Federal Court  Cour fédérale

Date: 20130327

Docket: T-453-12

Citation: 2013 FC 319

Ottawa, Ontario, March 27, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ROGER J. DUNCAN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Office of the Commissioner of Review Tribunals (the "Review Tribunal" or the "OCRT"), finding Mr. Roger J. Duncan (the "Applicant") to be ineligible for an Old Age Security (OAS) pension, whether full or partial.

[2] For the reasons that follow, I find that the application for judicial review should be granted.

[3] As a preliminary matter, it is to be noted that the Applicant, who was self-represented, improperly named the Respondent. Pursuant to subsections 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106, the Attorney General of Canada is the properly named Respondent in this matter, and shall replace the Minister of Human Resources and Skills Development (the "Minister") in that capacity.

1. Background

[4] The Applicant was born in England on March 19, 1943, and is now 70 years of age. He immigrated to Canada in 1966 and was admitted as a lawyer in the province of British Columbia in 1969, becoming a Canadian citizen in 1972. From 1984 until 2002, the Applicant returned to England in order to practice law, having lost his job in Canada. In 2002, the Applicant resigned his law partnership in England and claims to have left his London home in order to accept a full-time consultancy position with a Vancouver-based law firm. After a one-year period working as a consultant, the Applicant started his own law practice in 2003 (splitting his time between England and British Columbia on an approximately quarterly basis) and ultimately retired in 2007. The Applicant owns part-time residences in each of Canada, England, France and Spain. Since retiring, he has travelled and intends to travel extensively, splitting his time between the four part-time homes. Mr. Duncan claims to be in need of his OAS pension, despite appearing to have significant worldwide investments, and affirms that he would not be subject to the OAS recovery tax.

[5] The Applicant applied for an OAS pension on September 6, 2007. In the section of the application addressing "residence history", the Applicant indicated that he lived in Canada from December 30, 1966 to August 20, 1984, that he was a full-time resident of England from August 21,

1984 until February 22, 2002, and that he was a part-time resident of England from April 4, 2002 until the date of his application. In the section of the application requesting the Applicant's "home address", he provided an English address. The Applicant signed his OAS application and declared the information to be true and complete.

[6] In a letter received by Human Resources and Social Development ("HRSDC") on February 6, 2008, the Applicant attached a completed "residence questionnaire", dated January 25, 2008. In a question addressing CPP contributions between the years 2002 and 2004, the Applicant responded as follows: "Not paid but claimed by CRA. As above I was not 'living' in Canada 02-Date but was a part-time non-resident sojourner" (Respondent's Record, Volume 1, Tab 2, p. 86).

[7] Similar affirmations were made in two other submissions to the government, both dated 2006, asserting that the Applicant was not a resident of Canada from 2002 until at least 2006. In his CRA Determination of Residency Status form, dated 12/5/06, the Applicant indicated that he "sojourn[ed] in Canada as a Canadian citizen staying for short stays as a non-resident and also in England and Spain", was "not resident in Canada full-time or England or Spain, but [would] travel/sojourn to each", and was involved in "part-time legal [handwriting unclear] work occasionally when in BC when & if I get any" (Respondent's Record, Volume 1, Tab 2, pp. 78-81). In a letter to the Client Services Division, International Tax Services, dated 11/7/06, the Applicant claimed: "I am not at present 'living' or 'resident' in any country. […] Accordingly, I did not again become a 'resident' of Canada, factual or otherwise, in 2002 merely by my 9 months' consultancy stay, but was only a visitor […]" (Respondent's Record, Volume 1, Tab 2, p. 82).

[8] By letter dated February 12, 2008, the Applicant was informed that the information provided in his application indicated that he had resided in Canada for 17 years and 235 days. To qualify for a pension he would need to change his principal country of residence to Canada, taking all steps to establish a permanent residence. For these reasons, his application was denied.

[9] By letter dated August 6, 2008, the Applicant requested a reconsideration of the decision to deny him OAS benefits. In his request for reconsideration to the Regional Director of Human Resources and Social Development, the Applicant submitted that he made a number of errors in his initial application, including: (i) listing his English address instead of his Vancouver address; (ii) listing that he was a part-time resident of England instead of a part-time resident of Vancouver from 2002 to the date of application (September 6, 2007), having allegedly missed a note instructing him to disregard 'periods when you were outside Canada for less than six months at a time'; and (iii) listing that he 'live[d] permanently outside Canada', when he claims to have in fact lived part-time in British Columbia and part-time (but not permanently) in England. With respect to the residence questionnaire (dated January 25, 2008), he submits that he correctly stated his 'part-time non-(full-time) resident sojourner' status in response to question 10.

