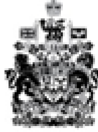

Citation: *SA v Minister of Employment and Social Development*, 2022 SST 291

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. A.
Respondent:	Minister of Employment and Social Development
Representative:	Ian McRobbie

Decision under appeal:	General Division decision dated July 21, 2021 (GP-19-1612)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	February 15, 2022
Hearing participants:	Appellant Respondent's representative
Decision date:	April 14, 2022
File number:	AD-21-334

Decision

[1] The appeal is dismissed. The General Division did not make any errors. Its decision stands.

Overview

[2] The Appellant, S. A., applied for an Old Age Security (OAS) pension in August 2012, just before she was due to turn 65. Her application stated that she entered Canada in May 1971 and had lived here ever since. The Minister approved her application, granting her a pension at 40/40ths of the full rate. The Minister later approved the Appellant's Guaranteed Income Supplement (GIS), payable at the rate for a single person.

[3] The Minister revisited these decisions in 2015. It determined that the Appellant ceased to be a Canadian resident as of October 1998, when she acquired permanent resident status in the United States. According to the Minister, that meant she only had 27 years of Canadian residence. The Minister also determined that the Appellant had not actually separated from her husband as claimed.

[4] The Appellant appealed this decision to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and allowed the appeal, but only in part. The General Division found that the Appellant had stopped being a Canadian resident in 1998 but had later resumed her residence for another 4½ years, for a total of 32 years. The General Division also found that the Appellant had never stopped cohabiting in a conjugal relationship with her husband.

The Appellant's Allegations

[5] The Appellant appealed the General Division's decision to the Tribunal's Appeal Division. She alleged that, in coming to its decision, the General Division made the following errors:

- It failed to ensure that the Minister provided her with documents;

- It misinterpreted the scope of the Minister's powers under the *Old Age Security Act* (OASA);
- It overlooked or misunderstood evidence showing that she was a Canadian resident after 1997; and.
- It failed to address whether she was Canadian resident from 2004 to 2013.

[6] One of my colleagues on the Appeal Division allowed this appeal to proceed because she thought that the Appellant had raised at least one arguable case. In February, I held a hearing by teleconference to discuss the Appellant's allegations in full.

[7] At the hearing, I told the parties that I would not render a decision until the Federal Court of Appeal had ruled in a pending case called *Burke*, which was expected to clarify some of the legal issues that the Appellant had raised. After *Burke* was issued on March 15, 2022,[1] I asked the parties to make written submissions on its impact, if any, on their respective cases. Both parties responded to my request by the specified deadline.[2]

[8] Having reviewed all submissions, I have concluded that none of the Appellant's allegations justifies overturning the General Division's decision.

Issues

[9] There are only four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important factual error.[3]

[1] See *Attorney General of Canada v Burke*, 2022 FCA 44.
[2] See Minister's letter dated March 21, 2022 (AD13) and Appellant's brief dated April 8, 2022 (AD14).
[3] *Department of Employment and Social Development Act* (DESDA), section 58(1).

[10] My job is to determine whether any of the Appellant's allegations fall into one or more of the permitted grounds of appeal and, if so, whether any of them have merit.

Analysis

The General Division did not proceed unfairly by failing to ensure that the Minister provided her with documents

[11] The Appellant argues that the Minister withheld information from her while conducting investigations into her residence. She criticizes the General Division for failing to hold the Minister's behaviour to account.

[12] I don't see merit in this argument.

[13] The Social Security Tribunal is an independent body with a mandate to take a fresh look at claims for government benefits. When a claimant appeals to the General Division, the Minister's conduct in assessing the claim is irrelevant. The only thing that matter is whether the available evidence indicates entitlement to OAS benefits.

[14] In this case, the Appellant is not saying that the General Division denied her access to documents. Nor is she claiming that she lacked access to any documents by the time she had her hearing. Rather, she seems to be calling on the General Division to punish the Minister for past bad behaviour. However, that is not the General Division's function. Its job is not to pass judgement on how the Minister carried out her investigation but to weigh the evidence on the record from the ground up and come to its own conclusion about whether and when the Appellant met the criteria for Canadian residence.

[15] What the Minister did during her investigatory process is irrelevant to the grounds of appeal at the Appeal Division.

