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

Citation: *C. H. v. Minister of Employment and Social Development*, 2017 SSTGDIS 108

Tribunal File Number: GP-15-1864

BETWEEN:

C. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Shane Parker

HEARD ON: August 2, 2017

DATE OF DECISION: August 8, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant
Mr. E. H., spouse of the Appellant (support)

INTRODUCTION

[1] On May 13, 2011 the Appellant applied for an Old Age Security (OAS) pension. In this application she stated that she resided in Israel. Further to providing additional information, the Respondent denied this application on April 11, 2012. The Appellant requested a reconsideration of this decision on April 21, 2012. The Appellant asked that the Respondent reconsider this decision. She provided additional information to the Respondent at the time, including another OAS application on May 7, 2012. After an ongoing exchange of correspondence, and production of copious documents by the Appellant, the Respondent transferred the file to its International Operations division on February 4, 2014 for review under the Canada-United States Agreement on Social Security (the Canada-US Agreement).

[2] On June 12, 2014 the Respondent advised the Appellant that she was denied an OAS pension under the Canada-US Agreement because she did not meet the minimum residence requirement (her combined years of actual Canadian residence and periods of coverage in the US do not total 20 years) (GD2-40).

[3] On January 5, 2015 the Respondent maintained this decision upon reconsideration. In its reconsideration decision the Respondent stated that the Appellant "*may have 18 years, 10 months and 7 days of residence […] however, you have not proven that you have been resident in Canada…*" (GD2-20 to 23).

[4] On May 21, 2015 the Appellant appealed the Respondent's January 5, 2015 reconsideration decision to the Tribunal's General Division. Despite being filed late, the appeal was allowed to proceed in accordance with the Tribunal's interlocutory decision dated August 10, 2016.

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

- Videoconferencing is not available within a reasonable distance of the area where the Appellant lives;
- The issues under appeal are complex;
- There are gaps in the information in the file and/or a need for clarification; and,
- This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUES

[6] The Tribunal must determine if the evidence establishes, on balance, that the Appellant met the minimum residence requirement of 20 years, as a foreign resident applying for the OAS pension, pursuant to paragraph 3(2)(b) of the OAS Act and the totalization principle adopted in the Canada-US Agreement.

[7] If the Appellant does qualify for an OAS pension, the Tribunal must determine the amount of the pension and when it becomes payable.

THE LAW

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

[9] Paragraph 3(2)(b) of the OAS Act pertains to the minimum residence period required for a foreign resident to qualify for an OAS pension abroad:

> **Payment of partial pension**
>
> (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.** [emphasis added here]

[10] Section 20 of the OAS Regulations deals with the determination of residence:

Residence

20. (1) To enable the Minister to determine a person's eligibility in respect of residence in Canada, the person or someone acting on the person's behalf shall provide a statement giving full particulars of all periods of residence in Canada and of all absences from Canada that are relevant to that eligibility.

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

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.

[12] Section 40 of the OAS Act permits Canada to enter into reciprocal arrangements with other countries in regards to the administration of social security benefits.

[13] Canada and the United States entered into one such agreement on August 1, 1984, called the Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security (the Canada-US Agreement).

[14] Chapter 2, Article VIII of the Canada/US Agreement (Second Supplementary Agreement dated May 28, 1996) provides:

Article VIII

1.

a. If a person is not entitled to the payment of a benefit because he or she has not accumulated sufficient periods of residence under the *Old Age Security Act*, or periods of coverage under the Canada Pension Plan, the entitlement of that person to the payment of that benefit shall, subject to sub-paragraph (1)(b), be determined by totalizing these periods and those specified in paragraph (2), provided that the periods do not overlap.

b. In the application of subparagraph (l)(a) of this Article to the *Old Age Security Act*:

i. only periods of residence in Canada completed on or after January 1, 1952, including periods deemed as such under Article VI of this Agreement, shall be taken into account; and

ii. if the total duration of those periods of residence is less than one year and if, taking into account only those periods, no right to a benefit exists under that Act, the agency of Canada shall not be required to pay a benefit in respect of those periods by virtue of this Agreement.