[10] After several requests for further information, which the Applicant provided, he was informed by letter dated September 29, 2009 that the initial decision to deny his application for OAS benefits had been maintained, as he did not fully meet the residence requirements of the *Old Age Security Act*, RSC 1985, c O-9 (the "*OASA*" or the "Act"). By letter dated November 12, 2009, the Applicant advised the OCRT that he wished to appeal the Minister's decision of September 29, 2009.

[11] A Review Tribunal hearing was convened on June 14, 2011 in Vancouver. The hearing was adjourned to allow the Applicant additional time to submit further documentation.

[12] By letter dated October 20, 2011, and marked "without prejudice", HRSDC informed the Applicant that, following a review of the additional information provided since June 2011, it had determined that he did meet the residence requirements under the *OASA*. The Applicant was informed that although his passports confirm several absences from Canada from May 16, 2006 onwards, HRSDC calculated his Canadian residence from April 3, 2002 to September 10, 2007. As a result he was entitled to a partial pension of 23/40ths, effective April 2008 (Respondent's Record, Volume II, p. 691).

[13] By letter dated October 26, 2011, and marked "without prejudice", the Applicant informed the Respondent that he did not wish to accept the settlement offer of a partial OAS pension. The Applicant requested that the Respondent reconsider its decision and amend the offer to reflect a full OAS pension (Respondent's Record, Volume III, p. 687).

[14] A second Review Tribunal was convened on November 9, 2011, in Vancouver. On February 1, 2012, the Review Tribunal dismissed the Applicant's appeal. It is this decision that is the subject matter of this proceeding.

2. Decision under review

[15] As noted above, the Review Tribunal found the Applicant to be ineligible to receive either a full or partial OAS pension pursuant to section 3 of the *OASA*. The decision notes that the appeal

hearing was adjourned at the Applicant's request on June 14, 2011, in order to permit him to submit further documentary evidence regarding his Canadian residency.

[16] The Review Tribunal dealt with two preliminary matters: (i) finding, after receiving oral submissions from the parties and upon careful consideration, that a "without prejudice" settlement letter from the Minister to the Applicant, dated October 20, 2011, and reply dated October 26, 2011, are not relevant to the establishment of the Applicant's Canadian residency for the period of April 4, 2002 to March 19, 2008 (the "Relevant Period"); and (ii) accepting as admissible certain insurance records filed by the Applicant after the close of his appeal hearing.

[17] The only issue on appeal before the Review Tribunal was a determination of the Applicant's duration and periods of residency in Canada for the purposes of determining whether he should be entitled to receive a full or partial OAS pension or no pension at all.

[18] The Review Tribunal surveyed a number of statements suggesting that the Applicant was not resident and did not consider himself to be resident in Canada during the Relevant Period, as well as the documentation and other evidence put forward by the Applicant in support of what he now alleges to be "part-time residence in Canada from 2002 to 2008".

[19] The Review Tribunal considered the parties' submissions and the eligibility requirements for full and partial OAS benefits under subsections 3(1) and (2) of the *OASA*, as well as under subsection 21(1) of the *Old Age Security Regulations*, CRC, c 1246 (the "*OAS Regulations*"),

finding that the two periods of time relevant to determining the Appellant's residency in Canada are: (i) April 4, 2002 to March 19, 2007; and (ii) March 20, 2007 to March 19, 2008.

[20] Ultimately, the Review Tribunal found that, upon weighing all of the evidence and examining the whole context of the individual, the Applicant did not intend to reside and did not reside in Canada as required under the *OASA* and the *OAS Regulations* during the two relevant time periods. On a balance of probabilities, the Review Tribunal concluded that the Applicant was last a resident of Canada for the purposes of OAS benefits eligibility on August 20, 1984. Accepting that the Applicant had been resident in Canada for a total of 17 years and 235 days between 1966 and 1984, this was insufficient to meet the requirements for either full or partial OAS benefits.

