

Citation: *G. M. v. Minister of Human Resources and Skills Development*, 2013 SSTGDIS 4

Appeal No: 122139

BETWEEN:

G. M.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Virginia Saunders

HEARING DATE: November 27, 2013

TYPE OF HEARING: Telephone

DATE OF DECISION: December 6, 2013

PERSONS IN ATTENDANCE

G. M. Appellant

O. M. Witness

DECISION

[1] The Tribunal finds that an *Old Age Security Act* (OAS Act) pension (OAS pension) is payable to the Appellant.

INTRODUCTION

[1] The Appellant's application for an OAS pension was date stamped by the Respondent on February 10, 2010. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT) on August 24, 2012 .

[2] The hearing of this appeal was by telephone for the reasons given in the Notice of Hearing dated October 31, 2013.

THE LAW

[3] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 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 Social Security Tribunal.

[4] An OAS pension is payable to a person who has reached 65 years of age, and who meets the residence requirements set out in subsections 3(1) and (2) of the OAS Act.

[5] To receive a full pension, an applicant must have resided in Canada for at least 40 years. A person who resided in Canada on or before July 1, 1977 may receive a full pension after a shorter period of residence if other conditions are met.

[6] To receive a partial pension, an applicant must have resided in Canada for at least 10 years if she resides in Canada on the day before the application is approved. An applicant who resides outside of Canada on the day before the application is approved must prove that she had previously resided in Canada for at least 20 years.

[7] Subsection 21(1)(a) of the *Old Age Security Regulations* provides that a person resides in Canada if she makes her home and ordinarily lives in any part of Canada.

ISSUE

[8] In this case, there is no question that the Appellant does not meet the requirements for a full OAS pension. The Tribunal must decide if the Appellant meets the residency requirements to qualify for a partial OAS pension.

EVIDENCE

[9] The Appellant was born in Zambia on May 14, 1945. She lived there until July 30, 1978, except between September 1966 and June 1970, when she attended school in the United States.

[10] The Appellant arrived in Canada as a landed immigrant on July 31, 1978. She became a Canadian citizen on September 22, 1994.

[11] From July 31, 1978 until mid-1998, the Appellant resided in Canada, living mostly in Montreal with her husband and children. The Appellant and her husband then moved to Tulsa, Oklahoma, in the United States, where they continue to reside.

[12] The date in 1998 on which the Appellant ceased to reside in Canada is at issue in this appeal.

[13] In her OAS application, the Appellant stated that her residence in Canada ceased on July 26, 1998, and that she began residing in the US on July 31, 1998. However, in subsequent communication with the Respondent, the Appellant sought to clarify or amend that statement.

[14] The Respondent does not dispute that the Appellant resided in Canada from July 31, 1978 until July 26, 1998. That calculation resulted in the decision appealed from, which is that the

Appellant resided here for 19 years and 361 days after her eighteenth birthday, leaving her four days short of qualifying for a partial OAS pension.

[15] The Appellant completed questionnaires at the request of Human Resources and Skills Development Canada (HRSDC). She provided further information in the form of letters, as well as notarized copies of her passport and her husband's passport, moving documents, a real estate contract, employment and insurance records, and Social Security documentation. In addition, the Appellant and her husband, O. M., both gave oral testimony to the Tribunal.

[16] Mr. O. M. was employed by Air Canada, and based in Montreal. He and the Appellant testified that in May 1998 he received a job offer from American Airlines that would require a move to the US. They decided to make the move, and Mr. O. M. accepted the offer.

[17] On May 21, 1998 the Appellant crossed into the US and obtained a "TD" class visa, valid until May 20, 1999, which allowed her to live in the US as the spouse of a professional worker under the North American Free Trade Agreement. She testified that she returned to Canada that same day.

[18] The Appellant testified that, after she and Mr. O. M. obtained their visas, the process of actually moving to Tulsa from Montreal stretched over several months, and did not end until she and her husband moved into their new home on August 31 or September 1, 1998.

