

Citation: *Y. B. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 13

Appeal No: GT-124284

BETWEEN:

Y. B.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Shane Parker

HEARING DATE: May 20, 2014

TYPE OF HEARING: Teleconference

DATE OF DECISION: June 3, 2014

PERSONS IN ATTENDANCE

Y. B., Appellant

M. C., Co-representative and witness for the Appellant

E. M., Co-representative of the Appellant

Johanne Don Carlos, Representative of the Respondent

Martine Boulanger, Observer and colleague of the Respondent's representative

PRELIMINARY MATTERS

[1] Prior to the start of the hearing, the Tribunal wished to clarify the issues before it. The Respondent's representative advised that the period of November 2002 to February 2005 was not in dispute because the Appellant was not in receipt of Old Age Security ("OAS") benefits as of June 2003 due to her advising that she was abroad during this time (see also: GT1-71). The Appellant, through her representatives, did not dispute that she was not entitled to OAS benefits during that time period. The Appellant agreed that she was not claiming entitlement to OAS and GIS benefits for periods after six consecutive months abroad. This is also reflected in paragraphs numbered "2" and "3" in the Appellant's letter at GT1-214 to 215. The parties confirmed that the period of October 2000 to October 2002 inclusive and March 2005 to February 2011 inclusive were the disputed time periods. In other words, the parties disagreed whether the Appellant should reimburse the Respondent for OAS and GIS benefits received between November 2000 and June 2003, and March 2005 and February 2011. The parties agreed that the Appellant was resident in Canada from March 2011 onward.

DECISION

[2] For the reasons below, the Tribunal finds that the Appellant was entitled to the OAS and GIS payments received between November 2000 and February 2011, with the exception of OAS benefits received after the sixth month in the following periods of absence: October 13, 2005 to July 27, 2006; October 16, 2006 to July 5, 2007; and July 4, 2008 to April 1, 2009.

INTRODUCTION

[3] The Appellant's application for an OAS pension was date stamped by the Respondent on January 5, 2000. After an exchange of documentation, the Respondent awarded the Appellant a partial OAS pension of 10/40ths effective November 2000. In November 2009 the Appellant applied for the GIS. Payments were activated for the GIS in February 2010 but suspended in May 2010. The Respondent then conducted an investigation into the Appellant's residence. Further to this investigation, on January 16, 2012 the Respondent took the position that the Appellant's Canadian residence ended in October 2000. The Respondent also took the view that the Appellant's residence in Canada resumed in March 2011. Therefore, according to the Respondent, the Appellant's eligibility for OAS and GIS benefits began in March 2011, not November 2000. The Respondent claimed reimbursement of the alleged overpayment of OAS and GIS. Effective February 2012 it unilaterally began the reimbursement process by clawing back from the Appellant's monthly benefit payment (GT1-43).

[4] On April 3, 2012 the Appellant asked the Respondent to reconsider this decision. On September 26, 2012 the Respondent denied the Appellant's reconsideration request. In December 2012 the Appellant appealed to the Office of the Commissioner of Review Tribunals. The Appellant signed her Notice of Readiness on July 25, 2013, which was received by the Social Security Tribunal of Canada on April 1, 2014. The Respondent filed its Notice of Readiness in December 2013. The appeal was heard by the Social Security Tribunal of Canada on May 20, 2014.

LAW

Transitional

[5] Section 257 of the *Jobs, Growth and Long-term Prosperity* Act of 2012 states that appeals filed with the Review Tribunal before April 1, 2013 and not heard by the Review Tribunal are deemed to have been filed with the Social Security Tribunal of Canada (the "Tribunal").

Eligibility Requirements

- [6] The most relevant legislative provisions from the OAS Act are as follows.

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.

- [7] A couple important definitions in section 2 of the OAS Act relate to "pension" and "pensioner". A pension means a monthly pension authorized to be paid under Part I. In other words, pension refers to the OAS pension. A pensioner means a person whose application for a pension has been approved.

- [8] Subsection 9(1) of the OAS Act stipulates when a pensioner's pension is suspended where the pensioner leaves Canada, and when payment may be resumed. It states:

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.

[9] Subsection 9(3) of the OAS Act discusses when the OAS pension is suspended where the pensioner ceases to reside in Canada, and when payment may be resumed. It provides:

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.

[10] Part II of the OAS Act deals with the GIS. To be eligible to receive the GIS, a person must be receiving the OAS pension (s. 11(1) OAS Act).

[11] Subsection 11(7) of the OAS Act deals with limitations on the payment of the GIS. In particular, the GIS is not payable to a pensioner for any month for which no pension may be paid to the pensioner (s. 11(7)(b)).

