

Citation: *A. K. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 23

Appeal No: GT-102112

BETWEEN:

**A. K.**

Appellant

and

**Minister of Human Resources and Skills Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security**

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SOCIAL SECURITY TRIBUNAL MEMBER: Shane Parker

DATE OF DECISION: August 15, 2014

## **DECISION**

[1] The Tribunal finds that the Appellant did not establish sufficient Canadian residence to originally qualify for an Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS) in May 1995. As such, all OAS and GIS benefits paid to the Appellant from June 1995 to January 2006 amount to an overpayment and must be repaid to the Respondent.

## **BACKGROUND**

[2] The Appellant's application for an OAS pension (GT1-45 to 48) was date stamped by the Respondent on June 21, 1994. He was awarded a partial OAS pension at the rate of 10/40ths effective June 1995. The Appellant applied for and began receiving the GIS in June 1995. On December 11, 2006 the Respondent wrote to the Appellant about his OAS pension and GIS (GT1-36 to 37). In that letter, the Respondent stated that further to its investigation the Appellant did not meet the requirements to receive the OAS and therefore the GIS. The Respondent rescinded the OAS and GIS benefits paid to the Appellant from June 1995 to January 2006 (totaling \$78,841.00). In particular, the Respondent concluded that it overpaid the Appellant by \$12,253.58 for the OAS and \$66,587.42 for the GIS, totaling \$78,841.00, for the period of June 1995 to January 2006. On September 7, 2007 the Appellant asked the Respondent to reconsider this decision. On February 13, 2008 the Respondent maintained its initial decision, that the Appellant was not eligible for the OAS and GIS, and had to repay these benefits (GT1-31 to 32). On June 16, 2008 the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT) (GT1-02 to 03).

[3] On April 1, 2013 the appeal was transferred to the Social Security Tribunal of Canada (Tribunal). On June 4, 2014 the Tribunal informed the parties that the appeal was considered ready to proceed pursuant to the Tribunal's new process. The parties were invited to file additional documents or written submissions without delay. On June 19, 2014 the Tribunal advised the parties that the Tribunal Member assigned to the appeal intended to make a decision on the basis of the documents and submissions filed for these reasons: the cost-effectiveness and expediency of the hearing choice; and the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and

quickly as circumstances, fairness and natural justice permit. In that same correspondence, the parties were given until July 21, 2014 to file any additional documents or submissions. The Tribunal did not receive any further documents or submissions from the parties by the July 21, 2014 deadline.

## **DECISION ON THE RECORD**

[4] The Supreme Court of Canada in *Baker* [1999] 2 R.C.S. 817 provided that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved (*Baker* at para. 33).

[5] Section 28 of the SST Regulations provides that a decision on the merits can be made on the basis of the documents and submissions filed in appropriate circumstances. This is also called a “decision on the record”.

[6] Section 2 of the SST Regulations expresses the general principle that “[t]hese Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.”

[7] The Tribunal was guided by the principles above in determining that the present appeal is one for which a decision on the record is appropriate. Here are the reasons for this determination:

- a) A decision can be rendered in keeping with the principles of natural justice and the general principle reflected in section 2 of the SST Regulations;
- b) Significant time (over six years) has elapsed and resources expended since the Appellant filed his appeal to the OCRT in 2008. Since that time the parties have failed to conclude a hearing. There has been one postponement and two adjourned hearings before the Tribunal’s predecessor for such appeals, the Canada Pension Plan/Old Age Security Review Tribunal (see: Reasons for Adjournment of the February 8, 2011 hearing, at pages GT1-370 to 376);

- c) The Appellant's former representative requested a decision on the record due to the Appellant's advanced age and concerns about the Appellant's capacity to adequately represent himself before the Tribunal (GT2-2);
- d) The documentary evidence and submissions filed are sufficient to address the issue in dispute.

## **THE LAW**

### ***Transitional***

[8] 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 of Canada (the "Tribunal").

### ***Eligibility Requirements***

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

#### **Payment of full pension**

**3.** (1) Subject to this Act and the regulations, a full monthly pension may be paid to

(a) every person who was a pensioner on July 1, 1977;

(b) every person who

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

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

(iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after

attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved; and

### **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.

[10] In order to qualify for an OAS pension, a person who was not in receipt of the pension on July 1, 1977, and who is not a Canadian citizen, must be legally resident in Canada the day before the OAS application is approved (s. 4(1)(a) OAS Act).

[11] 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).

[12] Section 37 of the OAS Act relates to repayment of benefit payments to which an individual is not entitled:

### **Return of benefit where recipient not entitled**

**37.** (1) A person who has received or obtained by cheque or otherwise a benefit payment to which the person is not entitled, or a benefit payment in excess of the amount of the benefit payment to which the person is entitled, shall forthwith return the cheque or the amount of the benefit payment, or the excess amount, as the case may be.

