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

[TRANSLATION]

Citation: *GI v Minister of Employment and Social Development*, 2020 SST 911

Tribunal File Number: AD-20-728

BETWEEN:

G. I.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 23, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] In 2016, the Appellant (Applicant) applied for the Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS).

[3] The Applicant was born in Haiti in 1952 and arrived in Canada on September 3, 1979. He turned 65 on November 18, 2017. He applied for an OAS pension on December 22, 2016, when he turned 64, to start as soon as possible, the month after he turned 65. He also asked to be considered for the GIS. He then applied for the GIS on November 24, 2017, with his 2016 income.

[4] After an investigation, the Minister of Employment and Social Development (Minister) did not approve the OAS pension application or the GIS starting the month after the Applicant turned 65 because it found that the Applicant had not lived in Canada for at least 20 years after the age of 18.

[5] The Applicant disputed the Minister's decision before the General Division. He argued that he had never been outside Canada for more than six months without coming back, that he is a resident of Canada, and that the length of his trips complied with immigration regulations. The General Division dismissed his appeal in part.

[6] The General Division determined that the Applicant was not a resident of Canada under the *Old Age Security Act* (OAS Act) from July 2, 1997, until the day before the approval of the OAS application, on November 17, 2017, and until the date he returned to Canada from his last trip, on January 16, 2020. It found that the Applicant was not entitled to an OAS pension or the GIS on November 18, 2017, or on the date he returned to Canada from his last trip, on January 16, 2020.

[7] The Claimant was granted leave to appeal. He argues that the General Division made an error of law and that it made its decision without regard for the material before it.

[8] After reviewing the file, I am of the view that the General Division did not make an error and that the Applicant's appeal must be dismissed.

ISSUES

[9] Did the General Division make an error of law or base its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?

ANALYSIS

Appeal Division's Mandate

[10] The Federal Court of Appeal has established that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

[11] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[12] Therefore, unless the General Division failed to observe a principle of natural justice, made an error of law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

PRELIMINARY REMARKS

[13] A telephone hearing was scheduled for September 22, 2020. The Applicant asked me before the hearing to make a decision on the record. I accepted the Applicant's request and

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[1] *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

cancelled the September 18, 2020, hearing. I also gave the Applicant until September 30, 2020, to provide a written response to the Minister's submissions filed on September 16, 2020. The Applicant filed his response on September 18, 2020.

[14] In accordance with my limited powers under section 58(1) of the DESD Act, my decision considers only the evidence presented before the General Division.

General Division Decision

[15] The General Division had to decide whether the Applicant was a resident of Canada the day before the approval of his OAS application, on November 17, 2017. In the event that the Applicant was not a resident of Canada under the OAS Act the day before the approval of his OAS application, it had to decide whether the Applicant had accumulated 20 years of residence in Canada after the age of 18.

[16] The General Division determined that the Applicant was not a resident of Canada under the OAS Act from July 2, 1997, until the day before the approval of his OAS application, on November 17, 2017, and until the date he returned to Canada from his last trip, on January 16, 2020. The General Division found that the Applicant was not entitled to an OAS pension or the GIS on November 18, 2017, or on the date he returned to Canada from his last trip, on January 16, 2020.

Applicant's Position

[17] In support of his appeal, the Applicant argues that he accumulated more than 20 years of residence since he arrived in Canada on September 3, 1979. He submits that the General Division made an error of law and that it based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[18] The Applicant essentially submits that:

- The General Division arbitrarily ignored the proof of his addresses, which were registered with the Canada Revenue Agency (CRA), the Régie de l'assurance-maladie du Québec [Quebec's health insurance plan] (RAMQ), and the Société de l'assurance automobile du Québec [Quebec's automobile insurance corporation]

(SAAQ) well before his OAS application. The Minister did a check. All his personal possessions were there while he was away.

- The General Division arbitrarily ignored as valid evidence all the statements his family members provided. These statements collaborate [*sic*] the addresses used for a long time by the CRA, RAMQ, and SAAQ.

- The General Division ignored his work in Canada from 1998 to 2001, work that is documented at the SAAQ and CRA, based on unproven assumptions.

