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

Citation: *Minister of Employment and Social Development v J. A.*, 2020 SST 414

Tribunal File Number: AD-19-835

BETWEEN:

Minister of Employment and Social Development

Appellant
(Minister)

and

J. A.

Respondent
(Claimant)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: May 14, 2020

Canada

DECISION AND REASONS

DECISION

[1] I am allowing this appeal in part. The matter will be returned to the General Division for a hearing on the Claimant's residence after August 18, 2016.

OVERVIEW

[2] The Claimant was born in November 1946, and he defected from Cuba to Canada in July 1992. He became a permanent resident of Canada in September 1993, and he acquired Canadian citizenship in May 1997.

[3] On October 21, 2013, the Claimant applied for an Old Age Security (OAS) pension. In his application, he indicated that he had resided in Canada from July 1992 to August 2007 and from April 2013 to March 2014.[1] He later added that he had been living with his son in Mexico since March 2014 because he was waiting for his OAS pension application to be approved.[2]

[4] In October 2014, the Minister approved the application, granting him an OAS pension at a rate of 15/40^{ths} of the full amount, as well as a Guaranteed Income Supplement (GIS), both benefits effective May 2013.[3] The Minister found that the Claimant had re-established his residency in Canada in April 2013 and that his absence was only temporary. At the same time, the Minister immediately suspended both the Claimant's OAS pension and his GIS benefits pending his return to Canada.[4]

[5] The Claimant returned to Canada in November 2014, and the Minister commenced payment of benefits. Later, the Minister learned that the Claimant had left Canada again from May 2015 to November 2015. Despite this absence, the Minister maintained the Claimant's benefits.[5] However, soon afterward, the Minister opened an investigation into the Claimant's

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[1] The Minister appears to have misplaced the Claimant's first application. The Claimant submitted a second application in May 2014 and the Minister agreed to protect the earlier date.
[2] Claimant's letter date stamped July 21, 2014, GD-56.
[3] Minister's letter dated October 27, 2014, GD2-119.
[4] Minister's letter dated October 27, 2014, GD2-123.
[5] Minister's letters dated November 28, 2015 (GD2-146) and January 12, 2016 (GD2-144).

residency claim.[6] The investigation revealed other previously undisclosed absences, and the Minister determined that the Claimant had not resided in Canada since August 2007. The Minister terminated the Claimant's benefits and ordered him to repay the OAS and GIS monies that he had received from May 2013 to April 2016, an amount totalling $42,908.[7]

[6] The Claimant appealed the Minister's decision to the Social Security Tribunal. In a decision dated August 31, 2019, the General Division allowed the appeal in part. The General Division found that the Minister did not have the authority to revisit its prior determinations that the Claimant was a resident between April 2013 to December 2015. It therefore allowed the Claimant to keep the OAS and GIS monies in question, even though he had not actually lived in Canada during much of that period. However, the General Division also made a finding that the Claimant had not resided in Canada from December 2015 to August 2016.

THE MINISTER'S REASONS FOR APPEALING

[7] On November 29, 2019, the Minister requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed the following errors in arriving at its decision:

- It misinterpreted and misapplied the *Old Age Security Act* (OASA), the *Old Age Security Regulations* (OASR), and the Appeal Division case, *B.R. v Canada*[8];
- It failed to exercise its jurisdiction by not making findings of fact on the Claimant's residency from April 2013 to December 2015; and
- It based its decision on an erroneous finding that the Claimant re-established residency in Canada after April 2013.

[8] In a decision dated January 10, 2020, I granted leave to appeal because I thought the Minister had raised an arguable case. On March 9, 2020, I held a hearing by teleconference to discuss the merits of the issues raised by the Minister.

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[6] ISP Investigation Request dated January 20, 2016, GD2-154.
[7] Minister's letter dated March 22, 2017, GD2-380.
[8] *B.R. v Canada (Minister of Employment and Social development),* 2018 SST 844.

