Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *K. K. v. Minister of Employment and Social Development,* 2017 SSTGDIS 22

Tribunal File Number: GP-14-3593

BETWEEN:

K. K.

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: July 12, 2016
January 17, 2017

DATE OF DECISION: February 16, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant:	K. K. (July 12, 2016, only) Ms. Myrna Barbar (representative)
Respondent:	Written submissions only

OVERVIEW

[1] The Appellant was born on X X, X, in Egypt, arrived in Canada on December 8, 1989, and became a Canadian citizen in 1995. On February 14, 2012, he applied for an Old Age Security pension (OAS pension), declaring to have lived in Canada from December 8, 1989, to January 6, 1996, and since August 22, 2000. On September 14, 2012, the Appellant also applied for the Guaranteed Income Supplement (GIS).

[2] On February 13, 2014, following the assessment of his file, the Minister refused the Appellant's applications because it concluded that the Appellant had never permanently resided in Canada. The Appellant asked for a reconsideration of the decision, but the Minister maintained the initial decision (GD2-3). It is that decision made following the reconsideration that is the subject of the appeal before the Social Security Tribunal (Tribunal).

[3] For the reasons that follow, the appeal is dismissed.

METHOD OF PROCEEDING

[4] The hearing of this appeal was by teleconference for the following reasons:

a) There are gaps in the information in the file and/or a need for clarification;

b) The method of proceeding is the most appropriate to address inconsistencies in the evidence; and

c) The method of proceeding respects the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and quickly as circumstances, fairness and natural justice permit.

Procedural Background and Request for Adjournment

[5] In this case, the Tribunal had initially scheduled a hearing by teleconference for May 17, 2016 (GD0). As the Tribunal usually does, the date was chosen without consulting the parties. However, the parties have two ways of requesting a new hearing date. If the request is received within two business days following receipt of the notice of hearing, an administrative adjournment may be granted.

[6] Otherwise, an adjournment request must be communicated in writing to the Tribunal providing reasons why a new hearing date is necessary. Once the adjournment is granted, any other adjournment from that same party cannot be accepted except under exceptional circumstances (SST Regulations, subsection 11(2)).

[7] On April 5, 2016, the Tribunal received the first adjournment request from the Appellant. In this request, Ms. Barbar, the Appellant's representative, provided the following explanation (GD4): [translation] "We were informed by our client today that he is currently held up in Egypt and cannot return to Quebec before the end of June 2016. As a result, there is no way he can attend the teleconference hearing on May 17, 2016." The hearing was therefore postponed until July 12, 2016, and it was held on that day.

[8] At the hearing, the Appellant testified for nearly an hour. However, the Tribunal had concerns about the lack of documentation in the appeal file and communicated these concerns to the parties. In response, Ms. Barbar explained that the Appellant had provided the Minister with all the documents that had been requested. However, the Tribunal noted that the burden of proof was on the Appellant and that he was not limited to the documents that had been specifically requested. Ms. Barbar therefore requested a second adjournment and she committed, with her client, to provide all the documents that could establish his Canadian residency. According to the Appellant and his representative, it would take approximately a month to compile these additional documents.

[9] Given that there was some confusion about the burden of proof and the Appellant's ability to submit new evidence, the Tribunal was satisfied that a second adjournment was justified.

[10] The Appellant and his representative said they would commit to submitting these new documents as quickly as possible, and the Tribunal decided not to set a date for the continuation of the hearing until these documents were received. But when the documents had not been received on September 15, 2016, the Tribunal followed up and Ms. Barbar confirmed that the documents would be sent to the Tribunal before September 24, 2016.

[11] On October 5, 2016, the Tribunal sent a new notice of hearing and set new dates concerning the periods for submitting documents and responding (GD0B) because the documents still had not been received at that time. These periods ended on November 21, 2016, and December 23, 2016, respectively, and the continuation of the hearing was scheduled for January 17, 2017. Once again, the Appellant had the opportunity to request an administrative adjournment if this date did not suit him, but he did not use that option.

[12] Finally, on October 26, 2016, the Tribunal received the additional documents from the Appellant (GD5). These documents were sent to the Minister and an addendum to the Minister's submissions was subsequently received (GD7).

[13] On October 31, 2016, the Tribunal invited the Appellant to provide a history of his stays inside and outside of Canada, but Ms. Barbar denies having received this letter at the time (GD6).

