Citation: ***J. Z. v. Minister of Employment and Social Development*****, 2015 SSTGDIS 104**

Date: September 11, 2015

File number: GP-13-848

GENERAL DIVISION - Income Security Section

Between:

J. Z.

Appellant

and

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

Respondent

Decision by: Virginia Saunders, Member, General Division - Income Security Section Heard by videoconference on August 6, 2015, and by teleconference on August 20, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. Z.	Appellant
Kaila Eadie	Appellant's Representative
Jin-Hua (Miki) Wu	Interpreter (August 6, 2015)
Yue (Ann) Yin	Interpreter (August 20, 2015)
R. A.	Witness (August 6, 2015)
W. Z.	Witness
O Z.	Observer (August 6, 2015)

INTRODUCTION

[1] The Appellant began receiving a partial *Old Age Security Act* (OAS Act) pension and Guaranteed Income Supplement (GIS) in November 2006. In a decision dated November 26, 2012, the Respondent determined that the Appellant left Canada in January 2007 and had ceased to reside here since that time. Her benefits were cancelled and the Respondent demanded repayment of $74,411.26 received by the Appellant between August 2007 and November 2012.

[2] The Appellant requested reconsideration of this decision. In its reconsideration decision dated March 12, 2013, the Respondent determined that the Appellant had failed to disclose information about her absences from Canada, and that in light of these absences as well as her frequent travels since December 2009 she did not meet the residency requirement to qualify for an OAS pension or a GIS at all. The demand for repayment of $74,411.26 was maintained. The Appellant appealed to the Tribunal.

[3] In its submission dated April 28, 2014, the Respondent took the position that the Appellant had in fact established sufficient residence in Canada to qualify for a partial OAS pension of 10/40ths and a GIS as had been granted originally. However, it submitted that the Appellant did not reside in Canada from January 2007 up to and including November 2009, and so was not eligible to receive OAS or GIS from August 2007 through November 2009. It further submitted that the Appellant re-established residence in Canada in December 2009 and

continued to reside here until February 2011; but that there was insufficient evidence of residence here after that date.

[4] The hearing of this appeal was at first by videoconference on August 6, 2015 for the following reasons:

a) the form of hearing was most appropriate to allow for multiple participants;

b) videoconferencing was available close to the area where the Appellant lives; and

c) the form of hearing respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] The hearing was adjourned because the Appellant became confused. She later submitted documents which indicated that she went that day to her family doctor for acute onset memory loss, and then to the hospital for testing to rule out a stroke. She was diagnosed with Transient Global Amnesia. By August 11, 2015, she had had complete resolution of her symptoms except for amnesia surrounding the day of the event.

[6] With the agreement of the Appellant's representative, the re-convened hearing was heard by teleconference on August 20, 2015.

PRELIMINARY MATTERS

Documents submitted between August 6, 2015 and August 20, 2015:

[7] In addition to the documents related to her condition at the videoconference hearing, the Appellant submitted copies of tickets and travel itineraries for 2011 and 2012. Translated copies of these documents were not available until the day of the re-convened hearing. Because the information contained in the documents did not appear to be contentious and served mainly as a memory aide for the Appellant regarding her travels, the Tribunal decided to admit the documents into evidence and did not provide the Respondent with an opportunity to view or make submissions on them. The Tribunal considered that there is always a possibility that a party will provide documentary evidence at a hearing, and that in choosing not to attend a

hearing other parties must be taken to have no position or particular interest in viewing such evidence or making submissions on it.

THE LAW

[8] Subsection 3(2) of the OAS Act sets out the criteria to be met for payment of a partial OAS pension:

> (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.

[9] Subsection 21(1) of the *Old Age Security Regulations* (OAS Regulations) explains the difference between residence and presence for OAS purposes:

> 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.

[10] Paragraphs 21(4)(a) and (c); 21(5)(a)(vi),(vii) and (viii); and 21(5)(f) of the OAS Regulations are relevant to this proceeding. They are concerned with how certain absences from Canada may impact residence here:

> (4) Any interval of absence from Canada of a person resident in Canada that is
>
> (a) of a temporary nature and does not exceed one year,
>
> . . . or

(*c*) specified in subsection (5) shall be deemed not to have interrupted that person's residence or presence in Canada.

(5) The absences from Canada referred to in paragraph (4)(*c*) of a person residing in Canada are absences under the following circumstances:

(a) while that person was employed out of Canada

. . .

(vi) by a Canadian firm or corporation as a representative or member thereof, if during his employment out of Canada he
(vii) had in Canada a permanent place of abode to which he intended to return, or
(viii) maintained in Canada a self-contained domestic establishment,

and he returned to Canada within six months after the end of his employment out of Canada or he attained, while employed out of Canada, an age at which he was eligible to be paid a pension under the Act;

. . .

(f) while that person was a dependent person and was accompanying and residing outside Canada with the person on whom he was dependent, if the person on whom he was dependent resided in Canada and was absent from Canada in any of the circumstances specified in paragraph (a) or (b) and if the dependent person

(i) returned to Canada before or within six months after the return of the person on whom he was dependent or within six months after that person's death, if that person died while so absent from Canada.