[21] The Review Tribunal placed significant weight on the statements in the Applicant's OAS application suggesting that he did not consider himself a resident during the Relevant Period and found that "[w]hile the [Applicant] has testified that in fact he filled in the OAS Application incorrectly, it does not follow that he can retroactively revise or amend that application at the time of the appeal hearing" (Review Tribunal Decision, para 57). The Review Tribunal emphasized the probative value of the application, finding that it "evidence[d] the [Applicant's] mindset at the time of the OAS Application submission, that he was visitor, a part-time sojourner, to Canada from April 4, 2002 onwards" (Review Tribunal Decision, para 58).

[22] The Review Tribunal also emphasized the insufficiency of the "patchwork of evidence filed" by the Applicant for the Relevant Period, and noted that a "pattern of late and over due payments of invoices since 2002" suggested absence, rather than assisting in establishing residency.

The Review Tribunal wrote: "If one makes their home and ordinarily lives in Canada one would be reasonably expected to pay bills and statements of account on a regular basis" (Review Tribunal Decision, para 62).

3. Issues

[23] Having reviewed the materials and submissions of both parties, I am of the view that the following questions must be determined:

i) What is the applicable standard of review?

ii) Did the exclusion of the settlement letter and reply between the Minister and the Applicant constitute a breach of procedural fairness?

iii) Was the Review Tribunal's decision reasonable?

4. Analysis

- The legislative framework

[24] The general requirement for a full OAS pension as set out in paragraph 3(1)(c) of the *OASA* is to have accumulated 40 years of residence in Canada after the age of 18. However, paragraph 3(1)(b) of the *OASA* sets out the criteria to be met in order for an individual to qualify for a full OAS pension without having 40 years of residence. It provides as follows:

MONTHLY PENSION	**PENSIONS**
PENSION PAYABLE	***AYANTS DROIT***
Payment of full pension	**Pleine pension**
3. (1) Subject to this Act and the regulations, a full monthly pension may be paid to	**3.** (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux

[…]

(*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; and

[…]

personnes suivantes :

…

b) celles qui, à la fois :

(i) sans être pensionnées au 1er juillet 1977, avaient alors au moins vingt-cinq ans et résidaient au Canada ou y avaient déjà résidé après l'âge de dix-huit ans, ou encore étaient titulaires d'un visa d'immigrant valide,

(ii) ont au moins soixante-cinq ans,

(iii) ont résidé au Canada pendant les dix ans précédant la date d'agrément de leur demande, ou ont, après l'âge de dix-huit ans, été présentes au Canada, avant ces dix ans, pendant au moins le triple des périodes d'absence du Canada au cours de ces dix ans tout en résidant au Canada pendant au moins l'année qui précède la date d'agrément de leur demande;

…

[25] If an individual cannot qualify for a full OAS pension, he or she may qualify for a partial pension under subsection 3(2) of the *OASA*. For a partial pension, the individual must have resided in Canada for at least 10 years and must have been a resident on the day preceding the day on which the application is approved. If the individual did not reside in Canada on the day preceding the day on which the application is approved, the individual must have resided in Canada for at least 20 years. Subsections 3(2) to 3(5) provide as follows:

MONTHLY PENSION	**PENSIONS**
PENSION PAYABLE	***AYANTS DROIT***
Payment of partial pension	**Pension partielle**
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	**3.** (2) Sous réserve des autres dispositions de la présente loi et de ses règlements, une pension partielle est payable aux personnes qui ne peuvent bénéficier de la pleine pension et qui, à la fois :
(*a*) has attained sixty-five years of age; and	*a*) ont au moins soixante-cinq ans;
(*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.	*b*) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins dix ans mais moins de quarante ans avant la date d'agrément de leur demande et, si la période totale de résidence est inférieure à vingt ans, résidaient au Canada le jour précédant la date d'agrément de leur demande.
Amount of partial pension	**Montant**
(3) The amount of a partial	(3) Pour un mois donné, le

monthly pension, for any month, shall bear the same relation to the full monthly pension for that month as the aggregate period that the applicant has resided in Canada after attaining eighteen years of age and prior to the day on which the application is approved, determined in accordance with subsection (4), bears to forty years.	montant de la pension partielle correspond aux n/40 de la pension complète, n étant le nombre total — arrondi conformément au paragraphe (4) — d'années de résidence au Canada depuis le dix-huitième anniversaire de naissance jusqu'à la date d'agrément de la demande.
Rounding of aggregate period	**Arrondissement**
(4) For the purpose of calculating the amount of a partial monthly pension under subsection (3), the aggregate period described in that subsection shall be rounded to the lower multiple of a year when it is not a multiple of a year.	(4) Le nombre total d'années de résidence au Canada est arrondi au chiffre inférieur.
Additional residence irrelevant for partial pensioner	**Résidence ultérieure**
(5) Once a person's application for a partial monthly pension has been approved, the amount of monthly pension payable to that person under this Part may not be increased on the basis of subsequent periods of residence in Canada.	(5) Les années de résidence postérieures à l'agrément d'une demande de pension partielle ne peuvent influer sur le montant de celle-ci.