[9] After the hearing, I identified another issue that I thought might potentially affect the outcome of the appeal. The issue involved the General Division's possible failure to exercise its jurisdiction over the question of the Claimant's residency after August 18, 2016. I invited the parties to make written submissions on that issue, including their recommendations about the appropriate remedy if I were to find that the General Division had erred.

ISSUES

[10] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division (i) did not follow procedural fairness; (ii) made an error of jurisdiction; (iii) made an error of law; or (iv) based its decision on an important factual error.[9]

[11] In this appeal, I had to decide the following questions:

Issue 1: Did the General Division err in law when it found that the OASA and associated regulations limited the Minister's scope to revisit its determinations of residence?

Issue 2: Did the General Division refuse to exercise its jurisdiction by not making any finding about the Claimant's residency between April 2013 to December 2015?

Issue 3: Did the General Division base its decision on an erroneous finding that the Claimant had re-established Canadian residency after April 2013?

Issue 4: Did the General Division refuse to exercise its jurisdiction by not making any finding about the Claimant's residency after August 18, 2016?

ANALYSIS

Issue 1: Did the General Division err in law when it found that the OASA and associated regulations limited the Minister's scope to revisit its determinations of residence?

[12] In my view, the General Division correctly found that the Minister lacked jurisdiction to change its previous findings about the Claimant's residency.

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[9] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

(i) The General Division's decision

[13] In its decision, the General Division suggested that the Minister had approved and repeatedly affirmed the Claimant's OAS benefits without having sufficiently investigated his ties to Canada. In essence, the General Division thought that the Minister should be barred from revisiting a decision to approve benefits where there was no evidence that the claimant committed fraud to obtain those benefits.

[14] The General Division examined the Claimant's OAS entitlement over four distinct periods.

[15] First, the General Division found that the Claimant had likely spent much of his time outside Canada from **April 2013 to April 2014.** However, the General Division also found that the Claimant had not knowingly made any misrepresentations on his OAS application because the form only requires an applicant to report absences from Canada that are longer than six months. Since the Minister's October 2014 letter affirmed the Claimant's Canadian residence,[10] the General Division found that the Minister could not revisit its decision to pay him the OAS pension during this period.

[16] Second, the General Division found that, even though the Claimant had left Canada in March 2014, he could nevertheless keep the OAS pension amounts that he had received from **April 2014 to October 2014**, because the legislation allows a recipient to continue receiving benefits for six months after departure.

[17] Third, the General Division found the Claimant did not have to pay back the OAS pension that he had received from **November 2014 to December 2015** because the Minister had reaffirmed his Canadian residence, and OAS entitlement, in its January 2016 letter.[11] The General Division noted that this reaffirmation came after the Claimant had completed a residency questionnaire, in which, again, he did not make any misrepresentations. The record showed that, although the Minister reaffirmed the Claimant's residence, it launched a full investigation into the Claimant's ties to Canada almost immediately afterward.

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[10] *Supra*, Note 3.
[11] *Supra*, Note 5.

[18] Finally, the General Division looked at the Claimant's status from **December 2015 to August 2016**. The General Division felt that, since the Minister had offered the Claimant no assurances about his residence during this period, it was subject to assessment. The General Division proceeded to weigh a number of relevant factors,[12] including the Claimant's living arrangements, his absences from Canada, and the whereabouts of his family and his personal property, before determining that, on balance, the Claimant was not a resident of Canada during the first nine months of 2016.

(ii) The General Division's reliance on B.R. v Canada

[19] To find that the Minister had exceeded its authority by reversing its pre-January 2016 determinations of the Claimant's residence, the General Division relied on a recent decision from the Appeal Division, *B.R. v Canada*. In that case, the claimant applied for an OAS pension 10 years after arriving in Canada and, in his application, he reported that he had returned to India several times and that his longest trip to India was for 16 months. In assessing his application, the Minister asked the claimant questions about the 16-month absence and then approved his application as though the absence had not interrupted his residency in Canada. Eight years later, the Minister chose to review the claimant's eligibility for the OAS pension. After its investigation, the Minister changed the initial eligibility decision and concluded that the claimant's 16-month absence had in fact interrupted his residency in Canada.