The General Division properly interpreted the scope of the Minister's powers

[16] The Appellant argues that the General Division made a legal error when it found that the Minister has the power to revisit her decisions. In particular, the Appellant says

that the General Division should have followed a line of cases that strictly limit the Minister's ability to "claw back" OAS benefits that it had approved previously.

[17] Now that the Federal Court of Appeal has issued its decision in *Burke*, I cannot agree with the Appellant. Her argument might have succeeded at one time, but it cannot succeed since the Court has provided binding instruction about the extent of the Minister's authority to reopen her past OAS decisions.

[18] On the face of it, the OASA gives the Minister broad powers to recover what she deems to be overpayment:

- Section 37(1) of the OASA says that any benefit to which the recipient is not entitled must be returned immediately.
- Section 23 of the *Old Age Security Regulations* permits the Minister to, at any time, investigate the eligibility of a person to receive an OAS benefit.

[19] In the past few years, a series of Tribunal decisions have found that the Minister's powers might not be as broad as they appear to be. These decisions, led by a case called *B.R.*, restricted the Minister's ability to reopen her prior approvals of OAS benefits, despite the wording of the above provisions.[4]

[20] At the time of hearing, the Federal Court of appeal was poised to release its judgement in *Burke*,[5] which adopted a similar line of reasoning to *B.R.* Like the present case, *Burke* involved an OAS recipient whose entitlement to benefits was called into question years after the Minister approved them. As in the present case, the General Division found that the Minister had a nearly open-ended right to reverse her prior approvals and assess overpayments. However, unlike the present case, the Appeal Division overturned the General Division's decision. The Appeal Division, following *B.R.,* found that the Minister had very limited authority to revisit her prior assessments.

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[4] See *B.R. v Canada (Minister of Employment and Social Development)*, 2018 SST 844; *Minister of Employment and Social Development v J.A.*, 2020 SST 414; *Minister of Employment and Social Development v M.B.*, 2021 SST 8. This last case went before the Federal Court of Appeal as *Burke*.
[5] *Burke*, see note 1.

[21] The Minister applied to the Federal Court of Appeal for judicial review of the Appeal Division's decision. In a judgement dated March 15, 2022, a panel led by Madam Justice Mary Gleason granted the Minister's application. It agreed with the Minister that the Appeal Division erred in its interpretation of the governing legislation and set aside its decision as unreasonable. In her reasons, Judge Gleason accorded the Minister broad powers to reopen her past entitlement decisions:

> The words of section 37 of the Act and section 23 of the Regulations are "precise and unequivocal", inasmuch as they authorize the Minister to reconsider the eligibility of an individual to old age security benefits "at any time", and to recover payments that should not have been made. An interpretation of the legislation that leads to a different conclusion is thus unreasonable.[6]
>
> […]
>
> Put simply, the investigative authority under section 23 of the Regulations allows the Minister to reassess an individual's eligibility for benefits where, for example, new information surfaces, or where errors, misrepresentation or even fraud has occurred, ensuring that only those entitled to benefits actually receive them. Section 37 of the Act allows the Minister to recover benefits that were improperly paid to a claimant.[7]
>
> […]
>
> I agree with the Minister that an interpretation of the powers in section 37 of the Act and section 23 of the Regulations that allows people to keep benefits despite their not meeting the specific residency requirements of the Act is one that is inconsistent with a scheme that provides benefits only to people who meet the eligibility requirement of residency.[8]

[22] The Court's words leave no room for the Appellant to argue that the Minister lacked the authority to retroactively reassess her entitlements. They affirm that the Minister had the right to revisit her prior approvals of the Appellant's OAS pension at 40/40ths and her GIS at the single rate.

[6] *Burke*, paragraph 82.
[7] *Burke*, paragraph 106.
[8] *Burke*, paragraph 113.

The General Division did not overlook evidence of the Appellant's Canadian residence

[23] Many of the Appellant's arguments revolve around her conviction that the General Division paid too much attention to the evidence favouring the Minister's position and too little to evidence favouring hers. She argues that the General Division selectively placed weight on information supporting the Minister's argument that she stopped being a Canadian resident in 1998, while ignoring information showing otherwise.

[24] I carefully examined the Appellant's arguments on this point. In the end, I found them less than persuasive.