[26] For individuals who have already established residence in Canada, subsection 21(4) of the *OAS Regulations* protects their residence by ensuring that temporary absences from the country do not interrupt their period of residence:

RESIDENCE	**RESIDENCE**
21. (4) Any interval of absence from Canada of a person resident in Canada that is	**21.** (4) Lorsqu'une personne qui réside au Canada s'absente du Canada et que son absence
(*a*) of a temporary nature and does not exceed one year,	*a*) est temporaire et ne dépasse pas un an,
(*b*) for the purpose of attending a school or university, or	*b*) a pour motif la fréquentation d'une école ou d'une université, ou
(c) specified in subsection (5)	*c*) compte parmi les absences mentionnées au paragraphe (5),
shall be deemed not to have interrupted that person's residence or presence in Canada.	cette absence est réputée n'avoir pas interrompu la résidence ou la présence de cette personne au Canada.

[27] Finally, subsection 21(1) of the *OAS Regulations* explains the difference between "residence" and "presence" for purposes of OAS eligibility. It states:

RESIDENCE	**RESIDENCE**
21. (1) For the purposes of the Act and these Regulations,	**21.** (1) Aux fins de la Loi et du présent règlement,
(*a*) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and	*a*) une personne réside au Canada si elle établit sa demeure et vit ordinairement dans une région du Canada; et
(*b*) a person is present in Canada when he is physically present in any part of Canada.	*b*) une personne est présente au Canada lorsqu'elle se trouve physiquement dans une région du Canada.
[…]	…

i) What is the applicable standard of review?

[28] It has been decided on several occasions, both pre- and post-*Dunsmuir* that the issue of residence is a question of mixed fact and law that is more factually than legally driven and is therefore reviewable on a reasonableness standard, save and except where the critical issue is the proper legal test to be applied for determining residency (which is not the case here): see *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 [*Ding*] at paras 58-60; *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277 at paras 23-24; *Kiefer v Canada (Attorney General)*, 2008 FC 786 at paras 20-21; *de Bustamante v Canada (Attorney General)*, 2008 FC 1111 at paras 33-34; *Singer v Canada (Attorney General)*, 2010 FC 607 at para 18. I agree with the Respondent, therefore, that this Court can only set aside the Review Tribunal's decision if it determines that its decision-making process does not exhibit justification, transparency and intelligibility and its decision does not fall within a range of possible, acceptable outcomes which are defensible with respect to the facts and the law of the case: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

[29] With respect to allegations of breach of procedural fairness, the Court will apply a standard of correctness. As a result, no deference is owed to the decision-maker in such matters, and the only question to be decided is whether the procedure followed was fair: *Attorney General of Canada v Sketchley*, 2005 FCA 404, [2006] 3 FCR 392 at para 52-55; *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 100-103. As recently indicated by the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the adequacy of reasons should not be evaluated as a potential breach of procedural fairness *per se*. When reasons

are provided by a tribunal, "[a]ny challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis" (at para 22). In other words, the Supreme Court ruled that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met" (at para 16).

ii) Did the exclusion of the settlement letter and reply between the Minister and the Applicant constitute a breach of procedural fairness?

[30] In a letter of settlement dated October 20, 2011, and reproduced at page 691 of the Respondent's Record, a Service Canada Benefits Officer accepted that the Applicant had resumed residence in Canada in 2002 and offered him a partial (23/40ths) pension. The Applicant refused this offer in a reply produced at page 687 of the Respondent's Record, arguing that he was entitled to a full pension. The letter of settlement and reply were both marked as "without prejudice" and the Review Tribunal decided, "[a]fter receiving oral submissions from the parties and after careful consideration," that their inclusion would be inappropriate and that the documents were "not relevant to the primary issue on appeal, that is, the establishment, or lack thereof, of the Appellant's Canadian residency" from 2002 to 2008. The Applicant claims that the exclusion of these letters resulted in a breach of procedural fairness and unfairly deprived him of the opportunity to make full submissions.