[14] On December 20, 2016, the Appellant submitted a third request for adjournment, this one almost identical to the first (GD8). Given that it was not satisfied that exceptional circumstances were present, the Tribunal requested further information (GD9). The Tribunal's letter was sent to Ms. Barbar by registered mail, but it was returned to the Tribunal because it had never been received. After receiving authorization from Ms. Barbar, the Tribunal's requests numbered GD6 and GD9 were sent to her by email on January 16, 2017.

[15] The continuation of the hearing therefore took place on January 17, 2017, at the beginning of which Ms. Barbar renewed her request for adjournment and submitted that the

Appellant had the right to participate in the hearing and should be present to respond to the Tribunal's questions. However, in response to the Tribunal's questions, Ms. Barbar also confirmed that, for her part, the evidence in the appeal file was complete. Moreover, the Appellant had already testified for an hour on July 12, 2016, and she had included in the appeal file only a few additional documents to respond to the Tribunal's concerns.

[16] Regarding the request for adjournment, Ms. Barbar explained that the Appellant was in Egypt for family and weather-related reasons. He is, in fact, a "snowbird" who prefers to escape Canadian winters. Having concluded that this explanation did not constitute exceptional circumstances, the Tribunal refused the request for adjournment. Nevertheless, Ms. Barbar was invited to make her closing remarks, and the Tribunal also gave her until the end of January to respond to the Tribunals request regarding the Appellant's stays inside and outside of Canada (GD6). A response was never received.

THE LAW

[17] The OAS pension is a monthly benefit provided under the *Old Age Security Act* (OAS Act) to seniors aged 65 and older who meet the Canadian legal status and residence requirements. The Appellant does not claim that he is entitled to the full pension under subsection 3(1) of the OAS Act.

[18] However, 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 following are relevant revisions on the payment of partial pensions:

> **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.

[19] 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 Canadian residency and not be absent from the country for long periods of time (OAS Act, paragraphs 11(7)(*b*) and (*d*)).

[20] 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.

[21] Residency is a question of fact that requires a consideration of the whole context of the individual and that may not be determined based on that individual's intentions. The jurisprudence has established a non-exhaustive list of factors that can guide the Tribunal when it must address this question, namely:

a) Ties in the form of personal property (for example, furniture, car, bank account, credit card, etc.);

b) Social ties to Canada (for example, participation in professional organizations, etc.);

c) Other ties to Canada (for example, property, medical insurance, driver's licence, rent, lease, mortgage, public service, life insurance policy, contracts, tax records, voters' list, retirement pension, etc.);

d) Ties to another country;

e) regularity and length of stay in Canada, and 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)

[22] The assessment of an individual's residency is fluid in that weight might be given to a factor in a particular set of circumstance that is inappropriate in a difference context (*Singer*, paras. 33 and 36).

ISSUE

[23] The issue before the Tribunal in this appeal is to determine the Appellant's residency based on the OAS Act.

[24] The onus is on the Appellant to prove his residency for the relevant period based on the balance of probabilities (*Saraffian v. Canada (Human Resources Development)*, 2012 FC 1532 at para. 20).

SUBMISSIONS

[25] The Appellant argued that he has been permanently established in Canada since his arrival in this country on December 8, 1989. Specifically, in June 1990, he bought and took possession of a residence located on X Boulevard in X—a property he still owns today.

[26] In 1995, the Appellant obtained his Canadian citizenship and he said he subsequently returned to Egypt from 1996 to 2000 because the economic crisis in Quebec was at its peak. However, the Appellant claims that he permanently re-established himself in Canada as of July 2000. In this regard, the Appellant notes that his eldest son was a student at McGill University, the two of them founded Corporation K. Inc., and they purchased six lots in X-X-X. Another family business, Construction T. Inc. was also established around 2002.

[27] The Appellant's second son came to Canada in 2004. Today, there are grandchildren also living in X. So the Appellant explains (at page GD2-19) that [translation] "it is normal that I have chosen, at the age of 65 and older, to live alongside my children to bring the family back together, especially after the revolution and crisis in Egypt."

[28] Simply put, the Appellant is someone who arrived in Canada with certain means. He invested and worked in Canada. He paid taxes like other Canadian citizens and did not use Employment Insurance or social assistance. The Appellant therefore submits that he meets the conditions to qualify for the OAS pension and the GIS.