[12] Paragraph 11(7)(c) of the OAS Act applies when a pensioner is absent from Canada for six consecutive months. It states:

(7) No supplement may be paid to a pensioner for

(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;

[13] The GIS is also not payable to a pensioner for 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 (s. 11(7)(d)). In other words, the GIS is not paid six months after the pensioner is no longer resident in Canada.

[14] The relevant provisions of the OAS Regulations are as follows:

Residence

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.

(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,

(b) for the purpose of attending a school or university, or

(c) specified in subsection (5)

shall be deemed not to have interrupted that person's residence or presence in Canada. [emphasis added here]

ISSUES

[15] There are two issues before the Tribunal.

[16] The first is to determine the Appellant's entitlement to OAS from November 2000 to February 2011. As mentioned above, the parties agreed that the Appellant was absent from Canada between November 2002 and February 2005 and was not entitled to OAS benefits from June 2003 to February 2005. The parties also agreed that the Appellant was resident in Canada from March 2011 onward. In determining this first issue, the Tribunal must examine whether the Appellant was resident in Canada from October 2000 to February 2011 inclusive. The Tribunal must also review the Appellant's periods of absence during this time.

[17] The second issue is the question of GIS eligibility following the applications submitted in November 2009. As discussed above, the GIS was initially granted and in pay commencing February 2010, but suspended in May 2010.

SUBMISSIONS

[18] The Appellant disputes the Respondent's decision to claim reimbursement for OAS and GIS benefits paid from November 2000 to February 2011. She contends that her status

of Canadian resident was not interrupted between October 2000 and February 2011 despite her absences from the country. In particular:

- (a) Her primary residence was with her son in X (X X);
- (b) She was physically present in Canada when she applied for the OAS and GIS benefits;
- (c) She applied to reside in a seniors' residence (see: Application to Norma McAllister Residence signed July 20, 2010 at GT1-220 to 221);
- (d) Her GIS should not be suspended because she did not depart Canada for six consecutive months contrary to paragraph 11(7)(c) of the OAS Act;
- (e) She was completely honest in advising the Respondent's officials of her departure and arrival dates to Canada, and no issue was taken by the Respondent with respect to her OAS benefits until after she applied for the GIS. As such, the Respondent, by initially granting her OAS benefits in 2000- 2001 and paying her benefits between November 2000 and February 2011, is contradicting itself by disputing her entitlement to these benefits now. (see: GT1-42; 214-218; GT4-7)

[19] The Respondent submitted that the Appellant was physically present and not a resident in Canada between October 2000 and February 2011 inclusive (GT1-12; GT1-213).

[20] At the hearing, the Respondent emphasized its document at pages GT1-20 to 21 in arguing that the Appellant was absent for periods greater than 6 months. Accordingly, in the Respondent's view, doubts arose about her permanent ties to Canada from October 2000 to February 2011 inclusive. The Respondent submitted that the evidence, including its investigative report, demonstrates that the Appellant was present and not resident during the relevant time periods.

[21] The Respondent's representatives clarified at the hearing that the Appellant's GIS was suspended in May 2010 because that was when the Respondent began questioning the

Appellant's residence (see also: GT1-64). The Respondent's representatives reiterated that the Respondent formally asked for an investigation into the Appellant's residence in October 2010 (see: investigation request at GT1-38 to 39). The Respondent's representatives confirmed that the Appellant received the GIS in February, March, and April 2010.

EVIDENCE

[22] The Tribunal considered all the evidence before it at the end of the hearing. What follows is an overview of the evidence found to be most relevant in determining the outcome of this appeal.

Documentary evidence

[23] The Appellant's OAS pension application was received by the Respondent on January 5, 2000 (the "OAS application") (pages GT1-04 to GT1-07). The OAS application included important pieces of evidence, as follows:

- (a) The Appellant was born in Egypt on January 7, 1932 and lived there until July 6, 1986;
- (b) The Appellant came to Canada (Montreal) on July 6, 1986 and resided there until February 24, 1997;
- (c) From February 25, 1997 until December 18, 1999 she resided in Egypt;
- (d) From December 18, 1999 until the time of application (January 5, 2000) she listed Montreal (X) as her place of residence but was "out of Canada" at the time;
- (e) The Appellant listed a home address in X ("X X").

[24] On April 4, 2001 the Appellant accepted an OAS pension in the amount of 10/40ths effective November 2000, in response to a "choice letter" sent by the Respondent on March 19, 2001 (GT1-189 to 191).

