



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. H. v Minister of Employment and Social Development*, 2020 SST 368

Tribunal File Number: GP-19-560

BETWEEN:

C. H.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Carol Wilton

In person hearing on: February 20, 2020

Date of decision: April 8, 2020

DECISION

[1] Even though the Claimant ceased to be a resident of Canada in January 2000, he is eligible to receive *Guaranteed Income Supplement* (GIS) benefits from October 2013 to March 2015. This is because the Minister does not have the authority to reassess its initial decision of March 2015 approving the Claimant's application for the GIS.

[2] However, the Minister has the authority to reassess the Claimant's eligibility for the GIS for the period from March 2015 to June 2016. The Minister is entitled to recover the overpayment of the Claimant's GIS for that period.

[3] The Claimant is also entitled to receive the GIS as of January 2018.

PRELIMINARY MATTER

[4] The issue before me is the Claimant's entitlement to the GIS.

[5] The Claimant raised another issue with the Minister. It concerned a reassessment of the amount of his *Old Age Security* (OAS) payments. The Claimant was in Canada on work and study permits in the years 1972 to 1977. In February 2014, the Minister initially decided that these years counted toward his years of residence in Canada for the purposes of his OAS entitlement.¹ In January 2016, the Minister changed its position and informed the Claimant that the years from 1972 to 1977 did not count as residence. As a result, he had an overpayment for the period September 2011 to June 2014.²

[6] In March 2018, the Claimant raised the issue of his OAS pension with the Minister. He stated that there had been an error in the calculation of his OAS pension.³ In April 2018, the Claimant raised the matter again, asking that his "petition [would] receive a more favourable response from Service Canada this time around."⁴ Since this correspondence was beyond the 90-day limit for requesting reconsideration,⁵ it is surprising that the Minister did not consider it a

¹ GD2-50

² GD4-7; the original letter from the Minister was not in the appeal file.

³ GD2-29

⁴ GD2-81

⁵ Subsection 27.1(1) of the OAS Act, section 29.1 of the OAS *Regulations*

late request for reconsideration and decide whether to grant the Claimant an extension of time to appeal the Minister's decision of January 2016.

[7] Instead, in January 2019, the Minister proceeded to send the Claimant a reconsideration decision letter that made no mention of the OAS issue.⁶

[8] I cannot consider an appeal except where there has been a reconsideration decision.⁷ It is a reconsideration decision that is the proper subject of an appeal. Under the law, I do not have the authority to make a decision on the Claimant's OAS matter because there has been no reconsideration decision on that issue.

[9] On this issue, the Claimant should contact the Minister to discuss the best course of action to follow going forward.

OVERVIEW

[10] The Claimant was born in Ghana in March 1946 and came to Canada in September 1972. He completed his bachelor's, master's, and doctoral degrees here. Then he worked for various universities and organizations in Canada.⁸ He remained in Canada until January 2000,⁹ when he returned to Ghana to work. At the hearing, he stated that he resumed residence in Canada in January 2018.

[11] The Claimant applied for the GIS in September 2014.¹⁰ In March 2015, the Minister approved payment of the GIS to the Claimant beginning in October 2013.¹¹

⁶ GD1-5-6

⁷ Subsection 28(1) of the OAS Act; *Canada (A.G.) v. Bannerman*, 2003 FCT 208; *N.N. v. MESD*, 2018 SST 304, a decision that is not binding on me but that is persuasive.

⁸ GD2-90-91

⁹ GD2-45

¹⁰ GD2-56

¹¹ GD2-61, 63. October 2013 was 11 months before the Minister received the application, and was the greatest amount of back payment the Claimant could receive: paragraph 11(7)(a) of the OAS Act

[12] In March 2018, the Minister changed position and informed the Claimant that he was not eligible for the GIS from July 2014 to June 2016 because he did not live in Canada during that time.¹²

[13] In the reconsideration letter of January 2019, the Minister stated that the Claimant was not entitled to the GIS for the period July 2014 to June 2016 because he had provided insufficient evidence to allow the Minister to determine his exact years of residence. He was required to repay the GIS overpayment of \$24,255.09 for that period. In addition, he provided insufficient information to support a finding that he returned to live permanently in Canada in January 2018.¹³

[14] The Claimant appealed the reconsideration decision to the Social Security Tribunal.

ISSUES

[15] Did the Minister have the authority to re-assess the Claimant's GIS eligibility for the period from July 2014 to June 2016?

[16] If so, from what date could the Minister recover payment?

