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

Citation: *R. G. v Minister of Employment and Social Development*, 2020 SST 635

Tribunal File Number: AD-20-690

BETWEEN:

R. G.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 22, 2020

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

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

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

[4] The Minister asked the Claimant to provide evidence, such as passports and utility statements, to support his claim of Canadian residence. In response, the Claimant's then legal counsel submitted a letter claiming that, while in Guyana, his client had worked for a wholly-owned Canadian corporation from 1994 to 2001.[4] Counsel argued that those seven years should have been added to the Claimant's residency calculation, giving him the 20 years required to receive an OAS pension while living abroad.

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

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[1] The Claimant had previously applied for an OAS pension in August 2007. That application was also unsuccessful, and the Minister ultimately refused it in a reconsideration decision dated June 3, 2016 (IS2-76). The Claimant did not appeal that decision to the General Division.
[2] Under section 3(2) of the *Old Age Security Act*, a partial OAS pension can be paid only to a claimant who has at least 10 years of residence in Canada. For a claimant who resides abroad, the residence requirement is more onerous—20 years.
[3] Application for pension dated September 8, 2016, GD2-3.
[4] Letter dated April 17, 2017 from Kaisree Chatarpaul, barrister and solicitor, GD2-10.
[5] Minister's initial refusal letter dated June 7, 2017, GD2-8.

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

[6] The Claimant appealed the Minister's refusal to the General Division of the Social Security Tribunal. In April 2019, the General Division dismissed the appeal, but that decision was subsequently overturned by the Tribunal's Appeal Division for reasons of procedural fairness. The matter was returned to the General Division for reconsideration.

[7] The General Division held a second hearing in April 2020. Once again, the General Division again dismissed the Claimant's appeal. This time, the General Division found that the Claimant had once resided in Canada but had never re-established residency after leaving for Guyana in September 1992. At the same time, the General Division found that the Claimant's employment with Edgeworth Construction did not qualify as Canadian residence under the *Old Age Security Act* (OASA) and associated regulations, because he was not living in Canada when he took the job.

[8] On June 23, 2020, the Claimant applied for leave to appeal from the Tribunal's Appeal Division.

THE CLAIMANT'S REASONS FOR APPEALING

[9] The Claimant alleges that, in coming to its decision, the General Division made numerous errors:

(i) It failed to properly apply the laws governing Canadian residence;

(ii) It erroneously confused "living in Canada" with "being a resident of Canada";

(iii) It erroneously found that he never re-established Canadian residency after September 1992;

(iv) It erroneously found that he was not working in Canada after 1991 because he had no CPP contributions after that year;

(v) It erroneously found that he had been absent from Canada between 1990 and 2008, even though records showed him making numerous visits to this country during that period;

(vi) It ignored factors indicating his continuing ties to Canada, including:

- His wife and two children, all of whom have been resident in Canada for 44 years;
- His family's ownership of a series of properties in the Greater Toronto Area;
- His membership in Canadian organizations such as the Association of Concerned Guyanese;
- His Royal Bank of Canada accounts, which he has maintained since 1976;
- His remittances to Canada to help pay for the post-secondary education of his two children; and
- His lack of familial ties to any one country;

(vii) It erroneously found that he abandoned Canada in September 1992 when he travelled to Guyana to observe elections;

(viii) It failed to take into account his work in Guyana for Edgeworth Construction, a Canadian company;

(ix) It erroneously found that he could not avail himself of the protections afforded by the *Old Age Security Regulations* (OASR) because he was not a Canadian resident when his employment with Edgeworth Construction began;

(x) It erroneously based its decision on what it found were his strained relations with his family;

(xi) It failed to consider that, even if he was obliged to re-establish Canadian residency, the cost of living in Canada would make doing so very difficult after 13 years of living abroad; and

(xii) It failed to adequately investigate why his August 2007 application has never been resolved.

ISSUES

[10] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[6]

[11] An appeal can proceed only if the Appeal Division first grants leave to appeal.[7] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[8] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[9]

[12] I have to decide whether the Claimant has an arguable case.