[31] I cannot accept such an argument, for several reasons. First of all, the privilege that attaches to settlement negotiations is well established and works to the benefit of both parties. It is based on broad policy interests in facilitating settlements and promoting economy in the use of judicial

resources. As Wigmore stated, "[…] admissions made in the course of settlement negotiations may not be concessions of wrongs done, but merely an expression of a desire to purchase peace, and as such irrelevant and inadmissible": see *Wigmore on Evidence* (Chadbourn rev., 1972), no 1061, as quoted in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed (Markham: Lexis Nexis, 2009), at no 14.316).

[32] Given the lengthy negotiations that went on between the Applicant and the Minister regarding the OAS pension, a justification of this type may have legitimately motivated the Review Tribunal's decision to exclude the settlement letters. The Applicant contends, however, that the privilege was waived in the case at hand when the Review Tribunal decided to include these documents in the hearing file.

[33] I agree with the Respondent that the inclusion of the settlement documents in the hearing file by the Review Tribunal cannot be interpreted as a waiver of privilege by the Minister. The Review Tribunal is an independent administrative tribunal at arm's length from the Minister, which does not have the legal status required to waive the Minister's privilege on her behalf. It is quite clear from the sections of the *Canada Pension Plan*, RSC, 1985, c C-8, dealing with the Review Tribunal's constitution that it is meant to act independently from the Minister, for the obvious reason that it is empowered to vary a decision of the Minister (subsection 82(11)). As a result, I do not think it can be said that the Minister has waived her settlement privilege in the case at hand.

[34] In addition, the Applicant cannot seriously contend that he was prevented from making full submissions because he relied on the October 20, 2011 letter to establish residency from 2002 to

2007. First of all, that letter clearly stated that it should not be relied upon at the hearing. The Applicant appears to have accepted this, as he stated the following at paragraph 7 of his reply letter, dated October 26, 2011: "I will not, as you request, refer to your without prejudice offer at the Hearing, if it proceeds, although I will, but without doing so, of course now have to deal with your points without referring to your letter".

[35] Moreover, the Review Tribunal's assertion that it received oral submissions from the parties regarding the inclusion of the documents is another indication that the Applicant should not have relied blindly on the privileged letters to establish his residency from 2002 to 2007. While the Applicant claims to have been informed on the telephone prior to the hearing that such letters are not privileged in administrative proceedings, there does not appear to be any evidence on the record of this conversation, and the Applicant did not claim to have relied on this information once informed at the hearing that the admissibility of the documents was in question. Despite the fact that the Review Tribunal reserved its decision as to the admissibility of the privileged letters, the Applicant was clearly on notice that their admissibility was in question and that they could not be blindly relied on to establish residency from 2002 to 2007.

[36] Finally, the Applicant submits that the position taken by the Review Tribunal is inconsistent, given that it made no findings with respect to other documents marked "without prejudice". This argument is not particularly helpful since the Applicant has not established that either party sought to rely on those documents or that the documents undermined his arguments or position in any way. Indeed, these letters were all from the Applicant and were not meant to offer a compromise but sought instead to advance his position.

[37] For all of these reasons, I find that the Review Tribunal did not err in excluding the settlement documents. It probably overstated matters when it declared that these documents were not relevant to establishing the Applicant's residency. Had it not found that the settlement offer was privileged, the Review Tribunal would not have been bound to adopt the position expressed in the October 20, 2011 letter, but it would at least have been required to assess and explain why it has come to a different conclusion. Having found, however, that the letters were privileged, this is a red herring and the comment of the Review Tribunal that these letters were irrelevant is of no consequence, assuming it can be considered to have fully reviewed the record before it.

iii) Was the Review Tribunal's decision reasonable?

[38] The granting of a full or partial OAS pension to the Applicant depends on a determination of his residency, if any, in Canada, between 2002 and 2008. In his OAS application, the Applicant claimed not to be a resident between 2002 and the date of his application in 2007, but later explained that these assertions were made in order to protect his more valuable non-resident income tax status. He alleges that one may be considered a non-resident for tax purposes while still qualifying as a resident for OAS purposes and, therefore, that the Review Tribunal should have accepted his corrected statements and evidence demonstrating that he was in fact resident in Canada between 2002 and 2007. If such a position were accepted, he argues that his residence from 2007 to 2008 would also be established by virtue of subsection 21(4) of the *OAS Regulations*, which deems that temporary absences not exceeding one year will not interrupt a person's residence in Canada.

