



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *I. W. v Minister of Employment and Social Development*, 2019 SST 1587

Tribunal File Number: GP-19-188

BETWEEN:

I.W.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: John Eberhard

Date of decision: November 1, 2019

DECISION

[1] I. W. (the Appellant) does not qualify for an increased partial OAS pension rate of 20/40th. He did not accumulate 20 years of Canadian residence at the time that his OAS application was approved.

[2] The Appellant lived in Canada between September 26, 2016 and June 23, 2017. He did not re-establish his residency in Canada during this period. He was in receipt an OAS partial pension rate (at a rate of 19/40th) from October 2016. He is not entitled to an increased rate of 20/40th.

[3] I have dismissed the appeal for the reasons that follow.

OVERVIEW

[4] The Appellant made an application dated September 19, 2016 for Old Age Security. He was born in Northern Ireland on November 26, 1947. He reached the age of 65 in November 2012. In his application, he stated that he lived in Canada from:

- June 22, 1982 to November 23, 2001; and,
- from November 24, 2001 to September 6, 2016 in Northern Ireland; and,
- from September 6, 2016 to June 16, 2017, in Canada. He then left Canada.

[5] The Minister asserts that he was present in Canada from September 6, 2016 to June 16, 2017. He did not re-establish a permanent home in Canada.¹ The period of September 6, 2016 to June 16, 2017 is regarded by the Minister as “presence” not “residence” in Canada. This means that his residence in Canada is from June 22, 1982 to November 23, 2001, which is 19 years and five (5) months.

[6] The Old Age Security Act (OASA) requires a minimum of 20 years of residence in Canada after the age of 18 in order to qualify to receive pension payments outside of Canada. Individuals applying for the pension from abroad must have 20 years of residence at the time of approval. Those who reside in Canada and qualify for a pension with less than 20 years of

¹ his principal residence being in Northern Ireland, United Kingdom

residence at the time of approval must have accumulated the 20 years of residence by the date of their departure, whether it is for a cessation of residence or a prolonged absence, in order to continue to receive the pension abroad.

[7] The Appellant does not qualify for an increased partial OAS pension rate of 20/40th, as he did not accumulate 20 years of Canadian residence at the time that his OAS application was approved in September 2016. The Appellant had more than 20 years of living in Canada by his last date of departure from Canada June 2017. Not all of this time was, by definition, as a resident. He left to reside permanently abroad. He fulfilled more than 20 years of living in Canada but because he was a resident for a shorter period at the time of application, he receives only a partial OAS pension at the rate of 19/40th.

[8] His residence was 19 years and 179 days (5 months and 29 days). The Minister informed him that once an application for a partial OAS pension is approved, the pension would not increase with additional years of residence in Canada. Since he did not live in Canada for at least 20 years after the age of 18, he can only get payments for six months after he leaves Canada.

[9] The Appellant wrote that he disagrees with the decision. He asked for a reconsideration. The Minister upheld the reconsideration decision. On February 4, 2019, the Appellant appealed the Minister's reconsideration decision to the Social Security Tribunal.

[10] I find that this appeal must be denied. From October 2016, an OAS partial pension rate of 19/40th was granted. I agree that the Appellant did live additional months in Canada between September 26, 2016 and June 23, 2017. He is not entitled to an increased rate of 20/40th because he was not resident during that period.

THE FACTS

[11] You retired to Ireland in 2001. You lived there for about 15 years. You then sold your house in United Kingdom (U.K.) and lived with your wife and daughter in Canada from September 6, 2016 until June 16, 2017 (the date of return to live in U.K.).

[12] From June 22, 1982 to November 23, 2011, you had 19 years and 5 months (155 days) of residence in Canada where you worked. Whether your pension is portable or not depends on

whether the period of living in Canada until your return from September 2016 to June 2017 can be considered “residence”. That period would represent nine months and 10 days (273 days). To determine whether you returned to reside in Canada in 2016, you must have severed your ties in Ireland and re-established yourself in Canada. If you did not do that, your return to Canada is considered “presence” (visit) and not residence.

[13] The Minister maintains that your residence in Canada is from June 22, 1982 to November 23, 2001. That is 19 years and 155 days. That period of residence would entitle you only to 19/40 of the OAS pension not 20/40.

[14] The question for me is whether or not you established a permanent home in Canada on your return in September 2016. It seems your principal residence was in Northern Ireland when you and your wife decided to return and live there in June 2017. The Minister approved your application for a partial OAS pension (19/40). It was effective in October 2016. It is settled law that following the date of one's return to Canada, a pension will not increase with additional years of residence in Canada.

