Citation: *IB v Minister of Employment and Social Development*, 2021 SST 428

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	I. B.
Representative:	Louis Century
Respondent:	Minister of Employment and Social Development
Representative:	Jordan Fine

Decision under appeal:	General Division decision dated March 23, 2021 (Tribunal number GP-20-28)

Tribunal member:	Jude Samson
Type of hearing:	Teleconference
Hearing date:	July 28, 2021
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	August 5, 2021
File number:	AD-21-166

Decision

[1] I. B. is the Claimant in this case. I am allowing his appeal in part.

[2] The Minister of Employment and Social Development (Minister) and the Tribunal's General Division have already recognized that the Claimant resided in Canada for 20 years, 6 months, and 12 days.[1] In addition, I find that he resided in Canada from May 1, 1992, to September 30, 2003.

Overview

[3] The Claimant applied for his Old Age Security (OAS) pension in 2018. The Minister approved his application and agreed to pay him a partial pension.

[4] The amount of the Claimant's OAS pension depends on the number of years he resided in Canada after turning 18.[2]

[5] The Minister decided that the Claimant had resided in Canada for 19 years, 2 months, and 12 days. So, the Minister agreed to pay the Claimant a partial OAS pension calculated at 19/40ths of the value of a full pension.

[6] According to the Minister, the Claimant did not reside in Canada after August 31, 1990. That is when the Claimant moved to the United States (US) to start a doctoral degree. After graduating in 2000, the Claimant completed two postdoctoral programs in the US. In 2008, he found steadier employment in the US. And, in 2015, he got his American "green card".

[7] The Claimant says that his professional talents, combined with discrimination within the Canadian musical establishment, pushed him towards the US for his training

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[1] The General Division seems to have mistakenly written "2 days" instead of "12 days" in paragraphs 1 and 36 of its decision: See, for example, the Minister's decisions (on pages GD2-18 and GD2-52), along with the Minister's submissions to the Tribunal (on pages GD4-4 and AD16-8). It is unlikely that anything turns on these additional 10 days.

[2] 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).

and career. He describes experiencing an "*inevitable* gravitational pull away from Canada" due to factors beyond his control.[3]

[8] Still, the Claimant remains proudly Canadian. He says that he represents Canada abroad when sharing his many gifts as a musician and musicologist.

[9] The Claimant appealed the Minister's decision to the Tribunal's General Division and asked it to award him a larger OAS pension. The Claimant based many of his arguments on his contributions to Canadian culture and on the injustices he has faced because of his faith, language, and culture.

[10] The General Division ruled in the Claimant's favour, giving him an additional 16 months of residence in Canada. So, the Claimant's partial OAS pension grew to 20/40ths of the value of a full pension.

[11] The Claimant is now appealing the General Division decision to the Tribunal's Appeal Division. He argues that the General Division member was biased against him and that he should be awarded a full OAS pension.

[12] I am allowing the Claimant's appeal in part. The General Division provided the Claimant with a fair hearing. However, the General Division made legal and jurisdictional errors in this case. As a result, I am giving the decision the General Division should have given.

[13] Beyond the periods of residence that the Minister and General Division have already recognized, I find that the Claimant also resided in Canada from May 1, 1992, to September 30, 2003.

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[3] See page AD1D-5. Italics in original.

Issues

[14] My decision focuses on the following issues:[4]

a) Can I consider the Claimant's new evidence?

b) Was the Claimant denied a fair hearing because the General Division member's questions showed that he was biased?

c) Did the General Division make errors of law and jurisdiction by failing to consider whether "attending a school or university" includes the Claimant's postdoctoral programs?

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

Analysis

[15] I can intervene in this case only if the General Division made a relevant error. So, I have to consider whether the General Division:[5]

- acted unfairly;
- failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- misinterpreted or misapplied the law; or
- based its decision on an important mistake about the facts of the case.

I cannot consider the Claimant's new evidence

[16] New evidence is evidence that the General Division did not have in front of it when it made its decision.

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[4] At the Appeal Division hearing, the Claimant's representative confirmed that he was narrowing the issues to those set out in paragraph 19 of his submissions: See page AD15-10.
[5] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[17] I cannot normally consider new evidence because of the Appeal Division's limited role.[6] The law says that I must focus on whether the General Division made any of the relevant errors listed above. I cannot take a fresh look at the case and come to my own conclusions based on new and updated evidence.

