



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *A. N. v. Minister of Employment and Social Development*, 2017 SSTGDIS 16

Tribunal File Number: GP-16-1772

BETWEEN:

A. N.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Jude Samson

HEARD ON: November 28, 2016

DATE OF DECISION: January 30, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: A. N.
Mr. Jack Handler (representative)

Respondent: Written submissions only

OVERVIEW

[1] The Appellant was born in Morocco on X X, 1950, arrived in Canada on May 1, 1975, and became a Canadian citizen in 1978. The Quebec Pension Plan (QPP) recognizes that he has been disabled since 2002 (GD2-27). The Appellant was married in Morocco in 2005, and he has two sons who still live there with their mother (his wife). Like the Appellant, his children hold both Canadian and Moroccan citizenship, but neither his children nor his wife have ever come to Canada. However, the Appellant is currently undertaking the necessary steps to bring them to Canada.

[2] On October 28, 2014, the Appellant submitted an application for an Old Age Security pension (OAS pension) (GD2-3). On August 17, 2015, he also filed an application for the Guaranteed Income Supplement (GIS) (GD2-8). In October 2015, upon review of his file, the Minister (Respondent) found that, since April 2010, the Appellant's primary residence had been in Morocco. However, the Appellant had established that he was a resident of Canada for 31 years—from May 1, 1975, to July 24, 1998, and from March 30, 2002, to August 9, 2010 (GD2-66).

[3] The Appellant was thus given the choice between a partial pension (at 31/40th of the full pension) starting in October 2015, or a full pension that would start the month following a complete year of residence in Canada (GD2-67). The Appellant made his choice (GD2-25) and was granted the partial pension starting in October 2015 (GD2-22).

[4] The Appellant then asked that his file be revised. However, on March 3, 2016, the Respondent maintained its initial decision, concluding that, since August 9, 2010, the Appellant had spent more time outside of the country than in Canada (GD2-16). It is this decision arising

from the reconsideration that is the focus of the appeal before the Social Security Tribunal (Tribunal).

[5] For the reasons set out below, the appeal is dismissed.

METHOD OF PROCEEDING

[6] The hearing of this appeal was in person for the following reasons:

- a) this method of proceeding was most appropriate to allow for multiple participants;
- b) there are gaps in the information in the file and/or a need for clarification;
- c) this form of hearing is the most appropriate to address inconsistencies in the evidence; and
- d) this method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[7] During the hearing, the Tribunal received new documents from the Appellant (GD8). These documents were sent to the Respondent, but additional written submissions in response to these documents were never received.

THE LAW

[8] The OAS pension is a monthly benefit available under the *Old Age Security Act* (OAS Act) to seniors aged 65 and older who meet the Canadian legal status and residence requirements. An individual is entitled to the full pension if they meet the requirements set out in subsection 3(1) of the OAS Act:

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,

(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;

c) every person who:

(i) was not a pensioner on July 1, 1977,

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

(iii) 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 forty years.

[9] Those who are not entitled to a full pension may be eligible for a partial pension under subsection 3(2) of the OAS Act. The relevant provisions pertaining to the payment of partial pensions 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.

Amount of partial pension

(3) Subject to subsection 7.1(3), the amount of a partial monthly pension, for any month, shall bear the same relation to the full monthly pension for that month as the aggregate period that the applicant has resided in Canada after attaining 18 years of age and before the day on which the application is approved, determined in accordance with subsection (4), bears to 40 years.

Rounding of aggregate period

(4) For the purpose of calculating the amount of a partial monthly pension under subsection (3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.

[10] Residence and presence in Canada are defined by the *Old Age Security Regulations* (OAS Regulations) as follows:

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, shall be deemed not to have interrupted that person's residence or presence in Canada.

[11] The GIS is a monthly benefit provided to OAS pension recipients who have a low income. To be eligible for the GIS, a person must (among other things) maintain their Canadian residence and must not leave the country for long periods of time (OAS Act, paragraphs 11(7)(b) and (d)).