[25] The Appellant submitted GIS applications in November 2009. One was for the period of July 2007 to June 2008 (GT1-09); another for July 2009 to June 2010 (GT1- 08). The Appellant was granted and received the GIS for February, March, and April 2010. Payments were suspended beginning May 2010 (GT1-214).

[26] The Tribunal has also taken note of the following relevant documents:

- a) Medical services chart for the period January 2000 to September 24, 2010 (GT1- 22 to 24);
- b) Confirmation letter regarding the Appellant's eligibility for the Quebec Health Insurance plan dated October 25, 2010 (GT1-32);
- c) The Appellant's letters dated October 26, 2010 (GT1-54); April 5, 2011 (GT1-47) explaining her whereabouts, amongst other matters;
- d) Questionnaire completed by the Appellant on May 2, 2010 (GT1-65 to 67);
- e) Letter from the Appellant dated September 13, 2006 stating she was abroad from October 11, 2005 to July 27, 2006 (GT1-69);
- f) The Respondent's investigation report into the Appellant's residence dated November 28, 2011 (GT1-86 to 88), and related Interview Report (GT1-89 to 91);
- g) Public Works and Government Services Canada (Translation Bureau) document regarding the Appellant's Egyptian passport with departure and arrival stamps (GT1-96 to 98);
- h) OAS questionnaires indicating departure dates and time away from Canada (GT1-151 to 154; 157 to 158; 196 to 200);
- i) Appellant's chart dated June 18, 2010 regarding arrival and departure from Canada (GT1-119 to 120) [At the hearing, Ms. M. C. said that they completed a document from Service Canada such as the questionnaires in preceding subparagraph 'h' for the pre-2005 time period];

- j) Canadian passport issued in Saint-Laurent on January 4, 2000 (GT1-140), in Cairo on February 3, 2005 (GT1-123), and Halifax on July 8, 2009 (GT1-121);
- k) Egyptian passport issued September 30, 1999 (GT1-136) and November 24, 2008 (GT1-134);
- l) Questionnaire completed by the Appellant on February 28, 2001 explaining that she was in Egypt for medical reasons, and could not return to Canada, from February 24, 1997 to October 23, 2000 (GT1-194 to 195);
- m) Application to Norma McAllister Residence signed July 20, 2010 (GT1-220 to 221);
- n) Sears Mastercard issued to the Appellant and valid July 2009 through May 2012 (GT1-232 to 233), and Sears Mastercard statement dated October 12, 2009 (GT1-234);
- o) Canada Revenue Agency Notices of Assessment for tax years 2005; 2006; 2007; and 2008 (GT1-73 to 80);
- p) Respondent's notes at pages GT1-20 to 21 [at the hearing, the Respondent's representatives explained that this document was a summary of the information from the Appellant's passports and other documents].

Oral evidence

[27] Ms. M. C., the Appellant's daughter-in-law and co-representative at the hearing, testified to the Tribunal. She stated that while the Appellant was in Canada she resided at X X during the disputed time periods. In particular, the Appellant lived in the basement of her representatives' (Ms. M. C. and Mr. E. M., the Appellant's biological son) home. The furniture from her previous apartment was transferred to X X in or around 1997 or 1998. They ate together upstairs. The Appellant covered her own food costs. She did not pay rent. There was no formal rental agreement. Between the years 2000 and 2005 the Appellant traveled back and forth between Canada and Egypt. In March or April 2011 the Appellant

moved out of X X to live on her own in an apartment while awaiting acceptance into a seniors' facility.

[28] Both Ms. M. C. and the Appellant testified at the hearing regarding the Appellant's activities and ties to Canada and other countries from October 2000 to February 2011.

Canada

- a) Ties in the form of personal property (bank accounts, business, furniture, automobile, credit card): Ms. M. C. informed that the Appellant had a bank account with Scotiabank as well as a credit card. Both she and Mr. E. M. covered the utilities at X X.
- b) Social ties (membership with organizations or associations, professional membership): The Appellant informed that she attended church and attended seniors' meetings of congregation members on Thursdays. She also met friends from church after Sunday mass; she visited a local seniors' centre weekly, delivering newspapers and other items; she shopped at shopping malls; and she met non-church friends at a cafeteria.
- c) Other ties to Canada (for example, hospital and medical insurance coverage, driver's license, property tax statements, public records, immigration and passport records, federal and provincial income tax records): The Appellant said she never had a driver's license.
- d) Mode of living in Canada: The Appellant pointed to her involvement with her church; attending the market; visiting friends weekly; and her relatives. In addition to Ms. M. C. and Mr. E. M., she had a brother who lived in Canada and passed away in the mid-2000s. She saw him every two months during the time period in question (he lived about 30 minutes' drive from X X). She had four nieces and one nephew (the children of her late brother). She saw them on average twice per year; but would speak to them often on the phone (every two weeks). Ms. M. C. added that during the disputed time period the Appellant was mainly in contact with the Appellant's sister-in-law and herself and Mr. E. M. The Appellant visited with her sister-in-law