[18] There are exceptions to the general rule against considering new evidence.[7] For example, I can consider new evidence that provides general background information only or that describes how the General Division might have acted unfairly.

[19] As part of his appeal, the Claimant filed a lot of new evidence, mostly about his research and musical talents.[8] None of this evidence falls within an exception to the general rule against considering new evidence, so I did not consider it.

The Claimant had a fair hearing

[20] The General Division needed to decide when the Claimant resided in Canada. In other words, when did the Claimant make his home and ordinarily live in Canada?[9]

[21] As part of this assessment, the General Division considered the relative strength of the Claimant's ties to Canada and the US using the factors from a decision called *Ding* (*Ding* factors).[10]

[22] The recording of the General Division hearing makes clear that the member was canvassing the *Ding* factors with the Claimant. But, the Claimant says that the member crossed a line by asking this question toward the end of the hearing:[11]

> And, lastly, I saw a reference letter from your Rabbi in Brookline, and he wrote that you had been a member since 1990. Have you

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[6] The Appeal Division's role is mostly defined by sections 58 and 59 of the DESD Act.
[7] Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal listed in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8 and that the Federal Court listed in *Greeley v Canada (Attorney General)*, 2019 FC 1493 at para 28.
[8] See documents AD2, AD3, AD4, and AD6, except for those pages that are already marked with a General Division (GD) page number.
[9] This is the legal test for residence in Canada under section 21(1) of the OAS Regulations.
[10] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 at para 31. These factors have been quoted in many decisions, and in paragraph 13 of the General Division decision.
[11] Listen to Part 2 of the audio recording of the General Division hearing starting at approximately 1:04:08.

> belonged to any other religious, community, cultural, social, or political organizations since 1990?

[23] The Claimant answered the question without hesitation. The General Division member then followed up by asking whether there were any other organizations that the Claimant wanted to add to his answer.

[24] The Claimant now describes the General Division member's questions in the following ways:

- "[H]ighly personal and private matters questioning the fervency of my religious practice and political advocacy were questioned"[12]
- an "egregious intrusion into my spiritual life and political orientations"[13]
- "highly inappropriate, and perhaps even illegal"[14]
- "Such egregious misconduct raises, at the very least, the appearance of overt, if not actual racial/religious discrimination, which is the very foundation of the Appeal I have launched."[15]

[25] The Claimant says that he was "stunned to stupefaction by the questions" but that he answered them "under the pressures of the circumstances."[16]

[26] The Claimant alleges that the General Division member's questions showed bias, or at least a perception of bias, and that he lost his right to a fair hearing.[17] In other words, the Claimant is concerned that the member treated him unfairly because of his Jewish faith.[18]

[27] I disagree with the Claimant's arguments on this point.

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[12] See page AD15-23.
[13] See page AD1D-6.
[14] See page AD1C-31.
[15] See page AD15-23.
[16] See page AD1C-32.
[17] Listen to the audio recording of the Appeal Division hearing starting at approximately 2:50:00.
[18] See paragraph 56 of the Claimant's submissions, on page AD15-21.

[28] I cannot conclude that the General Division member's questions would lead an informed person, viewing the matter realistically and practically, to conclude that he did not decide this case fairly.[19]

[29] When looking into the *Ding* factors, the Tribunal sometimes ends up discussing personal or private subjects. For example, one of the *Ding* factors is about a person's social ties: Did the person participate in any religious, cultural, political, social, or professional organizations?

[30] As a result, the General Division member's questions were relevant to the issues he needed to decide. In fact, the Claimant had emphasized his religious and cultural affiliations throughout his case. He also provided a letter of support from his Rabbi.[20]

[31] The General Division member also asked his questions appropriately and respectfully. The member did not probe for details about the Claimant's exact faith or political leanings. And, at the end of the hearing, the General Division member asked the Claimant whether he had anything more to add. The Claimant responded by saying: "I think you have posed very good questions, and I thank you for having allowed me to express myself as I did …."[21]

[32] Regardless of the denomination, the Claimant's membership in an American religious community since 1990 is relevant to one of the *Ding* factors. Notably, the Claimant did not mention being part of any similar community in Canada. Put simply, this is one way in which the Claimant's ties to the US are stronger than his ties to Canada.