[25] One of the General Division's key roles is to establish facts. In doing so, it is entitled to some leeway in how it weighs evidence. The Federal Court of Appeal addressed this topic in a case called *Simpson*,[9] in which the claimant argued that the tribunal attached too much weight to certain medical reports. In dismissing the application for judicial review, the Court said:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.[10]

[26] The Appellant criticizes how the General Division weighed the available evidence, but none of her criticisms fall under any of the permitted grounds of appeal. The General Division correctly listed the eligibility criteria for obtaining an OAS pension and/or GIS and followed the appropriate legal test for assessing Canadian residence.[11] Then, looking at the evidence on the record, the General Division proceeded to assess the Appellant's residence in Canada. It came to the following conclusions:

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[9] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[10] *Simpson*, paragraph 10.
[11] See General Division Decision, paragraphs 40–45, citing and applying *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 and *Duncan v Canada (Attorney General)*, 2013 FC 319.

- ***The Appellant was a resident of Canada from May 1971 to October 1998.*** This period, totalling 27½ years, was not disputed by either party.
- ***The Appellant was not a resident of Canada from October 1998 to April 2004.*** The General Division heard the Appellant's testimony about this period and weighed it against the evidence in the record. In its decision, it pointed to several facts suggesting that the Appellant ceased to be a Canadian resident in October 1998, including her acquisition of U.S. citizenship in 2004. The General Division logically concluded that the Appellant could not have accumulated five years of U.S. residence for citizenship purposes while simultaneously claiming Canadian residence for a future OAS application.
- ***The Appellant was a resident of Canada from April 2004 to April 2013*.** The General Division found that, after getting an American passport, the Appellant returned to Canada and resided in this country for approximately 50 percent of her time over the next nine years, until she applied for OAS benefits. The General Division also found that the Appellant's social and financial ties were split equally between Canada and the U.S.

[27] The General Division took the Appellant's 27½ years of Canadian residence from 1971 to 1998 and recognized another 4½ years of Canadian residence over the period between 2004 and 2013. That totalled 32 years or 32/40ths of the maximum OAS pension amount. The General Division then considered the Appellant's eligibility for the GIS and found that her true marital status was not "single – separated," as she had previously claimed, but rather "married," because she was still living with her husband in a conjugal relationship in the U.S. The General Division found that the Appellant's income, combined with her husband's income, was too high to qualify for the GIS while she was receiving it.

[28] I don't see any indication that the General Division's findings were based on erroneous findings of fact. The Appellant may not agree with the General Division's conclusions, but it came to them after giving due consideration to the available evidence. It sorted through a large volume of information, including stamped passports,

border crossing records and, not least, the Appellant's own testimony. It assessed this information in what strikes me as a good faith effort to deduce a picture of the Appellant's whereabouts and lifestyle over a nearly 20-year period.

[29] In the end, the Appellant is asking me to reweigh the evidence and reach a conclusion that corresponds to her desired outcome. That is not something my mandate permits me to do.

The General Division addressed the Appellant's residence from 2004 to 2013

[30] The Appellant alleges that the General Division refused to exercise its jurisdiction by not addressing the issue of her Canadian residence from 2004 to 2013.

[31] This argument cannot succeed. Even a passing glance at the General Division's decision reveals that it dealt at length with the question of the Appellant's residence during the nine years preceding her application for benefits. That discussion, which took up a full three pages of the General Division's written reasons,[12] found that the Appellant had deep-rooted and settled ties both to Canada and the U.S. The General Division concluded that, since nothing in the law prevents OAS applicants from residing in two countries at once, the Appellant's residence alternated between Canada and the U.S.

[12] See General Division decision, paragraphs 54 to 69.

Conclusion

[32] In sum, the General Division did not breach any rules of procedural fairness, nor did it make any legal or factual errors. In particular, it made a full and genuine effort to sort through the relevant evidence and assess its quality. I see no reason to question the General Division's choices to give some items of evidence more weight than others.

[33] The Supreme Court of Canada, reiterating one of the principles of natural justice, has held that reasons must rest on a "logical connection between the evidence, the law on one hand, and the verdict on the other."[13] In this case, I am satisfied that the General Division successfully linked its findings to the evidence and the law.

[34] For these reasons, the Appellant has not demonstrated to me that the General Division committed an error that falls within the permitted grounds of appeal.

[35] The appeal is therefore dismissed.

Member, Appeal Division

[13] *R. v R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51.