[17] Was the Claimant resident in Canada as of January 2018, and thus eligible for the GIS as of January 2018?

ANALYSIS

The Minister is not entitled to recover the Claimant's GIS payments from October 2013 to March 2015, but is entitled to recover payment from April 2015 to June 2016

[18] The Claimant's eligibility for the GIS prior to June 2016 depended on his being in receipt of the OAS pension, which the Claimant was at all relevant times. The Claimant also needed to meet the income test and have been resident in Canada.¹⁴

¹² GD2-71. The omission of the period from October 2013 to July 2014 appears to be the result of an oversight. The Minister later submitted that the overpayment dated back to October 2013:GD4-2

¹³ GD1-5

¹⁴ Subsections 11(7)(c) and (d) of the OAS Act

[19] When the Claimant applied for the GIS in August 2014 (for the periods from July 2012 to June 2013, and from July 2013 to July 2014), he gave a home in Brampton as his address.¹⁵ In February 2015, he applied for the GIS for the period from July 2014 to June 2015, citing the same address in Brampton.¹⁶ In March 2015, the Minister approved payment of the GIS beginning in October 2013.¹⁷

[20] In November 2017, the Minister asked the Claimant to update his records by filling out a questionnaire.¹⁸ In February 2018, the Claimant's completed questionnaire stated that he had lived in Ghana from January 2000 to July 2012, and from December 2012 to January 16, 2018. He stated that he had lived mostly in Ghana since January 2000, but could not recall specific dates because he did not have access to his expired passports. He stated that he was already in Canada to stay, he hoped.¹⁹ In March 2018, he confirmed this information in a telephone call with a representative of Service Canada. The Minister put his GIS application "on hold."²⁰

[21] In March 2018, the Minister informed the Claimant that he was not eligible for the GIS from July 2014 to June 2016 because was not resident in Canada during that period.²¹ However, the Minister determined that the Claimant was entitled to the GIS as of January 2018. The Minister claimed an overpayment of \$24,225.99 for the period July 2014 to June 2016. Deductions from his monthly payments would begin in April 2018.²²

[22] In October 2018, the Minister requested further information, including Canada Border Service Agency travel records since January 2013; all passports from 2000 to the present; and proofs of departures from Canada, current financial information, and current information about such matters as his current health coverage and driver's licence.²³

¹⁵ GD2-22, 23. This was the family home, where his wife lived, and where he stayed when he was in Canada.

¹⁶ GD2-24

¹⁷ GD2-61, 63

¹⁸ GD2-64. This was the first questionnaire he was asked to complete since 2013: GD2-8.

¹⁹ GD2-67

²⁰ GD2-70

²¹ GD2-71. The Minister's letter of March 2018 he Claimant's Statement of Income for the GIS for 2016-2017 has a notation from the Minister's office stating that the Claimant was a "non-resident": GD2-25

²² GD2-71

²³ GD2-113

[23] In October 2018, the Claimant submitted passport entries showing that he left Ghana January 16, 2018 and arrived in Canada the following day. There were no other entries showing he had left Canada since. The Claimant also provided evidence of medical appointments in Canada during the period January to October 2018.²⁴

[24] In the Reconsideration letter of January 2019, the Minister stated that the Claimant was not entitled to the GIS because he had provided insufficient evidence to allow the Minister to determine his exact years of residence. The Claimant would have to repay the GIS overpayment of \$24,255.09 for the period from July 2014 to June 2016. In addition, he provided insufficient information to support a finding that he returned to live permanently in Canada in January 2018.²⁵

[25] In submissions dated October 2019, the Minister stated that the Claimant did not qualify for the GIS effective October 2013.²⁶

[26] In his Notice of Appeal of April 2019, the Claimant stated that he had been unable to provide all the requested information because he had been out of Canada from October 2018 to January 2019.²⁷ He provided additional information to support his claim to have been resident in Canada since January 2018.

[27] At the hearing, the Claimant acknowledged that he did not live in Canada between January 2000 and January 2018. That, however, is not the end of the matter.

[28] A developing body of Tribunal case law holds that the Minister lacks the authority to reassess an initial decision to grant the OAS pension. The GIS benefit is governed by the same act and regulations as the OAS pension.

[29] A recent decision of the Appeal Division (AD), *B.R. v. MESD* (the *B.R.* decision),²⁸ involved a claimant who initially received approval for the OAS. The Minister then reversed its

²⁴ GD2-89-99

²⁵ GD1-5

²⁶ GD4-16

²⁷ GD1-2

²⁸ *B.R. v. MESD*, 2018 SST 844; *M.B. v. MESD*, GP-19-281 (General Division). Neither of these decisions is binding on me.

position and stated that the claimant was not entitled to two years of benefits to which he had been found entitled in the initial eligibility decision. The Minister demanded repayment of the two years of benefits.