ISSUE

[12] The issue before the Tribunal in the present appeal is to determine the Appellant's years of Canadian residence according to OAS Act. This decision will have an impact on his eligibility for the full pension and for the GIS.

[13] The burden of proof rests with the Appellant to prove, on a balance of probabilities, his residence for the relevant period (*De Carolis v. Canada (A.G.)*, 2013 FC 366, para. 32).

SUMMARY OF THE EVIDENCE

[14] During the hearing, the Tribunal heard the Appellant's testimony. The Tribunal considered the entire record, including oral and documentary evidence. The most relevant evidence, according to the Tribunal, is summarized below.

[15] According to the Appellant's OAS pension application, he arrived in Canada on May 1, 1975, and has not left the country for more than six months since then (GD2-4). Subsequently, in questionnaires he completed, the Appellant admitted that he had lived in Morocco from August 31, 1998, to March 31, 2002 (GD2-7 and 86 to 89). He stated that he had been sick, and was living and resting at his brothers' place during that period (GD2-86 and 181). The Appellant was unable to explain to the Tribunal why he had omitted this period of absence from Canada on his initial application.

[16] According to his testimony, the Appellant returned to Canada in 2002, because he had been granted a subsidy to help him pay his rent. He received this subsidy until April 2007, when he was given the low-cost apartment in which he currently resides. In the meantime, in April 2003, the QPP recognized that he had been disabled since August 2002 (GD2-27). In addition to his disability pension, the Appellant also receives social assistance, and it is because of these benefits that his medication, glasses and dental care are free (GD1-27 to 29). According to the Appellant, he has a heart condition, diabetes, hypertension and prostate problems. He testified that he could not live somewhere else without these services.

[17] To maintain his Quebec health insurance benefits, the Appellant submitted that he must be within the province for at least 183 days per calendar year. Although he was never given a specific number of days, the Appellant also stated that he must maintain his Quebec residence to be eligible for his low-cost apartment and social assistance.

[18] In support of his Canadian residence since August 2010, the Appellant pointed to the following documents:

- a) a letter of eligibility from January 2002 to July 2015 for the Quebec Health Insurance Plan (GD2-141). The Appellant stated that he had been eligible for the Quebec Health Insurance Plan from 2002 to the hearing date, continuously;

- b) the register of medical visits from the *Régie de l'assurance maladie du Québec* [Quebec Medical Insurance Board] (RAMQ) (GD2-113 to 134);
- c) his tax returns, filed consistently and on time (GD1-53 to 59, and GD2-28 to 52 and 80);
- d) his lease from March 2010 to February 2017 with the *Office municipal d'habitation de Montréal* [Montreal Municipal Housing Bureau] (OMHM) (GD1-23 to 24, and GD2-55 to 65). The Appellant stated that he has lived at this same address since April 1, 2007;
- e) logs of complaints issued by Emploi Québec [Quebec Employment] that cover certain months between 2009 and 2016 (GD1-27 to 29);
- f) his Québec driver's licence valid from 2003 to 2006, and from 2010 to 2018 (GD1-29 and 62);
- g) his bank statements for certain months between November 2010 and August 2016 (GD1-30 to 48 and GD6-4 to 11);
- h) his eligibility for a Québec disability pension and retirement pension (GD1-60 to 61); and
- i) his Canadian passports (GD2-150 to 176).

[19] According to the Appellant, his visits to Morocco varied from year to year. It all depended on what was happening with his family. For example, he testified that he had been there for the birth of his sons—in February 2010 and May 2011—and, each time, he had stayed in the country for approximately two to three months. Other times, he admitted, he had stayed in Morocco for five or six months. However, in 2015, he said that he had been in Morocco for only six weeks, and in 2016, only 10 weeks. At the time of the hearing, the Appellant indicated that he had not seen his wife and children in nine months.