ANALYSIS

[13] To succeed at the Appeal Division, a claimant must do more than simply disagree with the General Division's decision. A claimant must also identify specific errors that the General Division made in coming to its decision and explain how those errors, if any, fit into the one or more of the three grounds of appeal permitted under the law.

[14] Having reviewed the General Division's decision against the underlying record, I have concluded that none of the Claimant's submissions would have a reasonable chance of success on appeal.

There is no arguable case that the General Division improperly applied the law governing Canadian residence

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[6] The formal wording for these grounds of appeal is found in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[7] DESDA, sections 56(1) and 58(3).
[8] DESDA, section 58(2).
[9] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[15] The Claimant suggests that the General Division misinterpreted the applicable provisions of the OASA and the OASR when it decided that he had not been a Canadian resident since September 1992.

[16] I don't see an arguable case on this point.

[17] In its decision, the General Division correctly cited the relevant parts of section 3 of the OASA and section 21 of the OASR, and it aptly referred to a key case called *Ding*,[10] which sets out factors that may be considered when assessing whether a person ordinarily makes their home in Canada. I see no indication that the General Division misunderstood the law. The Claimant alleges that the General Division confused "living in Canada" with "residing in Canada," but I can't agree. It is true that, in its decision, General Division used the word "living" interchangeably with "residing," but I'm not sure that there is any appreciable difference in meaning between the two words in this context. In any event, reading the decision as a whole satisfies me that the General Division applied the correct technical requirement for Canadian residency.

There is no arguable case that the General Division disregarded or misrepresented relevant evidence about the Claimant's place of residence

[18] At the General Division, the Claimant insisted that he has never stopped being a resident of Canada, despite having lived in Guyana since 1991. He claimed that, from 1992 to 2001, he was employed by, first a United Nations (U.N.) agency, then a Canadian-based construction firm. He insisted that he spent considerable time in Canada and maintained numerous ties to this country after his retirement.

[19] I don't see an arguable case that the General Division based its decision on any erroneous factual findings.

[20] The General Division examined the available evidence and determined that, while the Claimant's Canadian residency continued until September 1992, it came to an end after that date. The General Division found that the Claimant's employment at the Guyanese Ministry of

[10] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.

Finance could not be included as a period of Canadian residence because there was no evidence the job was funded by a U.N. development program. The General Division likewise found that his time at Edgeworth Construction could not be counted as Canadian residence because the Claimant was not a Canadian resident in the period immediately before he took the job. The General Division found that the Claimant had never re-established Canadian residence after 1992, citing (i) the Claimant's failure to provide passport entry and exit stamps demonstrating how much time he had spent in Canada; (ii) the Claimant's own past statements indicating that he had not been living in Canada; and (iii) the Claimant's ongoing ties (real estate holdings, bank accounts, and driver's licenses) to Guyana, which were at least as strong as those to Canada.

[21] The Claimant alleges that the General Division ignored his many ties to Canada, but I can't agree. As its decision shows, the General Division was aware that the Claimant still had family, property, and accounts in Canada but concluded that those factors were outweighed by his ongoing connections to Guyana. The Claimant alleges that the General Division erroneously found he was not working in Canada after 1991 because he registered no CPP contributions after that year. In fact, he says, he was operating a small business in this country after 1992, and the General Division failed to realize that contributing to the CPP and working in Canada are two separate things. Again, I don't see a case for this argument. Although the General Division's decision made no reference to Claimant's business, a tribunal is presumed to have considered all material before it and can't be expected to refer to each and every item of evidence in its reasons. The Claimant may have testified that he was running a Canadian business after 1992, but the General Division was under no obligation to believe him, given the weight of evidence about his other activities during the same period.

[22] In its role as finder of fact, the General Division is entitled to some leeway in how it assesses evidence. My review of its decision indicates that the General Division conducted a comprehensive review of the available evidence, made rational findings based on that evidence, and then applied those findings to the relevant law. The General Division concluded that the Claimant ceased to be a Canadian resident after September 1992, and I do not see an arguable case that, in doing so, it misconstrued the facts or otherwise gave inadequate consideration to the material before it.