[15] When you responded to the Minister's Reconsideration letter, you noted:

- You lived and were resident in Canada from the 22nd June 1982 to the 23rd November 2001 and from 6th September 2016 to 16th June 2017 (9 months and 10 days). The first period of residence was for 19 years and 155 days. Service Canada confirmed this in their letters dated 16th July 2012 and 16th August 2012. The Minister also refers to your residence in Canada include the following :

- i. In a Service Canada letter dated June 2017. It states residency was 19 years and 179 days.
- ii. A second letter under Residency History² from 22nd June 1982 to 13th November 2001 it then states 19 years.

[16] The discrepancies do not affect the outcome of this appeal. You questioned why 155 days was omitted. I find that it was not omitted and the discrepancy between 179 days and 155 days does not make a difference in calculating the time you were considered a resident of Canada. The

² page GD2-41

apparent typographical error showing the 13th November instead of the 23rd of November 2001 does not make a difference to the result.

[17] You have submitted that you were a resident of Canada for a total of 20 years and 98 days. This includes the period between September 2016 and June 2017. You say you left Canada for personal family reasons and own a home in X, Northern Ireland. You answered a questionnaire dated September 14, 2018, which sets out these details. For the 9+ months, you lived with your daughter. You indicated you returned to Canada for “family ties”.

[18] You noted you and your wife sold your home in the UK and moved back to live in Canada for the second period of the 6th September 2016 to 16th June 2017. You note that Service Canada used the word “residency” in writing to your wife. These letters referred to the period from 6th September 2016 to 16th June 2017. Service Canada included them in their calculations and recognized them as residency in Canada for your wife. The Minister contended that the period of September 6, 2016 to June 16, 2017 was “presence” not “residence”. The distinction is a matter of legal interpretation.

THE LAW

[19] The relevant law is found in sections of the Old Age Security Act (OASA). These are set out in the annex of this decision. The OAS Regulations (OASR) define residence for the purposes of determining the eligibility of an applicant for OAS benefits (per section 21 of the OAS Regulations). Section 21 distinguishes between being resident and being present in Canada. A person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and a person is present in Canada when he is physically present in any part of Canada.

Application of the law to the facts in this case

[20] You have submitted that the evidence proves that you were a resident in Canada for the 273 days that you lived with your daughter.

ANALYSIS

[21] This case revolves around the question: “what is residence?” The OASR distinguishes between the physical location of an individual and his residence. Intention is not a sole

determining fact. A person who is present in Canada is physically within Canada but is not necessarily resident in Canada. Similarly, a person can be resident in Canada although not physically in Canada.

[22] You must prove on a balance of probabilities that you should be regarded a resident. You must prove you are entitled to have the OAS benefit based on a period residency for the period of September 2016 to June 2017.

[23] The primary assumption is that an individual can only be resident in any one country at any given time. While one may have property in many countries and spend some time in each of them, only one of the countries is his place of residence. This country will be the one to which he has the most significant attachment. An individual's attachment to a country is measured by evaluating the residential ties that the individual has in that country. Residential ties are factors that demonstrate an individual's deep roots to a country. It is necessary for me to evaluate whether you ordinarily lived and made your home in Canada during that period. Residential ties are things that demonstrate whether a person has set up a home and ordinarily lives within it. It is settled law³ (the Federal Court of Canada) that residence is a factual issue:

“...residence must be contrasted with the notion of domicile, which is focused on the intention of an individual. The wording of paragraph 21(1) (a) of the OAS Regulations makes the factual component of the definition of the residence under the OAS Act even clearer. In tying the notion of residence to a person's home and using the words “ordinarily lives” there can be no doubt that a person will have to establish that Canada is or was, for the amount of time required by the Act, the place where he or she is factually anchored.”

[24] You provided evidence that you left Canada after many years to live in Ireland. You returned for a short period after selling your Irish home to live with your daughter in Canada. The Federal Court⁴ has provided guidance with factors to be taken in account in determining whether a person makes his home in and ordinarily lives in Canada. They are as follows:

- a) ties in the form of personal property (bank accounts, business, furniture, automobile, credit card);

³ Duncan v. The Attorney General of Canada

⁴ In Canada Minister of Human Resources Development v. Ding, 2005 FC 76,

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

Ties to Canada during the disputed period

[25] There is no evidence that you owned real property or a vehicle in Canada when you temporarily returned for the 273 days to live with your daughter's family.⁵ After you sold your Irish house, you shipped personal goods to Canada in a container. Although I also note you sold furnishings as part of the contract for sale of the house in May 2017.⁶ There is no evidence as to where the furnishing went or how they were used. There is reference to the purchase of a home⁷ but no details as to where or why? You did not return to any work in Canada during that time. There is no evidence as to your lifestyle, friends or how you interacted with other Canadians. You continued to maintain a bank account in Canada for deposits and did take advantage of the Health system during the period. There is only indirect evidence you had a Canadian credit or debit card. Your TD bank account was active during the period⁸, with significant "wire transfers" "to customer" during May and June 2017. You noted that you returned to the UK to live. You purchased a one-way ticket back to your new home in Ireland.

