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

Citation: *O. R. v Minister of Employment and Social Development*, 2018 SST 1217

Tribunal File Number: GP-17-1832

BETWEEN:

O. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Videoconference hearing on: October 4, 2018

Date of decision: October 18, 2018

Canada

DECISION

[1] The Claimant is considered a resident of Canada for the purposes of his Old Age Security ("OAS") pension, from March 16, 1997, to December 15, 1999. However, the Claimant is not considered a resident of Canada from April 1, 2004, to December 20, 2013. When added to his previously accepted periods of Canadian residency (from December 20, 1966, to March 15, 1997, and from December 16, 1999, to March 31, 2004), his Canadian residency for OAS purposes totals 37 years and 103 days.

OVERVIEW

[2] In 1996, the Claimant entered a common-law relationship with L. V., an employee of the Canadian diplomatic service ("X").[1] He subsequently married L. V. in 2011. In 1997, he left Canada to live with L. V. during her posting to Belgrade, Serbia. He accompanied her on subsequent postings to Senegal, Macedonia, and Russia. L. V. retired from X in 2009 and moved with the Claimant to Budapest, Hungary. While they were living in Budapest, L. V. periodically worked for the Canadian Embassy as a locally engaged contractor or a short-term employee. These post-retirement work terms occurred between 2011 and 2015. In 2016, the Claimant and L. V. returned to Canada permanently. They visited Canada from time to time between 1997 and 2016, but not every year.

[3] The Minister received the Claimant's application for the OAS pension on April 10, 2014. The Minister granted a partial (34/40^{ths}) OAS pension initially and upheld that decision on reconsideration. The Claimant appealed the reconsideration decision to the Tribunal.

[4] As the spouse of a Canadian diplomatic employee, the Claimant could, under certain conditions, be considered resident in Canada during his spouse's diplomatic postings. He maintains that it is unfair for certain postings (such as Macedonia) to automatically trigger Canadian residency for both him and his spouse, while other postings (such as Serbia, Senegal, and Russia) do not automatically trigger Canadian residency. Both the Claimant and L. V. were deemed to be residing in Canada between December 16, 1999, and March 31, 2004, when L. V. was posted to Macedonia. Canadian residency was deemed to have arisen during this posting

[1] Canada's diplomatic service was known for an extended period of time as the X, or "X" for short.

because of the *Agreement on Social Security Between Canada and the Republic of Macedonia*. He also argues that the six-month post-employment limit for returning to Canada (to retroactively establish Canada residency after postings such as Serbia, Senegal, and Russia) is unfair and was not explained to either him or L. V.

ISSUES

[5] Was the Claimant a resident of Canada, for the purposes of his OAS pension, at any time between March 16, 1997, and December 15, 1999 (inclusive)?

[6] Was the Claimant a resident of Canada, for the purposes of his OAS pension, at any time after March 31, 2004, and before his 65th birthday on X, 2013?

[7] If the answer to either of the above questions is "yes", what is the impact on his OAS pension entitlement?

ANALYSIS

[8] The Claimant was born in Hungary on X. He arrived in Canada as a refugee on January 24, 1957, and became a Canadian citizen on May 9, 1962.[2] His 18th birthday was on X, 1966, and his 65th birthday was on X, 2013. The Claimant and L. V. commenced a common-law relationship on October 5, 1996, and were married on January 15, 2011.[3] L. V. reached the age of 65 on X, 2012.

[9] L. V. commenced employment with X on April 17, 1979, and worked at a variety of postings in Canada, Europe, and Africa. She was posted to the Canadian Embassy in Belgrade, Serbia from July 1993 to August 1997.[4] It was during this posting that her common-law relationship with the Claimant commenced. The Claimant moved from Canada to Serbia on March 15, 1997, in order to live with L. V.[5]

[2] GD2-69
[3] GD2-70, GD2-71, GD4-12, and GD4-13
[4] GD2-36
[5] GD2-14

Was the Claimant a resident of Canada at any time between March 16, 1997, and December 15, 1999 (inclusive)?