[29] However, the Minister argued that all periods that the Appellant had claimed as periods of residence in Canada had actually been periods of presence. The Minister further notes that the Appellant kept significant ties to Egypt and that he was present in Canada only for short periods every year.

SUMMARY OF EVIDENCE AND ANALYSIS

[30] At the hearing, the Tribunal heard the Appellant's evidence. The Tribunal took the entire record into account, including the oral and documentary evidence. The most relevant evidence, according to the Tribunal, is summarized below.

[31] First of all, it is worth noting that when he moved to Canada, the Appellant did not cut all ties to his country of origin. Rather, the Appellant maintains important family ties to Egypt, has significant assets in the country, and prefers to spend the winters there to escape Canadian winters.

[32] As part of his assessment, the Minister asked the Appellant to explain what the purpose of his absences from Canada was since August 22, 2000 (GD2-9). The Appellant answered this question by stating that he had to return to Egypt to gradually liquidate his affairs in order to support his family, and particularly to pay his children's university tuition (GD2-9). He also provided the following clarifications (GD2-19):

1) Finishing the job that I had at that time.

2) My responsibilities to my mother who was sick, and unfortunately the day she died, September 17, 2012, in Cairo, I was in Canada, which proves my permanent residency.

3) Managing my family's inheritance.

4) Family obligations.

5) Difficulty selling our possessions after the revolution in Egypt.

[33] In his OAS pension application, the Appellant claimed to be a resident of Canada from December 8, 1989, to January 5, 1996, and from August 22, 2000, to the date of his application, February 6, 2012 (GD2-10 to 11). At the hearing, The Appellant further divided the relevant time periods:

a) From December 8, 1989, to January 5, 1996 (Canada);

b) From January 5, 1996, to August 20, 2000 (Egypt);

c) From August 22, 2000, to 2005 (Canada)

d) From 2006 to 2011 (Canada); and

e) From 2012 to today (Canada).

[34] In fact, the most important part of the evidence in the appeal file ends near the end of 2013.

Period no. 1: from December 8, 1989, to January 5, 1996 (Canada)

[35] According to the Appellant, he arrived in Canada with his wife on December 8, 1989 (GD2-99). However, their two sons stayed in Egypt to finish their school year. In June 1990, they were reunited with their children, and the entire family returned to Canada. At the time of their arrival in Canada, the Appellant's sons were 9 and 11 years old. They were therefore enrolled in Canadian schools.

[36] It was also in June 1990 that the Appellant bought and took possession of a residence located on X Boulevard, X (GD5-45 to 58).

[37] Because he is a businessman and engineer by trade, the Appellant stated that he did a bit of consulting work during that time. However, to provide for his family, he also had to liquidate several of his assets in Egypt, which required a few stays there while he sold his assets and repatriated the funds.

[38] In 1995, the Appellant gained Canadian citizenship (GD2-98) and obtained his first Canadian passport (GD2-90).

[39] Aside from the purchase of his condominium and his Canadian citizenship, there are few documents that support the Appellant's Canadian residency during this period:

a) His travels were not precisely known;

b) He did not file tax returns in Canada (GD2-49);

c) The Régie de l'assurance maladie du Québec (RAMQ) has no data for the Appellant's medical profile from December 1, 1989, to December 31, 1995 (GD2-54); and

d) There is no evidence of his work as a consultant, his income or the contributions he supposedly made to the Quebec Pension Plan or to the Canada Pension Plan during this time period.

[40] For this period, the Tribunal is nevertheless willing to accept that the Appellant was a resident of Canada. In this regard, the Tribunal gives great weight to the purchase of the condominium in X in June 1990, the fact that his children attended Canadian schools and especially to the fact that the Appellant was granted Canadian citizenship in 1995, which indicates that, at the time, he met the relevant criteria for Canadian residency.

Period no. 2: from January 5, 1996, to August 20, 2000 (Egypt)

[41] In 1995, around the time when he obtained his Canadian citizenship, the Appellant stated that there was an economic crisis in Quebec and an economic boom in Egypt. Because he was struggling to make ends meet, the family decided to return to Egypt. In any event, the Appellant stated that he had always intended to return to Canada, and that is why he had not sold the condominium in X.