[39] There is generally no dispute between the parties as to the residency requirement to be applied. In order to be eligible for a full pension, as explained previously, the Applicant would need to satisfy the requirements of subparagraph 3(1)(b)(iii) of the *OASA*; namely, by (i) residing in Canada for at least one year immediately preceding the day on which his application would be approved, and (ii) satisfying the "3 for 1" rule in order to meet a requirement of 10 consecutive years of residency immediately prior to approval of his application (i.e., by showing that any absences during the 10 year period are accounted for by being "present" in Canada after age 18, with each three years of presence eligible as one year of residence).

[40] In order to be eligible for a partial pension, the Applicant would need to satisfy the requirements of paragraph 3(2)(b) of the *OASA* by showing that he had resided in Canada for at least 10 years after attaining eighteen years of age and, if the aggregate period of residence is less than twenty years, that he was resident in Canada on the day preceding the day on which his application would be approved.

[41] The Applicant submitted that the Review Tribunal should also have considered subsection 21(4), according to which short absences (less than a year) should be deemed not to interrupt a person's residency. This argument is without merit in light of the position taken by the Review Tribunal, as it is obvious from a plain reading of that section that it applies only where residency has already been established. If a short period of absence does not interrupt a person's residence, it is implicit that residence must have been established in the first place.

[42] The Applicant argued forcefully that the concept of residence under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) (*ITA*), is the not the same and should not be interpreted in the same way as the concept of residence under the *OASA*. In support of this position, he relied solely on the OCRT decision summary of *J-32512 v Minister of Human Resources Development* (June 15, 1998), which notes without further explanation that, in the context of that case, "[t]here were no legislative provisions which equate a Revenue Canada determination with the residency requirements of the Old Age Security Act."

[43] The Respondent counters that the concept of residence under the *ITA* is the same as residence under the *OASA*, pointing to case law under the *ITA* that suggests that the material factors to be considered in determining "residence" are the same under both acts (*Thomson v Canada (Minister of National Revenue)*, [1946] SCR 209, [1946] CTC 51 [*Thomson*]; *The Queen v Reeder*, 75 DTC 5160 at 5163 (FCTD)). The Respondent argues that the Applicant cannot have it both ways as an individual cannot be a non-resident of Canada for fiscal purposes, yet be a resident for OAS purposes.

[44] Although we have set out the *OASA* definition of residence above – "a person resides in Canada if he makes his home and ordinarily lives in any part of Canada" (paragraph 21(1)(a)) – there is no exhaustive definition of residence in the *ITA*. Despite the fact that an individual's liability for income tax is based on the concept of residency, the *ITA* leaves the meaning of residence to be defined in the common law, although it may deem an individual to be or not to be a resident in certain circumstances regardless of its conclusions regarding factual residence. The CRA's

Interpretation Bulletin IT-221R3 (Consolidated), "Determination of individual's residence status" (2002), provides as follows (at para 2):

> The term "resident" is not defined in the *Income Tax Act* (the "Act"), however, the Courts have held "residence" to be "a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question." In determining the residence status of an individual for purposes of the Act, it is also necessary to consider subsection 250(3) of the Act, which provides that, in the Act, a reference to a person "resident" in Canada includes a person who is "ordinarily resident" in Canada. The Courts have held that an individual is "ordinarily resident" in Canada for tax purposes if Canada is the place where the individual, in the settled routine of his or her life, regularly, normally or customarily lives. In making a determination of residence status, all of the relevant facts in each case must be considered, including residential ties with Canada and length of time, object, intention and continuity with respect to stays in Canada and abroad.

[45] In *Thomson*, above, Justice Rand of the Supreme Court of Canada commented on the concept of residence, noting that "[i]t is quite impossible to give it a precise and inclusive definition" as it is "highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter" (at para 47). In *Vegh v R*, 2012 TCC 95 at paras 24-29, Justice Boyle considered the law of residence in relation to the *ITA*, noting the foundational nature of the *Thomson* decision and beginning his analysis with the following comments regarding the factual nature of legal test:

> [24] "The legal test of residence has a substantial factual component": per Sharlow J.A. in *Laurin v. R.*, 2008 FCA 58, 2008 D.T.C. 6175 (Eng.) (F.C.A.). "It has frequently been pointed out that the decision as to the place or places in which a person is resident must turn on the facts of the particular case": per Cartwright J. in *Beament v. Minister of National Revenue*, [1952] 2 S.C.R. 486, 52 D.T.C. 1183(S.C.C.), and quoted by Bowman C.J. in *Laurin v. R.*, 2006 TCC 634, 2007 D.T.C. 236 (Eng.) (T.C.C. [General Procedure]).