[13] The relevant provisions of the OAS Regulations are as follows.

[14] Section 3 of the Regulations states that in order to qualify for an OAS pension, an application shall be made in writing.

[15] Section 5 of the Regulations deals with approval of an OAS application:

**Approval of an Application for a Pension**

5. (1) Subject to subsection (2), where the Minister

(a) ) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and

(b) approves the application after the last day of the month in which it was received, the Minister's approval shall be effective on the latest of

(c) ) the day on which the application was received,

(d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and

(e) ) the date specified in writing by the applicant.

(2) Where the Minister is satisfied that an applicant mentioned in subsection (1) attained the age of 65 years before the day on which the application was received, the Minister's approval of the application shall be effective as of the latest of

(a) ) the day that is one year before the day on which the application was received,

(b) the day on which the applicant attained the age of 65 years;

(c) ) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act; and

(d) the month immediately before the date specified in writing by the applicant.

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

**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.

[17] According to section 22 of the Regulations, a person is or was lawfully in Canada pursuant to the Immigration laws of Canada is legally resident in Canada. The provision reads as follows:

### **Legal Residence**

**22.** (1) For the purposes of subsections 4(1), 19(2) and 21(2) of the Act, “legal residence”, with respect to a person described in any of those subsections, means that, on the applicable day specified in paragraph (a) or (b) of those subsections, that person

(a) is or was lawfully in Canada pursuant to the immigration laws of Canada in force on that day;

(b) is or was a resident of Canada and is or was absent from Canada, but

(i) is deemed, pursuant to subsection 21(4) or (5) or under the terms of an agreement entered into under subsection 40(1) of the Act, not to have interrupted the person’s residence in Canada during that absence, and

(ii) was lawfully in Canada pursuant to the immigration laws of Canada immediately prior to the commencement of the absence; or

(c) is not or was not resident of Canada but is deemed, pursuant to subsection 21(3) or under the terms of an agreement entered into under subsection 40(1) of the Act, to be or to have been resident in Canada.

### **ISSUE**

[18] The Appellant’s OAS application was received in June 1994. He was already over 65 years of age and legally residing in Canada at the time. Therefore, the issue in this appeal is whether the Appellant resided in Canada for an aggregate period of 10 years the day before his application was approved pursuant to paragraph 3(2)(b) of the OAS Act. The Department initially determined the date of approval to be May 1995, apparently pursuant to paragraph 5(2)(c) of the OAS Regulations (his OAS and GIS became effective in June 1995). However, for the reasons mentioned above, the Respondent reversed its approval of the Appellant’s OAS and GIS. As such, the focus of this appeal will be on whether the

Appellant was resident in Canada for an aggregate or total of ten years, from the time he entered Canada in December 1983, until his application was approved in May 1995.

## **EVIDENCE**

[19] There were over 600 pages of material filed for this appeal. All of this material was reviewed. The following is a summary of the most persuasive documentary evidence in determining the outcome of this appeal.

[20] The Appellant's Canadian passport lists his birthday as January 24, 1927 (GT1-126).

[21] An Immigration Canada Visitor's Visa was issued December 13, 1983, and extended until January 13, 1984 (GT1-98).

[22] According to the Appellant's OAS application, he turned 65 in 1992. He came to Canada from Iran on December 18, 1983 and lived in Canada until the time he applied for the OAS (June 1994). His application was originally approved in May 1995, but became effective June 1995 when the Respondent apparently determined that he met the minimum residency period of ten years.

### ***Ties to Canada***

[23] The Appellant's questionnaire completed January 28, 1995 replied to various questions concerning ties to Canada and absences from Canada (GT1-197 to 198). For instance, the Appellant listed three absences of less than six months. He stated that he applied for Landed Immigrant Status in January 1984. He also indicated that he obtained this status in May 1985, the year he began filing Canadian income taxes. The Appellant began renting a property in Canada in December 1983. The Appellant had a Canadian driver's licence, with coverage beginning in January 1992.

[24] According to the Appellant's questionnaire received March 31, 2006 (GT1-282 to 291, the "March 2006 Questionnaire"):

- a) **He began living in Canada in May 1985** [emphasis added here];



- b) He registered with public utility companies in 1985;
- c) His reasons for leaving Canada since 1985 were to visit relatives and sell some property;
- d) It was possible to live in his house in Canada all year round;
- e) His furniture and property remained in Canada when he was abroad;
- f) He opened a bank account in Canada in 1983;
- g) He filed income tax returns every year since moving to Canada in 1985;
- h) He lived in his own house (three consecutive properties from 1984 to 1994);
- i) All his children lived in Canada, in his home;
- j) He had medical insurance;
- k) He had a driver's licence.