[30] In considering the case, the AD member conducted a careful review of the law.²⁹ He concluded that the OAS Act did not give the Minister authority to revisit a claimant's initial eligibility once an OAS application was approved:

- As social welfare legislation, the OAS regime should be interpreted liberally.³⁰
- “The law favours finality, and pensioners legitimately expect that they can rely on the Minister’s eligibility decision.” If the Minister had the power to revisit the initial eligibility decision, it was reasonable to expect clear statutory language to that effect. Such clear statutory language, which is found in other benefits-conferring legislation, is absent from the provisions of the OAS Act and *Regulations*.³¹
- For example, the OAS Act does not give the Minister the authority to rescind or amend an initial eligibility decision based on “new facts” (facts that could not have been discovered at the time the Minister made its initial eligibility decision).³²
- Further, the OAS Act does not give the Governor in Council the authority to create regulations that would allow the Minister to change previous eligibility decisions.³³
- In cases of fraud, the Minister’s remedy is to pursue summary conviction or assess a financial penalty.³⁴
- The Act allows for the possibility that a pensioner’s eligibility for OAS or GIS benefits, or the amount of their benefits, might change over time.³⁵

²⁹ Especially section 23 of the OAS *Regulations*, section 37 of the OAS Act

³⁰ *B.R. v. MESD*, 2018 SST 844, at paras. 41-43

³¹ *B.R. v. MESD*, 2018 SST 844, at para. 56-62

³² *B.R. v. MESD*, 2018 SST 844, at para. 59

³³ Section 34(j) of the OAS Act

³⁴ Sections 44 and 44.1 of the OAS Act

³⁵ *B.R. v. MESD*, 2018 SST 844, at para. 55

[31] The *B.R.* decision refers to the “significant unfairness and tremendous stress” that pensioners experience because of ministerial reassessments of entitlements under the OAS Act and *Regulations*. Ministerial requests for repayment – sometimes occurring years after the initial decision – can result in pensioners being liable to reimburse overpayments of \$100,000 or more.³⁶ At the hearing, the Claimant commented at length on the unfairness of the Minister’s having changed its mind about his entitlement to the OAS and the GIS.

[32] The *B.R.* decision is not binding on me, but I find it persuasive. The OAS Act and *Regulations* apply to the GIS as well as the OAS pension. I am unable to find authority in either document for the Minister to overturn an initial decision on a pensioner’s eligibility for the GIS.

[33] The Minister has made no allegation of fraud against the Claimant. Moreover, information in the file fails to indicate that the Claimant intentionally misrepresented his living circumstances in communications with the Minister. In connection with his OAS application, he informed the Minister twice in 2013-2014 that his address was in Ghana.³⁷ Further, the Minister’s records show a notation on correspondence to the Claimant in February 2014 stating that the Claimant had been living in Ghana since January 2000.³⁸

[34] In addition, in a questionnaire dated January 2013, the Claimant stated that he resided in Ghana from January 2000 to January 2013. During that time, he continued, he usually spent two months or so at Christmas with his family in Canada. He would be returning to live in Ghana. He planned to come back to live in Canada eventually, “but the conditions [were] not yet right.”³⁹ If the Minister had questions about the Claimant’s place of residence when he applied for the GIS in September 2014, giving the Brampton address, the Minister could have made further enquiries. The Minister did not do so.

[35] The next time the Minister asked the Claimant to complete a residence questionnaire – this time for both the OAS and the GIS – was not until November 2017, almost five years later.⁴⁰ When he completed the second questionnaire in February 2018, he reported that he was resident

³⁶ *B.R. v. MESD*, 2018 SST 844, at paras 78-80

³⁷ GD2-43, 49

³⁸ GD2-50

³⁹ GD2-11 ff.

⁴⁰ GD2- 67

in Ghana between January 2000 and January 2018 for all but seven months in 2012, when he was in Canada.⁴¹ At the hearing, the Claimant vehemently denied that he had tried to deceive the Minister. I believe him.

[36] In this case, the Claimant was entitled to receive the benefits after the Minister approved them,⁴² even if the Minister's initial approval was, with the benefit of hindsight, mistaken. However, the Minister could terminate his benefits after the approval, if the Claimant's circumstances warranted termination.