[10] The Claimant resided with L. V. in Belgrade from March 16, 1997, to the end of her posting in August 1997. She was then "cross-posted" (meaning that she did not first return to Canada before starting her next posting) to Senegal in August 1997. She remained in Senegal with the Claimant until December 1999, and arrived at her next posting in Macedonia on December 16, 1999.[6]

[11] The Claimant and L. V. were asked at the hearing about returning to Canada prior to the postings in Senegal and Macedonia. The Claimant was unable to recall, saying they usually went to her next cross-posting first and then returned to Canada within a couple of months. He said L. V. would be more reliable in that regard, although he was fairly certain they did not return to Canada before moving to Macedonia in December 1999. L. V. said they did not return to Canada between Serbia and Senegal, but would have visited Canada within a few months of starting her assignment in Senegal. She thought this would have happened in December 1997. In contrast, she very clearly recalled returning to Canada from Senegal with the Claimant prior to starting her posting in Macedonia, as it was necessary to report to X headquarters in Canada for operational reasons.

[12] The version of events provided by L. V. is in accordance with the Claimant's passport stamps and visas. The Claimant's passport shows that he entered Canada on December 8, 1999, after passing through Paris, France.[7] The Claimant was issued a visa on December 10, 1999, by the Macedonian Embassy in Ottawa. The Claimant then entered France on December 16, 1999, although it is difficult to tell whether the Claimant proceeded to Macedonia that day.

[13] L. V. also testified that she and the Claimant visited Canada for approximately two weeks in the summer of 1998, for unspecified compassionate reasons. She also said they would have vacationed in Toronto during the summer of 1999. Both she and the Claimant indicated that they

[6] GD2-14 and GD2-36
[7] GD2-52 and GD2-54 to GD-56

had elderly mothers in Canada during this time. Unfortunately, it is not possible to corroborate these visits through other evidence such as passport stamps.

[14] Although the Claimant and L. V. would have spent a small amount of time in Canada between March 16, 1997, and December 15, 1999, they clearly were living and working in Serbia and then Senegal. I must therefore determine whether the *Old Age Security Regulations* ("OAS Regulations") permit that time to be considered residency for the Claimant in Canada on account of L. V.'s diplomatic duties.

Under which conditions can diplomatic service abroad be considered residency in Canada?

[15] The OAS Regulations say that certain intervals of absence from Canada shall be deemed not to have interrupted a person's residence in Canada.[8] Most importantly for the Claimant, these intervals of absence include certain situations relating to diplomatic personnel and their spouses.

[16] In particular, those regulations say that a person's absence from Canada, while they were "employed or engaged out of Canada" by the Government of Canada, could be deemed not to interrupt residence in Canada. However, the person must return to Canada within six months of the end of her employment or engagement out of Canada. This also applies to the spouse or common-law partner accompanying the "employed or engaged" person, if the accompanying person returned to Canada within six months of the return of his spouse or common-law partner.[9]

[17] I find that L. V. was "employed or engaged" out of Canada by the Government of Canada at the relevant times. X is an integral part of the Government of Canada, and X has provided written evidence attesting to the employment of L. V. at X from April 17, 1979, to October 2009.[10] I must now determine whether the other requirements under the OAS Regulations are met and the Claimant can apply the OAS Regulations to establish Canadian residency between March 16, 1997, and December 15, 1999.

Can the Claimant establish continued Canadian residency after March 15, 1997, by virtue of his spouse's work and their return to Canada in December 1997 and/or December 1999?

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[8] S. 21(4) of the OAS Regulations
[9] Ss. 21(5)(b)(i) and 20(5)(c)(i) of the OAS Regulations
[10] GD2-36

[18] The OAS Regulations require L. V. to return to Canada within six months of the end of her employment or engagement out of Canada. The Minister has denied the Claimant's appeal thus far, on the basis that L. V. (and the Claimant) did not return to Canada within six months of her retirement from X in October 2009. This fact was used to preclude the Claimant's Canadian residency not just during the posting in Russia from 2004 to 2009, but also for the period between March 16, 1997, and December 15, 1999.