[42] The Appellant does not claim to have been a resident of Canada during this period.

Period no. 3: from August 22, 2000, to 2005 (Canada)

[43] According to the Appellant, he returned to live in the condominium on X Boulevard on August 22, 2000. In fact, he explained that it was also around 2000 that he had given the apartment to his children. However, the Appellant had to be reinstated as the owner of the apartment in 2005 (instead of his eldest son) to access a line of credit (GD2-36).

[44] As for his family, in 2000, the Appellant's eldest son began his studies at McGill University, which he continued until he received his doctorate in 2011. However, the second son stayed in Egypt until 2004 because he had to finish his studies there. The second son returned to Canada in 2004 and has worked for a Canadian bank in X since then.

[45] The Appellant admitted that, between 2000 and 2004, his wife had made frequent trips between Canada and Egypt, because the couple had a son in each country. For his part, the Appellant stated that he had become an entrepreneur. In particular, he founded Corporation K. Inc. and the company Construction T. Inc. (GD5-22 to 40 and GD7-6 to 10) with one or more members of his family. Based on the Appellant's testimony, T. was inactive until 2014, but K. acquired six lots in X-X-X, one of which was placed in his sons' names (GD5-41 to 48).

[46] Once again, there is little documentary evidence in support of the Appellant's Canadian residency during this period:

a) a quote from the real estate assessment roll indicating that the Appellant became the owner of the condominium on X Boulevard on November 18, 2005 (GD2-36);

b) the Appellant had a health insurance card that expired in February 2002 and another card that expired in November 2007 (GD2-40);

c) he had a few medical appointments between March 2001 and October 2004 (GD2-50);

d) the Appellant has filed his taxes in Canada since 2001 (GD2-49);

e) regarding the company T., according to provincial dues, several registration fees were paid late, and several of the company's statements were lumped together without reporting any one income, both federal and provincial (GD5-2 to 40); and

f) the bill of sale dated January 23, 2002, by which the Appellant's sons purchased a lot in X-X-X does not mention the Appellant (GD5-41 to 48).

[47] In its review of the file, the Minister made a list of the stamps in the Appellant's passports (GD2-31 to 34). The Tribunal finds that this list is significant and therefore gave the Appellant the opportunity to contest the information in this list (GD6), but the reliability of this information has never been questioned.

[48] Thus, this list establishes that the Appellant was absent from Canada for the greater part of 2000, 2001, 2002, 2003 and 2005:

From	To	Duration (days)
19-Oct-2000	27-Nov-2000	39
21-Dec-2000	23-Feb-2001	64
24-Mar-2001	13-Apr-2001	20
12-May-2001	23-Nov-2001	195
29-Dec-2001	22-Feb-2002	55
23-Mar-2002	20-Sept-2002	181
19-Oct-2002	28-May-2003	221
26-June-2003	21-Nov-2003	148
?	12-Aug-2004	?

From	To	Duration (days)
8-Oct-2004	24-Apr-2005	198
18-May-2005	31-Oct-2005	166
10-Dec-2005	31-Dec-2005	21

[49] In light of this information, the Tribunal cannot find that the Appellant was a Canadian resident during this time. The Appellant was more often outside of the county, he had given his condominium on X Boulevard to his children and, although he claims to be an entrepreneur, there is no documentary evidence that shows the activities of his businesses or his contribution to them.

Period no. 4: from 2006 to 2011 (Canada)

[50] The Appellant maintained that he had been living in Canada during this time, but he admitted during the hearing that he had spent about half of his time in Egypt during this time and that he has not always been able to respect "the six-month rule." In fact, this rule does not come from the OAS Act, but rather the *Regulation respecting eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec*. Under this Regulation, a person living outside of Quebec for 183 days or more in a calendar year can lose their eligibility for the provincial health insurance plan. According to the Appellant, in 2010 and 2011, he could make more money in Egypt than in Canada.