2.

a. For purposes of determining entitlement to the payment of a benefit under the *Old Age Security Act*, a quarter of coverage credited under United States laws on or after January 1, 1952 and after the age at which periods of residence in Canada are credited for purposes of that Act shall be considered as three months of residence in the territory of Canada.

EVIDENCE

Testimony

[15] The Appellant reminded the Tribunal during the hearing that the Respondent has found over 18 years of residence in its reconsideration decision dated January 5, 2015. She said she came to X to visit her mother for 9 months total, or for one month at a time in the following years: 1981, 1988, 1989, 1992, 1995, 1997, 1999, 2000, and 2001. Her mother was living in a seniors' apartment complex, and the Appellant stayed with her there to take care of her. Otherwise she visited her other family members. Her entire family lived in X at the time (her siblings). The Appellant added that she stayed in X with her sister for three months in 1991, during the Gulf War. The Appellant's two daughters went to school during this time.

[16] The Appellant admittedly had difficulty remembering events and facts from the past. During the one-month visits she said she had a bank account with Canadian Imperial Bank of Commerce, but was not certain. She "guessed" she kept funds in the account. She could not recall where she opened the account.

[17] She said that she and her husband owned a house on X Avenue in X, Ontario. She mentioned two time periods for this home ownership: from 1988 to 1992, and 1975 to 1978. The Appellant then relied upon GD1B-4 (which her husband helped draft), which stated that the home on X Avenue was owned from 1987 to 1992. The Appellant could not recall where her residence was in X after 1992, and referred the Tribunal to the documentation filed for this appeal.

[18] The Appellant did not discuss any other ties to Canada or activities she did while in Canada in 1981, 1988, 1989, 1991, 1992, 1995, 1997, 1999, 2000, and 2001. When asked what other connections to Canada she had during the one-month periods spent in Canada in the years mentioned above, she replied that "I think I've covered it all."

Documents and additional testimony

[19] The Tribunal reviewed all the documentary evidence filed, and testimony given at the hearing. What follows is a discussion of the most relevant and significant of that evidence in determining the within appeal.

[20] The Appellant contributed to the CPP in the years 1966 through 1969 according to a Service Canada Contributions record (GD2-215). She testified that she worked at Toronto City Hall. She clarified that she was not employed in Canada at any time after that. She was a homemaker after 1969, and never returned to the work force.

[21] The OAS application forms contain a declaration above the Appellant's signature that the information is "true and complete".

[22] The Appellant's May 2011 OAS application contained the following information:

a) A current home address in Israel;

b) Her place of birth (X);

c) Her date of birth (November 7, 1946);

d) She lived and worked in Canada, and contributed to the Canada Pension Plan (CPP) until 1969;

e) She resided in Canada from age 18 (November 7, 1964) until August 31, 1969;

f) She resided in Israel from September 11, 1969 to May 8, 1972, and worked there from September 25, 1969 to March 1, 1972;

g) She resided in Canada from September 7, 1979 until September 7, 1984;

h) She lived and worked in Israel from August 30, 2001 until August 30, 2009;

(GD2-23 to 26)

[23] The Appellant's May 2012 OAS application (GD2-27 to 30) contained the following different information pertaining to her Canadian residence history:

a) September 1, 1972 to September 1, 1987;

b) October 7, 1987 to November 7, 1982 (sic – 1992);

c) 1992 to 1997.

[24] In addition, the Appellant informed that she lived in the United States from 1985 to 2001; and that she worked in the United States from 1986 to 1990 and from 1991 to 2000. At the hearing, she said she did not return to the workforce after 1969. The Tribunal asked her to provide clarification in light of her declaration in her 2012 OAS application that she worked in the US. In response, the Appellant said that she occasionally would operate the cash register of her husband's business (a resort) for short periods when her husband took a break. She did not earn a salary or pay income taxes in the US.

[25] On September 16, 2013, the Appellant wrote that "[a]s you can see from my passports I was in the U.S. in the summertime from June to mid Sept. then I went to X from Sept. – June every year." In that letter, the Appellant listed her entry dates to the US according to her Canadian passports between 1979 and 2001 (GD2-72).