[19] However, L. V. testified that she returned to Canada frequently between 1997 and 2006 with the Claimant. In particular, there is oral evidence that they returned in approximately December 1997, shortly after the end of the posting to Serbia. There is both oral and documentary evidence supporting a return to Canada in December 1999, immediately after the Senegal posting and immediately before the Macedonia posting.

[20] In interpreting the OAS Regulations, should L. V. be considered to have just one term of "employment" from 1979 to 2009? Or could it be characterized as a series of "employments" or "engagements"? If it can be characterized as a series of either "employments" or "engagements", then the return of L. V. and the Claimant in December 1997 and again in December 1999 could trigger continued Canadian residency for the Claimant from March 16, 1997, to December 15, 1999. I will first consider when L. V. was "employed out of Canada", as contemplated by the OAS Regulations.

[21] L. V. testified that she had to return to Canada for operational reasons in December 1999. This is supported by the granting of a Macedonian visa to the Claimant in Ottawa during that time. As such, I find that L. V.'s employment "out of Canada" cannot be considered continuous from March 16, 1997, until her retirement in October 2009. Her employment was in Canada for at least a brief period of time in December 1999, when she had to report to DFAIT headquarters.

[22] Alternatively, I accept that L. V. was "engaged" out of Canada by the Government of Canada, in the course of her various X postings. According to the Cambridge Business English Dictionary, a person is "engaged" if they are "busy doing something", "working as something",

or even "involved in something".[11] This is somewhat broader than "employed" and I am satisfied that it includes the diplomatic activities of L. V.

[23] I therefore find that L. V. returned to Canada with the Claimant in December 1999, within six months of the end of either her employment or engagement out of Canada. If characterized as the end of a period of "employment" out of Canada, this would apply back to at least March 16, 1997, as L. V. was cross-posted from Serbia to Senegal later that year. If characterized as the end of her "engagement" out of Canada, this would apply only to the period she was posted in Senegal. However, in that case, the return of the Claimant and L. V. to Canada in December 1997 would be within six months of her previous engagement in Serbia.

[24] As a result, whether I characterize L. V.'s X duties as "employment" or "engagement" out of Canada, I find that L. V. was absent from Canada for circumstances set out in s. 21(5)(b) of the OAS Regulations (or actually in Canada) throughout the period from March 16, 1997, to December 15, 1999. It follows that the Claimant can apply s. 21(5)(c) of the OAS Regulations and establish continued Canadian residency from March 16, 1997, to December 15, 1999.

Was the Claimant a resident of Canada at any time after March 31, 2004, and before he reached age 65?

[25] As noted, based on an agreement between Canada and Macedonia, the Claimant was deemed to be resident in Canada while L. V. was posted to Macedonia from December 16, 1999, until March 31, 2004. I must now determine whether he was a resident of Canada after the end of the Macedonia posting and before his 65th birthday on December X, 2013.

[26] L. V. ended her diplomatic duties in Macedonia on March 31, 2004, although it appears she did not actually leave Macedonia until April 4, 2004.[12] Her next official X posting did not start until July 2004 in Moscow, Russia. At the hearing, the Claimant said he and L. V. drove from Macedonia to Budapest, Hungary. L. V. said she had a temporary assignment in Sweden for most of the period between her official postings in Macedonia and Russia. The Claimant remained in Budapest during her Sweden assignment. They then drove together from Budapest

[11] *Cambridge Business English Dictionary* (Cambridge University Press), accessed on-line on October 5, 2018.
[12] GD2-14

to Moscow. Ultimately, neither L. V. nor the Claimant said they returned to Canada before her Russia posting commenced, although they both described returning to Canada in September 2004 on compassionate leave after the Claimant's mother died.