[20] Even though he could not recall all the dates, the Appellant strongly denied being absent from Canada for more than six months at a time, and he confirmed that he had never made more than one trip to Morocco per year (each trip was expensive).

[21] In this regard, the documentary evidence contradicts the Appellant's testimony. The Respondent used the Appellant's passports, as well as the history of his entries into Canada recorded by Canada Border Services Agency (GD2-100), to compile a list of the Appellant's travels to and from Canada during the relevant period (GD2-74 to 76):

From	To	Country	Duration (days)
1-Feb-2010 ¹	27-May-2010	Morocco	114
27-May-2010	9-Aug-2010	Canada	75
9-Aug-2010	15-Jan-2011	Morocco	158
15-Jan-2011	15-April-2011	Canada	91
15-April-2011	14-Sept-2011	Morocco	151
14-Sept-2011	9-Dec-2011	Canada	87
9-Dec-2011	15-April-2012	Morocco	127
15-April-2012	9-Aug-2012	Canada	117
9-Aug-2012	8-Feb-2013	Morocco	182
8-Feb-2013	13-May-2013	Canada	95
13-May-2013	10-Nov-2013	Morocco	180
10-Nov-2013	6-Mar-2014	Canada	117
6-Mar-2014	25-Oct-2014	Morocco	232
25-Oct-2014	30-Dec-2014	Canada	67
30-Dec-2014	30-June-2015	Morocco	181

¹ The exact date of entry into Morocco in January or February 2010 is unknown. February 1, 2010, is an estimate based on the Appellant's last medical appointment in Canada (December 28, 2009) and the birth of his son in Morocco (February 24, 2010), the date on which the Appellant confirmed he had been in Morocco.

[22] This information is corroborated by the medical records of the RAMQ (GD2-115 to 134) and clearly establishes that:

- a) the Appellant spent more time in Morocco than he did in Canada;
- b) he exceeded the six months in Morocco in a single trip in 2014;
- c) he travelled to Morocco more than once in 2010, 2011 and 2014;
- d) he spent more than five months in Morocco at the time of the birth of his second son; and
- e) the Appellant stayed in Morocco for more than six weeks in 2015.

[23] On a calendar-year basis, the Appellant was absent from Canada for:

- a) at least 236 days in 2010 (because he was in Morocco for the birth of his son, but the exact date of his arrival in Morocco is unknown);
- b) 187 days in 2011;
- c) 249 days in 2012;
- d) 218 days in 2013;
- e) 233 days in 2014; and
- f) at least 180 days in 2015 (we do not know whether the Appellant went back to Morocco after June 30, 2015).

[24] As far as his other ties to Canada are concerned, the Appellant confirmed that:

- a) his sister and her four children live in Canada (but he sees only his sister on a regular basis);
- b) he receives all his medical care in Canada;
- c) he maintains only a Canadian passport;
- d) he has had a Canadian telephone number since 2002;

- e) all his personal belongings are in Canada; and
- f) he votes in Canadian elections.

[25] However, he also indicated that since he stopped working as an engineer, he does nothing in a typical day. He has no friends—just a few acquaintances. He does not belong to any associations or to a religious community. The situation is similar in Morocco, he says—he does not know anyone there except his family.

SUBMISSIONS

[26] The Appellant submitted that he is eligible for an OAS pension and for the GIS because his Canadian residence has been uninterrupted since 2002. In support of his position, the Appellant emphasized that he receives public services in Canada that are very important for him and that his permanent residence in Canada is one of the eligibility criteria for entitlement to these services. According to him, he does not have the means to live elsewhere.

[27] The Respondent argued that the Appellant was not entitled to a larger pension or to the GIS, because he had not lived in Canada since August 9, 2010. The Respondent acknowledges that the Appellant still has an apartment through the OMHM, that he receives his medical care in Canada and that he filed the majority of his income tax returns on time; however, it is of the opinion that the Appellant has had far more ties with Morocco since August 2010. In support of his position, the Respondent points to the following:

- a) the Appellant spends more than 183 days per year in Morocco;
- b) his wife, his two minor children and his brothers live in Morocco;
- c) Canadian bank account statements and social assistance logs concerning free medication do not confirm he was living in Canada, and they were provided over discontinuous periods;
- d) the Appellant has a Moroccan bank account and a small retirement pension (GD2-145 and GD6-2); and
- e) the OMHM's mechanisms for verifying the Appellant's residence are unknown.