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[19] This is the legal test for bias, as described in *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC).
[20] The letter from Rabbi Lipof is on page GD2-98.
[21] Listen to Part 2 of the audio recording of the General Division hearing starting at approximately 1:06:20.

The General Division made legal and jurisdictional errors by not considering the Claimant's postdoctoral programs

[33] Apart from the *Ding* factors, the Claimant might be able to rely on the so-called University Provision to help establish his residence in Canada after August 1990.[22]

[34] The University Provision is designed to protect Canadian residents from losing their residence in Canada when studying abroad. It says this:

21 (4) Any interval of absence from Canada of a person resident in Canada that is	**21 (4)** Lorsqu'une personne qui réside au Canada s'absente du Canada et que son absence
(a) […]	**a)** […]
(b) for the purpose of attending a school or university	**b)** a pour motif la fréquentation d'une école ou d'une université
(c) […]	**c)** […]
shall be deemed not to have interrupted that person's residence or presence in Canada.	cette absence est réputée n'avoir pas interrompu la résidence ou la présence de cette personne au Canada.

[35] In this case, the Claimant studied for a Doctor of Musical Arts from Boston University (BU). He started the program in September 1990 and graduated in January 2000. He then did two postdoctoral programs:

- From 2000 to 2003, he completed an Optional Practical Training program at BU.
- From 2002 to 2008, he did postgraduate work at Harvard.

[36] When assessing the Claimant's residence in Canada, the General Division never considered whether the University Provision might apply to the Claimant's postdoctoral programs. This was an error of law. Viewed from a different angle, this was a jurisdictional error: The General Division failed to decide an issue that it needed to decide.

[22] The University Provision refers to section 21(4)(b) of the OAS Regulations.

[37] The Minister argued that the General Division did not have to consider whether the Claimant's postdoctoral programs might fall under the University Provision for the following reasons:

- The Claimant did not specifically ask the General Division to decide this issue.
- A doctorate is the highest academic degree. Rather than studying, the Claimant said that he worked full time on writing a book and getting it published.
- The Claimant's postdoctoral programs were more like a paid internship or professional development opportunity.

[38] I disagree.

[39] Critically, the Claimant did ask the General Division to decide this issue, and it made an error by ignoring it.[23] The following parts of the General Division's record support my conclusion:

- In one of his earlier submissions to the General Division, the Claimant argued that his residence in Canada should continue at least until 2008, when his postdoctoral studies ended.[24]
- The Minister's written submissions to the General Division set out the University Provision and described how the Minister had applied it to the Claimant's studies in the 1970s.[25]

[23] The courts have emphasized the importance of writing reasons that respond to the issues raised by the parties: See *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.
[24] See page GD3-6.
[25] See page GD4-9.

- The Claimant then replied that he had studied in the US from 1990 to 2013. He provided supporting documents and asked the General Division to count these years toward the amount of his OAS pension.[26]

- In response, the Minister seemed to accept that the Claimant had studied in the US from 1990 to 2013. However, it maintained that the Claimant could not take advantage of the University Provision, since he did not return to live permanently in Canada after the end of his studies.[27]

- The Claimant responded again, writing: "Please view my years away from Canada from 1990 until 2013 in the same light as my undergraduate years, as temporary, and for study purposes, exclusively."[28]

- Indeed, the Minister seemed to recognize that some of the Claimant's years in the US might fall within the University Provision.[29]

[40] The supporting documents the Claimant provided on this issue included temporary US visas showing the Claimant as a student, along with his BU transcripts showing that he took courses in the fall of 2000, 2001, and 2002.[30]

[41] In other words, the facts and arguments in front of the General Division meant that it had to decide whether, after completing his doctorate, the Claimant remained absent from Canada for the purpose of attending university.

[42] The General Division made errors of law and jurisdiction by determining the Claimant's residence in Canada without considering this issue.

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[26] See page GD5-9, along with the surrounding documents.
[27] See the Addendum to the Submissions of the Minister marked GD7.
[28] See page GD8-2.
[29] See the Addendum to the Submissions of the Minister marked GD11.
[30] The Claimant's US visas are on pages GD5-6 and GD5-7 (see part 4). His BU transcripts start on page GD5-2.

