. In that sense, the General Division failed to observe an important component of the rules of natural justice—a claimant's right to be heard.

Issue 2: Did the General Division apply the *OAS Regulations* to the evidence?

[21] This issue, like the previous one, is about whether the General Division actually considered the Appellant's submissions. At the General Division, the Appellant argued that the seven years he spent working for a Canadian-owned corporation in Guyana should count toward his Canadian residence. The Appellant alleges that the General Division essentially ignored this argument.

[22] I agree that the General Division failed to consider the available evidence in light of the applicable law. Section 21(4) of the OAS Regulations states that, where a Canadian resident is absent from Canada, that absence shall be deemed not to have interrupted their residence or in Canada, provided that (i) the absence is temporary and does not exceed one year; (ii) the absence is for the purpose of attending a school or university; or (iii) the absence is for a reason specified in section 21(5) of the OAS Regulations.

[23] Under section 21(5) of the OAS Regulations, absences from Canada shall be deemed not to have interrupted a person's residence in Canada while that person was engaged in specified activities. One of those activities, described in section 21(5)(a)(vi) to (viii), is employment by a Canadian firm outside of Canada, if the person had a permanent Canadian abode to which they intended to return and if they did in fact return to Canada within six months after the foreign employment ended.

[24] At the hearing, the General Division did not ask the Appellant any questions about his job at X, a company that, to judge by its letterhead, was based in British Columbia.[7] In its decision, the General Division did not examine the nature and circumstances of the Appellant's work in Guyana for what appeared to be a Canadian company or apply the facts surrounding that employment to any specific provisions of the OAS Regulations. Instead, it stated without any further analysis, "The Appellant's situation is not covered by exemptions found in section 21."

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[7] GD2-16.

[25] Whether the General Division ultimately came to the right result is beside the point if it did not consider the material fairly or conscientiously. Here, I must conclude that the General Division disregarded the relevant facts and law in arriving at its decision.

REMEDY

[26] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision.

[27] Under section 3 of the SST Regulations, the Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow but, in this case, I feel my only option is to refer this matter back to the General Division for rehearing.

[28] The Appellant is urging me to expedite matters by substituting my decision for the General Division's. However, I do not think that the record is complete enough to allow me to decide this matter on its merits. As noted, there are indications in the file that the Minister did not produce all of the documents in its possession about the Appellant's current and previous applications. Then there is the General Division's failure to make inquiries about obvious gaps in the evidence, such as how the Minister calculated the Appellant's Canadian residence, whether X qualified as a Canadian company, and where the Appellant lived after 2004. The answers to these questions would be essential to make an informed decision about the Appellant's OAS entitlement, but I have no authority to solicit, accept, or hear such information. As a member of the Appeal Division, my role is limited to determining whether the General Division erred and, if so, to applying one of three precisely defined remedies. I do not have the authority to conduct a *de novo* hearing[8] or, more specifically, to consider new evidence. Since the General Division's mandate is to weigh evidence and make findings of fact, it is better positioned than I am to hear the Appellant's testimony anew and to explore whatever avenues of inquiry that may arise from it.

CONCLUSION

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[8] A Latin phrase that means "starting from the beginning."

[29] For the above reasons, I find that the General Division erred in law and failed to observe a principle of natural justice. Because the record is not sufficiently complete to allow me to decide this matter on its merits, I am referring it back to the General Division for a *de novo* hearing.

[30] To avoid any appearance of bias, I am directing the General Division to assign this matter to a member other than one who heard it in the first instance. I would ask that this decision be made available to whoever is assigned this file.

[31] When this matter is heard again, the General Division should consider the following questions:

(i) How did the Minister arrive at its calculation of 15 years and 315 days for the Appellant's Canadian residence period?

(ii) Did the Minister receive and process an earlier application for OAS benefits that the Appellant may have submitted in 2007 or 2008?

(iii) Did the Appellant's employment in Guyana fall under one of the exemptions listed in sections 21(5) of the OAS Regulations?

(iv) Did the Appellant establish Canadian residence for OAS purposes after his return to Canada in 2004?

[32] The appeal is allowed.

Member, Appeal Division

HEARING DATE	October 21, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Sandra Doucette, representative for the Respondent