[26] In a letter dated September 18, 2016 the Appellant stated she had 20 years of Canadian residence, as follows:

> November 7, 1964 until August 31, 1969;
>
> November 1972 until August 1987 (different from May 2012 OAS Application);
>
> August 1988 until August 1993.
>
> (GD4)

[27] The profit/loss statements filed by the Appellant's spouse list him as sole proprietor of a business in the US (GD2-138 to 139, 181). The Appellant filed a signed but undated letter stating that her husband had a business with his brother in the summer. She added in the letter that they "used to travel every year for a few months from Canada." (GD2-201).

[28] There are portions of joint individual income tax returns filed in the United States (for her husband and herself). The home address listed on the US Tax Returns was in New Jersey until 2002 (GD2-76 to 80). The home address was listed in Florida for the years 2002 and 2003 (GD2- 143 to 144). At the hearing, the Appellant clarified that her husband's brother lived in Florida. It was not actually her home address. She said that their residence was in X or Israel. She could not recall the address of her residence in X after 1992.

[29] The Appellant wrote that she and her family returned to X in 1972 and owned a home at X X Drive in X until 1987 (the X home). During the hearing, she said they rented the home to tenants before it was sold. The Appellant could not recall how long they rented it out, but after asking her husband, she replied that they rented it out for one year. The Appellant also wrote that her son was born in X in 1973 and studied at Mackenzie High School (GD2-201).

[30] None of the following were on file: Canadian bank statements, records of utilities, phone or cable bills, insurance policies, property tax statements, or Canadian income tax returns.

SUBMISSIONS

[31] The Appellant submitted that she is entitled to a partial OAS pension because she has over 20 years of Canadian residence (GD3-2; GD4). During the hearing she argued that the one month periods spent in Canada in the years 1981, 1988, 1989, 1992, 1995, 1997, 1999, 2000, and 2001, as well as the three month period in 1991 should be considered Canadian residence. She did not make any further argument at the hearing.

[32] The Respondent submitted that the Appellant did not meet her onus of establishing sufficient residence in Canada. In particular:

> Throughout the entire application for OAS, there are virtually no documents to substantiate residence in Canada. The majority of the documents provided by the appellant indicate that she has resided in Israel or in the United States. Since there is insufficient documentation on the appellant's file to support her residence in Canada, the Minister is unable to grant her an OAS pension.
>
> (GD6-12)

ANALYSIS

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

The Appellant was resident from November 7, 1964 to August 31, 1969

[34] The Tribunal carefully considered all the evidence, including the testimony given at the hearing. Further to that review, the Tribunal has determined that the Appellant was resident in Canada from November 7, 1964 to August 31, 1969. The evidence supporting this residence period is reliable and consistent, and largely undisputed. The Appellant testified that she worked at Toronto City Hall during this time. The CPP contributions record confirms this for the years 1966 to 1969 (GD2-215). The Appellant also stated in her OAS applications (GD2-25 and 29) and in a letter (GD4) that she resided in Canada during this exact period.

The Appellant was resident from September 1, 1972 to September 1, 1986

[35] The Tribunal was also satisfied on balance that the Appellant was resident from September 1, 1972 to September 1, 1986. Her OAS applications in this regard, and her statement in her September 18, 2016 letter (GD4), were consistent regarding this residence period, except for the end date. The Tribunal accepts that the Appellant and her spouse owned a home on X Drive in X from 1972 until 1987. However, the Tribunal was not satisfied that the Appellant resided in Canada until September 1, 1987 as declared in her 2012 OAS application because of her testimony that the X home was rented out for one year prior to selling it in 1987.

[36] The Tribunal accepts that the Appellant's son was born in X in 1973. This particular claim was not specifically disputed.

[37] The Tribunal also accepts that the Appellant stayed home to raise her children, given the lack of CPP contributions and employment evidence after 1969.

