Citation: *SB v Minister of Employment and Social Development*, 2021 SST 360

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. B.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated May 4, 2021, GP-20-1926

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	July 21, 2021
Hearing participants:	Appellant Respondent's representative
Decision date:	July 27, 2021
File number:	AD-21-164

Decision

[1] The appeal is allowed. The file will go back to the General Division for reconsideration, with the directions below.

Overview

[2] S. B. is the Claimant in this case. He applied for an Old Age Security (OAS) pension in August 2018. The Minister of Employment and Social Development (Minister) approved his application and agreed to pay him a partial pension. However, the Claimant says that the amount of his partial pension should be higher.

[3] The amount of the Claimant's OAS pension depends on the number of years he resided in Canada after turning 18.[1]

[4] Specifically, this case is about whether the Claimant resided in Canada between April 1989 and June 1991. During those years, the Claimant lived and worked in the United Kingdom (UK). However, the Claimant maintains that he has resided in Canada continuously since July 1982.

[5] The Minister rejected the Claimant's arguments. As part of its decision, the Minister reviewed a list of special circumstances in which the law considers that a person has maintained their residence in Canada, even if they were outside the country for a long time.[2]

[6] One of these special circumstances might have helped the Claimant establish his residence in Canada. It applies to Canadian residents who are working outside the country, but for a Canadian employer.[3]

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[1] In this context, "residing" in Canada has a specific meaning. It is defined in section 21 of the *Old Age Security Regulations* (OAS Regulations). The Claimant is entitled to 1/40th of a full pension for each year he resided in Canada: see sections 3(3) to 3(5) of the *Old Age Security Act* (OAS Act).
[2] These circumstances are listed under sections 21(4) and 21(5) of the OAS Regulations.
[3] See section 21(5)(a)(vi) of the OAS Regulations.

[7] However, the Claimant first told the Minister that he was employed by an American company.[4] Later, he said that he was employed by a Canadian company, and that the American company was a subcontractor that simply processed his salary.[5]

[8] The Minister was not convinced that the Claimant fell within any of the special circumstances. So, the Minister decided that the Claimant's work in the UK interrupted his residence in Canada.

[9] The General Division accepted the Minister's position and dismissed the Claimant's appeal.

[10] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division.

[11] I am allowing the Claimant's appeal. The General Division made a legal error in the way that it assessed the Claimant's residence in Canada. As a result, I am returning the file to the General Division, with the directions below.

Preliminary matters

The Appeal Division hearing proceeded as scheduled

[12] At the beginning of the Appeal Division hearing, the Claimant raised the following issues:

- He asked why the hearing was not being held in person.
- He complained about receiving the Minister's submissions a day after they were due.[6]

[13] In the conversation that followed, the Claimant confirmed that there were no compelling reasons why he needed an in-person hearing. He also confirmed that he

[4] See the Claimant's questionnaire on page GD2-35.
[5] See the Claimant's reconsideration request, which starts on page GD2-42.
[6] The Minister's submissions are marked AD4 and AD5.

had had the time he needed to review and understand the Minister's submissions. Finally, he made clear that he did not want to reschedule his hearing.

[14] In the circumstances, I carried on with the hearing as scheduled.

I reviewed the Claimant's email received after the hearing

[15] Just as I was completing this decision, I received the Claimant's email dated July 26, 2021.[7] I reviewed the Claimant's email but did not ask the Minister to comment on it because it simply re-emphasizes points the Claimant made during the Appeal Division hearing.

Issues

[16] The issues in this appeal are:

a) Did the General Division make an error of law when assessing the Claimant's residence in Canada?

b) Did the General Division make any of the other errors that the Claimant is alleging?

c) If the General Division made any errors, how should I fix them?

Analysis

[17] I have to determine whether the General Division made at least one of the following errors:[8]

- It acted unfairly.
- It failed to decide an issue that it should have decided, or decided an issue that it should not have decided.

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[7] This document, received after the close of the Appeal Division hearing, is marked AD11.
[8] The relevant errors, formally known as "grounds of appeal", are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

- It misinterpreted or misapplied the law.
- It based its decision on an important mistake about the facts of the case.

