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

Citation: *SB v Minister of Employment and Social Development*, 2021 SST 361

Tribunal File Number: GP-20-1926

BETWEEN:

S. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Antoinette Cardillo

Videoconference hearing on: April 14, 2021

Date of decision: May 4, 2021

DECISION

The Claimant is not entitled to the Old Age Security (OAS) pension at a rate higher than 34/40ths.

OVERVIEW

[1] The Minister received the Claimant's OAS pension application on August 15, 2018[1]. The Minister determined that the Claimant resided in Canada pursuant to paragraph 21(1)(a) of the *Old Age Security Regulations* (OAS Regulations) from July 21, 1982 to April 15, 1989 and from June 15, 1991 to June 11, 2019. The Minister approved payment of a partial pension at the rate of 34/40ths effective in July 2019. The Claimant requested a reconsideration of the Minister's decision and asked that his pension be approved at a rate of 36/40ths and that the period from April 15, 1989 to June 15, 1991 be recognized as Canadian residence. The Minister maintained its initial decision and denied the reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

ISSUE

[2] I have to determine if the Claimant was residing in Canada from April 15, 1989 until June 15, 1991, while he worked and lived abroad.

ANALYSIS

i. Applicable law and Regulations

[3] Subsection 3(2) of the *Old Age Security Act* (OAS Act) provides that 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 and who has attained sixty-five years of age, 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

[1] GD2-3

than twenty years, was resident in Canada on the day preceding the day on which that person's application is approved.

[4] The definition of residence is set out in subsection 21(1) of the OAS Regulations and provides that 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.

[5] Further, subsection 21(4) of the OAS Regulations provides that any interval of absence from Canada of a person resident in Canada that is (a) of a temporary nature and does not exceed one year, (b) for the purpose of attending a school or university, or (c) specified in subsection (5) shall be deemed not to have interrupted that person's residence or presence in Canada.

[6] Subsection 21(5)(a)vi) of the OAS Regulations provides that the absences from Canada referred to in subsection (4)(c) of a person residing in Canada are absences while that person was employed out of Canada by a Canadian firm or corporation as a representative or member thereof, if during his employment out of Canada he had in Canada a permanent place of abode to which he intended to return, or maintained in Canada a self-contained domestic establishment, and he returned to Canada within six (6) 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 OAS Act.

[7] Residence is a factual issue that requires an examination of the whole context of the individual and cannot be determined on the basis of the individual's intentions[2].

ii. Documentary evidence

[8] On his OAS pension application, the Claimant indicated that he entered Canada on July 21, 1982. He submitted proof of his date of entry in Canada[3] and his certificate of Canadian citizenship[4]. He also indicated that he resided in England but was still a Canadian resident from April 1989 to June 1991.

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[2] *Duncan v. The Attorney General of Canada*, 2013 FC 319
[3] GD2-7
[4] GD2-9

[9] On a questionnaire dated February 19, 2019[5], the Claimant confirmed having resided in Canada from July 21, 1982, except for the period from April 1989 to June 1991, when he resided in England but indicated that he was a Canadian resident, his home and address continued to be in Canada and he paid his income taxes in Canada.

[10] On a second questionnaire dated March 23, 2019[6], the Claimant indicated that he returned to Canada in June 1991, within six (6) months of the end of his period of employment in England. He also confirmed that he was not sent abroad by a Canadian company, as his employer was X, an American company based in X.

[11] On May 13, 2019[7], the Minister informed the Claimant that his application for an OAS pension had been approved for payment of a partial pension at the rate of 34/40ths effective in July 2019. Based on the information and documents received, the Minister determined that his residence in Canada was from July 21, 1982 to April 15 1989 and from June 15 1991 to present.

[12] In his request for reconsideration[8], the Claimant asked his pension be approved at the rate of 36/40th with an uninterrupted residence since his initial entry in Canada. He stated that he always paid his taxes in Canada and maintained his residence. He listed the utilities and services he paid for while he was abroad.

[13] In his notice of appeal[9], the Claimant confirmed that he worked and lived in England from April 1989 to June 1991, but requested that period to be considered as Canadian residence. He claims that during that period, he had a house in Canada, paid for the mortgage and utilities, maintained bank accounts and filed income tax returns in Canada. He also included a letter from the Canada Revenue Agency (CRA)[10] dated November 26, 2020, which qualified his status in June 1989 as a factual resident. More precisely, the letter stated that the term factual resident

[5] GD2-31
[6] GD2-35
[7] GD2-38
[8] GD2-42
[9] GD1
[10] GD1-9

meant that even if he left Canada, he was still considered a resident of Canada for income tax purposes. As a factual resident, he was subject to tax in Canada on his world income, meaning all the income he received from sources inside and outside Canada.

[14] In a letter dated February 18, 2021[11], the Claimant explained that his employer was not X but X, a Canadian company with headquarters in X. He worked on the project X. The project was owned and managed by X. The project was big therefore, X hired many subcontractors from around the world. Many Canadians worked for these subcontractors and he was one of them. X paid the salaries to all employees working for the subcontractors. He added that X paid his salary to X and they in turn paid him. It was not X that paid his salary, but X. Moreover, X was charging X a fee to process his salary. He was sent to work on the project by X.

iii. Minister's position

[15] The Minister submitted that the Claimant might have had numerous links with Canada during his period of absence, however, the circumstances of his absence were not provided by the OAS Regulations. To be considered as Canadian residence, the period during which the Claimant worked abroad had to meet the specific circumstances of the OAS Regulations and the Claimant's situation at the time did not meet any of those prescribed circumstances. In addition, the Minister submitted that the CRA confirmed that the Claimant filed his 1989 income tax return on October 10, 1990 as a non-resident and that he filed his 1990 income tax return, on October 18, 1991, also as a non-resident. It was confirmed that the Claimant filed his 1991 income tax return as a Canadian resident on June 23, 1992.

iv. Claimant's testimony

[16] The Claimant testified that he arrived in Canada in June 1982 and that he worked and lived in England from April 1989 to June 1991. He was a mechanical engineer technician for a large construction company in Quebec (X). He was in charge of exterior surfaces of buildings.