[27] L. V. said she returned to Canada with the Claimant on compassionate leave on an unspecified date in the summer of 2005 when her own mother died. She believed they also visited Toronto around January 2006, to see her brother-in-law. However, she said they did not return to Canada again until the late spring of 2011, when they visited a former X colleague. The Claimant said they generally saw their mothers in Canada every calendar year from 1997 to 2005, when his mother-in-law passed away. He said that they subsequently took vacations in the United States rather than in Canada.

[28] L. V. retired from X in October 2009, although her Record of Employment indicates that her last actual day of work was September 30, 2009.[13] This was at the end of her Russia posting: she and the Claimant then commenced living in Budapest, Hungary, without first returning to Canada. The Claimant said they drove from Moscow to Budapest and likely did not return to Canada until 2015. There is no agreement between Russia and Canada to automatically deem Canadian diplomatic service in Russia as a period of residency in Canada.

[29] Although there are some inconsistencies between the evidence of the Claimant and L. V., their accounts are generally consistent with travel to Canada until at least 2005 and possibly early 2006. They are also consistent with not returning to Canada until at least the late spring of 2011, well after L. V. retired from X.

[30] Unlike the return of the Claimant and L. V. to Canada after their posting in Senegal, I find that there was no such return after her final posting in Russia for at least 18 months. While they may have returned to Canada during the early stages of that posting in Russia, I find that L. V. did not return to Canada within six months of the end of her posting in Russia. This prevents the Claimant from applying the OAS Regulations to establish residency in Canada for that entire posting.[14]

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[13] GD2-36 and GD4-17
[14] Subsections 21(4) and (5) of the *Old Age Security Regulations*

[31] I also considered whether the Claimant's return to Canada in September 2014 for his mother's funeral could create Canadian residency for him from April 1, 2004, to September 1, 2014. I set September 1, 2014, as the end of this period as there was no evidence about the exact dates of his visit to Canada in September 2014. The OAS Regulations do permit an interval of absence from Canada to be considered continuing residence in Canada, if that interval does not exceed one year. However, the interval of absence also needs to be of a temporary nature.[15] I am not persuaded that the Claimant's absence from Canada after March 31, 2004, was of a temporary nature: the Claimant moved to Hungary for several months, moved to Moscow, and returned to Canada on compassionate leave only when his mother died. There is no persuasive evidence of an imminent and planned return to Canada. On a balance of probabilities, I find it most likely that the Claimant's absence from Canada after March 31, 2004, was likely intended to be an extended absence and only ended with the unexpected passing of his mother.

[32] While the Claimant and L. V. appear to have returned to Canada periodically beginning in 2011, they continued living in Hungary until May 2016.[16] I find that, until he moved back to Canada in 2016, the Claimant would still have been "resident" in Hungary. As he cannot be resident in more than one country, this precludes residency in Canada during that period. However, before concluding, I would like to address two specific issues: the work performed by L. V. in Hungary after her retirement, and the fairness of the legislation.

Does the post-retirement work performed in Budapest by L. V. assist the Claimant?

[33] On four occasions between June 6, 2011, and August 30, 2013, L. V. was "contracted" by the Canadian Embassy in Budapest to provide services. She was also "employed" by the Canadian Embassy in Budapest from April 9, 2014, to October 14, 2014. Finally, she was again "contracted" by the embassy to provide services for several periods between March 30, 2015, and September 1, 2015. Two 2017 letters from the embassy expressly made the distinction between being "contracted" and being "employed" for those periods.[17]

[15] Subsection 21(4) of the OAS Regulations
[16] GD2-8 and GD3-1
[17] GD3-2 to GD3-9

[34] I find that these periods of "contracting" and "employment" do not assist the Claimant. There is no persuasive evidence that L. V. returned to Canada within six months of the end of the contracts on September 1, 2015. She moved to Canada with the Claimant in May 2016. However, even if I had found that she returned to Canada after previous contracts or "employment" in Budapest, several other factors are also unfavourable to the Claimant.