The General Division made an error of law when assessing the Claimant's residence in Canada

[18] To reside in Canada, the Claimant needed to make his home and ordinarily live in the country.[9]

[19] When determining whether a person resided in Canada, the Tribunal normally considers the strength of the person's ties to Canada using the following factors (which the Minister calls the "Ding factors"):[10]

- Personal property (for example, house, furniture, automobile, business, bank account, credit card)
- Social ties to Canada (for example, family members, along with participation in social clubs, religious organizations, and professional associations)
- Other ties to Canada (for example, medical services, insurance policies, driver's licence, rental contracts, leases, loan or mortgage agreements, contracts, utility bills, participation in public services and programs, pension plans, and tax payments)
- Ties to another country
- Amount of time spent in Canada compared to the amount of time spent in other countries
- Lifestyle (for example, language and culture)

[9] See section 21(1) of the OAS Regulations.
[10] This is a plain-language version of the relevant factors, along with some examples. These factors appear in many decisions, including *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 at para 31.

[20] In this case, the General Division made an error of law by failing to use the Ding factors to assess the Claimant's residence in Canada.[11]

[21] Instead, the General Division (and the Minister before it) focused almost entirely on whether the Claimant was working for a Canadian company while living the UK. But by doing that, they overlooked one of the Claimant's main arguments: his ties to Canada remained stronger than his ties to the UK.

[22] The Minister accepted that the General Division could have explained its decision better. However, it stressed the flexibility of the Ding factors and how the weight the Tribunal gives to each factor depends on the circumstances of the case.[12] Plus, the Ding factors are non-exhaustive, meaning that **all** relevant circumstances need to be considered.

[23] As a result, the Minister argued that the Claimant's lengthy absence of over a year allowed the General Division—even within the Ding analysis—to focus on the special circumstances provided under the law. In this case, that meant deciding whether the Claimant was employed by a Canadian company.

[24] I cannot accept the Minister's arguments for the following reasons:

- The Claimant has continuously highlighted the strength of his ties to Canada, even while living in the UK.[13] The General Division could not ignore one of the Claimant's main arguments.[14]

- By overlooking this issue, the General Division effectively assumed that the Claimant's 26 months in the UK had interrupted his residence in Canada.

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[11] This is a relevant error under section 58(1)(b) of the DESDA.
[12] This is discussed in *Singer v Canada (Attorney General)*, 2010 FC 607 at paras 32-36.
[13] See, for example, the Claimant's reconsideration request that starts on page GD2-42 and his Notice of Appeal to the General Division, especially page GD1-4.
[14] The courts have emphasized the importance of writing reasons that respond to the issues raised by the parties in cases like *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 127 to 128 and *Malonga v Canada (Attorney General)*, 2020 FC 913 at paras 31 to 35.

However, the courts have warned against assuming that absences of over a year automatically interrupt a person's residence in Canada.[15]

- By focusing on whether the Claimant was employed by a Canadian company, the General Division's approach is inconsistent with court decisions saying that the Tribunal must consider the Claimant's entire context and all of his relevant circumstances.[16]

[25] I recognize that the General Division did mention some of the Claimant's ties to Canada. However, I am not convinced that the General Division did a Ding analysis at all. For example, the General Division made no mention of the Ding factors. Nor did it explain why the nationality of the Claimant's employer was more important than the rest of the factors.

[26] Essentially, the General Division concludes its decision by saying that the Claimant is not entitled to a larger OAS pension because he failed to show that he spent his time in the UK working for a Canadian company.[17] In other words, this is the only issue that the General Division decided.

[27] The audio recording of the General Division hearing supports my conclusion. The General Division hearing also focused on the nationality of the Claimant's employer. During the hearing, the General Division did not canvass the Ding factors in a way that would allow it to determine the relative strength of the Claimant's ties to Canada versus the UK.

[28] In fact, the Minister's written arguments seem to accept that the General Division decision focuses on one main question: Was the Claimant working for a Canadian company?[18]

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[15] See *Perera v Canada (Minister of Health & Welfare)*, [1994] FCJ No 351 (TD).
[16] See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 at para 58; *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277 at para 32.
[17] See paragraph 26 of the General Division decision.
[18] See paragraphs 45 to 47 of the Minister's submissions on page AD4-16.

[29] The General Division made an error of law by assessing the Claimant's Canadian residence in this way. Even if the Claimant did not fall within any of the special circumstances provided under the law, he was still able to argue that the strength of his ties to Canada outweighed his ties to the UK. However, the General Division overlooked this issue.[19]

The General Division did not make any of the other errors that the Claimant is alleging

– The General Division provided a fair process

[30] The Claimant alleges that the General Division failed to provide a fair process for the following reasons:[20]

- The General Division member was biased against him.
- She was not qualified to decide his case because she is not a member of the Quebec Bar.
- She recorded the hearing without his permission.

