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

Citation: *A. D. v. Minister of Employment and Social Development*, 2018 SST 1044

Tribunal File Number: GP-17-2865

BETWEEN:

A. D.

Appellant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Virginia Saunders

Appellant represented by: David Dolson

Teleconference hearing on: July 11, 2018

Date of decision: September 14, 2018

DECISION

[1] The appeal is allowed. The Appellant qualifies for a full pension under the *Old Age Security Act* (OAS Act), payable as of December 2011.

OVERVIEW

[2] The Appellant applied for an OAS pension in January 2011[1], as he was to turn 65 the following November. The application was denied because the Appellant did not submit requested documents and information as proof of residence in Canada[2]. He applied again in March 2012[3], and was denied for the same reason. He requested reconsideration of that decision. After investigation, the Minister decided there was still not enough evidence to establish the Appellant's residence in Canada, and maintained the original decision[4]. The Appellant appealed to the Social Security Tribunal. The Tribunal's General Division dismissed the appeal; but in November 2017 the Appeal Division returned the matter to the General Division for redetermination.

[3] The Minister now accepts the Appellant resided in Canada for 27 full years and qualifies for a partial OAS pension of 27/40ths[5]. The Appellant claims he is entitled to a full pension; because he actually resided in Canada for the required number of years; or because his absences are deemed not to have interrupted his residence under the special circumstances set out in subsection 21(5) of the *Old Age Security Regulations* (OAS Regulations).

ISSUES

Eligibility for an OAS Pension

[4] This appeal was returned because the General Division did not analyze the evidence the Appellant filed in support of his claim that subsection 21(5) applied. However, the Appeal Division did not limit the scope of the redetermination to the question of whether the Appellant

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[1] GD2-105-108
[2] GD2-859
[3] GD2-99-104
[4] GD2-91
[5] IS26-4

could use that provision to prove his residence. Therefore, I must consider all the evidence and decide if the Appellant qualifies for a full OAS pension on any of the possible grounds.

[5] There is no dispute the Appellant resided in Canada from June 6, 1966, to June 30, 1990; and from March 22, 2001, to June 30, 2004.

[6] The first issue I must decide is whether the Appellant resided in Canada at any other time up to when he turned 65 in November 2011.

[7] If I find the Appellant had additional periods of residence, I must decide how they affect his OAS pension entitlement.

Eligibility for Guaranteed Income Supplement

[8] The Appellant's entitlement to the Guaranteed Income Supplement (GIS) is not an issue in this appeal. Although he submitted a GIS application in March 2012[6], his entitlement was not thoroughly canvassed, because until recently the Minister's position was that the Appellant was not entitled to any OAS pension and, therefore, could not receive the GIS. The Minister did not make a decision about the Appellant's residence or presence in Canada after November 2011, which would determine the Appellant's eligibility for GIS. Because the Minister made no decision on this matter, I do not have jurisdiction to consider it.

ANALYSIS

Residence Requirements for a full OAS pension

[9] To receive a full OAS pension an applicant must have resided in Canada for at least 40 years from age 18 until the time his application is approved[7]. A person with less than 40 years residence qualifies for a full OAS pension under what is known as the 10-year rule, if he meets the following[8]:

- on July 1, 1977, he was at least 25 years old and resided in Canada; and

[6] GD2-103
[7] OAS Act paragraph 3(1)(c).
[8] OAS Act paragraph 3(1)(b)

- he resided in Canada for the 10 years immediately preceding the day on which his OAS application could be approved.

[10] A person resides in Canada if he makes his home and ordinarily lives in any part of Canada[9]. The onus is on the Appellant to prove on a balance of probabilities that he resided in Canada long enough to qualify for an OAS pension[10]. Case law has set out a non-exhaustive list of factors to be considered in determining that. They include personal property; social and fiscal ties in Canada; ties in another country; regularity and length of visits to Canada, as well as the frequency and length of absences from Canada; and the lifestyle of the person and his establishment in Canada[11]. The person's intention may be considered but it is not determinative. He must establish that Canada was the place where he was factually anchored[12].

