



[TRANSLATION]

Citation: *E. M. v Minister of Employment and Social Development*, 2019 SST 1575

Tribunal File Number: GP-17-2072

BETWEEN:

E. M.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: François Guérin

HEARD ON: November 26, 2018

DATE OF DECISION: January 31, 2019

REASONS AND DECISION

DECISION

[1] The Applicant was not eligible for a partial Old Age Security (OAS) pension when he applied for that pension on April 9, 2014.

OVERVIEW

[2] The Applicant was born in Haiti. He entered Canada on October 28, 1972, and decided to stay there permanently in July 1973. He obtained permanent resident status on August 20, 1974.

[3] The Applicant and his wife returned to live in Haiti in December 1984. They came back to Canada in December 2009. Given the earthquake in Port-au-Prince on January 10, 2010, the Applicant and his wife decided to come back to Canada and re-establish their principal residence there.

[4] The Applicant applied for a partial pension under the *Old Age Security Act* (OAS Act), which was received by the Minister on April 9, 2014.¹ The Applicant submits that he is entitled to a partial OAS pension given his age and his residence in Canada from October 1972 to December 1984, and since December 2009. The Minister denied the application initially and on reconsideration because it submits that the Applicant had not resided in Canada for at least 20 years to benefit from payments outside Canada. The Applicant appealed to the Social Security Tribunal.

[5] To be eligible for Old Age Security, the Applicant must meet the necessary requirements. In particular, the OAS Act provides for the payment of a partial OAS pension for persons having resided in Canada for a minimum of 10 years after the age of 18 but for less than 40 years. In the case of applicants who no longer live in Canada but who wish to obtain payments outside Canada, the minimum period of residence is 20 years.

¹ GD2-16 to 20.

ISSUE

[6] Has the Applicant been a resident of Canada, within the meaning of the Act, from December 2009 to April 9, 2014, when he applied for a partial OAS pension?

[7] Based on the cumulative periods of residence, was the Applicant eligible for a partial OAS pension when he applied on April 9, 2014?

ANALYSIS

[8] At the hearing, the parties agreed that the Minister's assessment of the period of residence in Canada until the month of December 1984 is correct and is 11 years and 329 days.

[9] For OAS purposes, a person resides in Canada if they make their home and ordinarily live in any part of Canada. This is distinct from the concept of presence. A person is present in Canada when they are physically present in any part of Canada.² A person can be present in Canada without being resident in Canada.

[10] Residence is a question of fact to be determined on the particular facts of each case. A person's intentions are not decisive. Factors to be considered include, but are not limited to:

- a. Ties in the form of personal property;
- b. Social ties in Canada;
- c. Other ties in Canada (medical coverage, driver's licence, rental lease, tax records, etc.);
- d. Ties in another country;
- e. Regularity and length of stay in Canada, and the frequency and length of absences from Canada;

² *Old Age Security Regulations*, s 21(1).

- f. The person's mode of living, or whether the person's life in Canada is substantially deep rooted and settled.³

Has the Applicant been a resident of Canada from December 2009 to April 9, 2014, when he applied for a partial OAS pension?

[11] I find that the Applicant has not made his home and ordinarily lived in Canada from December 2009 to April 9, 2014, when he submitted an OAS applicant, despite his intermittent presence in Canada during that period.

[12] The Applicant confirmed the dates he entered and left Canada since December 2009, as compiled in the table composed by the Minister,⁴ and provided explanations as to his travels abroad.

[13] The Applicant indicated that, when he entered Canada in December 2009, he and his wife had come to celebrate their daughter's birthday in Montréal and that they planned to stay for about three weeks. On January 10, 2010, there was the earthquake in Port-au-Prince. After learning of the destruction of their property in Port-au-Prince, the couple decided to leave Haiti for good and come back to live in Canada permanently. Still, they returned to Haiti on February 21, 2010,⁵ to see the extent of the damage. They stayed there until December 21, 2010, before going to the United States of America. They came back to Canada only on December 26, 2010, for about three weeks. The Applicant went back to Haiti with his wife on January 16, 2011.⁶

[14] Therefore, the Applicant and his wife were in Haiti from January 16 until April 21, 2011. They came back to Canada for a few days, through the United States, but immediately went back to Haiti, where the Applicant and his wife stayed from May 10 to December 12, 2011.

[15] The Applicant and his wife went through the United States and arrived in Canada on December 26, 2011. They went back to Haiti on January 15, 2012, and stayed there until April 5,

³ *Canada (MHRD) v Ding*, 2005 FC (Federal Court) 1976.

⁴ GD3-28.

⁵ GD2-68

⁶ GD2-58 and GD3-28.