[20] Although the General Division did not feel itself bound by *B.R.*, it agreed with the Appeal Division's interpretation of the applicable law. It also found that the factual situation in *B.R.* was not significantly different from the Claimant's case. On this point, I agree. Like *B.R*, the Claimant in this case

- was approved for a partial OAS pension after the Minister found that he was a resident of Canada at the time of application;
- truthfully disclosed all absences from Canada exceeding six months on his OAS application;

[12] As outlined in *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.

- left Canada for extended periods after his OAS benefits started and never attempted to conceal those absences;
- was not subjected to a full investigation until the Minister decided that his subsequent trips abroad cast new light on his Canadian residence; and
- saw his OAS benefits terminated and "clawed back" when the Minister reversed its prior position and determined that he had never established Canadian residence.

[21] I therefore see no reason to distinguish *B.R.* on its facts. However, I still have to decide whether to adopt *B.R.*'s interpretation of the law.

(iii) I agree with B.R.

[22] Just as the General Division is not bound by *B.R.*, neither am I. Decisions by Appeal Division members do not bind their colleagues, but all of us strive to make decisions that are consistent with one another, even if achieving that ideal is not always possible. That said, I find myself in broad agreement with *B.R.*'s view that the Minister's power to change its initial eligibility decisions is limited.

[23] As the General Division notes, the OASA has an altruistic purpose and it, like any other statute, must be "given such fair, large and liberal construction and interpretation as best ensure the attainment of its objects."[13] The Minister argues, here as in *B.R.*, that the OASA and associated regulations give it broad powers to investigate and reassess a recipient's eligibility for an OAS benefit. In essence, the Minister submits that a recipient is subject to reassessment at any time and for any reason, with the onus on the recipient to prove their entitlement to the benefit.

[24] Under section 37 of the OASA, persons who have received benefits to which they not entitled must immediately pay back those benefits. Any unpaid amount constitutes a debt that is recoverable in court.

[25] Under section 23 of the OASR, the Minister may, at any time, investigate the eligibility of a person to receive an OAS benefit. In doing so, the Minister may, at any time, require an

[13] *Interpretation Act*, section 12.

OAS applicant or recipient to provide further information or evidence regarding their eligibility for a benefit.

[26] After engaging in a careful exercise in statutory interpretation, the Appeal Division concluded that the Minister had limited scope to revisit OAS eligibility once an application had been approved. The Appeal Division noted that the OASA drew a distinction between the cessation of a benefit on one hand and its suspension on the other. The former is contemplated only upon the written request or death of a recipient,[14] whereas the latter occurs under several other circumstances, such as when a recipient is incarcerated[15] or leaves Canada for a prolonged period, having lived here for less than 20 years.[16] Under the OASA, cessations are permanent, whereas suspensions are temporary and leave open the possibility of a benefit being reinstated once the former recipient's status is "normalized."

[27] The Appeal Division could not find any clear statutory language that permitted the Minister to reverse decisions that, in some cases, it had made years or even decades earlier—particularly where that reversal would force recipients to repay significant amounts of money that they had reasonably believed was theirs by right. The Appeal Division also noted that other benefits-conferring statutes, such as the *Canada Pension Plan* and the *Employment Insurance Act*, contain provisions that specifically give the Minister broad powers to reconsider its decisions—whereas the OASA does not.

[28] The Appeal Division found support for its interpretation in the provision that authorizes Cabinet to make regulations for carrying out the purposes and provisions of the OASA: "The Governor in Council may make regulations… providing for the **suspension** of payment of a benefits during an investigation into the eligibility of the beneficiary and the **reinstatement or resumption** of the payment… [emphasis added]"[17] The Appeal Division found no indication that Parliament intended to give Cabinet the authority to create regulations that would allow the Minister to change previous eligibility decisions, potentially leading to the retroactive cessation of OAS benefits and to the triggering of potentially significant repayment obligations.