[11] In some circumstances, a person's absence from Canada is deemed not to have interrupted his residence or presence in Canada. These include periods where the person was employed by a Canadian firm or corporation; was employed or engaged as a missionary with a religious group or organization; or was employed or engaged as a worker in lumbering, harvesting, fishing or other seasonal employment[13].

[12] The Appellant filed reams of paper with the Tribunal that contained mostly irrelevant submissions, evidence of little probative value, and abusive language. His highly emotional approach to his appeal did not assist him, and caused significant delay. However, despite being combative and given to hyperbole on paper, the Appellant appeared honest and spontaneous in answering questions at both General Division hearings. His ex-wife, S. M., testified at the first hearing, and was also credible. After reviewing all the written and oral evidence, I found the Appellant and his ex-wife told a plausible story that supports a conclusion that he resided in Canada continuously between November 2001 and November 2011. As a result, he qualifies for a full OAS pension under the 10-year rule. Because of this decision, I did not consider whether the Appellant resided in Canada between June 1990 and March 2001.

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[9] OAS Regulations paragraph 21(1)(a)
[10] *De Carolis v. Canada (Attorney General)* 2013 FC 366
[11] *De Carolis v. Canada (Attorney General)* 2013 FC 366
[12] *Duncan v. Canada (Attorney General)* 2013 FC 319
[13] OAS Regulations subsection 21(4); subparagraphs 21(5)(a)(vi); and 21(5)(b)(vi) and (vii)

Background: June 1966 to June 2004

[13] The Appellant was born in Italy on November 24, 1946[14]. He arrived in Canada as a landed immigrant in June 1966. For many years after that, he lived and worked in the Toronto area. In the late 1970s, he began going to Guyana frequently; and he had a relationship there that produced a son. In 1981, he married a Guyanese woman, S. M., and she moved to Canada in April that year. Their daughter was born in Canada in July 1982[15].

[14] In 1983, the Appellant was disabled in a motor vehicle accident. He began receiving *Canada Pension Plan* (CPP) disability benefits in July 1983, and these were paid to him until December 2011 after which they were converted to a CPP retirement pension.

[15] In 1988, the Appellant and his family moved to a home on X in X[16]. The following year he and S. M. divorced, but they both continued living at the same address because S. M. was a caregiver for the Appellant's mother, who also lived there[17].

[16] In the early 1990s, the Appellant began travelling to Costa Rica because the climate was good for his health and because he could live there and obtain treatment such as physiotherapy more cheaply than in Canada. He was also looking for business opportunities to replace the income he lost when he had to stop working because of his disability. Around 1993 he acquired an interest in a teak farm there. The nature of his interest and his involvement in teak farming is discussed in more detail below.

[17] In the following years the Appellant spent a considerable amount of time in Costa Rica; he also travelled to other countries in the area, to the United States, and back to Canada[18]. He began a relationship with a woman in Costa Rica, and married her there in 2000. They have two children who are now 18 and 20 years old. The Appellant's wife and children remained in Costa Rica for many years.

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[14] GD2-93
[15] GD2-598
[16] GD2-586
[17] S. M.'s testimony
[18] GD2-754-775; Appellant's and S. M.'s testimony

[18] The Appellant ran into difficulties with the Canada Revenue Agency (CRA), as a result of which he was tried and convicted on charges that are not relevant to this appeal. He was in prison in Canada from May 2001 to May 2003; and was then on parole until May or June 2004. While on parole, he had to live with his sister in Toronto.

The Appellant continued to reside in Canada from June 2004 to July 2007

[19] After his parole ended, the Appellant went back to Costa Rica. The exact date is unknown, because his passport for that period was stolen in 2009. Both parties agreed the Appellant likely left Canada in June 2004, and I so find. The Minister submitted the Appellant's residence in Canada ceased after that, because he left the country and had limited ties here; and because his connection to Costa Rica was considerable given the length of time he spent there and the fact that his wife and children remained there.