[11] Subsections 9(1) and (3) of the OAS Act relate to payment of the OAS pension while a person is absent from or ceases to reside in Canada:

9. (1) Where a pensioner, having left Canada either before or after becoming a pensioner, has remained outside Canada after becoming a pensioner for six consecutive months, exclusive of the month in which the pensioner left Canada, payment of the pension for any period the pensioner continues to be absent from Canada after those six months shall be suspended, but payment may be resumed with the month in which the pensioner returns to Canada.

. . .

(3) Where a pensioner ceases to reside in Canada, whether before or after becoming a pensioner, payment of the pension shall be suspended six months after the end of the month in which the pensioner ceased to reside in Canada, but payment may be resumed with the month in which the pensioner resumes residence in Canada.

[12] Subsection 11(1) of the OAS Act provides for payment of a GIS to qualified recipients of the OAS pension:

> 11. (1) Subject to this Part and the regulations, for each month in any payment period, a monthly guaranteed income supplement may be paid to a pensioner.

[13] Paragraphs 11(7)(b), (c) and (d)) deal with payment of the GIS when a person is absent from or ceases to reside in Canada:

> (7) No supplement may be paid to a pensioner for
> . . .
>
> (b) any month for which no pension may be paid to the pensioner;
>
> (c) any month throughout which the pensioner is absent from Canada having commenced to be absent from Canada either before or after becoming a pensioner and having remained outside Canada before that month for six consecutive months, exclusive of the month in which the pensioner left Canada;
>
> (d) any month throughout which the pensioner is not resident in Canada, having ceased to reside in Canada, either before or after becoming a pensioner, six months before the beginning of that month.

ISSUE

[14] The Tribunal must decide if and when the Appellant resided or was present in Canada so as to qualify for an OAS pension and a GIS.

EVIDENCE

Testimony at the Hearing:

[15] The Appellant was born on October 24, 1941 in X, China. She arrived in Canada with her husband and younger daughter in October 1996, as an immigrant sponsored by her older daughter, W. Z., and W. Z.'s husband, O. Z. They all lived together at the Z.'s home in X.

[16] In May 1997 the Appellant's husband returned to China to settle some affairs, and soon after that fell ill with stomach cancer. He remained in China for surgery and chemotherapy treatment. In July 1997, the Appellant flew to China to be with her husband. He died there in April 1998, and the Appellant remained there for a short period afterwards before returning to Canada. She testified that for the next several years she remained in Canada, travelling occasionally but not very often.

[17] The Appellant and her daughter both testified that at all times she has lived with W. Z. and O. Z. at their home in X. She was financially unable to buy or rent her own home, and in any case it was part of their culture for a parent to live with her adult children to help with household and child care. This was particularly so with the Z.'s, as they both worked full-time and needed help with the care of their two sons.

[18] Mrs. W. Z. testified that she immigrated to Canada herself in 1987, and that after completing her education here she began working for Umicore Ltd., where she still works. Her parents had no sons, so that as the oldest daughter she had a particular responsibility to provide for her parents both financially and emotionally. Although she provided her mother with this support, the Appellant was in turn a great help to her in looking after the home, caring for the Z.'s sons, and supporting Mrs. W. Z. in her career.

[19] The Appellant testified that she has always had her own room and bathroom at the Z. home, where she keeps her personal possessions. She spends Monday to Friday with the Z. family, and on the weekends stays with her other daughter, Y. Z. Mrs. W. Z. testified that this pattern began around 2006 after Y. Z., who had been living in X, moved back to X and found an apartment big enough so that her mother could stay there regularly.

[20] Mrs. W. Z. testified that the Appellant registered for Alberta health care coverage (AHCIP) when she first arrived in Canada, and has maintained it ever since. Neither she nor the Appellant recalled any further communication with AHCIP regarding the Appellant's residence status or requirements, nor did they ever report the Appellant's travel activities to AHCIP. The Appellant has had a family doctor since arriving in Canada, but has been relatively healthy and so for many years did not see him regularly. She developed high blood pressure around 2007 or 2008, followed by some problems with her eyes and her stomach, and so she has had more medical care since that time.

[21] The Appellant testified that after moving to Canada she opened a bank account here. She had no property of any kind left in China or in any other country. She has an X library card and a local gym card. She has a drivers' licence.

[22] The Appellant joined the Jehovah's Witnesses in 2005 after spending time studying with them. She testified that since that time while in X she has gone to church twice a week and has also regularly gone out into the community spreading the gospel. She has attended the local rec centre regularly since 2009 or 2010, and knows people from the fitness classes she goes to. She does not see them outside of the classes, and her interaction with them usually revolves around promotion of her religion.

[23] The Appellant became a Canadian citizen in 2006. She testified that China does not recognize dual citizenship, so that she has effectively renounced her Chinese citizenship. When she travels there she has to obtain a visa from the Chinese government.

[24] Mrs. W. Z. testified that her employer, Umicore, is a Belgian-owned company that makes technical material. In 2006 she was given a three-year assignment by Umicore to set up a joint venture in China. She viewed this as a very good opportunity that presented the family with a dilemma in that her husband had a good job in X, and their older son was well-settled in high school there and was an enthusiastic hockey player. Neither of them wanted to leave X, so Mr. O. Z. and Mrs. W. Z. decided that she would go to China with their younger son, M. Z., who was about 10 years old at the time.

