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

[TRANSLATION]

Citation: *E. M. v Minister of Employment and Social Development*, 2020 SST 148

Tribunal File Number: AD-19-428

BETWEEN:

E. M.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jude Samson

DATE OF DECISION: February 18, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] In October 2014, E. M. (Claimant) applied for an Old Age Security (OAS) pension and the Guaranteed Income Supplement (supplement). Depending on where he resided[1] on the eve of his 65th birthday (in July 2014), the Claimant had to have accumulated either 10 or 20 years of residence in Canada to be eligible for these benefits.

[3] The Claimant states that he is entitled to both benefits because he re-established his Canadian residence in December 2009 and has resided in Canada continuously since that date.

[4] However, the Minister of Employment and Social Development found that the Claimant never re-established residence in Canada after he left the country in December 1984. As a result, the Claimant does not even have 12 years of Canadian residence, when he needs at least 20.

[5] The Claimant disputed the Minister's decision, but the General Division dismissed his appeal. The Claimant is now appealing the General Division decision to the Appeal Division.

[6] I find that the General Division failed to examine the entire relevant period. Therefore, it refused to exercise its jurisdiction and made an error of law. As a result, I can give the decision that the General Division should have given.

[7] I find that the Claimant re-established his residence in Canada as of April 5, 2013, and that he resided there on the eve of his 65th birthday. He was therefore eligible for a partial OAS pension and the supplement. These are the reasons for my decision.

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[1] In this context, "residence" has a very specific meaning. Section 21(1) of the *Old Age Security Regulations* (OAS Regulations) defines whether a person **resides** in Canada, rather than being **present** in Canada.

PRELIMINARY MATTER

[8] At the General Division, the Claimant's hearing was held at the same time as his wife's hearing. However, the two separated after that date.

[9] I have some concerns about the fact that the Claimant's ex-wife was not part of the appeal before me. In April 2014, for example, the Claimant applied for the Allowance,[2] another benefit available under the *Old Age Security Act* (OAS Act). However, the Claimant's eligibility for that benefit depended on the years of Canadian residence accumulated by his ex-wife (among other things).

[10] At the hearing, the parties agreed that it was not necessary to add the Claimant's ex-wife to the proceeding as an added party. Furthermore, the Claimant indicated that he does not dispute his ineligibility for the Allowance. As a result, this decision will not address the Claimant's eligibility for the Allowance or his ex-wife's residence in Canada.

ISSUES

[11] These are the issues I examine in this decision:

a) The General Division assessed the Claimant's residence until April 2014. In doing so, did the General Division refuse to exercise its jurisdiction or make an error of law in making its decision?

b) What is the best possible remedy for the Claimant's situation?

c) Is the Claimant eligible for the OAS pension and the supplement?

ANALYSIS

[12] The Appeal Division can intervene in a case only if the General Division committed at least one of the errors set out in the *Department of Employment and Social Development Act*

[2] Pages GD2-23 to GD2-26.

(DESD Act).[3] Furthermore, the Appeal Division can only grant a remedy set out in the DESD Act.[4]

[13] In this case, I focused on the errors of law and the General Division's refusal to exercise its jurisdiction. Based on the wording of the DESD Act, any error of this type could justify my intervention in this case.[5]

Issue 1: Did the General Division refuse to exercise its jurisdiction or make an error of law in making its decision?

[14] Yes, by ignoring the Claimant's residence after the month of April 2014, the General Division refused to exercise its jurisdiction over a relevant period. Furthermore, the General Division made an error of law in making its decision.

[15] To qualify for a partial OAS pension, the Claimant had to have accumulated at least 20 years of residence in Canada. However, if he resided in Canada the day before the approval of his application, this requirement went from 20 years to 10 years.[6]

[16] Regarding the date of the Minister's approval, this can vary depending on the facts of the case.[7] Here, the Minister's approval could take effect as early as the day on which the Claimant reached age 65 (in July 2014).[8]

[17] Therefore, it was essential for the General Division to determine whether the Claimant resided in Canada during the period from April to July 2014. The General Division decision shows that the Claimant's situation changed at the beginning of 2014.[9] This reinforces the importance of the period the General Division glossed over.

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[3] The types of errors recognized (also known as "grounds of appeal") are set out under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).
[4] These remedies are set out in section 59(1) of the DESD Act.
[5] These errors are set out in sections 58(1)(a) and 58(1)(b) of the DESD Act. *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.
[6] These requirements are set out in section 3(2)(b) of the *Old Age Security Act* (OAS Act).
[7] Section 5 of the OAS Regulations determines the date the Minister's approval takes effect.
[8] Section 5(2) of the OAS Regulations applies in this case.
[9] General Division decision at para 9, under the title [translation] "6. Applicant's way of life."