[20] The Appellant's Canada Border Services Agency (CBSA) Traveller History shows he did not return to Canada until December 12, 2005[19], meaning he was absent from Canada for about 18 months. He testified that he did not think he was ever out of the country for that long. Both he and S. M. testified that he was usually not absent from Canada for more than a few months. While I believe this is their honest recollection, without other evidence to support it I have to prefer the CBSA documentation. I accept the Appellant generally travelled between Costa Rica and Canada frequently, and spent a few months in each place each time, but I find in this instance he was absent from Canada from June 2004 to December 2005.

[21] By 2004, the Appellant had significant ties in both Canada and Costa Rica: his son and daughter, his ex-wife, his mother, and other close relatives, all lived in or near Toronto. He rented a room at S. M.'s home in X that was kept for his exclusive use. He kept his belongings there. He maintained his Ontario drivers' licence and kept a car registered to his name parked in the driveway. At the same time, his current wife and two young children lived in a home she rented in Costa Rica. He was involved in a business there. Physical presence is but one factor to consider in determining residence. However, the Appellant's uninterrupted presence in Costa Rica from June 2004 to December 2005, when considered with his other ties there, would in

[19] GD2-341

other circumstances tip the balance in support of a conclusion that when he left Canada in June 2004 his residence ceased.

[22] However, I find the Appellant's absence from Canada between June 2004 and December 2005 did not interrupt his residence, because he fell under the special circumstances set out in the OAS Regulations, which state:

> s. 21 (4) Any interval of absence from Canada of a person resident in Canada that is . . .
> (c) specified in subsection (5)
> shall be deemed not to have interrupted that person's residence or presence in Canada.
>
> s. 21 (5) The absences from Canada referred to in paragraph (4)(c) of a person residing in Canada are absences under the following circumstances:
> (a) while that person was employed out of Canada . . .
> (vi) by a Canadian firm or corporation as a representative or member thereof,
> if during his employment out of Canada he
> (vii) had in Canada a permanent place of abode to which he intended to return, or
> (viii) maintained in Canada a self-contained domestic establishment,
> and he returned to Canada within six months after the end of his employment out of Canada or he attained, while employed out of Canada, an age at which he was eligible to be paid a pension under the Act.

[23] The Appellant met all the requirements of this provision. In June 2004, he was residing in Canada. When he left, he was employed as a representative of a Canadian corporation, Ecologic International Inc (Ecologic). During his employment, he maintained a permanent place of abode in Canada to which he intended to return, and he returned within six months of his employment ending.

i. The Appellant was employed by a Canadian corporation

[24] The Appellant testified that he purchased the teak farm through a Costa Rican corporation. Although the actual ownership of the land was not made clear to me, I am satisfied from the testimony and other documents that from October 1992 the Appellant had the right to farm the property. I am also satisfied the Appellant transferred this right to Ecologic around

October 1997, and that he continued to act as administrator of the farm as a representative of that company[20].

[25] Ecologic was incorporated in Ontario in October 1997[21]. The Appellant testified that the company was set up as a vehicle to finance the teak farm business through Canadian investors. Investors purchased trees on the farm and contracted with Ecologic to manage them. The first contracts were signed in November 1997, and were for 10 years. Investors agreed to pay Ecologic $2500.00 per year for ownership of 100 trees and for maintenance, administration and other costs. In return, they would receive 85% of the net proceeds of sale of the trees[22].

[26] The Appellant's work began in late 1992. He hired local workers and forest engineers; purchased seeds and rootstock; and supervised clearing the land, planting, and harvesting. As the years went by the property needed to be cleared regularly and the trees culled. The Appellant testified that because he was disabled he did not do the physical work, but he was able to sit behind a desk to talk to people; apply for funding from the Costa Rican government; make bank transfers and pay employees; and visit the property to supervise the work.