[25] Mrs. W. Z. testified that she asked to be located in X rather than at the project site so that M. Z. could attend an international school. This meant that she would have to travel a fair bit, and she decided to bring the Appellant with her to X to provide child care and companionship for M. Z..

[26] Mrs. W. Z. testified that Umicore made all the arrangements for the move to China. It hired a relocation company, arranged for all visas and permits for the three of them, and found a furnished apartment. She, M. Z. and the Appellant did not bring anything from Canada except their clothing. She began travelling back and forth between Canada and X in the fall of 2006, transferring her job and setting up in X. The Appellant and M. Z. arrived in January 2007, after everything was ready for them.

[27] Mrs. W. Z. testified that during her three years in China, Umicore had an office in X and she reported to the head office in Belgium. Her travel schedule was generally two weeks at the

site and two weeks in X. Her mother rarely had free time because M. Z. was with her, so she stayed in X at the apartment. Her husband and older son sometimes visited X and stayed at the apartment with the rest of the family.

[28] The Appellant testified that she believes she may have opened a bank account in X after arriving there in 2007. Her daughter testified that she was unaware of such an account and that she paid for all of the Appellant's expenses.

[29] The Appellant testified that while in China she felt that Canada was her home because her daughters, her grandchildren and all her belongings were there. She did not feel that China was her home as she had nothing there. Although she initially stated that she was unable to practice her religion in China, she later clarified this and stated that while Jehovah's Witnesses are not registered in China, she was able to join a group in X and practice privately. This consisted of alternating worship and Bible study once each week.

[30] The Appellant's schedule revolved around M. Z.'s. On school breaks they returned to X. The Appellant testified that during these trips to Canada she would move into her room at the Z. home and would resume her routine of weekly church attendance, domestic chores, child care and spreading the gospel. She would occasionally visit her doctor. She also obtained prescription refills, and to keep these active she would have her daughter continue to fill them for her while she was absent.

[31] Mrs. W. Z.'s job in China ended in September 2009, and she and M. Z. returned to Canada. The Appellant testified that because her Chinese visa was valid for a few more months, she spent October and November touring different Chinese provinces, and returned to Canada before Christmas 2009.

[32] Mrs. W. Z. and the Appellant both testified that after September 2009, as M. Z. was in high school, the Appellant's constant presence was no longer required and her family encouraged her to take the opportunity to travel while she was still young enough to be able to. The Appellant had travelled very little in the past, and was interested in seeing China and other parts of the world. She preferred to travel with Chinese-based tour groups because of language issues and because she found them more considerate toward seniors. However, they generally

would not allow anyone over age 75 to be without a younger family member, so the Appellant was eager to travel as much as possible before then.

[33] The Appellant testified that even after losing Chinese citizenship she was able to continue using her Chinese passport because it was not confiscated. She testified that she did so because it made it easier to return to China and travel within that country, and it meant that she got a discount on admission to Chinese parks. She continued to use the passport until just before it expired in March 2011.

[34] Mrs. W. Z. testified that all of the Appellant's travel arrangements are made by a travel agency in X. She does not purchase travel medical coverage because she has never needed it. She brings prescriptions and eye drops with her from X, along with her clothing. While she is away her room in the Z.'s home remains untouched except to be cleaned. Mrs. W. Z. stated that even when the Appellant is absent it still feels like she is part of the family.

[35] The Appellant testified that the travel agency arranges for all of her hotels, food and excursions. She brings her clothing and some money with her, and leaves everything else in her room in X. She is accompanied on her trips by old classmates and friends from China. While on her tours she stays with the rest of the group in hotels, but she has also visited her brother in X. When she stays there, her nephew moves out of his room and stays in the living room to accommodate her. When she is not at her brother's home she does not leave any belongings there. While she is travelling she is not able to keep up with her religious practice because the schedules are tight and she does not know where to go for meetings.

[36] At the hearing the Appellant did not recall many specifics as to where she travelled after 2009. She testified that in June 2010 she and her daughters went to Las Vegas for a few days. In October and November 2011 she travelled within China, visiting a number of provinces. In 2012 she visited many places, including France, Switzerland and Italy. She has been to Mexico, back to China, and to Mongolia. She recalled that she went to China from January to April 2013, and reunited with classmates who also travelled there from Taiwan and the Unites States. She testified that she travelled only once in 2014, to her nephew's wedding in China, where she stayed for about two months in June and July. In 2015 she travelled to China, Australia and New Zealand between February and April.

[37] Mrs. W. Z.'s testimony as to the Appellant's travels generally confirmed the Appellant's. She testified that the family believed that as long as the Appellant returned to Canada at least every six months, she would remain eligible for her OAS benefits. They became aware of the investigation into her mother's residence around 2011, and it was a year or so after the investigation began before the Appellant's pension and GIS were suspended. Up until then, they had believed that the Appellant's travelling was not an issue because they had explained her situation to the investigator and he had not advised her to stop travelling. Once the benefits were suspended in November 2012, the Appellant travelled less.