[18] The General Division failed to assess the Claimant's residence during the entire relevant period.[10] Therefore, I find that the General Division refused to exercise its jurisdiction and made an error of law in making its decision.

Issue 2: What is the best possible remedy for the Claimant's situation?

[19] Among the possible remedies, I find that I should give the decision that the General Division should have given.

[20] The Claimant's representative submits that the hearing at the General Division was conducted in an unfair manner. In particular, the Claimant's ex-wife's testimony took up the majority of the hearing, and the General Division member did not ask the Claimant enough questions.

[21] I do not accept the Claimant's arguments about this. The Claimant was present for his ex-wife's testimony. He then confirmed that his situation was similar to hers.

[22] As noted by the Minister's representative, the Claimant was not prevented from speaking, asking questions, or making submissions.[11] On the contrary, the General Division member asked several times whether the Claimant had anything else to add.

[23] Therefore, I find that I have the information and authority necessary to make a final decision in this file.[12] I examined all the documents on file and I listened to the audio recording of the hearing from November 26, 2018, Therefore, there is little benefit to sending the appeal back to the General Division for another review.

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[10] General Division decision at paras 1, 6, 7, 20, 21, and 23. It seems this confusion may have been caused by the fact that the Claimant submitted his application for the Allowance (and not the OAS pension) in April 2014.
[11] AD12-2.
[12] Section 59(1) of the DESD Act gives me the power to give the decision that the General Division should have given. See also section 64(1) of the DESD Act and the Federal Court of Appeal decision *Nelson v Canada (Attorney General)*, 2019 FCA 222.

Issue 3: Is the Claimant eligible for the OAS pension and the supplement?

[24] Yes, I find that the Claimant re-established his Canadian residence as of April 5, 2013. Furthermore, he maintained it until the date of his 65th birthday in July 2014. Therefore, as of that date, the Claimant was eligible for the OAS pension and the supplement.[13]

[25] The parties agree that the Claimant accumulated 11 years and 329 days of residence in Canada in the years 1972 to 1984. Therefore, he is eligible for the OAS pension and the supplement if he resided in Canada the day before the date his application was received.[14]

[26] In the Claimant's case, he applied for the OAS pension a few months after his 65th birthday. Therefore, the Minister's approval can be antedated to the day the Claimant turned 65.[15]

[27] Did the Claimant establish that he was residing in Canada on the eve of his 65th birthday?

[28] To determine the Claimant's status, I examined the following ties and factors:[16]

a) his personal property in Canada;

b) his social ties in Canada;

c) his other ties in Canada;

d) his ties in another country;

e) the number and length of his stays in Canada;

f) the number and length of his absences from Canada;

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[13] Sections 8(1) and 8(2) of the OAS Act state that the Claimant's benefits are payable from the month after the application has been approved, in August 2014.
[14] In this situation, section 3(2)(b) of the OAS Act requires only 10 years of Canadian residence.
[15] Here, the date on which the Minister's approval takes effect is determined based on section 5(2) of the OAS Regulations.
[16] These factors have been quoted with approval by the Federal Court in *De Carolis v Canada (Attorney General)*, 2013 FC 366 at para 32 and *De Bustamante v Canada (Attorney General)*, 2008 FC 1111 at para 38 (among others).

g) his way of life and roots in Canada.

[29] The weight given to each factor can vary from case to case.[17] Furthermore, a person's entire situation must be examined to determine their residence.[18]

[30] In 2009, the Claimant was living in Haiti. Accompanied by his ex-wife, he arrived in Canada in December 2009 to celebrate his daughter's birthday. He was planning to stay there for about three weeks. But a devastating earthquake hit Haiti on January 10, 2010. Based on their claims, the couple decided to leave Haiti for good and re-establish in Canada permanently.

[31] After that decision, I acknowledged that the Claimant had established many ties with Canada. On the one hand, the Claimant:

a) opened a bank account in 2010 and has a Canadian credit card;[19]

b) has received a pension from the Québec Pension Plan since 2010;[20]

c) has a Québec driver's licence;[21]

d) re-registered for the Québec health insurance plan;[22]

e) resumed, in 2010, filing his annual income tax returns.[23]

[32] Furthermore, the Claimant's daughter lives in Québec.