[27] The Appellant testified that Ecologic lost its investors because the CRA would not recognize the business and they could not write off their costs. Litigation over this has continued for many years. The Appellant ended up paying for most of the farming expenses himself, and he did not receive a salary or any other payment from Ecologic. The trees were harvested in 2012 and 2013, and sold through a local company; but there was no profit, and the property is now neglected and in poor condition. Ecologic did not file tax returns or pay taxes in Canada.

[28] I find that Ecologic was a Canadian corporation for OAS purposes. The OAS Act and Regulations do not define "Canadian corporation", but there can be no doubt that a company incorporated in one of Canada's provinces falls into that category. The legislation does not require the corporation to be resident in Canada either under the *Income Tax Act*, or under common-law principles. It does not require the corporation to have business activity or assets in Canada, or to be in compliance with tax or other laws in this country.

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[20] IS4-23, 25; IS9-6; IS13-5; IS14-2-9
[21] IS27-3-10
[22] IS14-2-9

[29] I turn to the question of whether the Appellant was employed by Ecologic. "Employed" is not defined in the OAS Act and Regulations. The common meaning of the word suggests an arrangement where a person works for pay, but it can also mean to spend time doing something[23]. Because the OAS Act is social benefits legislation, it must be construed liberally[24]. The Appellant gave credible evidence that he expended considerable effort on behalf of Ecologic in the teak farming business, with a reasonable expectation that he would be paid when the trees were sold. I therefore find he was employed as a representative of Ecologic.

[30] I considered whether I could find the Appellant was employed by Ecologic at the same time he was collecting CPP disability benefits, which are only payable if he is incapable regularly of pursuing any substantially gainful occupation[25]. The Appellant described how he required flexible hours and how he limited his activity. The business was not profitable. Whether his involvement with the teak farm affected his entitlement to CPP disability benefits is not for me to decide; but I do not think the two are necessarily incompatible. The evidence before me on this appeal supports a conclusion that the Appellant was employed by a Canadian corporation as its representative, from October 1997 until March 2007, when Ecologic's corporation status was cancelled for failure to comply with the *Corporations Tax Act* of Ontario[26].

ii. The Appellant maintained a permanent place of abode in Canada

[31] Besides being employed by a Canadian corporation during his absence from Canada, the Appellant must have had a permanent place of abode in Canada, to which he intended to return[27].

[32] S. M. testified that around the time the Appellant's parole ended in 2004 she bought a house on X in X. The Appellant moved his possessions - including furniture, clothing, and valuables - into the house before he went to Costa Rica. He paid S. M. monthly rent, in return for which she reserved rooms in the finished basement exclusively for him and his family to use when they were in Canada. When a friend of hers wanted to move into the basement, she moved the Appellant's belongings to two rooms upstairs and kept those for him on the same terms. Until

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[23] Oxford English Dictionary; Cambridge Dictionary
[24] *Ward v. MHRSDC*, 2008 TCC 25
[25] CPP paragraph 42(2)(a)
[26] IS27-11-12
[27] OAS subparagraph 21(5)(a)(vii)

2006 or 2007, the Appellant stayed on X whenever he came to Canada. His wife and children often came with him, and stayed there as well. Based on this evidence, I find the Appellant had a permanent place of abode in Canada, to which he intended to return.

iii. The Appellant returned to Canada within six months of employment ending

[33] The Appellant's employment with Ecologic ended in March 2007, when its corporate status was cancelled. Although he continued working at the teak farm, he provided no evidence to support that he was working for a Canadian firm or corporation after that. However, because he returned to Canada in July 2007[28], he met the requirement that he return to Canada within six months of his employment with Ecologic ending.

The Appellant continued to reside in Canada after July 2007

[34] The Appellant submitted that his absences from Canada were also because he was engaged as a missionary; and as a worker in lumbering or harvesting. These would potentially extend the application of subsection 21(5) past July 2007, because they were not related to Ecologic's corporate status. However, these provisions do not apply to him.