[38] R. A. testified that she is a member of the Jehovah's Witnesses Chinese congregation in X, where she met the Appellant around 2004. At that time she saw the Appellant up to four times a week for meetings and volunteering. Ms. R. A. testified that the Appellant has always been an active member of the congregation and has taken a leadership role in conducting Bible studies in other people's homes. She testified that while the Appellant was in China in 2007 to 2009 she was still considered to be a member of the congregation, and she attended meetings, volunteer and gave lectures when she was in X. If she was doing any religious activity either formally or informally in China she would report this to the elders or to Ms. R. A. when she was back in Canada. Ms. R. A. believed that since about mid-2012 the Appellant has travelled much less, as she has seen much more of her since that time.

Documentary Evidence:

[39] The Appellant submitted an application for an OAS pension and GIS to the Respondent on February 8, 2006. On Page 2 of the application, she indicated that she wanted her benefit payment deposited directly into her financial institution located in Canada. The application form stated "You can only use Direct Deposit for a financial institution located in Canada."

[40] A letter from the Respondent dated June 29, 2006, advised the Appellant that she had been approved for an OAS pension of 10/40ths effective November 2006. The letter stated:

> You must tell us if: you move. . you leave Canada for more than six months or if you move between countries outside of Canada. This may affect your eligibility for your benefits and/or your tax status.

> Since you have not lived in Canada for at least 20 years after the age of 18, you can only get payments for six months after you leave Canada. After that we will no longer pay your benefit. If you start living again in Canada and meet all the eligibility requirements at that time, we will start paying your benefits again.
>
> The Guaranteed Income Supplement is payable only for the month you leave Canada and for six months thereafter.

[41] As part of the Respondent's investigation into the Appellant's residence status, she was asked to complete a questionnaire stating her dates of departure from and return to Canada. This document was completed and signed by the Appellant on April 8, 2011. In it the Appellant stated that she was absent from Canada and in China from July 23, 1997 to May 29, 1998 due to her husband's illness and death; from January 7, 2007 to June 16, 2007; from September 2, 2007 to February 2, 2008; from February 18 to June 14, 2008; from August 22, 2008 to January 19, 2009; from February 9 to June 27, 2009; from July 21 to December 19, 2009; and from August 15, 2010 to February 11, 2011.

[42] On February 1, 2012, the Appellant completed another questionnaire at the Respondent's request. In this document and the additional pages that accompanied it, she made the following statements relevant to this decision. Mrs. W. Z. helped her with the written material:

a) When she left China in October 1996 she closed her residence there, and closed all bank and/or credit accounts. She did not cancel accounts with utility providers. She and her husband did not have time to deal with their property before leaving China, which is why her husband returned there in May 1997.

b) When she departed Canada on July 23, 1997, she intended to return to China to reside, but she purchased an open return ticket and intended to return to Canada as soon as her husband recovered. She returned to her previous place of residence in China on July 23, 1997.

c) Her husband died on April 29, 1998, and she returned to Canada on May 29, 1998. She went back to China for her husband's first anniversary ceremony, and returned to Canada on May 31, 1999. Shortly after that, she discovered that her sister-in-law had

late-stage cancer, so she returned to China on September 18, 1999, to be with her. She returned to Canada on November 15, 1999.

d) Mrs. W. Z. signed a three year “expat assignment” with her employer Umicore, which she described as “a Belgium global company,” as a Vice General Manager to X to establish a joint venture. Her current direct boss was Laurent Gautier at Umicore Korea.

e) The Appellant went to China in January 2007 to help Mrs. W. Z. because she travelled a lot and needed someone she could trust to be with her son M. Z. while she was away. The Appellant returned to Canada with her grandson every summer or in winter school breaks during the period 2007 to 2009.

f) Now that she is older and her grandsons do not need her every day, her daughters encouraged her to do something for herself. Starting in 2010 she began to travel to China a lot. Because tourist packages are unavailable to people over 75, she is trying to visit as many places in China as she can before she reaches that age.

g) Between June 3 and June 6, 2010, she was vacationing in Las Vegas with her daughters.

h) After February 11, 2011, her travel outside Canada for a period of more than 90 days was from August 17, 2011 to January 31, 2012.

i) She will spend the rest of her life in Canada. She only has two daughters and they both live in X. She stays with one during the week and with the other on the weekend.

[43] A letter from M. P., of TD Canada Trust, dated June 17, 2011, stated that the Appellant has been a client of that bank since October 1996. Two years’ worth of statements were provided.

[44] The Appellant provided prescription receipts for July 2008 through October 2010.

[45] A Statement of Benefits Paid by AHCIP showed services provided to the Appellant between July 1, 2003 and May 7, 2011. It indicated that after December 2009 the Appellant had medical visits in January, June and July 2010; and in February, March and April 2011.

[46] There are numerous photocopies of Chinese and Canadian passport pages in the hearing file that are difficult to decipher. The Appellant's representative agreed that the passport dates shown in the Investigation Information Sheet dated February 14, 2012 are generally accurate regarding the Appellant's international travel between October 7, 1996, and February 19, 2011. She did not dispute any particular entries.

[47] These passport entries indicated that after leaving Canada on January 7, 2007 the Appellant remained in China until June 16, 2007. She then spent approximately two and a half months in Canada before returning to X in September. She returned to Canada on February 2, 2008 and remained here for 10 days, after which she returned to China. Her next trips to Canada were between June 14 and August 22, 2008; and January 19 and February 9, 2009. She returned to Canada on June 19, 2009, but left again because she re-entered on June 27 and then returned to China three weeks later on July 21, 2009. Her next entry to Canada was on December 19, 2009.