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[14] OASA, section 8(3).
[15] OASA, section 8(2.1).
[16] OASA, section 9.
[17] OASA, section 34(j).

[29] I agree with my Appeal Division colleague's analysis. Section 23 of the OASR gives the Minister broad powers to require claimants to demonstrate their entitlement to an OAS pension before their application is approved. However, once the Minister approves the application, it cannot go back and change its initial eligibility decision unless it can show that the claimant intentionally misrepresented their status.[18] Rather, section 23 of the OASR only authorizes the Minister, absent fraud, to investigate a recipient's ongoing entitlement to benefits, including the amount of those benefits.

(iv) The Minister's objections to **B.R.** *are not persuasive*

[30] The Minister argued that *B.R.* overlooked elements in the OASA supporting expansive powers to investigate and correct erroneous pension approvals.[19] However, I saw and heard nothing to change my view that the Minister cannot reach back in time to retroactively transform an approval into a denial. The Minister pointed to section 5(1) of the OASA, which prohibits payment of a pension to any person "unless that person is qualified under subsection 3(1) or 3(2)." This provision merely says that unqualified persons should not get an OAS pension, but what happens if, through Ministerial oversight or negligence, they do? In a case such as this one, a general statement of principles is of little help.

[31] The Minister also cited section 34(f) of the OASA, which permits the Governor in Council to make regulations to prescribe the "information and evidence" that an applicant must make available. Again, I see nothing in this that opposes *B.R.*, which acknowledges the Minister's broad power to demand information at the time of application or afterward. However, the question here is what the Minister can do with post-application information if it indicates a pension has been paid in error. Much the same can be said for sections 44.2(2) and 44.2(6) of the OASA, which elaborate on the Minister's powers to investigate a person's entitlement to benefits.

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[18] The same logic applies to any subsequent positive affirmation that the Minister may make of a recipient's entitlement to an OAS pension.

[19] Minister's application for leave to appeal dated November 29, 2019, paragraph 26 (AD1-30); Minister's submissions dated February 24, 2020, paragraphs 21-29 (AD3-10-12).

[32] In support of its expansive interpretation of the words "any time," the Minister referred to the Supreme Court of Canada case, *Comeau's Sea Foods Ltd. v Canada*,[20] in which the federal department of fisheries revoked its previously disclosed authorization to issue offshore lobster licenses to the appellant, which by then had incurred expenses in outfitting its boats. The Minister argued that *Comeau's Sea Foods* recognized its need for a broad, ongoing power to vary or rescind a decision in response to changed circumstances. I am not convinced. Leaving aside the entirely different regulatory context from which *Comeau's Sea Foods* emerged, I note significant differences between that case and this one. First, the legislative language that the Minister relied on to revoke its authorization of the lobster licenses was contained in the *Fisheries Act* itself and not the regulations. Second, the *Fisheries Act* gave the Minister "absolute discretion"[21] to authorize licenses—stronger language than what is seen in any comparable provision of the OASA.

[33] Above all, there was the difference between authorizing the issuance of a licence and actually issuing a licence. In *Comeau*, the relevant statute specified the circumstances under which the Minister could revoke a licence that it had already issued, but it was silent about revoking authorization. Authorization, as the Supreme Court noted, is a discretionary power that the Minister is free to revoke at any time. However, a license, once issued, confers upon the holder a legal right rooted in legislation. In my view, an OAS pension resembles a license more than it does an authorization because, once approved, the recipient is entitled to Parliamentary-sanctioned benefit that cannot be lightly revoked. In that sense, the Claimant in this case has substantive rights, unlike the appellant in *Comeau*, who had little more than a ministerial promise.