Residence not established after September 1, 1986

[38] For the time period after September 1, 1986, the Tribunal found the Appellant's evidence more controversial. It was unreliable, incomplete, evasive, contradictory or unsubstantiated with regard to establishing her Canadian residence period. For example, her

OAS applications contained conflicting information. The 2012 application contained additional residence not mentioned in the 2011 application. The 2012 application mentioned residence after 1984 whereas the 2011 application did not. Moreover, her 2011 application made no mention of living and working in the US between 1985 and 2001 (GD2-25) while her 2012 application does refer to this (GD2-29). As such, her 2011 application was incomplete despite her declaration in the application that the information was "true and complete."

[39] Furthermore, in a letter dated September 18, 2016 the Appellant claims she was resident in Canada from August 1988 until August 1993 (GD4). However, this residence period was omitted from her 2011 application (GD2-25) and differs with her stated residence of 1992 to 1997 in her 2012 application (GD2-29).

[40] The Appellant's testimony also conflicted with her documentary evidence. In particular, she testified that she was in Canada for one month in the years 1988, 1989, 1992, 1995, 1997, 1999, 2000, and 2001. However, on September 16, 2013 she wrote that she was in X from September to June "every year" from 1987 to 2001 (GD2-72).

[41] During the hearing, the Appellant admitted on repeat occasions that she had a poor memory. She also did not make much effort during the hearing to recall information, instead deferring generally to the written record, which her husband prepared and submitted. For instance, when asked about whether the Florida address was in fact her home address according to the joint US tax returns for 2002 and 2003 (GD2-143 to 144), she initially answered in the negative, stating she resided in either X or Israel. She could not recall her address in X after 1992 despite travelling "every year for a few months from Canada" to the US in the summer for her husband's US-based business (GD2-201), and purportedly being in Canada from September to June "every year" from 1987 to 2002 (GD2-72). The Appellant also expressed unfamiliarity with the tax returns as they were said to be submitted to the Tribunal by her husband. The Appellant then evaded further questioning about her home address by suggesting that the hearing was costing her money and that enough time had been spent conducting the hearing.

[42] For the above reasons, the Tribunal gave the Appellant's evidence little weight with regard to establishing residence after September 1, 1986. Furthermore there is little, if any, reliable documentary evidence verifying the Appellant's alleged residence in Canada after this time. As the Respondent rightfully observed, there are no Canadian bank statements, records of

utilities, phone bills, cable contracts, insurance policies, property tax statements or any other evidence to demonstrate a pattern of regular living in Canada. Conversely, most of the documents filed relate to residence in the United States (her 2012 OAS application, and joint US tax returns), despite the Appellant's denials of US residence during the hearing.

[43] Finally, with respect to the Appellant's time in Canada in 1988, 1989, 1991, 1992, 1995, 1997, 1999, 2000, and 2001, the Tribunal finds that the Appellant was present in Canada at most, visiting and residing with family members for very short periods of time. Her evidence of formal ties, including home ownership until 1992, was severely lacking and insufficient to establish a mode of life that was rooted in Canada.

[44] In *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, the Federal Court set various factors to be taken into account in determining whether a person makes his or her home in and ordinarily lives in Canada. In the present case, the Appellant had almost none of these factors in her favour:

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 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) regularity and length of stay in Canada and the frequency and length of absences from Canada; and
e) the lifestyle of the person or his establishment in Canada.

The Appellant did not establish that she qualifies for a pension under the Canada-US Agreement

[45] There is no official record on file from the United States Social Security Agency confirming she has quarters of coverage which may be creditable as Canadian residence. At any rate, the onus is on the Appellant to prove she qualifies for an OAS pension either by domestic law or the Canada-US Agreement. In this case, the Tribunal was not satisfied that she met her onus.

The Appellant's residence is less than 20 years

[46] In summary, the Appellant did not meet the 20-year minimum residence requirement under paragraph 3(2)(b) of the OAS Act; and there is no evidence she meets this requirement under the Canada-US Agreement. Based on the evidence and findings above, her residence period after age 18 is calculated as follows:

November 7, 1964 to August 31, 1969 (4 years, 9 months, 24 days)

September 1, 1972 to September 1, 1986 (14 years)

GRAND TOTAL: 18 YEARS, 9 MONTHS, 24 DAYS

CONCLUSION

[47] The appeal is dismissed.

Shane Parker
Member, General Division - Income Security