[48] Passport entries indicated that on February 2, 2010, the Appellant arrived in China and then left almost immediately for a trip that included a stay in Russia. She returned to China on April 2, 2010, and left a month later, arriving in Vancouver on May 3, 2010. She appears to have left again, as her passport shows an entry into X on June 6, 2010. She arrived in China on August 15, 2010, and departed on November 11, 2010. For the next nine days the Appellant travelled to Thailand, Singapore and Malaysia, and returned to China on November 20, 2010. She departed on February 11, 2011.

[49] Investigations and interviews regarding the Appellant's travels were carried out by A. Simmonds, an employee of the Respondent, between 2010 and 2012. His reports in the file contain information similar to what the Appellant and Mrs. W. Z. provided in their testimony, or in previous written material. In addition, the following relevant information was disclosed:

a) The Appellant had returned to Canada in February 2011 and was present for an interview on March 9, 2011. She responded to requests for information in May and July 2011.

b) An itinerary from Express Travel and Tour Limited in X indicated that the Appellant was booked for flights from X to Vancouver to X on May 15, 2012, and returning October 17,

2012. Boarding passes indicate that during this period the Appellant travelled to Paris, Istanbul and Rome.

[50] The Appellant's Canadian passport issued April 10, 2012, revealed that she obtained a Chinese visa on April 27, 2012, requiring entry before July 27, 2012; that she entered China, France and Italy in September and October 2012; and that she obtained another Chinese visa on December 5, 2012, requiring entry before March 5, 2013.

[51] Receipts showed the Appellant donated to the Mandarin Congregation of Jehovah's Witnesses in X in 2007, 2008, 2010, 2011, and twice in 2012; and that she donated to the Watch Tower Bible and Tract Society of Canada in 2007 through 2012.

SUBMISSIONS

[52] At the hearing the Appellant submitted that:

a) The only residence periods in issue are from January 2007 to December 2009, and after February 2011. During these periods the Appellant was never absent from Canada for six months or more, and she always indicated an intention to return to Canada. The cumulative effect of various indicia of residence should be considered, and there should not be an undue emphasis placed on her presence here.

b) During the first period, the Appellant was absent from Canada because she was compelled to move to China to take care of her grandson; she returned whenever she could during school breaks; and she maintained family and permanent ties to Canada while she was away, without establishing any in China. She therefore remained a resident of Canada.

c) After February 2011 the Appellant was travelling around the world. She had a transient lifestyle but her permanent home and possessions were in Canada, and she returned to Canada in between trips. She did not stop being a Canadian resident.

d) All of the Appellant's personal property is in Canada. She keeps a bank account here. She has a drivers' licence and a library card. She has no furniture or possessions in China and no permanent home there.

e) While absent from Canada, the Appellant maintained social ties in Canada through her church.

f) The Appellant's children and grandchildren are Canadian citizens and her life revolves around them. She is an integral part of the household in X.

g) Previous Review Tribunal decisions with similar facts support the Appellant's position.

h) The purpose of the OAS is to confer a social benefit on seniors in Canada. Because it has a broad-minded and social goal, the eligibility requirements should be construed liberally.

[53] In various written submissions, the Appellant made points similar to those set out above, and also submitted that:

a) The Appellant was absent from Canada from 2007 to 2009 because she was accompanying her daughter who was employed by a Canadian corporation; and her residence was therefore not interrupted pursuant to paragraph 21(5)(f) of the OAS Regulations.

b) The Appellant has abided by the law. She was advised by the Respondent that she only had to notify it if she left for more than six months. She has been diligent in limiting her trips to less than six months at significant personal expense, which shows a clear intention on her part to reside in Canada and maintain her home here.

c) The amount of time the Appellant spent in Canada is not relevant to a determination of residence status for OAS eligibility. What is relevant is whether she had any absences from Canada exceeding one year, and whether she intended to make her home in Canada. What is relevant for the uninterrupted payment of her pension is whether or not any of her absences exceeded six months' duration.

d) Requiring the Appellant to repay any overpayment would cause her undue hardship.

[54] The Respondent submitted that:

a) the Appellant resided in Canada from October 1996 to January 2007, and was therefore entitled to receive a partial OAS pension of 10/40ths and a GIS from November 2006 to July 2007;

b) The Appellant ceased to reside in Canada when she went to China in January 2007. As of August 2007 she was not entitled to receive OAS benefits or a GIS as she no longer resided here and had been absent from Canada for more than six months.

c) The Appellant's absences from Canada between January 2007 and December 2009 were not of a temporary nature, and the Appellant ordinarily made her home and lived in China during this period.

d) The Appellant resumed residence in Canada in December 2009 through February 2011, and was entitled to receive her OAS and GIS benefits from December 2009 through September 2011. Her statements and pattern of travel after February 2011 indicate that she has not been substantially settled here as of March 2011.

ANALYSIS

[55] The Tribunal found the Appellant and the other witnesses to be credible. Inconsistencies in the evidence provided over the years can be attributed to language issues, and none are of any significance. It is apparent that since the date of her OAS application the Appellant and Mrs. Z. presented their best recollections of her travel and in no way attempted any deception. It is also apparent that the dates of the Appellant's presence in Canada at least up to February 2011 are not in dispute. What is at issue is the significance of her presence or absence at various times, and whether there is sufficient evidence of residence here after February 2011.