[19] A letter from American Airlines indicates that Mr. O. M. began his employment there on June 8, 1998. Mr. O. M. testified that when he accepted the job, he did so on the understanding that he had commitments to his family and his previous employer that would prevent him from taking up the position full-time for several months. He was therefore permitted to attend at his new job in Tulsa for frequent but brief training intervals, during which he stayed at an extended-stay hotel in the area. When he was not required to be in Tulsa, he returned to Montreal. In June he travelled with the Appellant to attend a wedding in Zambia. He continued to work at his old job in Montreal until July 31, 1998. He did not begin full-time work in Tulsa until late August or early September, and the person he was replacing remained in the position until October.

[20] On June 30, 1998 the Appellant and her husband moved out of the rental home that had been their permanent residence in Montreal.

[21] The Appellant testified that the moving date of June 30 was dictated by a common practice in Quebec in which most tenancies end on or near July 1, and by the fact that the owner of their rental home wanted it for her own use.

[22] The contract with the moving company indicates that the Appellant's household goods were loaded on June 30, 1998 and were delivered to their destination in Tulsa on August 31, 1998.

[23] The Appellant testified that, although the furniture and many of her household goods were loaded onto the moving van to be taken to Tulsa, she kept clothing, cooking utensils and miscellaneous other items aside. She moved these into her daughter's home, where she planned to stay while she was in Montreal. Some of the items were things she planned to give away, but which she had not yet had time to sort through.

[24] The Appellant testified that she entered the US on July 1, 1998 – as shown in her passport – in order to find a realtor and begin looking for a home in Tulsa. On July 20, 1998, the Appellant and her husband entered into a contract to purchase a home in Tulsa, with completion to take place on or before August 28, 1998.

[25] The Appellant testified that she did not remain in the US for the entire period between July 1 and July 20, or after July 26, which is the only other date of entry into the US that summer that is recorded in the Appellant's passport . She could not remember where she was on specific dates in July and August, but recalled that she and her husband went back and forth from Montreal to Tulsa several times to facilitate a gradual move that accommodated their other plans, Mr. O. M. continued employment with Air Canada, and their wish to spend time with their grown children in Montreal. They were able to fly at little or no cost because of Mr. O. M.s' connection with the airline industry.

[26] The Appellant testified that when she was in Montreal she stayed in her daughter's home, where she was given the bedroom to sleep in, while her daughter slept on the couch. Mr. O. M. spent more time in the US than she did, and when she was there she would stay with him in the extended-stay hotel. Mr. O. M. testified that he sometimes rented the hotel by the day, and

sometimes by the week, depending on the length of his stay. The hotel room had a refrigerator and a microwave, and was “not very nice” to stay in, according to the Appellant.

[27] The Appellant testified that she believes that her pattern of travel between Montreal and Tulsa was fairly constant throughout July and August, although she may have spent more time in August in the US. She was never in the US when her husband was not there, and unless she had to be there for a particular reason, she flew back to Montreal to be with her family and to attend to matters there. She recalled being very busy. She had various accounts to change and household items to sort through. She would act on instructions from her husband.

[28] Mr. O. M. testified that he began to spend more time in Tulsa after July 3, but he flew back to Montreal on several occasions as well. He confirmed that the Appellant was travelling back and forth frequently, and he thought that in August she might have spent more time with him in the US than she did in July.

[29] Mr. O. M.s’ Record of Employment from Air Canada indicates that the last day for which he was paid was July 31, 1998, and his last pay period ended August 31, 1998. Mr. O. M. testified that he believes he was at work in Montreal on July 31, and that he believes that was the date of his farewell party.

[30] The Appellant testified that she too believes that she was in Montreal on July 31, 1998, although she did not attend the farewell party because she was busy and because it was a workplace event that would not have been intended for spouses. She testified that July 31 is her son’s birthday and she generally tries to celebrate it with him, so that if she had been out of town on July 31, she would have returned shortly thereafter for a postponed celebration.