at least once every 3-4 weeks. The Appellant recalled visiting her every 2 weeks. Ms. M. C. advised that the Appellant also visited Ms. M. C.'s late-mother twice weekly, and daily leading up to her time of death in 2012. Ms. M. C. clarified that the Appellant went shopping with childhood friends from Egypt, who also came to Canada. Ms. M. C. recalled that in 2005 or 2006 the Appellant spent a week with a friend's mother-in-law while the latter was sick, and the friend was traveling.

Ties in other countries

[29] The Appellant discussed her ties to Egypt during the disputed time period. The Appellant said she had no property, bank account, or furniture in Egypt. She stayed with her niece, her daughter, and sister. She had two sisters, one brother, one daughter, and two nieces in Egypt. She mainly visited her nieces, her sister, and daughter. She brought presents such as clothing to her relatives in Egypt; her relatives covered all her expenses while there. The Appellant attended church on Sundays and would go to the beach. She had no medical coverage or driver's license.

[30] The Appellant also travelled to Dubai [in 2007: GT1-65] because her daughter was in the hospital there, which prolonged her absence from Canada (see: investigative report at GT1-86). Aside from that visit, she had no ties to any other foreign country.

ANALYSIS

Issue #1: OAS Entitlement

[31] The Appellant turned 65 in January 1997. She applied for OAS benefits in January 2000. The Respondent found, and the Appellant chose, to receive a partial OAS pension at 10/40ths based on ten years' residence at the time of her OAS application. The parties agree that from March 2011 onward the Appellant has resided in Canada, according to the Hearing File material and discussion with the parties at the hearing. The evidence is also clear that the Appellant did not have 20 years' Canadian residence at the time she applied for OAS benefits in order to export her pension without restriction pursuant to paragraph 3(2)(b) of the OAS Act.

[32] Where the dispute arises is whether the Appellant's residence was interrupted from October 2000 to February 2011. The Appellant acknowledged her absences from Canada in that timeframe; but only disputes the Respondent's claim for reimbursement of OAS payments made during that time.

[33] Subsection 21(4) of the OAS Regulations directs that any interval of absence lasting less than a year does not interrupt a person's residence. But the residence analysis is much broader than that. It involves a fluid approach, with each case determined on its own facts (*Canada (Minister of Human Resources and Development) v. Ding*, 2005 FC 76 ("Ding"); see also: *Perera v. Canada (Health and Welfare)*, 7S F.T.R. 310, [1994] FJ No. 3S1 (T.D.) "*Perera*").

[34] In *Perera* the court discussed subsection 21(4), explaining that while an absence from Canada exceeding one year is obviously a factor to be considered, it is not determinative of the question of residence. The court pointed out that the section does not state otherwise. The court added that the effect of subsection 21(4) is simply that an absence of a temporary nature not exceeding one year shall be deemed not to have interrupted the person's residence. The court reasoned that it does not necessarily follow that an absence in excess of one year interrupts the person's period of residence.

[35] In *Ding* the court set out factors to be taken in account in determining whether a person makes his or her home in and ordinarily lives in Canada. In the present appeal, the Tribunal finds these factors to be relevant and helpful in determining the issue before it. They are as follows:

- a) ties in the form of personal property (bank accounts, business, furniture, automobile, credit card);
- b) social ties (membership with organizations or associations, professional membership);
- c) other fiscal ties to Canada (hospital and medical insurance coverage, driver's license, property tax statements, public records, immigration and passport records, federal and provincial income tax records);

- d) ties in another country;
- e) regularity and length of stay in Canada and the frequency and length of absences from Canada; and
- f) the lifestyle of the person or his/her establishment in Canada.

[36] Having considered the above factors, the Tribunal finds that the Appellant in the within appeal had stronger ties to Canada than to any other country between October 2000 and February 2011 inclusive. She filed income tax returns for the years 2005 to 2008 inclusive. She had a Canadian bank account; credit card; furniture; an informal rental arrangement whereby she covered her own food expenses; and medical coverage. The Appellant's involvement with her church included more than just attending mass; she attended organized meetings. The Appellant also did volunteer work for a local seniors' residence. She had none of these ties or obligations in Egypt or any other foreign country. The evidence at the hearing suggested that her mode of living while traveling abroad centred on visiting and vacationing. The Appellant aptly characterized it in these words: "I am received as a visitor during my Canadian <Snowbird> pilgrimage" (GT1-54). Again, she had no financial or property ownership obligations while abroad; unlike in Canada.