- The General Division ignored that, with the exception of three years, he always filed his tax returns in Canada.

- The General Division ignored that he had a valid driver's licence and had owned cars in Canada.

- The General Division arbitrarily ignored the proof from the RAMQ and his doctors that he was in Canada for more than six consecutive months in 2009/2010, and for more than a year in 2012/2013. The General Division speculated that he was outside Canada during his treatment in 2013 on several occasions when he had left Canada only for his mother's funeral.

- The General Division incorrectly found that he had brothers and sisters in Haiti when that was not the case. It incorrectly found that his social ties were greater in Haiti when his entire family and his children are in Canada.

- The General Division ignored the fact that he has spent more time in Canada since February 21, 2018, to arbitrarily find that he was not a resident of Canada until January 16, 2020.

- The General Division's conclusion about his credibility is not based on the evidence presented and does not take into account his explanations and cannot justify the rejection of all the evidence he has presented.

- The General Division's finding that the appeal is allowed in part is ambiguous and contradictory given that he is apparently not entitled to an OAS pension or the GIS.[2]

The Law

[19] For OAS purposes, a person resides in Canada if they make their home and ordinarily live in any part of Canada. This is distinct from the concept of presence. A person is present in

[2] AD1-1 to AD-1-17.

Canada when they are physically present in any part of Canada. A person can be present in Canada without being a resident of Canada.

[20] Residence is a question of fact to be determined on the particular facts of each case. A person's intentions are not decisive. In *Ding*, the court set out a non-exhaustive list of factors to consider when deciding the issue of residence:

a. Ties in the form of personal property;

b. Social ties in Canada;

c. Other ties in Canada (medical coverage, driver's licence, rental lease, tax records, etc.);

d. Ties in another country;

e. Regularity and length of stay in Canada, and the frequency and length of absences from Canada;

f. The person's mode of living, or whether the person's life in Canada is substantially deep rooted and settled.[3]

[21] The onus is on the Applicant to prove that it is more likely than not that he lived in Canada during the period in question.

[22] Under section 3(2) of the OAS Act, a partial pension can be paid to a claimant who has reached 65 years of age and has resided in Canada for at least 10 years after the age of 18, and if they resided in Canada the day before the approval of the application. If the pensioner is not a resident of Canada the day before the approval of the application, they have to have resided in Canada for at least 20 years after the age of 18.

[23] Section 5(1) of the *Old Age Security Regulations* states the date the approval of an OAS pension application takes effect.

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

Did the General Division make an error of law or base its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it?

[24] In his OAS pension application, the Applicant indicated in his residence history that he resided in Canada continuously from September 3, 1979, to December 1, 2015, and from November 1 to the present day. He indicated the same thing in his notice of appeal to the General Division.

[25] The General Division allowed the Applicant's appeal in part and determined that the Applicant lived in Canada for the period from September 3, 1979, to July 1, 1997. It also determined that the Applicant was not a resident of Canada under the OAS Act from July 2, 1997, to the day before the approval of his OAS application, on November 17, 2017, and until the date he returned to Canada from his last trip, on January 16, 2020.

[26] The evidence before the General Division shows that the Applicant sold his house in Canada on April 1, 1997, after a separation.[4] However, he only moved on July 1, 1997, after an agreement with the buyer. The Applicant then went to live with his mother before immediately going to Haiti in July 1997.[5] The Applicant said that, while he was in Haiti, he lived in the family home in Saint-Marc and that he spent time with his brothers, sisters, and nephew.[6] He has no utility accounts in his name in Haiti, but he covers the cost of utility accounts in his mother's name, without causing any problems.[7]

[27] In a letter addressed to the Canadian Embassy in Haiti dated December 9, 2002, the Applicant stated that he had brought his children with him to Haiti. He said that his children were in their last year of school. The letter signed by the Applicant gave his address in Haiti.[8]

[28] On September 19, 2003, a Canadian passport valid for three days was issued to the Applicant while he was in Haiti. This application shows a permanent address in Haiti.[9] The

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[4] GD2-225.
[5] GD8-10.
[6] GD2-228.
[7] GD8-6, Q17.
[8] GD2-187.
[9] GD2-176.