[35] Although the Embassy considered L. V. to be an employee on April 9, 2014, all of the "employed" periods were after the 65th birthdays of both L. V. and the Claimant.[18] As a result, these periods would have no bearing on the OAS entitlement of the Claimant. In addition, the services provided by E. K. were transitory and she was already resident in Budapest when she began to provide those services. As a result, I do not agree that services of this kind were intended to trigger the deemed residency provisions in s. 20 of the OAS Regulations. Her "contracted" work was described as "emergency", "back-up" or "temporary". I note that X's letter of July 18, 2012, which set out L. V.'s periods of employment, made no mention of any employment after October 2009 even though she began providing "contracted" services to the Embassy in Budapest on June 6, 2011. These services appear to be under a contract arranged locally by the Embassy rather than an engagement or employment directed by the Government of Canada. L. V. also did not move to Hungary at the request of the Government of Canada in order to provide those services.[19]

Is the legislation fair?

[36] The Claimant said it was unfair for the periods of L. V.'s Canadian diplomatic duties to not automatically qualify as continued residency in Canada. He suggested the requirement that such employees return to Canada within six months was completely arbitrary, particularly as the return might only be for a single day. He also argued that X failed to inform either L. V. or himself of the requirement to return to Canada within six months of the end of her final posting, in order to establish Canadian residency during her diplomatic employment. He also found it unfair that diplomatic assignments in some countries (such as Macedonia) were deemed to

[18] GD3-2 and GD3-8
[19] GD2-36, and GD3-2 to GD3-9

establish Canadian residency, while diplomatic assignments in other countries (such as Russia) did not in themselves establish Canadian residency.

[37] I have sympathy for the Claimant and his wife, as it appears that L. V. served Canada well over an extended career with X. The Claimant himself also appears to have been engaged as a community coordinator, during the last Russia posting. However, the Tribunal is created by legislation and, as a result, it has only the powers granted to it by its governing statute. I am therefore required to interpret and apply the provisions as they are set out in the CPP. I cannot waive or change requirements because they may appear to operate unfairly in a particular case. Similarly, I cannot grant entitlement to a benefit because an employer may have failed to adequately advise its employees or their spouses of the applicable laws. Finally, I cannot grant entitlement on the basis of the lack of an agreement between Canada and Russia. I cannot question the failure of Canada to enter into an applicable agreement with Russia despite entering into one with Macedonia. These issues are simply beyond the Tribunal's jurisdiction.

What is the impact of my findings on the Claimant's OAS pension entitlement?

[38] The Minister found that the Claimant had been resident in Canada for slightly more than 34 years between his 18th and 65th birthdays. However, I have found that the Claimant was also resident in Canada from March 16, 1997, to December 15, 1999. This means he was resident in Canada from December 20, 1966, to March 31, 2004: a total of 37 years and 103 days.

[39] For a person not residing in Canada at the time his OAS pension application is approved, an aggregate period of 40 years' residence is required to receive a full OAS pension.[20] A partial pension can be paid at the rate of 1/40th of the full pension amount for each full year of residence after age 18. However, if the total period of residence contains a fraction of a year, the total period of residence must be rounded down to the next lower multiple of a year.[21] Therefore, with Canadian residence of 37 years and 103 days, the Claimant is entitled to a partial OAS pension equivalent to 37/40^{ths} of a full OAS pension.

CONCLUSION

[20] Subparagraph 3(1)(c)(iii) of the *Old Age Security Act*
[21] Subsections 3(3) and (4) of the *Old Age Security Act*

[40] I found that the Claimant was resident in Canada from December 20, 1966, to March 31, 2004. Although this is a longer period of residence than previously found by the Minister, it still does not entitle the Claimant to a full pension because it is less than the 40 years required for a full pension. However, his partial pension increases from a 34/40th to a 37/40th entitlement.

[41] The appeal is allowed, in part.

Pierre Vanderhout
Member, General Division - Income Security