[31] Mr. O. M. amended his Quebec auto insurance effective August 17, 1998. He testified that this change was made to allow his son to use the car, as he no longer needed it. He testified that his other car passed all certifications and was legally imported by him into the US in mid-August.

[32] Automobile insurance was issued to the Appellant and her husband by Farmers Insurance Group on August 13, 1998. Their address was listed as Tulsa, Oklahoma.

[33] The Appellant and her husband moved into their newly-purchased home on August 31, 1998. They still live there.

[34] On September 10, 1998, the Appellant's husband closed his account at the Caisse d'Economie Credit Union in Dorval, Quebec.

[35] The Appellant testified that she has kept a bank account open in Montreal, which makes it easier for her when she visits her family in Montreal. She testified that she visits about once a month, on average. In 1999 she obtained an "H" visa to allow her to continue living in the US, and she became a permanent resident in 2007. She became a US citizen in October 2012.

[36] Mr. O. M. testified that he helped the Appellant complete her OAS application, and that her departure date from Canada was listed as July 26, 1998 because that was the last date that summer for which there was a passport stamp showing that she entered the US. The Appellant and her husband testified that they believed they had to submit that date because documentary proof was required, but that it held no particular significance related to their move to the US, and that in fact the Appellant returned to Canada during August for the same reasons she went back and forth the previous month.

[37] The Appellant and Mr. O. M. both testified that many of her trips from Canada to the US and back again between May and the end of August 1998 were not recorded on her passport because customs officers often do not stamp passports on either side of the border.

SUBMISSIONS

[38] The Appellant submitted that she qualifies for an OAS pension because she remained a resident of Canada until she moved into her new home in the U.S. on August 31, 1998.

[39] The Respondent submitted that the Appellant does not qualify for an OAS pension because she stated many times that she left Canada on July 26, 1998, short of the required 20 years of residence.

ANALYSIS

[40] The Appellant and her husband were credible witnesses. Their answers to questions during the hearing were spontaneous but thoughtful, and their oral evidence was generally consistent with previous statements made by them. They were reluctant to speculate if they did not have documents to support what they recalled, and often stated that they could not remember particular situations or dates that might have supported the Appellant's case. The Tribunal accepts their testimony as honest and accurate.

[41] Whether or not a person makes his home and ordinarily lives in Canada is a question of fact to be determined in the particular circumstances (*Perera v. Canada (Minister of Health and Welfare)* (1994), 75 F.T.R. 310). The onus is on the Appellant to prove that she resided in Canada at the relevant time.

[42] A person's mindset or intention is a legitimate factor to consider, but it is not determinative of the issue of residency. The Appellant must establish that Canada was, for the amount of time required by the OAS Act, the place where she was factually anchored (*Duncan v. Canada (Attorney General)* 2013 FC 319).

[43] It is common knowledge that customs officers on both sides of the border often do not stamp passports upon entry to or exit from the US and Canada. A review of the entry and exit stamps for the Appellant's passports from 1978 to 2000 shows many more entries into foreign countries than entries back into Canada, during a lengthy period when there is no dispute that the Appellant was resident in this country and must have been returning here from her travels. For example, the passport shows an entry into the US on July 1, 1998, and another entry on July 26, 1998, but there is nothing to show that the Appellant entered another country between those dates, when she obviously must have. The following year, only two entries to the US are shown, in August and December 1999, with nothing to indicate where the Appellant had been in order to require re-entry. In 2000, there is only one entry to the US shown, at Vancouver, where the Appellant testified she had travelled with her husband, who was attending a conference. There is nothing in the Appellant's passport to indicate that she entered Canada at the beginning of that visit.

[44] The Tribunal finds that the Appellant's passport does not accurately record her movements in and out of Canada and cannot be relied on as an indication of when the Appellant was present here and when she ceased to reside here.

[45] The Tribunal accepts the Appellant's evidence that she moved out of her home on June 30, 1998, not for the immediate purpose of taking up residence in the US, but because her tenancy expired and she was unable to extend it. Because of the impending move, the Appellant did not find a new home in Montreal, and instead moved in with her daughter along with her personal belongings and some household goods. The Tribunal finds that, at this stage, the Appellant continued to reside in Canada.