[31] First, allegations of bias are serious. They question the integrity of the Tribunal and of the member. As a result, the General Division member benefits from a presumption of impartiality.[21] Plus, the Claimant needs evidence to support his allegations of bias.[22]

[32] The Claimant did not provide evidence in support of his allegations against the General Division member. His bald assertions are not enough for me to find that she was biased against him.

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[19] Viewed from this angle, the General Division's error might also fall under section 58(1)(a) of the DESDA.
[20] See pages AD1-17 to 20.
[21] *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC).
[22] See *Joshi v Canadian Imperial Bank of Commerce*, 2015 FCA 92 at para 10, and *SM v Minister of Employment and Social Development*, 2015 SSTAD 1050 at para 17.

[33] Regardless, I examined the General Division decision and listened to the recording of the General Division hearing. Nowhere did I find that the General Division member showed bias against the Claimant.

[34] Second, the law does not require that Tribunal members be licensed lawyers.[23] The rules about becoming a judge are not the same as the rules about becoming a Tribunal member.

[35] Nothing in the law creating the Tribunal says that the General Division member needed to be a member of the Quebec Bar to decide the Claimant's case.

[36] Third, the Claimant says that the General Division member promised to send him the audio recording of the hearing. Otherwise, he says that he would not have allowed her to record his voice.[24]

[37] Although there was some delay, the Tribunal did provide the Claimant with the audio recording of the General Division hearing. But he says that it was too late.

[38] While the Claimant's allegations reflect poorly on the Tribunal, they do not compromise the fairness of the General Division proceeding. So, this argument cannot justify my intervention in this case.

– **The General Division did not make a legal error in the way that it used jurisprudence from the courts**

[39] The Claimant argued that the General Division made a legal error by relying on court decisions that have very different facts from the facts in his case.

[40] Instead, he said that the General Division should have followed his wife's case, which is identical to his. According to the Claimant, the Minister quickly recognized his wife's time in the UK as years of residence in Canada.

[41] I cannot accept the Claimant's arguments on these points.

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[23] Sections 44 to 48 of the DESDA provide information about the Tribunal's members.
[24] This exchange was not captured on the audio recording of the General Division hearing.

[42] I recognize, for example, that parts of Federal Court's decision in *Ding*[25] are quite different from the Claimant's case. But there are similarities too. Mrs. Ding had also applied for OAS benefits. And she too needed to show the number of years that she had resided in Canada.

[43] The General Division relied on the *Ding* decision for this proposition: The Tribunal cannot determine whether a person resides in Canada based just on where that person intends to reside.[26] Instead, the Tribunal must consider the person's entire context and all the circumstances of their case.

[44] The *Ding* decision is part of the law that the Tribunal must apply. And parts of the decision apply more generally: they apply to other cases involving OAS benefits and the way in which the Tribunal assesses the applicant's residence in Canada. For this reason, the Tribunal has cited the *Ding* decision many times, in many different cases.

[45] The General Division made no error by referring to this part of the *Ding* decision in the Claimant's case, even if the Claimant and Mrs. Ding have very different backgrounds.

[46] Similarly, the General Division made no error in the way that it used other jurisprudence in its decision.

[47] As for the Claimant's wife, the General Division had no documentary evidence about her case. So, there were no documents allowing the General Division to assess how similar or different the two cases might be. Plus, the Tribunal is obliged to follow past court decisions, but it is not obliged to follow past decisions made by the Minister.

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[25] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.
[26] See paragraph 21 of the General Division decision.

– The General Division was not obliged to follow an opinion from the Canada Revenue Agency (CRA)

[48] The Claimant argued that the General Division made a legal error by not following the CRA's opinion that, while living in the UK, he remained a "factual residence of Canada for income tax purposes.[27]

[49] The Claimant submitted that the Minister has no power to determine a person's residence in Canada. He also said that he phoned the CRA before leaving for the UK and followed the CRA's instructions for maintaining his residence in Canada.

[50] Finally, the Claimant argued that, if there are two definitions of residence under Canadian law, then the General Division had to apply the one that was most favourable to him.

[51] I understand the Claimant's frustration. However, I cannot accept his arguments.

[52] The Tribunal is not obliged to follow opinions from the CRA. The Tribunal and CRA decide cases independently from one another, based on the information that they have in front of them.

[53] Plus, the Tribunal is applying the laws that govern OAS pensions, while the CRA is applying the *Income Tax Act*.[28] Even if these two areas of law share similar concepts, the General Division was not obliged to bring its decision in line with that of the CRA.

