Citation: ***K. A. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 42**

Date: May 7, 2015

File number: GT-110714

GENERAL DIVISION- Income Security Section

Between:

K. A.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Shane Parker, Member, General Division - Income Security Section

Decided on the record on May 7, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for an Old Age Security pension (OAS) was date stamped by the Respondent on June 25, 2009. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013 pursuant to section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 which states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[2] By its notice dated February 16, 2015 (Notice) the Tribunal informed the parties that it would be rendering a decision on the basis of the documents and submissions filed, for the following reasons:

a) The complexity of the issue(s) under appeal; and,

b) The cost-effectiveness and expediency of the hearing choice.

[3] The Notice contained deadlines for the parties to file and respond to any additional documents and submissions. Those deadlines have passed.

THE LAW

[4] Subsection 3(1) of the OAS Act (OASA) sets out the eligibility requirements for a full OAS pension:

> **Payment of full pension**
>
> 3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to
>
> (a) every person who was a pensioner on July 1, 1977;
>
> (b) every person who

(i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,

(ii) has attained sixty-five years of age, and

(iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application
is approved

[5] Paragraph 3(2)(b) of the OASA provides that foreign residents require 20 years of Canadian residence in order to qualify for an OAS pension. That provision is reproduced here:

Payment of partial pension

3. (2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and

(a) has attained sixty-five years of age; and

(b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.

[6] Section 40 of the OASA states that the Respondent may enter into agreements on Canada's behalf with other countries in regards to the provision of old age or other benefits. Section 40 reads:

Reciprocal arrangements re administration, etc.

40. (1) Where, under any law of a country other than Canada, provision is made for the payment of old age or other benefits including survivors' or disability benefits, the Minister may, on behalf of the Government of Canada, on such terms and conditions as may be approved by the Governor in Council, enter into an agreement with the government of that country for the making of reciprocal arrangements relating to the administration or operation of that law and of this Act, including, without restricting the generality of the foregoing, arrangements relating to

(a) the exchange of such information obtained under that law or this Act as may be necessary to give effect to any such arrangements;

(b) the administration of benefits payable under this Act to persons resident in that country, the extension of benefits under that law or this Act to persons employed in or resident in that country and the increase or decrease in the amount of the benefits payable under that law or this Act to persons employed in or resident in that country;

(c) the administration of benefits payable under that law to persons resident in Canada, the extension of benefits under that law or this Act to persons employed in or resident in Canada and the increase or decrease in the amount of the benefits payable under that law or this Act to persons employed in or resident in Canada;

(d) the totalization of periods of residence and periods of contribution in that country and periods of residence in Canada; and

(e) the payment by that country and Canada respectively, where applicable as a result of totalization, of prorated benefits based on periods of residence and periods of contribution in that country and periods of residence in Canada.

Regulations for giving effect to agreements

(2) For the purpose of giving effect to any agreement entered into under subsection (1), the Governor in Council may make such regulations respecting the manner in which this Act shall apply to any case or class of cases affected by the agreement, and for adapting this Act thereto, as appear to the Governor in Council to be necessary for that purpose, and any regulations so made may provide therein for the making of any financial adjustments required under the agreement and for the crediting or charging of the amount of any such adjustments to the Consolidated Revenue Fund.

[7] Canada and Japan entered into such an agreement (Canada-Japan Agreement).

[8] Article 6, Part I, subsection b) of the Canada-Japan Agreement states:

> b) ***if a person is subject to the legislation of Japan during any period in which that person is present or resides in the territory of Canada, that period shall not be considered as a period of residence in Canada for that person*** *and for*

> *that person's spouse or common-law partner and dependants who reside with him or her unless that person's spouse or common-law partner and dependants are subject to the Canada Pension Plan or to the comprehensive pension plan of a province of Canada by reason of employment or self-employment.*
> [emphasis added here]

[9] Section 21 of the OAS Regulations distinguishes between being resident and present in Canada:

> 21. (1) For the purposes of the Act and these Regulations,
>
> (a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and
>
> (b) a person is present in Canada when he is physically present in any part of Canada.