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[11] GD05

[17] He was asked by his employer in Quebec (X) to go work in England. His salary was paid by a subcontractor (X) who was hired to process the pay cheques and charged a fee to X for the processing. They were also hired to do the core jobs, however, he explained that all the decisions were made by the Canadian company, X. He was not issued pay stubs or income tax slips. He stated that his salary was simply deposited in his bank account.

[18] While he was in England, he stated that he continued to own a house in Canada and paid the utilities as well as his income taxes in Canada. He left his belongings in Canada and returned almost immediately when there was no more work in England. The company went bankrupt and the project ended.

v. Residence

[19] Section 21 of the OAS Regulations sets out specific circumstances in which a person is deemed to reside or not to reside in Canada, and in which absence from Canada is deemed not to interrupt residence or presence. Of particular significance to this appeal, residence or presence is not interrupted by employment outside Canada if the person is employed by a Canadian firm or corporation and maintained a home in Canada, and if the applicant returned to Canada within six (6) months of the end of the employment out of Canada.

[20] The Federal Court[12] noted that the onus is on an applicant to establish that he is entitled to an OAS pension, and stated:

> [29] It is trite law that residency is a factual issue that requires an examination of the whole context of the individual under scrutiny: *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76. . . at paras 57-58 [*Ding*]. Intent does not equate to residence for the purpose of the [OAS Act].

[21] The Federal Court also stated[13]:

> [49] In *Ding*, above, this Court carefully canvassed the relationship between a claimant's intentions and the approach taken by the courts when dealing with the concept of residence in the context of the ITA. In that regard, Justice Russell found

[12] *Singh v. Canada* (AG), 2013 FC 437 (*Singh*)
[13] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 and *Duncan v. The Attorney General of Canada*, 2013 FC 319

> that "considerable care has been taken to distinguish between a change of "domicile" (which depends upon the will of the individual) and a change of "residence" which depends upon factual issues that are external to the individual[']s intentions" (para 57).
>
> [50] Justice Russell goes on to conclude that residency is a factual issue that requires an examination of the whole context of the individual and that it constitutes a reviewable error to focus on a claimant's "obvious intentions" to the exclusion of other factors in a case that could lead to a contrary conclusion.

[22] The Claimant left Canada in April 1989 to go work in England. Based on the evidence, the Claimant kept a home in Canada, paid for the utilities and services while he was abroad, maintained bank accounts and filed income tax returns in Canada. Therefore, based on the requirements set out in subsection 21(5)(a)vi) of the OAS Regulations that an applicant's residence is not interrupted by employment outside of Canada, if they maintain a home in Canada, and if they return to Canada within six (6) months of the end of the employment out of Canada, the Claimant satisfies these requirements.

[23] What seems to be less clear is whether or not he worked for a Canadian company while he was in England as provided by the OAS Regulations. In a letter dated February 18, 2021, the Claimant submitted that his employer was not X, an American company, but X, a Canadian company. The project he was working on in England was owned and managed by X. X hired many subcontractors from around the world because of the size of the project. He stated that many Canadians worked for these subcontractors and he was one of them. X paid the salaries to all employees working for the subcontractors. He added that X paid his salary to X and they in turn paid him. It was not X that paid his salary, but X. Moreover, X was charging X a fee to process his salary. He was sent to work on the project by X. However, in a questionnaire completed by the Claimant in March 2019[14], before the Minister determined that the Claimant was not considered a resident for the period he worked abroad, the Claimant indicated that he was not sent abroad by a Canadian company, as his employer was X, an American company based in X.

[14] GD2-35

[24] I have considered all the facts. Although I find the Claimant's testimony to be credible and forthcoming, unfortunately, I cannot determine that he worked for a Canadian company while he was in England. The Claimant was not able to submit evidence that he continued to work for X, the Canadian company. I cannot determined based on the documentary evidence or the Claimant's testimony, that in fact, the Claimant was an employee of X while he was abroad. The evidence that he submitted indicates that he was working for the American subcontractor retained by the Canadian firm. I understand that he vigorously testified and submitted in different documents after the Minister's decision that he was paid by the Canadian company through the American company, I have however no evidence of this. The Claimant testified that he never received pay stubs nor tax slips. I cannot make a determination on which company was the Claimant's true employer based on these facts.

[25] Lastly, the Claimant submitted evidence regarding his status determined by the CRA. However, this determination is for income tax purposes not for OAS pension purposes. In addition, there seems to be conflicting facts as the Minister submitted that the Claimant filed his income taxes as a non-resident during the period he was abroad but it would then appear that in 2020, the CRA determined that he was a factual resident. Nonetheless, I have to consider the Claimant's residency based on the OAS Act and OAS Regulations.

[26] Therefore, based on the evidence, I determine that the Claimant does not meet the requirements set out in subsection 21(5)(a)vi) of the OAS Regulations. He is not entitled to the OAS pension at a rate higher than 34/40ths.

CONCLUSION

[27] The appeal is dismissed.

Antoinette Cardillo
Member, General Division - Income Security