Applicant mentions in the application that he had to return to Canada urgently because his children were having problems and he no longer had a passport.[10]

[29] On February 6, 2004, the Applicant applied for a Canadian passport while he was in Haiti. He was therefore asked to identify his permanent address. The Applicant responded by giving a Haitian address, stating that he had been at this Haitian address from 1997 to the present day—the date the application was signed, on February 6, 2004. The Applicant also said that he was employed by two employers in Haiti between February 17, 2002, and February 6, 2004.[11]

[30] On February 10, 2004, the Applicant submitted a handwritten note on Immigration, Refugees and Citizenship Canada letterhead. In that note, he wrote that he did not want to lose his work and that he had construction contracts in Haiti. He added that it was for that reason that he had to use a travel order from the Haitian Consulate to return to Haiti on October 20, 2003, to work on his contracts. This information indicates that the Applicant did not return to Canada until September 20, 2003, to October 20, 2003.[12]

[31] On August 10, 2004, the Applicant made a declaration of lost, stolen, inaccessible, damaged or found Canadian passport. That declaration was submitted to the Embassy of Canada in Haiti. In that declaration, the Applicant confirmed that his permanent address was in Haiti.[13]

[32] In his January 25, 2009, passport application to the Embassy of Canada in Port-au-Prince, Haiti, the Applicant stated that his permanent address was in Haiti and that he was employed by the National Airport Authority of Haiti from May 2004 until the date the application was signed, on January 25, 2009.

[33] Although the Applicant submits in his OAS application that he resided in Canada continuously from September 3, 1979, to December 1, 2015, the information from the Applicant indicates instead that his personal address and professional ties were in Haiti from 1997 to 2009.

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[10] GD8-11.
[11] GD2-185.
[12] GD2-188.
[13] GD2-190.

[34] The Applicant had no medical appointments in Canada from November 2003 to June 2009. From 2009 onwards, several medical appointments were entered in the insured medical services history of the RAMQ shorty after the Applicant's entries into Canada.

[35] The evidence also shows that the Applicant had no income in Canada after 1994, except in 1999 and 2001. It is true that the Applicant reported earning $17,030 in 1999. However, the CRA's individual identification report for mailing addresses indicates an address in Haiti effective May 27, 1999. Furthermore, the Applicant had little income, only $5,272, for 2001. According to the Applicant, he was working for a staffing agency. This is clearly income that was obtained through that agency during his visits to Canada because the Applicant stated that he was living permanently in Haiti during that period, from 1997 to 2004.

[36] In an interview in Canada on November 9, 2018, the Applicant also denied having worked in Haiti during the 2000s, contradicting his own statements in support of his passport applications that he had worked in Haiti from 2002 to 2009.[14]

[37] As the General Division noted, the Applicant's statements in support of his passport applications contradict his position that he lived continuously in Canada from September 3, 1979, to December 1, 2015. They also contradict the addresses that were registered with various government authorities. The Applicant's statements even contradict the son's affidavit stating that the Applicant lived with his children in Canada from 2003 to 2010. The General Division did not give weight to the various addresses in Canada that the Applicant provided.

[38] However, the General Division accepted the Applicant's admission that he made up information when he did not have it.[15]

[39] Faced with these clear contradictions, and the Applicant's admission, the General Division gave little weight and credibility to the Applicant's statements about his addresses in Canada in his OAS application and the period of time in which he alleges to have established his residence in Canada.

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[14] GD2-232.
[15] GD8-14, Q51.

[40] To support that he was a resident of Canada, the Applicant indicated in the cover letter of his notice of appeal to the General Division that he had spent more than a year in treatment without ever leaving the country in 2012 and 2013.[16]

[41] In a letter dated July 3, 2014, Dr. Willems from CHUM confirmed that the Applicant had actually undergone 48 weeks of treatment in hepatology in 2013. However, no treatment date was given. As the General Division noted, contrary to the Applicant's statement that he had never left the country in 2012 and 2013, the evidence shows that the Applicant travelled outside Canada during his treatment in 2013.