(v) The Courts have not provided guidance on the extent of the Minister's powers

[34] The Minister has pointed to two cases in which the Federal Court apparently endorsed the Minister's retrospective reassessment of an OAS recipient's eligibility benefits. In both cases, information derived from an investigation prompted the Minister to terminate the recipient's pension and to demand the return of amounts that had been previously paid out.

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[20] *Comeau's Sea Foods Ltd. v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12.
[21] *Fisheries Act*, section 7.

[35] First, there is *De Carolis v Canada.*[22] In that case, the Court upheld a finding that a pensioner had to pay back benefits after the Minister concluded, contrary to its initial eligibility decision, that he had never established residence in Canada. It is true that the Court implicitly condoned the Minister's broad interpretation of its powers under section 23 of the OASR, but it is equally true that the Court never directed its mind to the issue. Indeed, it is fairly evident from the Court's reasons that the claimant in *De Carolis* never pleaded the issue.

[36] Then there is *De Bustamante v Canada.*[23] That case involved a claimant who contested the Minister's finding that she had resided in Canada for only 10 years, from 1994 to 2004, rather than, as she had claimed, for 18 years, from 1986 to 2004. In the end, the Court upheld a tribunal's decision that found the claimant, given her long periods outside Canada from 1986 to 1994, had not established residence in this country during those eight years. I find this case of limited relevance to issue at hand since it did not involve a reversal of a previous approval but a simple denial of an OAS application in the first instance. In *De Bustamante*, the Minister never wavered from its initial position that the claimant had only 10 years of residence; unlike the present case, it did not award the claimant a pension, change its mind years later, and then demand a refund.

(vi) The Minister lacked authority to order the Claimant to repay his benefits

[37] Turning to the case at hand, the General Division found that the Claimant had never knowingly misrepresented his status, either in his OAS application or in any of the subsequent questionnaires that the Minister asked him to complete. As noted, the Claimant disclosed to the Minister that he was submitting his initial OAS application from outside Canada and planned to return to this country pending approval. He also disclosed all his absences from Canada that exceeded six months. It is true that the Claimant was subsequently found to have been spending most of his time in Cuba or Mexico, returning to Canada for only brief periods, presumably to fulfill what he understood to be his residency obligations. However, it is equally true that the Minister never asked the Claimant some simple questions that, if they had been answered

[22] *De Carolis v Canada (Attorney General)*, 2013 FC 366.
[23] *De Bustamante v Canada (Attorney General)*, 2008 FC 111.

accurately, would have revealed how time he had actually spent in this country. It was not until after January 2016, when the Minister launched its investigation, that the Claimant's Canadian residency was called into question.

[38] Relying on *B.R.*, the General Division found that the Minister had no authority to reassess the Claimant's OAS pension from May 2013, when it commenced, to December 2015, when the Minister last affirmed his entitlement. Since I have (i) found that *B.R.*'s facts do not significantly differ from those of this case; (ii) adopted *B.R.*'s interpretation of the law; and (iii) seen nothing to indicate that the General Division based its decision on an erroneous finding of fact, then there is no reason to interfere with the General Division's decision allowing the Claimant to keep the benefits he has already received.

[39] Given the wording of the OASA and the context in which it was conceived, I find it difficult to imagine that Parliament intended to give the Minister as open-ended a power to revisit and rescind its decisions as it claims to have. Even the Canada Revenue Agency's power to reassess income tax is normally limited to only the three previous years. The law favours finality, and Canadians have a legitimate expectation that they can place continuing reliance on government decisions so important to their well-being.