[33] I must weight these factors against the Claimant's ties with Haiti.

[34] On the other hand, the Claimant and his ex-wife own land in Haiti. However, I give little weight to this factor because the Claimant has been trying to sell this land for several years.

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[17] This is specified in the decision *Singer v Canada (Attorney General)*, 2010 FC 607, confirmed by 2011 FCA 178.
[18] This is specified in the decisions *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.
[19] Pages GD2-51, GD2-52, and GD2-80.
[20] Pages GD2-45 and GD2-105.
[21] Pages GD2-56 and GD2-57.
[22] Page GD2-96.
[23] Page GD2-76.

[35] More importantly, I note that the Claimant went to Haiti for long periods in the years 2010 to 2013. Specifically, the Claimant returned to his country of origin from:[24]

a) February 21, 2010, to December 21, 2010;

b) January 16, 2011, to April 21, 2011;

c) May 10, 2011, to December 12, 2011;

d) January 15, 2012, to April 5, 2012;

e) April 29, 2012, to December 14, 2012;

f) January 26, 2013, to March 28, 2013.

[36] Given the number and length of absences from Canada, I give great weight to this factor.

[37] The Claimant states that Haiti was in chaos during this period. Nothing was working, and it took a long time to do anything. However, the Claimant chose to deal with this difficult situation rather than move to Canada.

[38] Regarding the period before March 28, 2013, I am therefore satisfied that the Claimant has not demonstrated the re-establishment of his residence in Canada.

[39] However, I find that the Claimant's situation changed when he entered Canada on April 5, 2013, when he re-established his residence in Canada.[25]

[40] In the paragraphs above, I noted to what extent the Claimant's absences from Canada were an important factor in this case. However, the Claimant states that he never returned to Haiti after March 2013.

[41] I acknowledge that the Claimant was absent from Canada for a long period after April 5, 2013, but this absence must be considered in context.

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[24] The dates in paragraphs 13 to 18 of the General Division decision were not disputed before me.
[25] After leaving Haiti, the Claimant spent a few days in the United States before he arrived in Canada.

[42] A few days after he arrived in Canada on April 5, 2013, the Claimant learned that his sister-in-law had died in Haiti. Accompanied by his ex-wife, he therefore left for New York to get his mother-in-law. Then, they were going to travel to Haiti together for the funeral. They planned to stay two to three weeks.

[43] However, the couple never made it to his mother-in-law's. Instead, they were involved in a serious car accident. The Claimant recovered from this accident fairly quickly. But his ex-wife required a much longer recovery period. The Claimant stated with his ex-wife during that entire period, until she was well enough to return to Canada on December 27, 2013.

[44] Although the absence was long, it was caused by a completely unforeseen event and its length was beyond the Claimant's control. Besides, the Claimant did not have the status to stay in the United States.

[45] I am therefore satisfied that the Claimant re-established his residence in Canada as of April 5, 2013 and that he maintained it until his birthday in July 2014.

[46] This finding is sufficient to establish the Claimant's eligibility for the OAS pension and the supplement. However, to preserve his entitlement to benefits, the Claimant must maintain his Canadian residence and must not leave Canada for long periods.[26] If the Minister deems necessary, it is in a position to assess whether the Claimant maintained his eligibility for benefits for the period after July 2014.

CONCLUSION

[47] Overall, I have found that the General Division made an error of law in making its decision and refused to exercise its jurisdiction. Given that these errors were committed, I have the authority to reassess the matter and give the decision that the General Division should have given.

[26] These requirements are set out in sections 9(1) to 9(4) and sections 11(7)(b) and 11(7)(d) of the OAS Act.

[48] I am satisfied that the Claimant re-established his residence in Canada as of April 5, 2013. Furthermore, he maintained it until his 65th birthday in July 2014. The Minister has the ability to assess the Claimant's Canadian residence after that date.

[49] As of July 2014, the Claimant was therefore eligible for the partial OAS pension and the supplement. It is now up to the Minister to calculate the exact sums to which the Claimant is entitled based on the periods of Canadian residence accepted by the Tribunal and any other relevant factor.

[50] Given that I did not retain the entire period of Canadian residence claimed by the Claimant, I am allowing the appeal in part.

Jude Samson
Member, Appeal Division

HEARD ON:	January 17, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. M., Appellant Diane Beaulieu (counsel), Representative for the Appellant Marcus Dinberger (counsel), Representative for the Respondent