[28] Regarding the Moroccan retirement pension, the Appellant claims that he cannot access it unless he is living in Morocco.

ANALYSIS

[29] In this case, the Tribunal must decide whether it is more likely than not that the Appellant was a resident of Canada during the relevant period.

[30] Residence is a question of fact that requires an examination of the individual's whole context and that cannot be determined based on that individual's intentions. Case law has determined a non-exhaustive list of factors that can guide the Tribunal when it must address this issue, including:

- a) ties in the form of personal property (for example, furniture, a car, a bank account, credit cards, etc.);
- b) social ties to Canada (for example, participation in an organization or professional organization, etc.);
- c) other ties to Canada (for example, real estate, medical insurance, driver's licence, rent, lease, mortgage, loan, utilities, life insurance policy, contracts, tax records, voters list, pension plan, etc.);
- d) ties to another country;
- e) regularity and length of stay in Canada, as well as the frequency and length of absences from Canada; and
- f) the person's mode of living, or whether the person living in Canada is sufficiently deep-rooted and settled.

(*Canada (MHRD) v. Ding*, 2005 FC 76; *Singer v. Canada (A.G.)*, 2010 FC 607, affirmed 2011 FCA 178; *J.R.E. v. MHRDC*, 2014 SSTGDIS 10.)

[31] The assessment of an individual's residence is fluid in that weight might be given to a factor in a particular set of circumstances that is inappropriate in a different context: *Singer*, paragraphs 33 and 36.

[32] In the present context, the regularity and length of stay in Canada, as well as the frequency and length of absences from Canada, is an important factor. However, it has already been established that the Appellant's testimony in this area was unreliable (see paragraphs 19 to 23 above). As a result, the Tribunal addressed the Appellant's testimony with a degree of caution.

[33] After a thorough review of the evidence on the record, the Tribunal finds that the Appellant's Canadian residence was interrupted around February 1, 2010, the month in which his son was born in Morocco. Although this date is earlier than the one retained by the Respondent, this risk is still present given the nature of the *de novo* appeal before the Tribunal (in other words, an appeal where evidence and facts are re-examined) (*Stevens Estate v. Canada (A.G.)*, 2011 FC 103). Under section 54 of the *Department of Employment and Social Development Act*, the Tribunal may confirm, rescind or vary, in whole or in part, the decision appealed from or give the decision that the Respondent should have given. Therefore, the Tribunal must be satisfied that the Respondent's conclusions are well-founded. Otherwise, the periods of residence retained by the Respondent may be broadened or narrowed.

[34] In this case, the documentary evidence shows that the Appellant returned to Canada on May 27, 2010, but the exact date of his departure to Morocco is unknown. However, the Appellant admitted during the hearing that he had been in Morocco for his son's birth, on February 24, 2010. It is therefore established that the Appellant was absent from Canada during the better part of 2010.

[35] Although the periods of residence retained by the Tribunal are smaller than those retained by the Respondent, the Tribunal's decision has no impact on the amount of the partial pension to which the Appellant is entitled. The Tribunal finds that the Appellant's Canadian residence was interrupted on February 1, 2010 (for the reasons that the Tribunal explained above); however, the Appellant still has more than 31 years of Canadian residence.

[36] It is clear that the Appellant maintains ties to Canada, as well as to his home country. However, the Tribunal finds that his ties to Morocco became stronger after the birth of his son in February 2010. Namely, the Appellant testified that he “does nothing” in Canada and that he has only casual acquaintances here. The Tribunal therefore infers that the people he is closest to are in Morocco, namely his wife, his children and his brothers.