[26] You did not present any contracts (such as telephone, utility accounts) in your name or filed income tax returns that might provide corroborative evidence of residence. There is no evidence you belonged to any social organizations in Canada not did any volunteer work that would indicate an attachment to the community. There is no personal information such as how you entertained relatives and friends as might be expected of one who ordinarily makes his home in a community. There is no information that assists me in determining your relationship with

⁵ This is confirmed by a letter from C. W. received on May 16, 2017.

⁶ GD1-11

⁷ GD2041

⁸ GD1-16

family and the attachment that would be consistent with deep ties to Canada. Indeed, you simply said you left the country because of certain (unnamed) “family reasons, personal”⁹

[27] Residence is a factual issue that requires an examination of the whole context of the individual under scrutiny.¹⁰ Unfortunately, here, there is little evidence from you as to what motivated you to leave Canada and your intentions related to the return to a home in Ireland. Your return to your country of birth represents a tipping point in your ties between Ireland and Canada. I find that from September 2016 and June 2017 the ties to Canada were not the predominant feature of your residence. I find that events after your 19+ years in Canada your life appears directed to a permanent retirement settlement in Ireland with a short break to live with your daughter after the sale of your home and before you acquired a new one.

[28] I find that you were not resident of Canada within the definition provided by the law¹¹ for those 273 days.

CONCLUSION

[29] The burden of proof rests on the Appellant to establish entitlement to an OAS pension.¹² The Respondent is not responsible for the supply of information that is uniquely in the hands of the Parties. I am not satisfied that the Appellant has met this onus. The Appellant has not provided evidence that satisfies me as to the legislative and jurisprudentially defined meaning of “residence”.

[30] I find it more likely that his time in Canada for the 273 days was “presence”. The Appellant has not demonstrated that he has met the minimum residence requirement to qualify for a full 20/40 year partial pension.

[31] The appeal is dismissed.

John Eberhard

⁹ GD2-55

¹⁰ De Bustamente v. Canada (Attorney General), 2008 FC 1111.

¹¹ Ding decision

¹² De Carolis v. Canada (Attorney General), 2013 FC 366.

Member, General Division - Income Security

ANNEX

Extracts from the Old Age Security Act and Regulations

Payment of full pension

3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to:

(a) every person who was a pensioner on July 1, 1977;

(b) every person who

(i) on July 1, 1977 was not a pensioner but had attained twenty-five years of age and resided in Canada or, if that person did not reside in Canada, had resided in Canada for any period after attaining eighteen years of age or possessed a valid immigration visa,

(ii) has attained sixty-five years of age, and

(iii) has resided in Canada for the ten years immediately preceding the day on which that person's application is approved or, if that person has not so resided, has, after attaining eighteen years of age, been present in Canada prior to those ten years for an aggregate period at least equal to three times the aggregate periods of absence from Canada during those ten years, and has resided in Canada for at least one year immediately preceding the day on which that person's application is approved

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.

Paragraph 11. (7) (b) of the OAS Act provides:

No supplement may be paid to a pensioner for

(c) any month throughout which the pensioner is absent from Canada having commenced to be absent from Canada either before or after becoming a pensioner and having remained outside Canada before that month for six consecutive months, exclusive of the month in which the pensioner left Canada;

(d) any month throughout which the pensioner is not resident in Canada, having ceased to reside in Canada, either before or after becoming a pensioner, six months before the beginning of that month

Paragraph 19 (1) of the OAS Act provides:

19(1) Subject to this Act and the regulations, an allowance may be paid to the spouse, common-law partner or former common-law partner of a pensioner for a month in a payment period if the spouse, common-law partner or former common-law partner, as the case may be, in the case of a spouse, common-law partner or former common-law partner, has resided in Canada after attaining eighteen years of age and prior to the day on which their application is approved for an aggregate period of at least ten years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which their application is approved.

Section 20 of the Old Age Security Regulations (OASR) deals with the determination of 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.