[51] Thus, from 2006 to 2011, the Appellant was outside of Canada during the following periods (GD2-31 to 34):

From	To	Duration (days)
?	20-Oct-2006	?
14-Nov-2006	13-Sept-2007	303
28-Sept-2007	25-Sept-2008	363

From	To	Duration (days)
?	1-Sept-2009	?
20-Sept-2009	7-Sept-2010	352
?	13-Nov-2010	?
5-Jan-2011	17-Apr-2011	102
22-May-2011	4-Nov-2011	166

[52] Based on this information, the Appellant did not spend half of his time in Canada, but much less. Furthermore, the Appellant no longer lived in the condominium on X Boulevard. Instead, his youngest son lived there with his family. Since 2007, the addresses that the Appellant registered with the Canada Revenue Agency (CRA) have corresponded to properties owned by his eldest son (GD2-38 to 39 and 49).

[53] In terms of health care, the Appellant had no medical appointments between October 2004 and December 2011 (GD2-50), and he had lost his eligibility for the Quebec Health Insurance Plan during a certain period before August 1, 2011, which seems to contradict the Appellant's statements (GD2-19) and 56).

[54] The Appellant did not establish that his most important ties were to Canada during that period. Therefore, the Tribunal cannot make a finding of Canadian residency.

Period no. 5: from 2012 to 2013 (Canada)

[55] During the 2011 crisis in Egypt, the Appellant said he stayed longer in Canada. In support of this position, the Appellant filed the following documents with the Tribunal:

a) a Hydro-Québec bill issued in his name and that of his second son's for the condominium on X Boulevard (GD2-15);

b) his health insurance card, expiring in November 2015 (GD2-40);

c) letters from the RAMQ confirming that the Appellant remained eligible for the provincial health insurance plant, despite his declared absences (GD2-52 and 56);

d) medical appointments in 2011, 2012 and 2013 (GD2-50 to 51); and

e) notice of assessment for T. (GD5-11 to 13 and 21).

[56] It is worth noting that the absences from Canada that the Appellant declared with the RAMQ do not necessarily correspond with the evidence on appeal file. For example:

a) the Appellant told the RAMQ that he had been absent from Canada from September 16, 2011, to November 4, 2011 (GD2-56), while the information in the

appeal file indicates that the departure date had actually been May 22, 2011 (GD2-33); and

b) the Appellant told the RAMQ that he had been absent from Canada from December 17, 2012, to April 26, 2013 (GD2-52), while the information in the appeal file indicates that the departure date had actually been September 18, 2012 (GD2-33).

[57] In fact, the appeal file again indicates that the Appellant was absent from Canada for long periods of time (GD2-33 to 34):

From	To	Duration (days)
30-Jan-2012 (GD2-56)	14-May-2012	105
18-Sept-2012	26-Apr-2013	220

[58] Therefore, regarding the ties that the Appellant maintained to his home country, the Tribunal is still unable to conclude that the Appellant had centralized his life in Canada. For example:

a) the Appellant lives with one of his sons;

b) in the appeal file, there is only one utility account (Hydro-Québec), and it is for a condominium in which the Appellant no longer lives (GD2-15);

c) the Appellant's eligibility for the Quebec health insurance plan is based on information that has been called into question; and

d) there is no convincing evidence of the Appellant's activities as an entrepreneur.

[59] Therefore, the Tribunal cannot make a finding of the Appellant's Canadian residency during this time period.

CONCLUSION

[60] The Tribunal took the entire record into account as well as the relevant factors listed above, and it was unable to find that the Appellant had based his life in Canada after January 1996. Because the Appellant maintained solid ties to his home country of Egypt, it was important for him to clearly show the strength of his ties to Canada, but the evidence in this regard is missing. The Tribunal also placed significant weight on the duration of his stays in both countries. In this regard, the Tribunal was unable to validate the Appellant's testimony and, in fact, the Appellant's testimony was often contradicted by the documentary evidence.

[61] It is highly likely that the Appellant intended to live in Canada during other periods, as well as those that the Tribunal has retained, but this conclusion must be based on the evidence in the appeal file and not on the Appellant's intentions.

[62] The Tribunal notes that the Minister's decisions could be interpreted as requiring 10 years of Canadian residence to be eligible for the OAS. However, because the Appellant was unable to prove his Canadian residency after January 1996, paragraph 3(2)(*b*) of the OAS Act requires 20 years of Canadian residency to be entitled to this partial pension, a threshold that the Appellant has not met. Given that the Appellant is ineligible for the OAS pension, he is also ineligible for the GIS.

[63] The appeal is dismissed.

Jude Samson
Member, General Division - Income Security