(vii) The Minister does not require unlimited power to administer the OAS program

[40] The Minister submitted an affidavit from one of its senior officials that provided information about how the OAS program is administered.[24]

[41] As noted above, the Appeal Division's mandate is limited to considering whether the General Division erred according to specific criteria. It does not does not normally consider new evidence. However, there is an exception to that rule if the new evidence provides general background information only.[25] It "applies to non-argumentative orienting statements" that can assist in understanding the history and nature of a case.[26]

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[24] Affidavit of Elizabeth Charron, Senior Legislation Officer, OAS Policy, sworn February 21, 2020, AD3-676.
[25] *Sharma v Canada (Attorney General)*, 2018 FCA 48 and *Greeley v Canada (Attorney General)*, 2019 FC 1493.
[26] *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 and *Delios v Canada (Attorney General)*, 2015 FCA 117.

[42] Although, strictly speaking, this affidavit could have, and perhaps should have, been submitted at the General Division, I decided to accept it as an exception to the general rule against new evidence and in the interest of providing the broadest possible context to the practice of Ministerial clawbacks. The Claimant raised no objection.

[43] The affidavit was written in neutral and uncontroversial language, and it did not advance an argument specific to the details of this case. It explained that the OAS program is run in a way designed to get benefits to qualifying applicants as fast as possible. To that end, the Minister proceeds on the assumption that the information in applications is accurate and verifiable. If there are no obvious gaps or contradictions in the information provided, the Minister takes it at face value and approves benefits based the applicant's signed statement. The Minister insists that it needs broad powers under section 23 of the OASR to administer the program responsibly.

[44] I am skeptical that the trade-off between efficiency and integrity is as stark as the Minister suggests. No one would deny the importance of timely pension approvals, but that objective is not incompatible with taking basic steps to confirm an applicant's past and present residence. Doing so would avoid situations such as this one, in which an unsophisticated applicant, with no intent to deceive, received years of OAS benefits despite the fact he had never re-established Canadian residence. Inadequate verification not only harms the Claimant, who now finds himself with a sudden and substantial debt to the Crown years after he had reasonably believed his OAS entitlement was settled; it also harms the Canadian taxpayer, who may have paid an unmerited pension to someone unlikely to ever pay it back.

[45] I am not suggesting that the Minister should be obliged to mount a full investigation, complete with interviews and scrutiny of primary documents, every time someone applies for an OAS pension. That would indeed be overkill. However, the Minister could do more to establish claimant's ties to Canada at the application stage. As noted, the current OAS pension application form only asks claimants to list absences from Canada exceeding six months; it does not seek detailed information about a claimant's comings and goings to and from Canada, and it therefore produces a sometimes distorted view of just how much time they may be spending in this country. It was in this way that the Claimant was able to truthfully complete the application form without disclosing that he had, in recent years, spent little time in Canada and kept virtually no

accounts or property here. The problem was compounded by the Minister's failure, early on, to pay proper attention to the Claimant's frank admission that he was submitting his application from outside the country and would return only when or if it was approved.

[46] The Claimant, who is otherwise blameless in this matter, should not be punished for the Minister's failure to ask certain relevant questions at the outset of the application process or for its blindness to what can only be described as obvious red flags in the application materials.

Issue 2: Did the General Division fail to exercise its jurisdiction by making no finding about the Claimant's residency from April 2013 to December 2015?

Issue 3: Did the General Division base its decision on an erroneous finding that the Claimant re-established Canadian residency after April 2013?

[47] I will deal with these questions quickly. The General Division found that the Minister had no authority to reverse its previous findings about the Claimant's residence between April 2013 to December 2015. Having done so, the General Division saw no need to determine whether the Claimant had, in fact, established during that period. I do not see an error in this logic. The Minister's objection to the General Division's decision ultimately comes from its reliance on *B.R.* The General Division declined to make a finding about the Claimant's Canadian residence between April 2013 and December 2015, not because it refused to exercise its jurisdiction, but because it was unnecessary. When the General Division summarized the Claimant's travel patterns in paragraph 43 of its decision, it did not wilfully ignore the pattern of repeated and extended absences from Canada, it deemed them irrelevant for the purposes of its analysis, except for the period after December 2015.

Issue 4: Did the General Division refuse to exercise its jurisdiction by not making any finding about the Claimant's residency after August 18, 2016?