There is no arguable case that the General Division erred when it decided not to count the Claimant's employment in Guyana as a period of Canadian residence

[23] One of the Claimant's main points is that his employment for the Guyanese government and later for Edgeworth Construction should have been included as a period of Canadian residence, according to two exceptions set out in section 21 of the OASR.

[24] The General Division found that the Claimant failed to qualify under either of these exceptions. I don't see an arguable case that the General Division erred in making this finding.

[25] Section 21(4)(c) of the OASR, read in conjunction with section 21(5)(a)(i), says that employment abroad by the U.N. or one of its specialized agencies will be deemed not to have interrupted a Canadian resident's residence in Canada. The General Division found no evidence to corroborate the Claimant's story that he was, in fact, employed by the U.N. or one of its specialized agencies. On top of that, the General Division found that the protection afforded by sections 21(4)(c) and 21(5)(a) applied only to persons who were residing in Canada when the absence began. The General Division found that the Claimant had stopped residing in Canada in September 1992, two months before he began his employment for the Guyanese government.

[26] Section 21(4)(c) of the OASR, read in conjunction with section 21(5)(a)(vi), says that employment abroad by a Canadian firm will be deemed not to have interrupted a Canadian resident's residence in Canada, provided the person has a permanent place of abode or domestic establishment in Canada to which he or she intends to return and to which he or she does, in fact, return within six months after the end of the employment outside of Canada. The General Division noted that the Claimant did not begin working at Edgeworth Construction until 1994, well after he ceased to be a resident of Canada. Moreover, the General Division found insufficient evidence to show that the Claimant kept either a permanent place of abode or domestic establishment to which he intended to return in Canada. The Claimant specifically objects to the General Division's finding that he had "strained" relations with his family members, but the General Division was doing no more than citing a letter on file from his former legal representative: "[The Claimant] was separated from his wife and he was estranged from his

two children and had no close blood relations in Canada."[11] Contrary to his submissions, the Claimant was given an opportunity to explain that his estrangement from his family was temporary, but the General Division was also within its rights to give that evidence lesser weight.

There is no arguable case that the General Division erred in failing to consider the high cost of living in Canada

[27] The Claimant suggests that, even if he had ceased to be a resident of Canada, the General Division should have taken into account the difficulty he would have faced in re-establishing residence in this country.

[28] I don't see an arguable case on this point. The relatively high cost of living in Canada is not listed among the factors that *Ding* suggests should be considered when making an assessment about Canadian residency. Of course, that list is not meant to be exhaustive but, even so, I fail to see any relevance in the affordability of claimant's potential return to Canada. The *Ding* factors describe past or present ties to Canada that in fact exist; they do not describe ties that a claimant hopes or intends to establish, nor do they invite decision-makers to consider why, for whatever reason, the claimant has not succeeded in establishing those ties.

There is no arguable case that the General Division erred by refusing to consider the Claimant's 2007 OAS application

[29] The Claimant insists that his first application, submitted 13 years ago, is still alive. He suggests that his second application has somehow revived, or possibly subsumed, the first. He argues that the General Division should have investigated or adjudicated that first application.

[30] I don't see a reasonable chance of success for this argument. The Claimant made a similar argument at the General Division, and the General Division rejected it for reasons that it explained in its decision.[12] The General Division rightly found that the first application is now extinguished, since the one-year deadline to appeal the Minister's reconsideration decision is

[11] Letter to Tribunal from Kaisee Chatarpaul dated January 20, 2015, IS2-62. This letter was submitted pursuant to the Claimant's unsuccessful 2007 application for OAS benefits.
[12] See paragraphs 15 and 16 of the General Division decision.

now past. The only active application is the Claimant's second, which the Minister refused on reconsideration in September 2018. That reconsideration decision was the subject of the Claimant's appeal, and it was the only source of the General Division's jurisdiction in that matter.

CONCLUSION

[31] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	R. G., self-represented