



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. S. and V. S. v Minister of Employment and Social Development*, 2019 SST 1339

Tribunal File Number: AD-19-292 and AD-19-265

BETWEEN:

**K. S.
And
V. S.**

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 8, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part. The decision that the General Division should have given is made regarding the Claimants' residence from September 2015 to December 2015 and their entitlement to GIS for this period.

OVERVIEW

[2] K. S. and V. S. (Claimants) were born in India. They moved to Canada in 1969 and 1970. While in Canada, each Claimant began to receive an Old Age Security Pension and Guaranteed Income Supplement (GIS) when they turned 65. In September 2013, the Minister of Employment and Social Development suspended payment of the Claimants' GIS because it decided that they had ceased to reside in Canada, and were therefore no longer entitled to receive GIS.

[3] The Claimants appealed this decision to the Tribunal. The Tribunal's General Division decided that the Claimants ceased to reside in Canada in November 2012 and so were no longer eligible to receive GIS after May 2013.¹ Leave to appeal this decision to the Tribunal's Appeal Division was denied.

[4] The Claimants later applied to have their GIS reinstated based on their return to Canada in 2015. The Minister initially decided that they had not re-established residence in Canada in 2015. The Claimants appealed this decision to the Tribunal. The Tribunal's General Division dismissed the appeal despite the Minister having changed its position and conceded that the Claimants were entitled to GIS from September 2015 to June 2016 based on Canadian residence from September 2015 to December 2015.

[5] Leave to appeal this General Division decision to the Tribunal's Appeal Division was granted because the appeal had a reasonable chance of success on the basis that the General Division based its decision on an erroneous finding of fact made without regard for all of the

¹ The *Old Age Security Act* provides that GIS is not payable if a claimant has not resided in Canada for six consecutive months.

material before it, including the change in the Minister's position regarding the Claimants' residence.

[6] The appeal is allowed on this basis.

PRELIMINARY MATTERS

[7] The appeal was decided on the basis of the documents filed with the Tribunal, after considering the following:

- a) The issues to be decided are straightforward;
- b) The parties filed written submissions that dealt with all of the issues;
- c) The parties attended three settlement teleconferences where the issues were discussed and their legal positions clarified;
- d) At the end of the settlement conferences the parties consented to my making the decision on the appeal;
- e) The parties agreed that the decision should be made without an oral hearing.

ISSUES

[8] Did the General Division fail to exercise its jurisdiction when it failed to consider whether the Claimants were entitled to GIS from June 2013 to April 2014?

[9] Did the General Division base its decision on an erroneous finding of fact that the Claimants had not re-established residence in Canada from September 2015 to December 2015?

[10] Can the Appeal Division consider the Claimants' entitlement to GIS after June 2016?

ANALYSIS

[11] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides rules for appeals to the Appeal Division. An appeal is not a re-hearing of the original claim, but a determination of whether the General Division made an error

under the DESD Act. The Act also states that there are only three kinds of errors that can be considered. They are that the General Division failed to observe a principle of natural justice, made an error in law, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.² If at least one of these errors was made, the Appeal Division can intervene. Each of the Claimants' grounds of appeal are considered below in this context.

Issue 1: The Claimants' entitlement from June 2013 to April 2014

[12] The Claimants' argue that the General Division made an error because it failed to decide that the Claimants were entitled to receive GIS from June 2013 to April 2014. They argue that there has been a breach of the principles of natural justice because the Minister has changed its position regarding their entitlement during this time.

[13] The principles of natural justice are concerned with ensuring that parties to an appeal have the opportunity to present their case to the Tribunal, to know and answer the other party's legal case, and to have a decision made by an independent decision maker based on the law and the facts. That one party to an appeal changed its legal position during the course of the appeal does not point to a failure to observe these principles. The Claimants knew the Minister's legal position about their residence during this time and had the opportunity to fully address it. Therefore, there was no breach of the principles of natural justice.

[14] What I must consider is not whether the General Division failed to observe a principle of natural justice, but whether it erred because it failed to exercise jurisdiction over the issue of whether the General Division erred by not considering the Claimants' entitlement during this time period.

[15] The General Division made no error in this regard. The Claimants' entitlement to GIS for this time was the subject of earlier appeals to the Tribunal. On October 4, 2017, the Tribunal's General Division decided that the Claimants were not entitled to GIS from June 2013 to April 2014. Leave to appeal this decision was refused by the Tribunal's Appeal Division.³ Therefore,

² DESD Act s. 58(1)

³ Appeal Division decision March 15, 2018, file numbers AD-17-956 and AD-17-958

that General Division decision is final. The Tribunal had no legal authority to reconsider the Claimants' entitlement. Therefore, the General Division made no error when it failed to consider this issue.

