



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. F. v Minister of Employment and Social Development*, 2019 SST 724

Tribunal File Number: GP-18-90

BETWEEN:

N. F.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: George Tsakalis

Teleconference hearing on: June 27, 2019 and July 11, 2019

Date of decision: July 29, 2019

DECISION

[1] The appeal is dismissed.

[2] I agree with the Minister that the Claimant is not entitled to a partial Old Age Security (OAS) pension because he had not resided in Canada for at least 10 years after the age of 18. I also agree with the Minister that the Claimant is not eligible to receive the GIS because he did not qualify for the OAS pension. These reasons explain why I am dismissing the appeal.

OVERVIEW

[3] The Claimant applied for and received a partial OAS pension based on 11 years or residency in Canada, effective January 2012. The GIS was also approved with an effective date of January 2012. The Minister initiated a review of the Claimant's entitlement to an OAS pension and the GIS in 2014. The Minister's review concluded that the Claimant was not entitled to an OAS pension and the GIS because he stopped living in Canada in October 2003. The Minister took the position that the Claimant had been overpaid for the OAS pension by \$6,365.88 and the GIS by \$40,012.14 for the period from January 2012 to June 2015.

[4] The Claimant disagreed with the Minister's position. He requested that the Minister reconsider its decision to deny his OAS pension and GIS benefits. The Minister declined the Claimant's reconsideration request on December 30, 2016. The Claimant appealed this reconsideration decision to the Social Security Tribunal.

PRELIMINARY MATTERS

[5] The hearing proceeded by international teleconference because the Claimant was in Iran. There were numerous technical issues with connectivity throughout the hearing. The hearing was to proceed with the assistance of an interpreter. We were unable to connect with the interpreter during the conference call. I decided to proceed with the hearing without an interpreter because I was satisfied that the Claimant's English language skills were sufficient to understanding the proceeding and my questions. The Claimant's son also participated in the hearing and assisted the Claimant.

ISSUE

[6] Did the Claimant reside in Canada after October 2003?

ANALYSIS

[7] A person who applies for an OAS pension has to meet the requirements that are set out in the law that deals with OAS benefits. To receive a partial OAS pension *while you live in Canada*, you must be at least 65 years old and must have resided in Canada for at least 10 years since age 18.¹ To receive a partial OAS pension while you live outside of Canada, you must be at least 65 years old and you must have previously resided in Canada for at least 20 years since age 18.² The calculation of a partial pension is 1/40th of the full pension for each complete year of residence in Canada after the age of 18.³

[8] The Claimant lived in Canada for less than 20 years since age 18, so he is not eligible to receive a partial OAS pension while living outside Canada. Thus, he had to reside in Canada while collecting an OAS pension. The Claimant also had to reside in Canada in order to receive the GIS.⁴

[9] To decide if the Claimant resided in Canada, I have to look at whether he made his home and ordinarily lived in any part of Canada.⁵ Under the OAS law, being physically present in Canada is different from residing in Canada.

[10] To decide whether the Claimant resided in Canada after October 2003, I must weigh all the facts of the case and the Claimant's circumstances. The Claimant's intention to live in Canada is not enough to demonstrate residence. Some of the factors I look at are:

- Lifestyle and ties in Canada (personal property, social ties, medical coverage, driver's license, rental lease, tax records, etc.) compared to ties in another country

¹ This is set out in s. 3(2) of the OAS Act.

² This is set out in s. 3(2) of the OAS Act.

³ This is set out in s. 3(3) of the OAS Act.

⁴ This is set out in s. 11(7) of the OAS Act.

⁵ This is found in s. 21(1) of the *Old Age Security Regulations*.

- Regularity and length of stays in Canada
- Frequency and length of absences from Canada.⁶

Facts

[11] The Claimant was born in Iran in 1946. He came to Canada in September 2000. He applied for an OAS pension in January 2011. The Minister awarded the Claimant a partial OAS pension effective January 2012 based on a rate of 11 years of residence in Canada. The Minister also received an application from the Claimant for the GIS in October 2011. The Claimant began receiving the GIS with an effective start date of January 2012.

[12] The Minister received an anonymous telephone call in January 2014 advising that the Claimant collected an OAS pension and the GIS when he did not reside in Canada. The Minister launched an investigation into the Claimant's residency. The Minister requested information from the bank where the Claimant's OAS and GIS benefits were deposited.

[13] The bank advised the Minister that the Claimant opened an account in January 2011 and there was no account activity until January 27, 2012 when he received a direct deposit of his first OAS payment.⁷

[14] The Minister received a declaration from the Claimant on May 14, 2015. The Claimant provided the Minister with a list of Canadian addresses since 2000. He also provided the Minister with copies of his Iranian passports and a Canadian passport. The Claimant also provided the Minister with dates when he was absent from Canada.⁸ The information provided by the Claimant showed that he was in Canada 2606 days from September 12, 2000 to May 31, 2015, and he was outside of Canada for 2805 days during period.