[56] The decision under appeal was made by the Respondent on March 12, 2013, pursuant to subsection 27.1(2) of the OAS Act. That decision was that the Appellant did not qualify for the OAS or GIS at all. The Respondent later amended its position and submitted that the Appellant

resided in Canada from October 1996 up to January 2007, and from December 2009 to February 2011. Thus, there are only two periods in dispute between the parties: between January 2007 and December 2009, and from February 2011 to present.

[57] The Tribunal considered whether the amendment of the Respondent's position during the appeal process amounted to a new decision under subsection 27.1(2). If it did, that might affect the Tribunal's jurisdiction to decide on the question of the Appellant's residence before January 2007 and between December 2009 and February 2011. Whether or not the Respondent generally has the ability to amend a decision at this stage of the proceedings, the Tribunal decided that in this case it had not done so. The Respondent's written submissions are clear that there has been a change in its position. The language used does not suggest a change in the decision under appeal. Thus, the Tribunal has jurisdiction and in fact has the obligation to decide on the question of the Appellant's residence and presence in Canada since October 1996.

[58] As set out in the legislation reproduced above, a partial OAS pension is payable to a person who has resided in Canada for at least 10 years if she resides in Canada on the day before the application is approved. The amount of a partial pension is calculated based on the number of years out of forty that a person resided in Canada after turning eighteen. For example, a person who resided in Canada for ten years receives a pension of 10/40ths of the full amount.

[59] Payment of the OAS pension is suspended after a person is absent from Canada for six consecutive months, not including the month he or she left, but is resumed with the month in which the pensioner returns. The pension is also suspended six months after the end of the month in which a pensioner ceases to reside in Canada, and is resumed with the month in which residence is resumed.

[60] The GIS is payable to a recipient of an OAS pension who resides in Canada and whose income is below a certain level. The GIS is not payable to a person who is absent from Canada for six consecutive months, exclusive of the month in which he or she left Canada; nor is it payable six months after a person has ceased to reside in Canada.

[61] Section 21 of the OAS Regulations governs the determination of whether a person is a resident of or present in Canada. A person resides here if she makes her home and ordinarily lives in any part of Canada. A person is present here when she is physically present in any part of Canada.

[62] Section 21 sets out specific circumstances in which a person is deemed to reside or not to reside in Canada, and in which absence from Canada is deemed not to interrupt residence or presence. Of particular significance to this appeal, residence or presence is not interrupted by "any interval or absence of a person resident in Canada that is of a temporary nature and does not exceed one year"; or by employment outside Canada of a person on whom an applicant is dependent if the person is employed by a Canadian firm or corporation and maintained a home in Canada, and if the applicant returned to Canada within six months of the person she is dependent on returning here.

[63] In *Singh v. Canada* (AG) 2013 FC 437 (*Singh*), the Court noted that the onus is on an applicant to establish that she is entitled to an OAS pension, and stated:

> [29] It is trite law that residency is a factual issue that requires an examination of the whole context of the individual under scrutiny: *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 . . . at paras 57-58 [*Ding*]. Intent does not equate to residence for the purpose of the [OAS Act].
>
> [30] There are several factors that may be considered in determining whether the residence conditions of the [OAS Act] have been observed: ties in the form of personal property; social ties in Canada; other fiscal ties in Canada (medical coverage, driver's license, rental lease, tax records, etc.); ties in another country; regularity and length of visits to Canada, as well as the frequency and length of absences from Canada; and the lifestyle of the person or his establishment here.

[64] The concept of residence and domicile was discussed in *Ding*, and more recently in *Duncan v. The Attorney General of Canada* 2013 FC 319 (*Duncan*):

> [49] In *Ding*, above, this Court carefully canvassed the relationship between a claimant's intentions and the approach taken by the courts when dealing with the concept of residence in the context of the ITA. In that regard, Justice Russell found that "considerable care has been taken to distinguish between a change of "domicile" (which depends upon the will of the individual) and a change of "residence" which depends upon factual issues that are external to the individual[']s intentions" (para 57).

> [50] Justice Russell goes on to conclude that residency is a factual issue that requires an examination of the whole context of the individual and that it constitutes a reviewable error to focus on a claimant's "obvious intentions" to the exclusion of other factors in a case that could lead to a contrary conclusion
>
> [51] As described above, residence, however one is to interpret it, must be contrasted with the notion of domicile, which is focused on the intention of an individual. The wording of paragraph 21(1)(a) of the OAS Regulations makes the factual component of the definition of residence under the OASA even clearer. In tying the notion of residence to a person's home ("demeure" in the French version) and using the words "ordinarily lives" ("vit ordinairement" in the French version), there can be no doubt that a person will have to establish that Canada is or was, for the amount of time required by the Act, the place where he or she is factually anchored.