[37] The Appellant notes the large number of allowances and public services that he receives in Quebec at no cost, for which his Quebec residence is an eligibility requirement. However, the Tribunal has no way of establishing whether the relevant government agencies know that the Appellant is absent from the country for long periods of time. For example, the following warning appears in a letter from the RAMQ confirming his eligibility (GD2-141): [translation] “We wish to inform you that the periods of eligibility for the insurance schemes specified in this letter reflect the information provided by the insured and were not systematically subject to verification. Please use this information with discretion.”

[38] Regarding social assistance, the Tribunal agrees with the criticisms made by the Respondent: the papers filed by the Appellant as proof of eligibility for this program do not cover a continuous period (GD2-27 to 29). The same is true for the bank account statements filed with the Tribunal (GD1-30 to 48). This evidence is unconvincing as to the Appellant’s Canadian residence. Furthermore, the Tribunal is unable to conclude that the Appellant was eligible for social assistance during the entire relevant period. Moreover, regarding the OMHM’s verifications, the Appellant stated that it [translation] “gives residents some distance.”

[39] The Appellant argues that his only home is in Canada. However, the Tribunal finds that he is well-housed during his stays in Morocco. Indeed, he stays there for long periods of time and testified that his wife and children come to live with him when he is there. His brothers also lend him a car.

[40] The Appellant highlights the fact that he filed his income tax returns every year during the relevant period. Furthermore, in a letter dated October 31, 2016, the Canada Revenue Agency (CRA) indicated that it had been unable to determine whether the Appellant was a Canadian resident (GD7-2). Instead, the CRA requested further information [translation] “so that we can determine your residency status for income tax purposes.” In the letter from the CRA, there was

no decision regarding the Appellant's residency status. Instead, the letter asked for further information before making a decision on the matter.

[41] The Tribunal acknowledges that the Appellant filed his income tax returns in Canada each year and that his most significant bank accounts are in Quebec. He also stated that he only had a cellphone in Canada, but there was no document in the appeal file to prove this. On the contrary, the Appellant testified that he changes his phone number frequently and that he had terminated his cellphone contract in Canada before his last trip to Morocco. Overall, the Tribunal finds that the Appellant's ties to Morocco are stronger than those to Canada.

[42] Finally, the Tribunal also reviewed subsection 21(4) of the OAS Regulations (cited above). This legislative provision ensures that temporary absences of less than one year do not interrupt a period of Canadian residence (*Duncan v. Canada (A.G.)*, 2013 FC 319, para. 26). The Tribunal finds that, because the Appellant's absences from Canada are not temporary, he cannot benefit from this subsection. On the contrary, his family is in Morocco and, since 2010, he has spent the better part of each year with them.

[43] Before concluding, it is important to note that the Tribunal's assessment ends in October 2015, the same month the Appellant's partial pension starts. According to the Appellant, for example, he has not returned to Morocco since March 2016, and he is currently making the necessary arrangements for his wife and children to immigrate to Canada. It is therefore possible that his Canadian residence may be reinstated, but that is an issue that must first be examined by the Respondent.

CONCLUSION

[44] The Tribunal considered the entire record and finds that the Appellant's lifestyle was not primarily in Canada between February 1, 2010, and October 2015. Therefore, the periods of Canadian residence accepted by the Tribunal are as follows:

- a) from May 1, 1975, to July 24, 1998; and
- b) from March 30, 2002, to January 31, 2010.

[45] Consequently, the Appellant was not entitled to receive a full pension because he had not been living in Canada during the year preceding the day on which his application was approved (OAS Act, subparagraph 3(1)(b)(iii)). Moreover, the Respondent was right to grant the Appellant a partial pension at the rate of 31/40th and to deny him the GIS. The Appellant has the opportunity to present a new GIS application, with proof of his Canadian residence as of October 31, 2015.

[46] The appeal is dismissed.

Jude Samson
Member, General Division – Income Security