Citation: *MM v Minister of Employment and Social Development*, 2022 SST 1394

# Social Security Tribunal of Canada
## Appeal Division

# Leave to Appeal Decision

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| **Applicant:** | M. M. |
| **Respondent:** | Minister of Employment and Social Development |

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| **Decision under appeal:** | General Division decision dated September 27, 2022 (GP-21-719) |

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| **Tribunal member:** | Neil Nawaz |
| **Decision date:** | November 14, 2022 |
| **File number:** | AD-22-761 |

## Decision

[1] Permission to appeal is refused. This appeal will not be going forward.

## Overview

[2] The Claimant is a 73-year-old native of Iran. In May 1988, he came to Canada as a landed immigrant. At some point between 1999 and 2001, he moved the United States, where he still lives.

[3] In November 2014, the Claimant applied for an Old Age Security (OAS) pension. In his application, the Claimant declared that he had been a resident of Canada from May 1988 to July 2012. The Minister approved the application and granted the Claimant a partial OAS pension at a rate 24/40$^{ths}$ of the full amount, with payment to begin in September 2015. The Minister found that, since the Claimant had resided in Canada for more than 20 years, he was eligible to receive his OAS pension while living in another country.[1]

[4] In 2017, the Minister received information that the Claimant had ceased to be a Canadian resident years earlier than he had claimed. The Minister launched an investigation, which found that the Claimant left Canada for the United States in August 1999. The Minister cancelled the Claimant's pension and asked him to repay amounts, totalling more than $14,000, that he had received from November 2014 to March 2018.[2]

[5] The Claimant appealed the Minister's decision to the Social Security Tribunal. The Tribunal's General Division held a hearing by teleconference and dismissed the appeal. The General Division found a longer period of Canadian residence—one that ended in July 2000—than the Minister had. However, the General Division decided that it was still not enough, even with the assistance of a social security treaty with the United States, to qualify the Claimant for the OAS pension.

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[1] See section 3(2)(b) of the *Old Age Security Act*.
[2] See Service Canada's demand letter dated March 15, 2018, GD2-100.

[6] The Claimant is now asking for permission to appeal the General Division's decision. He maintains that he moved to the United States on August 14, 2001, the date that he got his green card and cancelled his British Columbia automobile insurance policy. He says that gave him a total of 13 years, three months, and six days of Canadian residence. He insists that his Canadian residence, plus the seven years of U.S. social security contributions that the General Division had already recognized, gave him the 20 years that he needed to receive a pension in the United States.

[7] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Claimant's appeal does not have a reasonable chance of success.

## Issue

[8] There are four grounds of appeal to the Appeal Division. An applicant must show that the General Division

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

An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[4] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[5] This is a fairly easy test to meet, and it means that a Applicant must present at least one arguable case.[6]

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

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[3] See *Department of Employment and Social Development Act* (DESDA), section 58(1).
[4] See DESDA, sections 56(1) and 58(3).
[5] See DESDA, section 58(2).
[6] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

## Analysis

[10] The Claimant comes to the Appeal Division making essentially the same argument that he made at the General Division. He insists that he is entitled to an OAS pension because (i) he was a Canadian resident from May 1988 to August 2001 and (ii) his U.S. social security contributions gave him the 20 totalized years that he needed to receive an OAS pension while living outside Canada.

[11] I don't see a reasonable chance of success for these arguments.

[12] To succeed at the Appeal Division, claimants must do more than simply disagree with the General Division's decision and repeat their prior submissions. Instead, claimants must 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 four grounds of appeal permitted under the law.

[13] In this case, I don't see any indication that the General Division made an error in arriving at its decision. The General Division reviewed the available evidence and made the following findings:

- The Claimant came to Canada as a landed immigrant on May 8, 1988;
- Even though the Claimant said that he commuted from Maple Ridge, B.C. to Bellingham, Washington and back every day between July 2000 and August 2001, he logged only one entry into Canada during that period;
- The Claimant registered 35 quarters of contributions to U.S social security, but seven of them overlapped with periods in 1999 and 2000 when he was supposedly residing in Canada; and
- The Claimant resided in Canada for a period of 12 years and 85 days and benefitted from U.S. social security contributions totalling seven years and zero days. That meant his totalized OAS coverage under the terms of the Canada-U.S. social security treaty was 19 years and 85 days.

[14] Based on these findings, the General Division concluded that the Claimant had failed to show that he had the minimum 20 totalized years necessary to receive an OAS pension while living abroad.

[15] One of the General Division's jobs is to establish facts. In doing so, it is entitled to some leeway in how it chooses to weigh the evidence.[7] In this case, the General Division reviewed the available information and concluded that the Claimant had probably stopped residing in Canada by July 31, 2000. The General Division found it unlikely that Canadian border officials would have repeatedly waved the Claimant through after that date, especially since, by then, they were required by law to record every entry. I see no reason to second-guess General Division's conclusion, which it reached after what strikes me as a careful assessment of the evidence and applicable law.

[16] As the General Division correctly noted, an international treaty allows periods of coverage under the U.S. social security scheme to count towards **eligibility** for (but not the **amount** of) an OAS pension in Canada.[8] That allowed the Claimant, who no longer resides in Canada, to count periods in which he contributed to the U.S. social security scheme toward the 20-year requirement. However, the General Division also noted that periods in which the Claimant resided in Canada while simultaneously contributing to U.S. social security can't be counted twice.[9]

[17] Since seven of his 35 quarters with U.S social security contributions overlapped with his periods of Canadian residence, the Claimant was left with 28 quarters, or seven years of U.S. credits. When combined with his slightly more than 12 years of actual Canadian residence, the seven creditable years still left him short of the 20 that he needed to collect the pension outside of Canada.

[18] I don't see an arguable case that this analysis was incorrect. Moreover, even if the General Division had accepted the Claimant's position that he resided in Canada

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[7] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] See General Division decision, paragraph 17.
[9] See Article VIII of the *Social Security Treaty Between Canada and the United States*.

until August 31, 2001, he would have been no further ahead.[10] That is because the additional year of Canadian residence that he was claiming also overlapped with four quarters in which the Claimant had U.S. social security contributions. In his preferred scenario, the Claimant would have still had just over 19 totalized years—13 years and 85 days of Canadian residence plus six years or 24 creditable U.S. quarters (not counting the 11 that overlapped with periods in which he was living in Canada).

[19] The Claimant is understandably unhappy to return money that he thought was rightfully his. However, the General Division was bound to follow the letter of *Old Age Security Act*, and so am I.[11] From what I can see, there is no mechanism under the law that would allow him to keep his OAS pension.

## Conclusion

[20] The Claimant has not identified any grounds of appeal that have a reasonable chance of success.

[21] Permission to appeal is therefore refused.

Member, Appeal Division

[10] As previously noted, the Claimant originally claimed to have resided in Canada until July 31, 2012 – see the Claimant's application for OAS benefits dated November 15, 2014, GD2-34. He later revised that position to claim that he was a Canadian resident until August 31, 2001 – see the Claimant's notice of appeal to the General Division dated March 5, 2021, GD1-1.
[11] See *Pincombe v Canada (Attorney General)*, [1995] F.C.J. No. 1320 and *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.