[15] The Minister sent the Claimant a letter dated September 25, 2015 advising him that it took the position that he had not resided in Canada since October 2003.⁹

⁶ The Federal Court explains these factors in cases called *Canada (MHRD) v. Ding*, 2005 FC 76 and *De Carolis v. Canada (AG)*, 2013 FC 319.

⁷ GD2-99

⁸ GD2-189

⁹ GD2-192

[16] The Claimant advised the Minister in a letter dated November 5, 2015 that he had been a resident of Canada and that he met the eligibility requirements for an OAS pension and the GIS. He stated that he made trips outside Canada since receiving OAS and the GIS for medical reasons. He had surgeries in Iran to treat cataracts that he could not afford in Canada. He also stated that the documentation that he provided showed that he resided in Canada.¹⁰

[17] The Minister wrote to the Claimant on August 19, 2016 and November 3, 2016 requesting further information.¹¹

[18] The Minister wrote to the Claimant on December 30, 2016 and advised him that it maintained its decision to deny the Claimant's entitlement to OAS and GIS benefits.¹²

[19] The Claimant wrote to the Minister on December 8, 2017 and advised that he had lived in Ontario since 2000. He advised the Minister that he purchased a condominium as a residence when he came to Canada and moved to other condominiums with his family when his financial status became more established in Canada.¹³

The Claimant failed to establish that he resided in Canada after October 2003

[20] After reviewing the Claimant's hearing evidence and the documentary evidence, I conclude that the Claimant did not reside in Canada after October 2003. I find that the Claimant had more ties to Iran than Canada. I find that the Claimant was frequently absent from Canada and I agree with the Minister's decision that the Claimant was not eligible for a partial OAS pension and the GIS from January to June 2015.

[21] The Claimant testified that he manufactured X in Iran. He sold this business to his brother. He came to Canada in 2000 and started a business X. This business venture did not end well because his business partners deceived him. He performed no other work in Canada. The Claimant separated from his spouse after he arrived in Canada. He had a house in Iran that he put in his former spouse's name. He testified that he sold a property in Iran in 2009.

¹⁰ GD2-3

¹¹ GD2-199-201

¹² GD2-202-203

¹³ GD2-205-206

[22] The Claimant testified that he lived on X in X from 2000 to 2003. He sold this property. He lived in two different properties on X in X from 2003 to 2006 that he rented. He lived on X in X from 2006 to 2010. His evidence was difficult to follow, but he testified that his former spouse placed a second mortgage on this property and it was eventually sold. He has lived in rental properties in Canada since 2010.

[23] The Claimant was asked about his frequent absences from Canada. The documentary evidence showed that he was outside Canada from September 19 to October 28, 2000. The Claimant testified that he came back to manage things in Iran. He was outside Canada for more than 150 days in 2001. He testified that this was because he came back to Iran to arrange loans. He was in Iran for about 121 days in 2002. He testified that this was because he received money from his brother. He could not remember why he was outside Canada in 2003, but he mentioned his bother passed away and he attended a funeral. He spent a lot of time outside Canada in 2004 because he explored a business opportunity in Iran and Dubai that did not work out. He spent a lot of time outside Canada in 2005 because he explored a business opportunity in Iran and Venezuela. He could not remember why he spent a lot of time outside Canada in 2006. The records indicate that he spent almost that entire year outside Canada. He spent most of 2007 outside Canada. He testified that was because he visited his family in Iran. He spent a lot of time outside Canada in 2008 because his wife and son had problems and he had to settle their difficulties. He was outside Canada frequently in 2009 because he had to sell his property in Iran. He spent a significant amount of time outside Canada in 2010 because he came to Iran to see his family after his uncle passed away. He spent a significant amount of time outside Canada in 2011 because he explored a business opportunity in Iran that would have allowed him to export products there. His records showed that he spent a significant amount of time outside Canada in 2012, but he did not believe that he did. He spent a lot of time outside Canada in 2013 because he filed for divorce in Iran. He spent almost all of 2014 outside Canada because of problems with his wife. He was outside Canada from January 5, 2015 to May 25, 2015 because of problems with his former spouse.

[24] The Claimant keeps personal possessions in Canada when he is in Iran. He keeps an Iranian passport. He has public health coverage in Canada. He testified that he does not use the medical system in Iran, but he confirmed that he had eye surgery there. All of his medications

have been prescribed in Canada. He has bank accounts in both Canada and Iran. He holds both a Canadian and Iranian driver's license. He does not own any motor vehicles. He pays taxes in Canada, but he has not paid taxes in Iran since the 1979 revolution.