[16] The appeal fails on this basis.

Issue 2: the Claimants' residence from September 2015 to December 2015

[17] The Claimants also argue that the General Division based its decision that the Claimants were not entitled to GIS from September 2015 to June 2016 on an erroneous finding of fact that they did not re-establish residence in Canada in September 2015. In order to succeed on appeal on this basis, the Claimants must prove three things: that the General Division's finding of fact was erroneous (in error), that the finding of fact was made perversely, capriciously or without regard for the material that was before the General Division; and that the General Division decision was based on this finding of fact.⁴

[18] The General Division decision states that the Claimants returned to Canada in September 2015, and remained here until December 2015.⁵ It also correctly states that to decide whether the Claimants had re-established Canadian residence, it had to consider their social ties to Canada and India, the regularity and length of stays in both countries, family ties in India, living arrangements in Canada, and other factors.⁶ However, decision failed to analyze any of the Claimants' evidence in accordance with these factors. The General Division also failed to consider the Minister's submissions that conceded that the Claimants' had re-established Canadian residence during this time based on new information it had received.⁷

[19] Therefore, the General Division's finding of fact that the Claimants' had not re-established Canadian residence was made in error. This finding of fact was made without regard for all of the material that was before the General Division. The General Division failed to set out any evidentiary basis for its decision. It also failed to explain why it gave no weight to the Minister's concession on this issue, or the new evidence resulted in its change in position. The

⁴ *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319

⁵ General Division decision for the Kamlesh Kumar Sud appeal at para 6

⁶ *Ibid.* at para. 8

⁷ GD6-3

General Division decision was based on this erroneous finding of fact. Therefore, the appeal succeeds on this basis.

Issue 3: Entitlement to GIS after June 2016

[20] The Claimants also argue that the General Division erred because it failed to consider their entitlement to GIS after June 2016. However, it made no error in this regard. Before the General Division has any legal authority to decide an issue, the Minister must have made an initial decision on the issue and reconsidered this decision.⁸ The Minister has not made a reconsideration decision on the Claimants' residence for any time after June 2016. Therefore, the Tribunal has no authority to consider this. The appeal therefore fails on the basis that the General Division failed to consider their entitlement for this time.

CONCLUSION

[21] The appeal is allowed in part. The General Division based its decision regarding the Claimants' residence from June 2015 to December 2015 on an erroneous finding of fact, so this part of the appeal is allowed.

[22] The DESD Act sets out what remedies the Appeal Division can give when an appeal is allowed. This included giving the decision that the General Division should have given.⁹ It is appropriate that I do so in this case for the following reasons

- a) This appeal has been ongoing for a long time and further delay would occur if the matter were referred back to the General Division for reconsideration.
- b) The parties also agreed that I make the decision on this appeal.
- c) The record before me is complete.
- d) The facts are not in dispute: the Claimants' returned to Canada in September 2015. They planned to reside here permanently, and arranged their affairs to do so. The evidence in the written record demonstrates that they resided in Canada from

⁸ *Old Age Security Act* s. 28

⁹ DESD Act s. 59(1)

September 2015. The Claimants left Canada in December 2015 for reasons beyond their control – the sudden death of a close family member, and the need to attend to estate matters related to this.

[23] The *Old Age Security Act* states that GIS is not payable to a claimant if they have been absent from Canada for six consecutive months.¹⁰

[24] Therefore, the Claimants are entitled to payment of GIS for the period of September 2015 to June 2016, six months after they left Canada.

[25] The Claimants' applications for GIS since they turned 65 have been complex and convoluted. This has been further complicated by the Minister having changed its position regarding their entitlement more than once.

[26] The Claimants have received some GIS payments for the periods considered in this decision, and the Minister has recovered some money on account of overpayments. Although I have no jurisdiction to order how payments are to be made or overpayments recovered, I encourage the Minister to contact the Claimants to ensure that they understand what payments are owed by each party to the other, and to reach an agreement on how any such payments are to be made.

[27] I also encourage the Minister to make its decision regarding the time period after June 2016 quickly, and to contact the Claimants to explain this, so that further appeals may be avoided.

Valerie Hazlett Parker
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record

¹⁰ *Old Age Security Act* s. 11(7)(c)

APPEARANCES:	K. S. and V. S., Appellants Stéphanie Pilon, Representative for the Respondent
--------------	--