ISSUES

[10] There are two issues before the Tribunal:

1. Whether the Appellant was subject to the legislation of Japan during any period in which he is present or resides in the territory of Canada; and,

2. Whether he met the minimum residence requirement under section 3 of the OASA to qualify for an OAS pension.

EVIDENCE

[11] The Appellant came to Canada from Japan on an employment VISA on February 23, 1986. He was on a contract with Mitsubishi Bank of Canada (GT1-9). He returned to Japan on a permanent basis on July 1, 1989 (see: Appellant's passport at GT1-11 to 13; residence questionnaire, question 14 at GT1-5). He contributed to the Canada Pension Plan (CPP) during this time in Canada (GT1-24).

[12] The Appellant contributed to the Japanese Social Security scheme from April 1, 1967 to April 28, 2004 (GT1-52).

[13] The Appellant turned 65 in August 2008 (GT1-4).

[14] On June 25, 2009 the Appellant applied for an OAS pension under the Canada-Japan Agreement. He was residing in Japan at the time (GT1-4 to 8). In July 2009 the Appellant completed a questionnaire that indicated he did not intend to reside in Canada permanently when he arrived in 1986; he did not give up his residence in Japan which he considered to be his permanent home; nor did he bring all his possessions to Canada when he was in Canada between 1986 and 1989 (questionnaire, GT1-32 to 33).

SUBMISSIONS

[15] The Appellant submitted that he qualifies for an OAS pension because:

a) During his time in Canada between February 23, 1986 and July 1, 1989 he was a non-resident of Japan and was not subject to the Japanese tax obligations;

b) He has creditable periods in Japan after his 18th birthday amounting to over 20 years Canadian residence;

c) He lived in the United States of America and the United Kingdom, which also entered into reciprocal agreements with Canada.
(GT1-22)

[16] The Respondent submitted that the Appellant does not qualify for an OAS pension because he does not meet the minimum residence requirement of 20 years pursuant to paragraph 3(2)(b) of the OASA and Article 6, Part I, subsection b) of the Canada-Japan Agreement. In particular:

a) From February 23, 1986 to July 1, 1989 the Appellant contributed to the Japanese Social Security scheme while he was living in Canada and contributing to the CPP. As such, this is an overlapping period contemplated under the Canada-Japan Agreement and does not count as a period of residence in Canada;

b) The Appellant was present in Canada only, not resident, from February 23, 1986 to July 1, 1989.

ANALYSIS

[17] The burden of proof rests on the Appellant to establish entitlement to an OAS pension (*De Carolis v. Canada (Attorney General)*, 2013 FC 366).

[18] In order to be eligible for an OAS pension, an individual must apply in writing; be at least 65 years of age; have legal resident status; and have resided in Canada for the minimum period required. The dispute in this appeal centres on this last criterion.

[19] The time period in issue is February 1986 to July 1989.

ISSUE #1: Whether the Appellant was subject to the legislation of Japan during any period in which he is present or resides in the territory of Canada

[20] The Tribunal was persuaded that the answer to this question is in the affirmative. The Certificate for Periods of Coverage regarding the Japanese Basic Pension at page GT1-52 of the hearing file establishes the Appellant was covered for the period of April 1, 1967 to April 28, 2004. This period overlaps his time in Canada. As such, February 1986 to July 1989 cannot be considered a period of residence in Canada pursuant to Article 6, Part I, subsection b) of the Canada-Japan Agreement.

ISSUE #2: Whether the Appellant met the minimum residence requirement under section 3 of the OASA to qualify for an OAS pension

[21] The applicable legislative provision is paragraph 3(2)(b) of the OASA. As a foreign resident when he applied for the OAS pension, the Appellant requires 20 years of Canadian residence in order to qualify for the pension. Based on the finding in the first issue, the Appellant's time in Canada cannot be considered residence. Moreover, his ties were stronger to Japan, based on the answers in his residence questionnaire (he owned a home there, and never intended to make Canada his permanent home when in Canada). Finally, there was insufficient evidence and argument to persuade the Tribunal that the Appellant has any creditable periods of Canadian residence based on reciprocal agreements and time spent in other countries, to be considered in conjunction with his presence in Canada from February 1986 to July 1989. For the above reasons, this issue is answered in the negative.

CONCLUSION

[22] The Appellant did not establish any period of residence in Canada on a balance of probabilities. He therefore does not qualify for an OAS pension.

[23] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security