[35] First, the Appellant claimed his missionary work involved sharing the doctrine of social credit, and exposing "the crimes committed by men/women masquerading as government"[29]. The OAS Regulations stipulate the missionary work must be "with any religious group or organization"[30]. Social Credit is not a religious group or organization. It is an economic theory espoused by, among others, a now-defunct political party. Similarly, the Appellant's wish to educate people about crime in government is political, not religious. The Appellant's activities in promoting these beliefs were not missionary work as contemplated by the OAS Regulations.

[36] Second, the Appellant's activities at the teak farm were not as a "worker" in lumbering or harvesting. That term is not defined in the legislation, and I could find no case law or legislative background to shed light on what was intended. The generally accepted meaning of "worker"

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[28] GD2-341
[29] AD5-4-5
[30] OAS Regulations subparagraph 21(5)(b)(vi)

does not include the managerial and administrative tasks the Appellant testified constituted most of his work.

[37] However, I find that after he returned to Canada in December 2005, the Appellant resided in Canada whether or not he was employed by Ecologic. He and S. M. testified that in 2006 he purchased a house X, Ontario, with money his wife gave him. He moved into the house later in 2006 or in 2007, and he still lives there. He continued travelling back and forth to Costa Rica to manage the farm and to see his family; and his wife and children often came to Canada to visit. The Appellant testified he could not sponsor his family to immigrate to Canada because of his pending charges and eventual conviction; and then because he could not afford to. He applied to sponsor them in January or June 2011[31]. His children moved to Canada in 2012 and 2014, and his wife arrived in February 2018.

[38] The Appellant did not file income tax returns in Canada for many years. In 2017, he tried to file after the fact, but CRA would only assess him for the last 10 years. Those assessments show that from 2007 to 2015, the Appellant's only income was from his CPP pension, and he owed no tax[32]. Therefore, his failure to file returns is not evidence he did not reside in Canada.

[39] Although the Appellant had strong ties to Costa Rica, I find his greater ties were to Canada; and that he made his home and ordinarily lived in Canada at least up to November 24, 2011. He had an established home in Canada, and many close family members. His trips outside Canada were temporary ones made for a specific purpose. The teak farm did not require his constant presence in Costa Rica. In fact, he often had to be in Canada to deal with the farm's accountants and investors. I did not place much weight on the fact the Appellant's wife and children lived in Costa Rica. They were there because he was unable to bring them to Canada to live. They visited often, staying in the Appellant's home at S. M.'s, and then in the house purchased with money provided by the Appellant's wife.

[40] The Appellant's CBSA Traveller History shows that between December 2005 and November 2011, he was not absent from Canada for more than one year[33]. The only exception is

[31] AD1G-21-22
[32] IS27-16-45
[33] GD2-341

where the record shows he entered Canada on July 10, 2008; and his next entry is more than a year later, in August 2009. Because his passport was not available, I could not tell when he left Canada in that interval. However, he wrote a letter in September 2008, and a reply was sent to him at his house in X[34]. This indicates he was likely in X when he wrote the letter, and intended to be there to receive the reply. Therefore he would not have left Canada until October 2008 at the earliest and so was not absent for a year or more. Because the Appellant was resident in Canada in December 2005; and his absences after that were temporary ones and were for less than one year, they are deemed not to have interrupted his residence in Canada[35]

Approval and Payment of the Appellant's Pension

[41] The Appellant is entitled to a full OAS pension because he meets the requirements of paragraph 3(1)(b) of the OAS Act:

- on July 1, 1977, he was more than 25 years old, and he resided in Canada; and
- he resided in Canada for the 10 years immediately preceding the day on which his OAS application could be approved; that is from November 23, 2001, to November 23, 2011.

[42] The effective approval date of the Appellant's application is November 24, 2011, when he turned 65[36]. His pension was payable beginning the following month, in December 2011[37].

CONCLUSION

[43] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security

[34] GD2-276
[35] OAS Regulations subsection 21(4)
[36] OAS Act subsection 8(2); OAS Regulations subsection 5(2)
[37] OAS Act subsection 8(1)