[46] The Tribunal accepts the evidence of the Appellant and her husband that, between July 1 and August 31, 1998, the Appellant made several trips to the US and then back into Canada in order to facilitate her eventual move to Tulsa, and that these trips were not recorded by customs officials on her passport.

[47] The Tribunal also accepts the Appellant's evidence that, until moving into her new home at the end of August 1998, she remained in Montreal as much as possible and only went to the US if her presence was required there.

[48] Although the Appellant's intention to eventually move to the US was evident when she arranged for her furniture and household goods to be loaded onto a moving van on June 30, 1998, the Appellant had not even started looking for a home there. She entered into a Contract of Purchase and Sale on July 20, 1998, with a closing date of August 28, 1998. Her furniture was not delivered to her in Tulsa until August 31, 1998.

[49] In the meantime, the Appellant remained in Montreal unless required to be in the US. She maintained bank accounts, kept up her family connections and continued to work on the move. Her husband continued to work in Canada until July 31, 1998. The Appellant's use of her daughter's bedroom suggests a more long-term arrangement that supports the Appellant's testimony. The marginal accommodation the Appellant and her husband had available to them in Tulsa before they moved into their home there suggests that only short stays were the rule.

[50] The Appellant has not been able to produce documents tracking her daily movements in July and August 1998. Few people are able to do so 15 years after the fact. However, the few documents that have been produced show the following:

1. The Appellant obtained a visa allowing her to live in the US in May 1998;
2. The Appellant's husband began his employment in the US in June 1998, but continued his employment in Canada until July 31, 1998;
3. The Appellant and her husband moved out of their Montreal home on June 30, 1998;
4. The Appellant purchased her home in Tulsa on July 20, 1998, with possession to take place on August 28, 1998;
5. The Appellant and her husband obtained car insurance in the US on August 17, 1998; and
6. The Appellant's household goods that had been moved out of her Montreal home on June 30, 1998, were delivered to her in Tulsa on August 31, 1998 .

[51] These documents, together with the oral evidence, support the Appellant's submission that her move to the US was a gradual one, and that the July 26, 1998 date she gave in her OAS application does not accurately reflect when she ceased to reside in Canada.

[52] The Tribunal finds that, while she intended to move to the US and reside there, and although she was physically present in the US for an undetermined number of days in the summer of 1998, the Appellant maintained physical, practical, financial and emotional ties to Canada during this period. This factual anchor is sufficient to persuade the Tribunal that the Appellant made her home and ordinarily lived in this country until August 31, 2013, when she had possession of her new home in Tulsa and moved her belongings into it.

[53] Although the Respondent submitted that the Appellant had stated "many times" that she ceased to reside in Canada on July 26, 1998, the Tribunal has found only two instances in the file where the Appellant used that date: on her OAS application, and in response to a query made the

following month. The OAS application states “You *must* provide proof of your residence history. See the information sheet under “Documents required.” The letter containing the query also states “Please provide a document to prove your date of departure from Canada in 1998,” and then encloses a list of acceptable documents, including a passport. The Appellant provided a satisfactory explanation to the Tribunal as to why she used that date on her application, and why it does not accurately pinpoint the date on which she ended her residence here. The Tribunal notes that all of the Appellant’s subsequent statements were consistent with her position that the moving process began in July 1998 but was not completed until August 31, 1998. These are not an indication of “facts” evolving to suit the situation, but of the Appellant’s initial belief that anything other than documentary proof was irrelevant to her case, which led her to make a statement that did not accurately reflect her true circumstances.

[54] The Tribunal finds that the Appellant resided in Canada after age 18 from July 31, 1978 to August 30, 1998, for a total of 20 years and 30 days.

CONCLUSION

[55] The Appellant meets the requirements for a partial OAS pension set out in subsection 3(2) of the *OAS Act*.

[56] The appeal is allowed.

Virginia Saunders

Member, General Division