[48] I have found no fault with how the General Division considered the Claimant's OAS entitlement up to August 18, 2016. However, I do not think that the General Division finished its job.

[49] In paragraph 12 of its decision, the General Division said that it had to determine whether the Claimant resided in Canada during "any period" not covered by the Minister's previous residency findings. It went on to declare that it would be limiting its assessment of the

Claimant's residency in Canada to "the period from December 18, 2015 (being the Claimant's first departure from Canada after the Respondent determined he resumed residency on December 10, 2015) to and including August 18, 2016 (being the day before the Claimant's most recent entry into Canada as documented by the CBSA report)."[27]

[50] After the oral portion of the hearing, I asked the parties for their views on whether the General Division had jurisdiction over the Claimant's residency after August 18, 2016 and, if so, whether it had reason not to exercise that jurisdiction.

[51] In post-hearing submissions, the Minister readily agreed that the General Division had failed to exercise its jurisdiction by not considering the Claimant's residence from August 2016 to August 2019. The Claimant had a different view. First, he argued that, since administrative tribunals have no inherent jurisdiction, the General Division's authority in this case flowed from three sources:

- Section 28(1) of the OASA, which makes the Minister's reconsideration decision the only thing subject to an appeal to the Social Security Tribunal;
- The Minister's reconsideration decision letter dated March 9, 2018, which the Claimant said was limited to whether he was eligible for OAS benefits from May 2013 to April 2016; and
- Section 54(1) of the DESDA, which enables the General Division to dismiss an appeal, "confirm, rescind or vary" the Minister's decision, or give the decision that the Minister should have given.

Second, the Claimant said that, since the Minister's reconsideration letter addressed only his OAS eligibility up to April 2016, the General Division had no jurisdiction to make a ruling on his Canadian residency after that date. In support of his position, the Claimant pointed to a case in which the Appeal Division condoned the General Division's refusal to consider a claim of incapacity because the Minister had not addressed it in its reconsideration letter.[28]

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[27] General Division decision, paragraph 30.
[28] *D.M. v Minister of Employment and Social Development*, 2017 CanLii 47457 (SST).

[52] Although I appreciate the thought that went into it, I ultimately do not find the Claimant's argument convincing. The General Division must not exceed or refuse to exercise its jurisdiction.[29] This means that when the General Division considers an appeal, it must decide all live issues before it while taking care not to go beyond its statutory powers.

[53] The Claimant rightly asserts that the General Division's authority in this matter flows from the Minister's reconsideration decision letter. However, the Minister based its decision to deny the Claimant benefits on an assessment of his residence, not just as of the application date, but during the period up to and including the March 2018 issuance of the reconsideration decision letter. Similarly, the General Division's jurisdiction over the Claimant's residence was not subject to a cut-off date, and it extended up to and including the August 2019 hearing.

[54] To receive a partial OAS pension, an applicant must have resided in Canada for at least 10 years if he or she resides in Canada on the day before the application is approved.[30] To receive a pension outside of Canada, an applicant must show that he or she had resided in Canada for at least 20 years after reaching age 18.[31] When the Claimant applied for an OAS pension in October 2013, he put his eligibility at issue—by whatever means possible over any period. In March 2018, the Minister refused the Claimant a partial OAS pension on reconsideration because it found that he had resided in Canada for only 15 years and 30 days. In doing so, the Minister was also making an implicit finding that the Claimant had not re-established Canadian residence in October 2013 **or at any time up to the date of the reconsideration letter.**

[55] When the Claimant filed his appeal with the General Division in June 2018, he put all of the Minister's findings at issue: "I returned to Canada in 2013. Accordingly, I have been resident in Canada for a total of 20 years."[32] By the time the General Division considered the Claimant's appeal in August 2019, he was claiming that he had lived in this country for more than six years since re-establishing his Canadian residence. The General Division decided not to make any