[43] Perhaps the General Division thought that it could avoid this issue based on its finding that the University Provision applies only to people who re-establish their Canadian residence **immediately after** attending school or university.

[44] However, this conclusion is based on another error of law.

[45] The Claimant provided a student visa associated with his Optional Practical Training at BU. The visa ended on June 18, 2003. Plus, the General Division found that the Claimant re-established his Canadian residence on October 1, 2003.[31]

[46] This raises an important—yet unanswered—question about what the General Division meant when it said that the Claimant needed to return to Canada immediately after his studies. Apparently, the Claimant's three-and-a-half-month delay was not quick enough for the General Division. Did the Claimant need to return to Canada within a day, a week, or a month of finishing his studies?

[47] Throughout these proceedings, the Minister has argued that a person can take advantage of the University Provision only if they reside in Canada before and after attending school or university abroad. However, the Minister has never argued that a person must return to Canada immediately after their studies.

[48] On the contrary, the Minister conceded at the hearing before me that the Claimant could benefit from the University Provision if he had attended university in the US until June 2013 and re-established his Canadian residence a few months later, in October.

[49] The provisions surrounding the University Provision refer to temporary absences of less than a year and to an obligation to return to Canada within six months.[32] The University Provision has no similar timing requirement, yet the General Division interpreted it even more restrictively: To take advantage of the University Provision, former students must return to Canada immediately.

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[31] See page GD5-7 and paragraph 30 of the General Division decision.
[32] See sections 21(4) and 21(5) of the OAS Regulations.

[50] The General Division did not explain why it was interpreting the University Provision to include this timing requirement. It did not explain what it meant by "immediately" either. The General Division made another error of law by interpreting the University Provision in this way.

I will fix the General Division's errors by giving the decision it should have given

[51] As long as the Claimant had received a fair hearing, the parties agreed that I should give the decision the General Division should have given.[33]

[52] I agree. The Claimant was given every opportunity to present his case at the General Division level.

[53] This means that I can decide when the Claimant resided in Canada for the purpose of calculating the amount of his OAS pension.

– The Claimant resided in Canada from May 1, 1992, to September 30, 2003

[54] The General Division was deciding this issue: Did the Claimant reside in Canada at any time after August 31, 1990?

[55] The parties agree that the Claimant was absent from Canada to attend university in the US from September 1990 to January 2000. During this time, the Claimant earned his doctorate from BU.

[56] In addition, I find that the Claimant was absent from Canada to attend university in the US from January 2000 to June 2003. During this time, the Claimant completed an Optional Practical Training program at BU.

[33] Sections 59(1) and 64(1) of the DESD Act give me the power to fix the General Division's errors in this way. Also, see *Nelson v Canada (Attorney General)*, 2019 FCA 222 at paras 16 to 18.

[57] I reached this conclusion for the following reasons:

- The University Provision uses broad language—"for the purpose of attending a school or university"—and I should interpret it generously.[34]
- The Claimant's BU transcripts show that he continued taking courses during this time.[35]
- The Claimant was in the US on temporary (J-1) visitor visas sponsored by BU, where he had just finished his doctorate. While the Claimant's program was available to foreign students, professors, research scholars, and short-term scholars, the US admitted him as a student, with a permanent address in Canada.[36]

[58] I cannot accept the Minister's arguments that the Claimant's years spent at BU before earning his doctorate were significantly different from the years spent doing his Optional Practical Training program.

[59] All of the time the Claimant spent at BU was in hopes of starting a new career as a researcher and academic. Plus, the University Provision is not restricted to people who are attending university to earn a degree.

[60] The General Division also found that the Claimant resided in Canada from October 1, 2003, to May 31, 2004.[37] During this time, the Claimant supported his mother while she was fighting cancer, and he intensified his attempts to find work in Canada. The Minister now accepts that the Claimant resided in Canada during this time.

[61] At the Appeal Division hearing, the Minister also accepted that, if I found the facts above to be true, then the Claimant could rely on the University Provision.