[37] Although the Minister did not have the power to reassess the Claimant's initial eligibility for GIS benefits, it did have the power to determine whether he was no longer eligible for the benefits up until June 2016 as of any time after March 2015.⁴³

[38] Even though the Claimant ceased to be a resident of Canada in January 2000, he is eligible to receive GIS benefits from October 2013 to March 2015. This is because the Minister does not have the authority to reassess its initial decisions of March 2015 approving the Claimant's application for the GIS. However, the Minister has the authority to reassess the Claimant's eligibility for the GIS for the period from April 2015 to June 2016. The Minister is entitled to recover the overpayment of the Claimant's GIS for that period.

The Claimant was resident in Canada as of January 2018

[39] As stated above, in order to be eligible for the GIS, the Claimant must have been resident in Canada at the relevant time. There is a difference between residence and presence. Under the law, a person is considered a resident if they make their home and ordinarily live in Canada. A person is present in Canada when he is physically present in any part of the country.⁴⁴

[40] Residency is a factual issue that requires an examination of the whole context of a claimant's circumstances. Relevant factors include, but are not limited to, social ties in Canada;

⁴¹ GD2-67

⁴² Subsection 10(2) of the OAS Act

⁴³ B.R., para 77

⁴⁴ Section 21, OAS Regulations

other ties in Canada such as medical insurance and income tax records; and ties in the form of personal property.⁴⁵

[41] An interval of absence that is of a temporary nature and is of less than a year does not interrupt residence.⁴⁶

[42] The burden of proof is on the Claimant to show that it is more likely than not that he was resident in Canada as of January 2018.⁴⁷

[43] In the January 2019 reconsideration letter, the Minister stated that the Claimant had not provided enough evidence to prove that he returned to live permanently in Canada in January 2018.⁴⁸

[44] The Claimant provided plane tickets indicating that he arrived in Toronto in January 2018, returned to Ghana in October 2018, and came back to Canada in January 2019.⁴⁹ In addition, the Claimant informed the Tribunal that he was in Ghana from September 2019 to February 2020.⁵⁰ He confirmed all these dates at the hearing.

[45] At the hearing, the Claimant stated that he had tried to find teaching employment when he returned to Canada in January 2018, but without success. Very occasionally, he had business meetings here. When asked how he spent his days, he said that in Canada he lived the life of a retiree, travelling to Ghana periodically in order to get a change of scenery.

[46] The Claimant stated that he had the following ties in Canada as of January 2018:

- Family: his wife, all of his three children, and two siblings. In his February 2018 questionnaire, he stated that he returned to Canada the month before because of retirement from employment and improved relations with his family.⁵¹
- Property:

⁴⁵ *Singh v. Canada (A.G.)*, 2013 FC 437; *Canada (MHRD) v. Ding*, 2005 FC 76; *Duncan v. Canada (A.G.)*, 2013 FC 319

⁴⁶ Paragraph 21(4)(a) of the *OAS Regulations*

⁴⁷ *De Carolis v. Canada (A.G.)*, 2013 FC 366

⁴⁸ GD2-33

⁴⁹ GD1-94, 118

⁵⁰ GD6-2

⁵¹ GD1-11

- He signed over his half interest in the family home to his wife in 2003. He was living in Ghana most of the time. As sole owner of the family home, his wife would not need his signature when renegotiating the mortgage;⁵²
- His wife pays all the bills associated with the house;
- When in Canada, he has always stayed at the family home;
- His Canadian mailing address has remained the same since 2000; and
- When he left Canada in 2000, he took only two suitcases, leaving his furniture and other personal property behind.⁵³
- Other ties:
 - OHIP card, March 2016 to March 2022;⁵⁴
 - Evidence of medical appointments in April and July, 2018;⁵⁵
 - He has a family doctor and a dentist;⁵⁶
 - He is a Canadian citizen;
 - He has a Canadian passport, valid December 2017 to December 2027;⁵⁷
 - He filed tax returns in Canada, most recently for the 2016, 2017, and 2018 taxation years.⁵⁸ He plans to file tax returns here for the 2019 taxation year;
 - He closed his Canadian savings accounts in January and February 2018. He opened basic bank accounts, one in January 2018 and one in September 2018, making credit applications on the same dates.⁵⁹ At the hearing he explained that when he decided to move back to Canada in 2018, the bank staff suggested that he switch his accounts to ones with lower fees suitable for retired people. He also had a self-directed life income fund at a Canadian bank;⁶⁰
 - He does not have a car or driver's licence in Canada – he hasn't driven here since 2000; and

⁵² GD3-20, Canada Revenue Agency Notice of Assessment, February 2018

⁵³ GD1-9

⁵⁴ GD1-54

⁵⁵ GD2-97-99

⁵⁶ GD1-11

⁵⁷ GD1-57

⁵⁸ GD1-24

⁵⁹ GD1-109

⁶⁰ GD1-116

- Random small payments (about \$250 a month) from his adult children are his only income due to the deductions from his benefits. He stated that he used this income to pay back income taxes owing to the Canadian government.