***Ties to Iran***

[25] The Appellant described his ties to Iran in the March 2006 Questionnaire. These were as follows:

- a) A bank account opened in or around 1946;
- b) He lived in his own house;
- c) He had a farm (owned from 1960 until at least March 2006);
- d) He had car insurance;
- e) He had a driver's licence;

[26] The ISP Investigation Officer Report of October 26, 2006 (the “October 2006 Investigation Report”) (GT1-292 to 294) concluded as follows:

- a) The Appellant was outside of Canada between 1985 and 1995 more often than he was in Canada (confirmed by his daughter, the contact person on the Appellant’s file);
- b) The Appellant owned a business in Iran;
- c) The Appellant had an automobile registered in Iran;
- d) The Appellant had an Iranian passport most of his adult life and Iran does not recognize dual citizenship; therefore, he was likely representing himself as a resident and national of Iran in order to obtain passports.

## **SUBMISSIONS**

[27] The Appellant submitted that:

- a) He was resident in Canada for ten years and eligible for a partial OAS pension of 10/40ths when he began receiving OAS;
- b) He was eligible to receive the GIS;
- c) He does not have to repay any OAS or GIS benefits.

[28] The Respondent submitted that:

- a) The Appellant’s June 1994 OAS application should not have been approved because he did not meet the minimum ten aggregate years of residence in Canada in order to qualify for an OAS pension, effective June 1995;
- b) Since the Appellant did not qualify for the OAS pension, he was not entitled to receive the GIS;
- c) The Appellant was overpaid OAS and GIS benefits, in a combined total of \$78,841.00, and this amount must be repaid.

## ANALYSIS

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

[30] In order to be eligible for an OAS pension, an individual must apply in writing; be at least 65 years of age; have legal resident status; and have resided in Canada for the minimum period required. In the present appeal, the Appellant applied in June 1994; he was over 65 years old at the time of application; and he had legal resident status by virtue of his Visitor Visa in December 1983 (GT1-98).

[31] Where the dispute arises, and what the Tribunal must decide, is the final factor; namely, whether he met the minimum resident requirement. The Appellant does not qualify for a full OAS pension because he does not meet the requirements under subsection 3(1) of the OAS Act; for instance, he did not reside in Canada on July 1, 1977, nor did he possess a valid immigration visa as of that date. In other words, the Tribunal cannot apply the analysis as to whether the Appellant had ten consecutive years of residence immediately before the approval of his OAS application.

[32] This leads to the issue in this appeal: whether the Appellant qualified for a partial pension pursuant to paragraph 3(2)(b) of the OAS Act. In determining the answer to that question, the Tribunal must examine whether the Appellant had a total, or aggregate, of ten years residence at the time the application was approved.

[33] The residence analysis is a fluid one. In *Canada (Minister of Human Resources and Development) v. Ding*, 2005 FC 76 (“*Ding*”), the Federal Court set out factors to consider in determining whether a person makes his or her home in and ordinarily lives in Canada. They are these:

- 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.

[34] The Tribunal carefully considered and weighed the evidence in the within appeal in light of the principles in *Ding* and *De Carolis*. After doing so, the Tribunal was not persuaded on balance that the Appellant established residence in Canada. The period of December 18, 1983 to April 1985 inclusive could not be considered residence; since according to the Appellant's own evidence he did not begin living in Canada until May 1985 (GT1-282).

[35] The analysis then turned to whether the Respondent was correct in initially considering the period of May 1985 to May 1995 as an aggregate of ten years residence. The Tribunal was not convinced that it was. First, extensive investigations confirmed that the Appellant came to Canada with significant ties to Iran. He maintained these ties during this time period. He owned a house, a farm, a business, a bank account, and a vehicle in Iran. He also maintained a driver's licence and insurance for his vehicle there. Through an admission by the Appellant's daughter (an admission against interest, which carries greater weight), it was clarified that the Appellant spent more time in Iran than in Canada from May 1985 to May 1995.

[36] By virtue of section 21 of the OAS Regulations, it is not possible to ordinarily live in more than one country at once. His ties to Iran were stronger than those to Canada during this time. He spent more time in Iran; he had a business in Iran (not in Canada); he had a farm and a home in Iran (only a home in Canada); he had a vehicle and car insurance in Iran (not in Canada); he had a driver's licence throughout this period in Iran (he obtained a Canadian driver's licence in 1992). In view of the Appellant's significant and stronger ties

to Iran between May 1985 and May 1995, it cannot be said that he made his home in and ordinarily lived in Canada.

[37] In conclusion, the Appellant did not establish the minimum ten aggregate years of Canadian residence when his application for OAS benefits was originally approved in May 1995. As such, he should not have been awarded an OAS pension at the time; and by extension he should not have been awarded the GIS. The Respondent rightly rescinded all OAS and GIS benefits paid from June 1995 to January 2006. The Appellant must repay these benefits pursuant to section 37 of the OAS Act.

## **CONCLUSION**

[38] The appeal is dismissed.

*Shane Parker*

Member, General Division