[42] On the passport application signed in Pierrefonds on September 11, 2013, the Applicant wrote that he was retired and that he was leaving Canada on December 17, 2013.[17] This indicates that the Applicant was in Canada for his treatments, went abroad between his treatments, and planned to leave Canada as of September. The Applicant left Canada on December 17, 2013, at the end of his treatments, and returned only on June 1, 2014.

[43] The evidence also shows that, from December 17, 2013, to December 1, 2015—the period after his treatment—the Applicant was in Canada for approximately only 5 months over a period of 24 months.

[44] The Applicant also admitted that he had lived in Haiti from December 1, 2015, to November 1, 2016. The General Division also found that this absence was not reflected in his statements with government authorities. The letter dated March 13, 2018, from the RAMQ made no mention of it.

[45] The General Division considered the fact that the Applicant did not want to respond about the health insurance coverage, specifically for the period from 2014 to 2017. The Applicant admitted, however, to having problems with the RAMQ, which penalized him for his travel.

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[16] GD1-6.
[17] GD2-206.

[46] Since returning to Canada on November 1, 2016, the Applicant said that he made the following trips:[18]

- He left Canada for Haiti and the United States on December 27, 2016, and returned on May 14, 2017.
- He left Canada on May 31, 2017, for Haiti, and visited the Dominican Republic twice and the United States. He returned to Canada on November 15, 2017.
- He went back to Haiti on December 6, 2017, and returned to Canada on February 21, 2018.
- He left Canada on July 26, 2018, to go to Mexico, then Haiti, before returning to Canada on November 7, 2018.
- He left Canada for Haiti on February 10, 2019, and returned to Canada on June 12, 2019.
- He left Canada on December 16, 2019, for the United States, then Haiti, and returned to Canada on January 16, 2020.

[47] The General Division gave a lot of weight to the regularity and length of his stays in Canada, compared to the frequency and length of his absences from Canada.

[48] I find from the evidence that was before the General Division that, for the period from December 2013, to the day before the OAS application was approved, on November 17, 2017, the Applicant was in Canada for less than 10 months over a period of 48 months, even though he claims to have stronger family ties in Canada. It is true that the Applicant has a driver's licence and car in Canada, but he also has a licence and vehicle in Haiti. Furthermore, I find that the Applicant had medical appointments soon after his entries into Canada during that period.

[49] I am of the view that the frequency and length of the Applicant's absences from Canada do not support his position that he is a snowbird and that he made his home and ordinarily lives in Canada.

[50] The General Division found from the evidence that, even though the Applicant comes to Canada to visit his family, occasionally sees doctors in Canada, and has a living arrangement

[18] GD8-9 and 10, Q32.

with either his niece or his sister while he is in Canada, the Applicant does not ordinarily live in Canada. His true place of residence is his family home in Haiti, where he is also responsible for the utility accounts.

[51] After reviewing the file, I am of the view that the General Division did not make an error of fact or of law by finding, on a balance of probabilities, that from July 2, 1997, to January 16, 2020, the date the Applicant returned to Canada after his last trip, the Applicant had not made his home and ordinarily lived in any part of Canada.

[52] It is true that the Applicant seems to have been more present in Canada since February 21, 2018. However, as the General Division noted, the Applicant must provide more irrefutable and non-contradictory evidence to show his deep roots in Canada and that he had made his home and ordinarily lives in Canada. The Applicant did not meet his burden of proof in this regard.

[53] The General Division also made no error of law by allowing the Applicant's appeal in part, given its finding that additional periods of residence should be added for the Applicant.

[54] I would like to point out that it is well established that I have no authority to retry a case or to substitute my discretionary power for that of the General Division. The Appeal Division's jurisdiction is limited by section 58(1) of the DESD Act. Furthermore, the case law has consistently stated that, unless there are obvious particular circumstances, the issue of credibility must be left to the discretion of the General Division, which is better able to decide on it.

[55] I am of the view that the General Division's decision was made based on the evidence before it and that it complies with both legislation and case law regarding residence in Canada. There is no reason to intervene on the issue of credibility, as assessed by the General Division.

CONCLUSION

[56] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
APPEARANCES:	G. I., Appelant Suzette Bernard, Representative for the Respondent