2012. They arrived in Canada on April 9, 2012, for a period of 20 days and returned to Haiti on April 29, 2012. They stayed there for the rest of the year.

[16] The Applicant and his wife arrived in Canada, through the United States, on December 28, 2012. On January 26, 2013, after less than a month in Canada, they had already returned to Haiti.⁷

[17] The Applicant and his wife left Haiti on March 28, 2013, traveled through the United States,⁸ and arrived in Canada on April 5, 2013.

[18] A few days after he arrived, the Applicant learned that his sister-in-law in Haiti had died. While traveling to New York with his wife to get his mother-in-law to go back to Haiti for the funeral, the Applicant was involved in a car accident. He and his wife stayed in the United States for care and physiotherapy until December 27, 2013.⁹ Although he recovered from the accident faster, the Applicant stayed by his wife's side during her recovery.

[19] After this brief chronology of events, I will now examine several factors as established in *Ding* to decide whether there was residence.

1. Ties in the form of personal property

I do not find this factor supportive of Canadian residence. The Applicant submitted a general letter from the Royal Bank,¹⁰ showing only the balance. He did not own anything in Canada (house, car, furniture) except his clothes, according to his own testimony. Although they are trying to sell it, the Applicant and his wife own only one piece of land in Haiti.

2. Social ties in Canada

⁷ GD2-58 and GD3-28.

⁸ GD2-58.

⁹ GD2-58.

¹⁰ GD2-80.

I do not find this factor supportive of Canadian residence. The Applicant was living with his daughter while he was in Montreal, in the same way as he lived with his mother-in-law in New York or his brother in New Jersey. The Applicant and his wife have a few friends.

3. Other ties in Canada

I find this factor to be relatively neutral with respect to a finding of Canadian residence. The applicant has coverage with RAMQ [Québec health insurance plan], which was reinstated after his entry into Canada in December 2009. However, this service was used very little when he returned from trips outside Canada.¹¹

4. Ties in another country

I find this factor unsupportive of Canadian residence. Although he and his wife own land in Haiti, it is for sale and does not seem to have much value. However, by his own admission, after the January 10, 2010, earthquake, the Applicant returned to assess the damage. Although he spoke of the major destruction of the country, he remained there for nearly 10 months rather than quickly returning to Canada. To me, this indicates stronger ties with Haiti. The Applicant went back regularly and for longer periods until 2013.

5. Regularity and length of stay in Canada

I do not find this factor supportive of Canadian residence. Although the Applicant returns to Canada occasionally, for his daughter's birthday, for example, this factor seems to show a stronger attachment to Haiti, or even to the United States, through which he passed regularly to visit family, than to Canada. The Applicant and his wife went to Haiti for long periods and made regular visits to the United States, the same way he visited Canada.

6. Applicant's way of life

I do not find this factor supportive of Canadian residence. The Applicant personally considers that he has lived in Canada since the time when he decided to no longer go back to live in Haiti.

¹¹ GD2-77.

However, his travels outside Canada for long periods, mainly to Haiti and, to a lesser extent, the United States, do not give the impression of wanting to seriously and concretely establish roots in Canada. This is during the period in question, from December 2009 until the date on which the Applicant submitted his OAS application, received on April 9, 2014. However, according to his testimony and the evidence since then, I am satisfied that things have changed and that he and his wife have re-established their ties with Canada. Unfortunately, on April 9, 2014, I do not believe that the Applicant was resident in Canada.

Summary of factors from December 2009 to April 9, 2014

[20] As a result, I find that the *Ding* factors do not support a finding of Canadian residence from 2009 until the Applicant applied for a partial OAS pension on April 9, 2014.

Based on the cumulative periods of residence, was the Applicant eligible for an OAS pension when he applied on April 9, 2014?

[21] Given the finding I made regarding the first question—that the Applicant was not a resident in Canada at the time of the April 9, 2014, application—he therefore lived outside the country and requires a minimum of 20 years of residence in Canada to qualify for OAS. Therefore, he was not eligible for OAS on April 9, 2014.

CONCLUSION

[22] The Applicant seems to be a good-natured and honest person, and I have no reason to doubt the accuracy of his testimony about entering and leaving Haiti, the United States, and Canada, and the reasons for his travels. I am also sensitive to the arguments presented regarding the Applicant's and his wife's precarious financial situation.

[23] However, I must make my decision based on the evidence received and the testimony heard on appeal. On April 9, 2014, the date on which the Minister received the Applicant's application for a partial OAS pension, I do not believe, based on a balance of probabilities, that the Applicant met the definition of residence in Canada.

[24] The appeal is dismissed.

François Guérin
Member, General Division - Income Security