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

Citation: *J. K. v Minister of Employment and Social Development*, 2020 SST 538

Tribunal File Number: GP-19-674

BETWEEN:

J. K.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Shannon Russell

Teleconference hearing on: May 19, 2020

Date of decision: May 30, 2020

DECISION

[1] The Claimant began residing in Canada on February 23, 1992. She is therefore eligible for a higher partial Old Age Security (OAS) pension than what the Minister awarded.

OVERVIEW

[2] The Claimant is a 67-year-old woman who was born in England. She came to Canada in February 1992 and became a Permanent Resident in July 1995.

[3] The Claimant applied for an OAS pension in November 2017. The Minister approved the application, and awarded the Claimant a partial pension of 23/40ths effective April 2018 (the month after her 65th birthday). The Claimant asked the Minister to reconsider the amount of her partial pension as she believed that she was eligible for a partial pension of 26/40ths (rather than 23/40ths). The Minister reconsidered, but decided to maintain its original award of 23/40ths. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

ISSUE(S)

[4] I must decide whether the Claimant resided in Canada from February 23, 1992 to August 6, 1994.

ELIGIBILITY REQUIREMENTS

[5] To receive an OAS pension, a person must[1]:

- be at least 65 years of age;
- have legal resident status in Canada; and
- have resided in Canada after the age of 18.

[6] A full OAS pension is paid to individuals who have resided in Canada for at least 40 years after the age of 18[2]. If a person has not resided in Canada for at least 40 years, the

[1] Sections 3 and 4 of the Old Age Security Act
[2] Paragraph 3(1)(c) of the *Old Age Security Act*

legislation provides for the possibility of a partial pension. A partial pension is paid to a person who has resided in Canada for at least 10 years[3]. So, for example, if a person resided in Canada after the age of 18 for 10 years (and also meets the other eligibility requirements), then the person will be eligible for a partial OAS pension of 10/40ths (or one-quarter of a full OAS pension).

[7] The OAS legislation distinguishes between the concepts of residency in Canada and presence in Canada. A person resides in Canada if she makes her home and ordinarily lives in any part of Canada[4]. A person is present in Canada when she is physically present in any part of Canada[5].

[8] There are several factors that are relevant to deciding whether a person has made their home and ordinarily lived in Canada. These factors include, but are not limited to[6]:

- Ties in the form of personal property (i.e. house, business, furniture, automobile, bank account, credit card);
- Social ties in Canada (i.e. membership with organizations or associations or professional memberships);
- Other ties in Canada (i.e. hospital and medical insurance coverage, driver's license, rental, lease, loan or mortgage agreement, property tax statements, electoral voter's list, life insurance policies, contracts, public records, immigration and passport records, provincial social services records, public and private pension plan records, federal and provincial income tax records);
- Ties in another country;
- Regularity and length of stay in Canada and the frequency and length of absences from Canada; and

[3] Paragraph 3(2)(b) of the *Old Age Security Act*
[4] Paragraph 21(1)(a) of the *Old Age Security Regulations*
[5] Paragraph 21(1)(b) of the *Old Age Security Regulations*
[6] *Canada (Minister of Human Resources Development)* v. *Ding*, 2005 FC 76

- The person's mode of living (i.e. whether her lifestyle and degree of establishment in Canada is substantially deep rooted and settled).

ANALYSIS

There is only one period of time that is in dispute

[9] The Minister acknowledges that the Claimant resided in Canada continuously from August 6, 1994 to March 2018 (her 65th birthday). The Minister explained that it chose August 6, 1994 as the start of the Claimant's residency in Canada because the Claimant reported that she decided to live permanently in Canada in the summer of 1994. The Minister further explained that when applicants make general statements about an event that occurs in the "summer", then the Minister's policy is to use the date of "August 6"[7].

[10] The Claimant submits that she began residing in Canada earlier than August 6, 1994. Specifically, she submits her residency in Canada began on February 23, 1992 (when she first arrived in Canada).

[11] I see no reason to interfere with the Minister's finding of residency from August 6, 1994 through to March 31, 2018. I will therefore focus my analysis on whether the Claimant resided in Canada from February 23, 1992 to August 6, 1994.

The Claimant likely began residing in Canada in February 1992

[12] The Minister acknowledges that the Claimant was present in Canada from February 23, 1992 to August 6, 1994. However, the Minister submits that the Claimant was not residing in Canada between February 23, 1992 and August 6, 1994 because, during that time, the Claimant did not intend to stay in Canada permanently. In support of its position, the Minister points to a Questionnaire the Claimant completed in March 2018. In that Questionnaire, the Claimant reported that when she first arrived in Canada, she did not intend to live in Canada permanently. She also reported that she decided to live in Canada permanently in the summer of 1994[8].