[37] So the question then becomes, do her absences from Canada between October 2000 and February 2011 negate her Canadian residence during that period (resulting in an overpayment between November 2000 and February 2011)? Subsection 21(4) of the OAS Regulations mandates that intervals of absence less than a year do not disrupt residence. A review of the evidence indicates that the Appellant's only interval of absence exceeding one year was from November 2002 to February 2005. According to the investigation report, and the Appellant's documentary evidence, this interval was prolonged due to the Appellant suffering an injury which limited her mobility (see: report at page GT1-86; see also: questionnaire signed January 2, 2003 at GT1-152). There was scant, if any, medical evidence to explain why the Appellant was absent as long as she was during this time. However, applying *Perera*, an interval of absence exceeding one year is only one fact to take into account. As discussed above, while the Appellant was abroad, she maintained a Canadian bank account, income tax obligations (at least for tax year 2005), and property obligations at X X (presumably, arrangements were in place with Ms. M. C. and Mr. E. M.

to attend to the upkeep and tidiness of her basement suite). Moreover, the Appellant's letters, questionnaires, and oral evidence impressed upon the Tribunal that she was not setting out to deceive the Respondent in order to receive benefits to which she was not entitled. Indeed she accepted not to be paid OAS benefits during this extended interval of absence, namely from June 2003 to February 2005. The Appellant cooperated extensively with the Respondent throughout their dealings, which reinforced her ties to Canada between October 2000 and February 2011, in the Tribunal's view.

[38] In conclusion, the Tribunal finds on a balance of probabilities that the Appellant was a Canadian resident from October 2000 to February 2011 inclusive.

[39] However, although an individual may be a Canadian resident, that does not mean that OAS benefits cannot be suspended due to absences exceeding six consecutive months. The parties acknowledged this reality with respect to the Appellant's absence between November 2002 and February 2005. This resulted in an undisputed suspension of OAS benefits from June 2003 to February 2005. Pursuant to subsection 9(1) of the OAS Act, the Appellant's OAS benefits should also have been suspended in light of the following absences: October 13, 2005 to July 27, 2006; October 16, 2006 to July 5, 2007; and July 4, 2008 to April 1, 2009 (see: pages GT1-20 to 21). With the exception of payments received after six consecutive months in these three periods of absence, no OAS benefits received between November 2000 and February 2011 should be repaid by the Appellant.

Issue #2: Entitlement to the GIS

[40] A Review Tribunal, including the present Tribunal, is created by legislation and, as such, it only has the powers granted to it by its governing statute. A Review Tribunal is required to interpret and apply the provisions as they are set out in the OAS Act. (*Canada (Minister of Human Resources Development) v Esler*, 2004 FC 1567).

[41] As discussed above, the Appellant applied for the GIS in November 2009 and received GIS payments for the months of February, March, and April 2010. In May 2010 these payments were suspended arbitrarily on the basis that the Respondent then began doubting her Canadian residency from October 2000 onward.

[42] Both the Respondent and Appellant's evidence indicate that the Appellant was abroad between November 10, 2009 and April 28, 2010 (GT1-86 and 119, respectively). However, since the Tribunal found that the Appellant remained a Canadian resident from October 2000 to February 2011, and entitled to be receiving OAS benefits when she applied for the GIS, she was therefore entitled to receive the GIS under subsection 11(1) of the OAS Act. The Appellant is also not captured by any of the relevant limitations found in subsection 11(7) of the OAS Act. In particular, paragraph 11(7)(b) does not apply because the Tribunal found that she was a pensioner to whom a pension was to be paid. For a related reason, paragraph 11(7)(d) does not apply because the Tribunal found that the Appellant remained a resident in Canada during the disputed time period. Finally, paragraph 11(7)(c) does not apply because the Appellant was not absent from Canada longer than six months following her GIS application. According to the Respondent's analysis, the Appellant remained in Canada from April 28 to October 30, 2010; and from November 1, 2010 to March 25, 2011 she was again abroad (GT1-21). As such, the Tribunal finds that no repayment of the GIS payments received in February through April 2010, is in order; and GIS payments should not have been suspended in May 2010.

CONCLUSION

[43] The appeal is allowed, in part.

Shane Parker

Member, General Division