[47] The Claimant explained his property interests in Ghana. Prior to January 2018, he rented a two-room apartment there. In about January 2018, when he knew he would be spending a long time in Canada, he sold his furniture and other items. He retained only items he thought he might need when he returned to Ghana. These he stored at his sister's house. He rented a one-room apartment, where his nephew lived while he was in Canada. When he returned to Ghana in September 2019, he gave up the apartment and stayed with his sister. In addition, in 2019 he sold his car in Ghana. He has a bank account there, but no pension - he started his career there late and had to retire at age 60.

[48] On his April 2019 questionnaire, the Claimant reported that he owned two plots of land in Ghana.⁶¹ At the hearing, he explained that the plots consisted of vacant land, each about 100 feet by 70 feet. Since April 2019, his interest in these properties had lapsed because he had failed to pay fees on them. Someone else had encroached on the land. When he made enquiries about this, he learned that rectifying the situation would be prohibitively expensive.

[49] On his April 2019 questionnaire, the Claimant stated that he had worked in Ghana, doing part-time teaching and working as a self-employed consultant "from 2006 to present." However, he also said that he retired from active employment as of January 2018.⁶² At the hearing, he stated that he did very little business in Ghana after January 2018. He just had very occasional meetings. When he was in Ghana after that date, he spent some time mediating family disagreements over the disposal of his father's estate.

[50] The Claimant stated that he had the following additional ties in Ghana:

- Family: fourteen siblings and a stepmother. His parents have passed away. The family is relatively close, but his siblings all have their own families.
- Other ties:

⁶¹ GD1-11

⁶² GD1-9 ff.

- He is a citizen of Ghana as well as Canada and had a passport from that country valid from September 2017 to September 2022;⁶³
- Ghana health card, February 2017 to January 2022;⁶⁴
- Ghana driver's licence (now lapsed because he didn't renew it, according to his testimony);⁶⁵ and
- He did not file tax returns in Ghana due to bureaucratic difficulties there.⁶⁶

[51] I find that it is more likely than not that the Claimant was resident in Canada after January 2018. He was not absent from Canada for more than six months after that date. He had family ties in both countries, but his wife and children are all in Canada, whereas his family connections in Ghana are more distant. Although his family ties in Canada were not sufficient to keep him in this country for many years, he stated that by January 2018 his relationship with his family here had become closer.⁶⁷

[52] For a time after January 2018, the Claimant's property ties were stronger to Ghana than to Canada. I do not find this determinative. It is true that he had no ownership interest in the Brampton house, while in Ghana he had a rental apartment and two plots of vacant land. However, his nephew lived in his one-room apartment in Ghana when the Claimant was in Canada, so that it was not kept for his exclusive use. He testified that he had disposed of most of his furniture and personal belongings in Ghana prior to moving to Canada in January 2018. Moreover, he testified that he could not afford either to build on the plots of land in Ghana or to maintain title to them. Accordingly, I find that his ties of property to Ghana were weak.

[53] The Claimant's other ties, such as citizenship, passports, health insurance, and bank accounts, are about equal in both countries. He has done only minimal business in either place since January 2018.

⁶³ GD1-51

⁶⁴ GD1-54

⁶⁵ GD1-54

⁶⁶ GD1-19: Statement of Claimant, March 2019

⁶⁷ GD1-11

[54] Taking into account all the circumstances, I have given greatest weight to his stronger family ties in Canada and the fact that between January 2018 and February 2020 he spent approximately 17 months in Canada, and only 8 in Ghana.

[55] The Claimant is entitled to the GIS as of January 2018, subject to verification of his income and the income of his spouse as appropriate, and subject to any deductions arising from an overpayment.

CONCLUSION

[56] The Minister is not entitled to reassess the Claimant's GIS payments from October 2013 to March 2015, but is entitled to reassess the payments from April 2015 to June 2016.

[57] The Claimant is entitled to the GIS as of January 2018.

[58] The appeal is allowed in part.

Carol Wilton
Member, General Division - Income Security