[25] The Claimant's son submitted that the Claimant was a generous man who had a successful career in Iran. The Claimant helped educate some of his siblings and used his earnings to help build a mosque and hospital in Iran. The Claimant now finds himself in dire financial circumstances and requires OAS and GIS. The Claimant testified that he considered himself a Canadian resident.

[26] However, I agree with the Minister that the evidence shows that the Claimant has not resided in Canada since October 2003. He often had a tendency to spend brief periods in Canada before returning to Iran for longer periods.

[27] When I look at the Claimant's ties to Canada in the form of personal property, I do not find this factor supportive of Canadian residency. He had a bank account in Canada, but after reviewing his bank statements, I agree with the Minister that there were sporadic transactions in this account from 2012 to 2015. In many months, the only transactions on the account were a direct deposit of his OAS pension and a withdrawal. The Claimant also maintained a bank account in Iran. The Claimant testified that he has not owned property in Iran since 2009. However, he has not owned any property in Canada since 2010. I find that he has little personal property ties to Canada.

[28] I also find that the Claimant did not have much social ties in Canada. He did not belong to any clubs or organizations in Canada. He also testified that he did not belong to any clubs or organizations in Iran. The Claimant has six brothers and four sisters. Only two of his brothers are in Canada. He has nieces and nephews in Canada, but I find that he has more family ties in Iran than Canada.

[29] When I review the Claimant's other ties to Canada, such as medical coverage, driver's licence, rental lease or tax records, I find that this factor did not support Canadian residency. The Claimant testified that he accessed the Canadian medical system, but he also used the Iranian medical system to receive eye surgery that he could not afford in Canada. He holds both

Canadian and Iranian driver's licences. The Claimant provided an agreement to lease dated September 26, 2017 with a friend of his. However, this agreement is after the date the Minister terminated the Claimant's benefits and demanded an overpayment. The Claimant testified that he paid taxes in Canada. He did not provide tax returns, but he gave evidence that he has not worked in Canada since he had a failed business venture with respect to X. He testified that he explored business opportunities in Iran 2004, 2005, and 2011. I find that the Claimant had closer ties to Iran than Canada.

[30] The Claimant's closer ties to Iran are reflected in how much time he spent there. He frequently visited Iran. He filed for divorce in Iran. He spent significant amounts of time in Iran because of problems with his former spouse.

[31] The Claimant's stays in Canada were irregular and his mode of living suggests that his life in Canada was not deeply rooted and settled. He frequently changed addresses in Canada and he did not work in Canada other than his one failed business venture. He also continued to hold Iranian passports after he arrived in Canada.

I cannot waive the overpayment on the ground of inaccurate advice from the Minister or on compassionate grounds.

[32] The Claimant testified that he received advice from the Minister that he could stay in Iran for as long as six months at a time. He testified that he followed the Minister's advice and did not stay outside Canada for more than six consecutive months.

[33] The Tribunal is created by legislation and it only has the powers granted to it by its governing statute. I do not have the jurisdiction to forgive an overpayment over any alleged inaccurate advice made by the Minister.¹⁴

[34] The Claimant and his son also requested relief from the overpayment on compassionate grounds. The Claimant is in poor health. He is in poor financial circumstances that he claims were caused by the fraudulent acts of former business partners and his former spouse. He wants

¹⁴ The Federal Court of Appeal explains this in case called *Canada (MHRD) v. Tucker*, 2003 FCA 278.

to live in Canada permanently, but he suggested that he could not do so because of the overpayment claimed by the Minister.

[35] As stated above, the Tribunal only has the jurisdiction granted to it by statute. I have jurisdiction under the OAS Act to determine whether a benefit may be paid to a person and the amount of a benefit that may be paid to a person. I do not have the jurisdiction to forgive overpayments on compassionate grounds.¹⁵

[36] The Claimant testified that he never broke any rules because he never went outside Canada for more than 180 days. However, the residency test is not based on whether somebody has never been outside Canada for more than 180 days or 6 months. The residency test is a factual issue that requires me to examine the whole context of a person's circumstances.¹⁶ I agree with the Minister that the Claimant stopped residing in Canada after October 2003. The Claimant not entitled to a partial Old Age Security (OAS) pension because he had not resided in Canada for at least 10 years after the age of 18.¹⁷ I do not have the jurisdiction to vary the requirements set out in the legislation to waive the Claimant's overpayment.

CONCLUSION

[37] The appeal is dismissed.

George Tsakalis
Member, General Division - Income Security

¹⁵ This is set out in s. 27.1 OAS Act and the Federal Court of Appeal explains this in a case called *Canada (MHRD) v. Tucker*, 2003 FCA 278.

¹⁶ The Federal Court explained this in a decision called *Singh v. Canada (AG)*, 2013 FC 437.

¹⁷ Section 40 of the OAS Act allows Canada to enter into international agreements with other governments that would allow applicants to qualify for an OAS pension even when they have not resided in Canada for 10 years, but Canada has no such agreement with Iran.