[54] As for the Minister's powers, the law clearly empowers the Minister to determine whether an applicant is entitled to an OAS pension and in what amount.[29] This depends on when a person resided in Canada and for how long. As a result, it is an assessment that the Minister must make before approving an OAS pension application. The

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[27] This opinion, dated November 26, 2020, starts on page GD1-9.
[28] Specifically, OAS pensions are governed by the OAS Act and OAS Regulations.
[29] See sections 2 (definition of "pensioner"), 3(1), 3(2), 5(1), and 8 of the OAS Act. These sections make clear that people must apply for their OAS pension. And that an OAS pension is not paid until the Minister approves the application.

Claimant has not shown—nor am I aware—that the Minister has handed over this responsibility to the CRA or to any other branch of government.

[55] That said, this does mean that different parts of government can sometimes make decisions that seem unfair and contradictory.

[56] The courts have acknowledged that there are many similarities between the legal tests used to determine a person's residence in Canada for tax purposes and for OAS pension purposes.[30] So while it might be possible, it is a bit unusual for a person to be residing in Canada for one purpose, but not for the other.

[57] Here, the CRA seems to have based its opinion on the strength of the Claimant's ties to Canada, even while living in the UK. But as I found above, the General Division has not yet weighed the Claimant's competing ties between Canada and the UK.

[58] In short, this story is not over. For the reasons described below, the General Division needs to reconsider this case. The General Division will be able to consider the CRA's opinion further as part of its next decision.

– **The General Division did not base its decision on an important mistake about the facts of the case**

[59] In its decision, the General Division said that the Claimant filed his 1989 and 1990 taxes as a non-resident.[31] The General Division seems to have based this finding on information that the CRA provided to the Minister.[32]

[60] The Claimant forcefully denied the truth of these statements, along with much of the other information that the CRA provided to the Minister.[33] He argues that the

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[30] See *Duncan v Canada (Attorney General)*, 2013 FC 319 at paras 42-58. In *Duncan*, it seems to have been the Minister who was arguing that a person's status as a resident of Canada must be the same for OAS purposes as for tax purposes.
[31] See paragraphs 15 and 25 of the General Division decision.
[32] See Appendix 1 of the Minister's submissions, on page GD4-13.
[33] See pages GD5-2 to 3 and listen to the audio recording of the General Division hearing starting at approximately 0:28:30.

General Division should not have simply accepted this evidence, while ignoring his objections.

[61] I agree with the Minister's submissions on this point. Although the General Division referred to this evidence, it was not relevant to the outcome of the case. As I have already found, the General Division based its decision on the nationality of the Claimant's employer while he was living in the UK.

[62] But again, this issue goes to the strength of the Claimant's ties to Canada while he was living in the UK. So, the General Division can consider this issue as part of its next decision.

I will fix the error by sending the file back to the General Division

[63] The Claimant argued that he has proven his case and that I should recognize that he resided in Canada during the time that he was living in the UK.

[64] I would have preferred to bring more finality to this case. However, I have decided that the General Division focused too narrowly on the question about the nationality of the Claimant's employer. That focus prevented the Claimant from fully presenting his case. It also means that I do not have all the evidence that I would need to decide the case. In fact, during the Appeal Division hearing, the Claimant highlighted many questions that he had never been asked before.

[65] In the circumstances, I am sending the file back to the General Division to reconsider whether the Claimant maintained his residence in Canada while working in the UK.[34] To avoid any confusion, I am also providing the General Division with the following directions:

- I have not disturbed the General Division's finding that the Claimant failed to show that he was working for a Canadian company while living in the UK. The

[34] Section 59(1) of the DESDA gives me this power.

Claimant did not persuade me that there were any errors in this part of the General Division decision.

- Instead, the General Division will use the Ding factors to determine whether the Claimant resided in Canada between April 1989 and June 1991. In other words, the General Division will weigh the strength of the Claimant's ties to Canada versus the UK, considering the Claimant's entire context and all the circumstances of his case.

- Before deciding on the form of hearing, the General Division will hold a pre-hearing conference and give the parties a reasonable amount of time to submit any new documents and arguments about the Claimant's ties to Canada and the UK during the relevant period.

Conclusion

[66] I am allowing the Claimant's appeal. The General Division made an error of law in the way that it assessed the Claimant's residence in Canada. As a result, I am sending the file back to the General Division to reconsider that issue, with the directions above.

Jude Samson
Member, Appeal Division