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[7] Page GD3-4
[8] Page GD2-32

[13] I can understand why the information the Claimant reported in the Questionnaire was concerning to the Minister. However, after hearing from the Claimant and learning about her circumstances during the period of time in dispute, I find that she likely began residing in Canada on February 23, 1992.

[14] The Claimant explained that she made a mistake when she completed the Questionnaire. She said that the two questions at issue (questions (iii) and (iv)) used the word "permanently"[9], and she was focused on that word. She also explained that she wrote in the Questionnaire that she decided to live in Canada permanently in the summer of 1994 because that is when she applied to be a Permanent Resident, and she thought she needed to prove her intention by way of her application for permanent residency.

[15] The Claimant's explanation makes sense to me, particularly in the context of her circumstances. The Claimant came to Canada because her husband (who is an engineer) was offered a one-year contract to work in Canada. She explained that when she came to Canada in February 1992 she and her husband knew they wanted to live here, but at that time they could not say they would live in Canada *permanently* because they did not know if the Claimant's husband's work contract would be renewed after the one year. She said it was always their hope that things would go well so that they could make Canada their home. Given the Claimant's explanation for why she completed the Questionnaire as she did, I am reluctant to use that Questionnaire as evidence that the Claimant did not intend to live in Canada upon her arrival in 1992. I can understand why the use of the word "permanently" in the Questionnaire was confusing to the Claimant, particularly since the OAS legislation does not make residency in Canada conditional on a *permanent* settlement in Canada.

[16] There is other evidence that supports a finding that the Claimant's residency in Canada began in February 1992.

[17] First, during the entire time in dispute (February 1992 to August 1994), the Claimant never returned to England. The Claimant testified that her first trip back to England was in

[9] Question (iii) asks "When you entered Canada did you intend to live here permanently?" Question (iv) asks "When did you decide to live permanently in Canada?" (page GD2-32).

December 1994. Except for short vacation trips to the United States, the Claimant spent her time in Canada.

[18] Second, when the Claimant came to Canada in February 1992, she came with her two young children (born in 1984 and 1987) and, significantly, she enrolled her oldest child in school in Canada. (Her youngest child was not yet ready for school when the Claimant arrived in Canada).

[19] Third, during the time in dispute, the Claimant and her husband rented an apartment in Montreal for their family to live in. The Claimant testified that her husband had arrived in Canada about 6-8 weeks before she and their children arrived, and her husband had found the apartment for the family to live in. The Claimant testified that she (and her immediate family) lived in the apartment for about one year and then moved to a larger apartment within the same building. They lived in the larger apartment for about 18 months.

[20] I do not have documentary evidence corroborating the Claimant's testimony but I have no reason to question her credibility. She provided her evidence in a forthright manner, and readily acknowledged facts (such as ownership of residential property in London, England) even though those facts may not have been viewed as supportive of her case.

[21] As a whole, I find the rental accommodations supportive of a finding of residency in Canada, particularly since the Claimant also testified that their rental agreements for the Montreal apartments were for at least one year. This is not a case, for example, where the Claimant was simply staying with family or friends or staying at a hotel while in Canada.

[22] As for the Claimant's residential property in England, the Claimant testified that during the period of time in dispute she and her husband owned a family home in London, England as well as a holiday home in England. They sold the holiday home in either 1995 or 1996 (the Claimant could not remember the exact date but she acknowledged it was after August 1994) and they sold the family home in 1998. I acknowledge that the Claimant's ownership of homes in England shows she had stronger personal property ties to England than to Canada during the disputed period. However, I cannot ignore the fact that the Claimant was not spending time in either of those homes during the disputed period. She testified that she rented her family home

out just before she came to Canada in February 1992. Given the fact that the Claimant was spending all of her time in Canada and was living in rented apartments in Montreal, I cannot, on these facts, place significant weight on the personal property factor.

[23] Fourth, the Claimant's husband (A. K.) testified during the hearing, and he told me that he is receiving his OAS pension and is receiving 27/40ths. In other words, he said the Minister treated him differently than his spouse in that the Minister did not question his residency in Canada from the date he first arrived (which was about 6-8 weeks before the Claimant). I know that the Claimant's husband was working in Canada (and paying income taxes in Canada) during the disputed period, but this in and of itself is not (in my mind) a sufficient reason to recognize residency for the Claimant's husband and not for the Claimant. They were living together as a family.

[24] Fifth, the Claimant and her husband provided a reasonable explanation for why they did not apply for permanent residency before the summer of 1994. They said that it was their understanding that if they applied for permanent residency while living in Quebec, their application might not have been successful because they believed Quebec required them to be proficient in French. As a result, they waited until they were in Newfoundland to apply for permanent residency.

CONCLUSION

[25] The appeal is allowed. The Claimant resided in Canada from February 23, 1992 continuously through to August 6, 1994.

Shannon Russell
Member, General Division - Income Security