[29] DESDA, section 58(1)(a).
[30] Section 3(2) of the OASA.
[31] Section 9(2) of the OASA.
[32] Claimant's notice of appeal to the General Division dated June 18, 2018, GD1-6.

findings about the Claimant's residency after August 2016 because "the evidentiary record was focused on the period before then."[33]

[56] In my view, the evidentiary record should not have dictated how the General Division exercised its jurisdiction. It is true that neither party focused on the period between August 2016 and August 2019, but those three years were not irrelevant to the potential outcome of the Claimant's appeal. The Claimant has consistently argued that he re-established residence in Canada several years ago. The General Division agreed, finding that he was a Canadian resident from April 2013 to December 2015, although not from December 2015 to August 2016. It mattered whether the General Division made a finding about the Claimant's post-August 2016 residence. If the General Division had carried on and considered his status after that date, then the Claimant might have conceivably registered up to three more years of Canadian residency, potentially bringing him over the 20-year threshold required to receive an OAS pension outside Canada.

[57] The General Division was correct to say that there was little evidence about the Claimant's residence after August 2016, but that did not, by itself, prevent the General Division from ruling on the matter. After all, courts and tribunals routinely decide issues with little or no evidence as a matter of necessity. In any event, if evidence was lacking about the Claimant's post-August 2016 residence, the General Division could have asked him for it, both before and during the hearing. I see no indication that it did.

[58] As for the Appeal Division case cited by the Claimant, I find that it has little application to his appeal. It involved an appellant who claimed that he had not applied for a Canada Pension Plan disability pension earlier by reason of incapacity. He had never pleaded incapacity during the application process, and since the Minister's reconsideration letter had not addressed the issue, the General Division accordingly disclaimed any jurisdiction over it. The Appeal Division upheld that decision, but unlike the present case, it involved a fresh issue that was never adjudicated by the Minister and was not raised until the matter came to the General Division. By

[33] General Division decision, paragraph 49.

contrast, the issue here has always been the Claimant's ongoing residence and, unlike the prior case, that is not something that was raised for the first time at the General Division.

[59] I therefore find that the General Division failed to exercise its jurisdiction by declining to assess the Claimant's Canadian residency in the approximately three years leading up to its decision.

REMEDY

[60] The Appeal Division can provide a remedy for errors committed by the General Division. I have the power to: 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, in whole or in part.[34]

[61] I have decided to confirm all of the General Division's findings up to August 18, 2016. However, since I have found that the General Division failed to exercise its jurisdiction by not considering the Claimant's residence after that date, I am returning this matter to the General Division for another hearing on that issue and only that issue.

[62] I considered giving the decision that the General Division should have given, but I do not think that the record is complete enough to allow me to decide the remaining issue on its merits. The General Division's refusal to consider the Claimant's status after August 18, 2016 closed off any potential to request relevant evidence or hear useful testimony that, if considered, might have produced a different outcome. Unlike the Appeal Division, the General Division's primary mandate is to consider evidence and make findings of fact. As such, it is better positioned than I am to make an assessment about the Claimant's residence during the past four years.

CONCLUSION

[63] For the reasons discussed above, I find that the General Division did not err when it found that the Minister was barred from revisiting its previous determination that the Claimant had re-established Canadian residence in 2013. However, I also find that the General Division

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[34] DESDA, section 59(1).

refused to exercise its jurisdiction by declining to consider whether the Claimant was a Canadian resident after August 18, 2016.

[64] This matter will be returned to the General Division for a hearing (i) to make findings about the Claimant's residence after August 18, 2016 and (ii) to determine what, if any, impact those findings have on the Claimant's OAS entitlement.

Member, Appeal Division

HEARD ON:	March 9, 2020
METHOD OF PROCEEDING:	Teleconference and post-hearing written questions and answers
APPEARANCES:	Tiffany Glover, representative for the Appellant J. A., Respondent Ronald Cronkhite, representative for the Respondent

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