[65] The Appellant entered Canada in October 1996, and settled in the home of her daughter and son-in-law. In 1997 she went to China to assist her husband, who had become ill while winding up his affairs there. Although she stated in one questionnaire that at that time she intended to reside in China, it is clear from the oral and other documentary evidence that she was not in fact returning to China to live, and that her visit was a temporary one solely to help her husband until he was well enough to return to Canada. When she returned to Canada following her husband's death, after being absent for ten months, she re-established herself in X and remained there until the following year, when she went back to China for two months to commemorate her husband's death. When she returned to Canada in May 1999, she did not expect or plan to leave again, and did so only to assist a dying relative, and only for two months.

[66] The Appellant was an integral part of the Z. household in X, providing child care and assisting in the running of the home. The Tribunal finds that she ordinarily lived and made her home there and was therefore a resident of Canada beginning in October 1996. The Tribunal finds that the Appellant's absences between that date and January 2007 were of a temporary nature and did not exceed one year. Her residence in Canada was therefore continuous between October 1996 and January 6, 2007, pursuant to subsection 21(4) of the OAS Regulations.

[67] The Tribunal finds that the Appellant ceased to reside in Canada on January 7, 2007, when she moved to X, China. On that date, Canada ceased to be the place where the Appellant was factually anchored. In arriving at this conclusion, the Tribunal considered the following:

a) The Appellant left the country as part of a family unit that included her daughter, her grandson and herself. While the move to China was pursuant to a work contract, and the Appellant planned to return to Canada when it was over, the fact remains that the move was for a period of three years that included full-time work for Mrs. W. Z., full-time attendance at school for her son, and full-time child care and home-making responsibilities for the Appellant.

b) The Tribunal considered that by then the Appellant was no longer a Chinese citizen, and that Mrs. W. Z.'s employer made all the moving and visa arrangements and provided a furnished apartment in X. These are not sufficient to overcome the fact that, regardless of her citizenship or legal status, the Appellant was allowed into China and received permits or visas enabling her to live there for three years, in long-term accommodation where she was part of a full-time domestic establishment. She had a daily routine revolving around the care of her grandson. Just as she had been an integral part of the family household in X, she now became an integral part of the new household established in X by the family members that moved there.

c) Although the Appellant moved to China with only her clothing, there was no need for her to bring anything else. The Tribunal notes that when she arrived in Canada and established residence in 1996, she also brought only her clothing. Her other needs have been met by her daughter and by her daughter's employer. She owns very little, and so her arrival in China with very little in 2007 is not an indication that she did not take up residence there.

d) The Appellant maintained a Canadian bank account and AHCIP coverage and library and gym cards while she was in China. In the circumstances of this case, these are not significant evidence of continued residence in Canada. The Appellant intended to return to X at times and so had an interest in retaining access to Canadian funds, Canadian health care, and Canadian community facilities. She needed a Canadian bank account for direct deposit of her OAS benefits. She was generally healthy and believed she could manage in China without any medical care. There is no evidence that AHCIP was aware of the Appellant's absence from the province and so the fact that it continued her coverage after January 2007 is irrelevant to a determination of her residency for OAS purposes.

e) The Appellant testified that her social ties in X revolved around her church activity, with a superficial connection to her fitness classmates that did not extend beyond that facility. While

she remained a member of her X congregation and donated money to it, she was also able to meet and practice her religion regularly while living in X.

f) The Tribunal accepts the evidence that during this time frame the Appellant returned to Canada periodically, and was never absent for six months. The Tribunal does not accept that this indicates that she did not give up residence. A person can be present in Canada without being resident. The six-month provisions in subsections 9(1), 9(3), and 11(7) of the OAS Act are only concerned with payment of a pension or GIS while a person is outside Canada. Nothing in the OAS Act or the OAS Regulations states that all one must do to maintain residence is to be present here every six months.

g) The Appellant submitted that she did not give up her Canadian residence because she was compelled to move to China for family and financial reasons, and that her emotional attachment was to Canada and her intention was to remain a Canadian resident. Many people are required to move for reasons beyond their control, including family, financial or cultural ones. The Court in *Ding* and *Duncan* noted the distinction between a change of domicile, which is driven by the will of an individual, and a change of residence, which is more factually driven. Eligibility for OAS benefits is based on residence, not domicile. The definition of "resident" in Section 21 of the OAS Regulations states that a person must ordinarily live and make his or her home here. The fact that a person wishes to live here, does not want to leave, or intends to return, may be taken into consideration in determining whether a person is resident but must be weighed along with all the other factors. In this case, the Tribunal finds that the wishes or the intentions of the Appellant are outweighed by the fact that on January 7, 2007, she moved out of Canada for the purpose of settling in China for an extended period with a family unit. At that time, she ceased to reside in Canada.

h) The Appellant cannot avail herself of paragraphs 21(4)(a) and (c) of the OAS Regulations. They apply only to "a person resident in Canada." As of January 7, 2007, the Appellant was no longer a resident here. Furthermore, the absence contemplated by 21(4)(a) is that "of a temporary nature." While that term is not defined in the legislation, the Tribunal finds that its meaning in this context cannot include a situation where over a period of almost three years the Appellant's absence from Canada was the norm, interrupted by short periods of

presence, after which she returned to her usual abode in China. The absence referred to in paragraph 21(4)(c) that arguably applied to the Appellant - paragraph 21(5)(f) – does not assist her. Mrs. W. Z.'s evidence – both written and oral – was that Umicore is Belgian-based. In Canada she reported directly to a boss in Korea. In X she reported to the head office in Belgium. The legislation does not define what makes a firm or corporation Canadian. The Tribunal finds that a company that is based in a foreign country, whose central management and control is exercised outside of Canada, is not a Canadian firm or corporation. Mrs. W. Z.'s employment with Umicore is not covered by the legislation and paragraph 21(5)(f) does not apply to the Appellant.

i) The Appellant submitted that the focus should not be on the length of time the Appellant was present in Canada. In *Singh* the Court stated at paragraph 34:

> . . . with the concept of residency being factually driven, the actual presence in Canada and the frequency of one's absences from this country will in most cases be a crucial factor.