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[34] See *Canada (Minister of Human Resources Development) v Stiel*, 2006 FC 466 at para 28.
[35] See page GD5-3.
[36] The Claimant's visas are on pages GD5-6 and GD5-7. The Claimant's status as a student is marked in part 4.
[37] See paragraph 30 of the General Division decision.

[62] So, beyond the periods of Canadian residence that the General Division has already recognized, I find that the Claimant also resided in Canada from May 1, 1992, to September 30, 2003. In other words, the Claimant resided in Canada while he was doing his doctoral studies and Optional Practical Training at BU.

– **The Claimant did not reside in Canada after May 31, 2004**

[63] The Claimant also did postdoctoral work at Harvard from 2002 to 2008. He argues that this postdoctoral program should be treated the same as his Optional Practical Training at BU.

[64] I disagree.

[65] While the Claimant provided proof of the student visas he obtained and of the courses he took between 2000 and 2003, there are no similar documents covering his postdoctoral program at Harvard. So, I cannot say whether he was attending Harvard or working there. I cannot confirm whether he was taking courses during this time, or what the nature of his immigration status was.

[66] I acknowledge that there is evidence that the Claimant continued to register for courses at BU beyond 2003.[38] However, he withdrew from all his courses between 2004 and 2008.[39]

[67] In the circumstances, I am not persuaded that, beyond May 31, 2004, the Claimant was absent from Canada for the purpose of attending either Harvard or BU.

[68] Given this finding, I do not need to decide whether the University Provision applies only to people who re-establish their residence in Canada after their studies.

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[38] See page GD2-122.
[39] There may have been practical reasons why the Claimant registered for these courses even if he did not, or could not, complete them: See document GD12.

– I cannot increase the amount of the Claimant's OAS pension based on his moral and ethical claims

[69] The Claimant argues that there are moral and ethical reasons why I should award him a full OAS pension.[40]

[70] I am sympathetic to the Claimant's circumstances. I acknowledge the many challenges he has faced throughout his life and career. I do not want to minimize or cast doubt on his experiences.

[71] But, however cold and mathematical it may seem, the law calculates OAS pension amounts based just on a person's years of residence in Canada. No matter how much I might like to do so, I cannot bend the law and award the Claimant a larger pension based on his ongoing contributions to Canada, even while living permanently in the US. Similarly, I cannot compensate him for the injustices he has faced in Canada because of his culture, faith, or language.

– What is the amount of the Claimant's OAS pension?

[72] The Minister will recalculate the amount of the Claimant's OAS pension based on the following periods of residence in Canada:

- June 4, 1969, to August 31, 1981
- September 16, 1983, to May 31, 2004

[73] Because the Claimant contributed to the US social security program, there are periods when the Claimant is considered to have resided in Canada and the US at the same time. However, the law does not allow periods of duplicate coverage.[41] So, when calculating the amount of the Claimant's OAS pension, the Minister is entitled to reduce

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[40] See the Claimant's arguments in AD1D and those starting on page AD15-25.
[41] See section 21(5.3) of the OAS Regulations and Article V(1) of the *Agreement on Social Security between Canada and the United States of America*. See also court decisions like *Stachowski v Canada (Attorney General)*, 2005 FC 1435 at paras 37-42; and *Gumboc v Canada (Attorney General*), 2014 FC 185 at paras 50 to 52.

the Claimant's residence in Canada by the number of months in which he contributed to the US social security program.[42]

Conclusion

[74] I am allowing the Claimant's appeal in part. The General Division made errors of law and jurisdiction by determining the Claimant's residence in Canada without considering whether the Claimant's postdoctoral programs fell within the University Provision.

[75] In the circumstances, I decided to give the decision the General Division should have given. Beyond the periods of residence in Canada that were already recognized, the Claimant also resided in Canada from May 1, 1992, to September 30, 2003. The Minister will recalculate the amount of the Claimant's OAS pension taking this additional period of Canadian residence into account.

Jude Samson
Member, Appeal Division

[42] The Claimant's contributions to the US social security program are detailed on pages GD2-16 and 17. See also paragraph 29 of the General Division decision, which the Claimant is not challenging. It is unclear whether the Minister already made a deduction for the Claimant's contributions to the US social security program in 1971, though it is unlikely that anything turns on this three-month period.