Between the Appellant's departure from Canada on January 7, 2007, and her return on December 19, 2009, she was in this country for just over 200 out of a possible 1077 days. Those were spread out over five different visits that were between 10 and 78 days long. After each visit the Appellant returned to the apartment in X and stayed there. The amount of time she spent at a permanent abode in China was far in excess of the amount of time she spent in Canada. While this is not the only factor to be considered, it is a significant one and cannot be ignored.

[68] The Tribunal finds that the Appellant became a resident of Canada once again when she returned here on December 19, 2009. By that time, her daughter and grandson had moved back to X, and her strongest familial ties and means of financial support were no longer in China. She had nowhere to live in China and her only reason for being there was to travel around the country. When she returned to Canada she re-settled into her old room and resumed her previous lifestyle. At that time, she began to ordinarily live and make her home in Canada.

[69] The Appellant left Canada again on February 2, 2010. During the next year, she was frequently absent from Canada, sometimes for several months. She spent her time travelling to different places, staying in hotels and at times in a room that was vacated for her during visits to her brother in X. The Appellant's trips in and out of Canada after February 2011 are not documented in her passport. The AHCIP records, written statements by the Appellant and Mrs. W. Z., and the investigation reports all indicated that the Appellant was in Canada at various times, staying at her home in X. The Tribunal accepts the evidence of the witnesses that since February 2011 the Appellant has continued the same pattern of travel she had established in 2010, but that she has made fewer trips. The Tribunal also accepts the evidence and finds that, as with the period between November 2006 and December 2009 discussed above, since December 2009 the Appellant's absences from Canada have been for periods of less than six months.

[70] The Tribunal finds that, after resuming residence in Canada in December 2009, the Appellant's subsequent absences from this country have been of a temporary nature and not exceeding one year, and therefore her residence since that time has not been interrupted, pursuant to paragraph 21(4)(a) of the OAS Regulations. The difference between this period and the period January 2007 to December 2009 is that when the Appellant left Canada she did not return to an ordinary lifestyle such as she had previously had in X. She was either in hotels in different parts of the world, or staying in temporary accommodations with her brother. She did not establish or form part of any kind of household. She did not resume religious activities because she was never in the same place long enough to become familiar with any possible meeting times or places.

[71] The Tribunal considered the case law submitted by the Appellant, but notes that in *Singer v. Canada (Attorney General)*, 2010 FC 607, the Court stated:

> [33] It is important to emphasize however that the use of precedent is dangerous in that weight might be given to a factor in a particular set of circumstance that is inappropriate in a different context.
>
> . . . .

> [36] Although each case cited was carefully reviewed by the Court, there is no need to comment further on them for, as mentioned, they do little more than confirm that the test is a fluid one.

[72] The Tribunal notes as well that previous Tribunal or Review Tribunal decisions are not binding, and agrees that they are of very little value in determining what constitutes residence in any given fact situation.

[73] The Tribunal recognizes that, as social benefits legislation, the OAS Act must be construed liberally. However, the concept of residence in Canada is defined in the OAS Regulations, and the test to be applied in determining residence has been stated numerous times by the courts. The Tribunal cannot ignore facts or give them less weight than the law requires in order to confer a benefit on someone who does not meet that definition.

[74] The Appellant submitted that requiring her to return any overpayment would cause hardship. Subsection 37(4) of the OAS Act allows the Minister to remit the amount of an overpayment in certain circumstances, including where collecting it would cause undue hardship. The decision to forgive an overpayment is a discretionary one for the Minister alone to make. Regardless of the circumstances, the Tribunal has no jurisdiction to entertain an appeal from or to interfere with such a decision, nor can it order the Minister to conduct an investigation into whether such a decision ought to be made (*Pincombe v. Canada (Attorney General)* [1995] F.C.J. No. 1320 (F.C.A.); *Canada (Minister of Human Resources Development) v. Tucker* 2003 FCA 278).

CONCLUSION

[75] The Tribunal finds that the Appellant was a resident of Canada after attaining 18 years of age from October 1996 to January 6, 2007; and from December 19, 2009 to the present.

[76] The Tribunal finds that, since November 2006, the Appellant has not been absent from Canada for a period of six months or more.

[77] The Tribunal finds that a partial OAS pension of 10/40ths and a GIS were payable to the Appellant beginning in November 2006 – the month after she turned 65 – up to and including July 2007 – the sixth month after the end of the month in which she ceased to reside in Canada.

[78] The Tribunal finds that the Appellant's partial OAS pension and GIS were payable once again beginning in December 2009 and continuing up to the present.

[79] The appeal is allowed, in part.

Virginia Saunders
Member, General Division - Income Security