[46] The concept of residence specifically as it relates to the *OASA* was recently explored by Justice Gauthier in *Singer v Canada (Attorney General)*, 2010 FC 607, aff'd 2011 FCA 178. Of note, she quoted the following sources regarding the history and purpose of the Act (internal references omitted):

> [23] The object of the *Act* and of various reciprocal agreements entered into by the Canadian Government pursuant to section 40 of the *Act* were ably described by Justice Judith A. Snider in *Stiel*, at paragraphs 28-29:
>
> > [28] What is the object of the *OAS Act* and the *Canada-U.S. Agreement*? I would describe the OAS regime as altruistic in purpose. Unlike the Canada Pension Plan, OAS benefits are universal and non-contributory, based exclusively on residence in Canada. This type of legislation fulfills a broad-minded social goal, one that might even be described as typical of the Canadian social landscape. It should therefore be construed liberally, and persons should not be lightly disentitled to OAS benefits.
> >
> > [29] However, it cannot be ignored that the *OAS Act* provides benefits, first and foremost, to residents of Canada; it has been described as "the building block of the Canadian retirement income system" (House of Commons Debates, 2nd Session, 30th Parliament, Volume III, 1976-1977, February 8, 1977, p. 2834 (Hansard)). That is the legislative scheme appears focussed on the provision of benefits to persons living their retirements in Canada. It is only through the operation of specific, added provisions that non-residents obtain even a partial OAS pension.
>
> [24] When he presented the *Act to Amend the Old Age Security*, S.C. 1976-1977, c. 9, the bill which implemented the current version of section 3 of the *Act*, before the Standing Committee on Health, Welfare and Social Affaires, Minister Lalonde said:
>
> > The bill was motivated by two factors: first immediately to simplify eligibility to pensions in Canada, and to tie in more closely this right to the contributions of persons who by their labour and

> residence in Canada have helped to build the coun[t]ry.
>
> The second factor, or objective of this bill, is to allow the closer integration of our old age security plan, particularly with the plans of other countries, so that persons immigrating to Canada or Canadians emigrating abroad may more easily receive the benefits to which they are entitled, in Canada as well as abroad, in view of the contributions they have [made] or simply the number of years they have spent in Canada or abroad.
>
> [25] Thus, new principles were introduced in the *Act*. The right to a pension was to be linked mainly to years of residence in Canada after the age of 18.[1] […]

[47] The legal test for residency is described at paragraphs 30-37 of *Singer*, which include the following key excerpts:

> [31] [The definition in paragraph 21(1)(a)] has been applied to a variety of circumstances. As noted by Justice James Russell in *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76, 268 F.T.R. 111 (*Ding*), one can refer to many factors to determine if a person has made her home and ordinarily lives in Canada as of the date set out in the *Act*.
>
> [32] Also, as noted by Justice Carolyn Layden-Stevenson in *Chhabu*, the list of factors enumerated in *Ding* is not exhaustive. There may well be other factors which become relevant according to the particular circumstances of a case.
>
> [33] It is important to emphasize however that the use of precedent is dangerous in that weight might be given to a factor in a particular set of circumstance that is inappropriate in a different context. Mrs. Singer appears to have fallen in this "trap" for she referred the Court to various summaries of decisions of the RT to support her position. These really have little precedential value in the

[1] Footnote 8 of *Singer* here provides as follows: "See *Minutes of Proceedings and Evidence of the Standing Committee on Health, Welfare and Social Affairs*, No. 23 (24 February 1977) at 23:20 (Hon. Marc Lalonde): "[…] Secondly, the eligibility criteria have been simplified. At the moment there are three eligibility criteria which are fairly complex. I shall not describe them; you are already aware of them. They will be replaced by a single criterion, whereby each year of residence in Canada after the age of 18 will account for one-fourtieth of the pension". It appears that reference to such age was to ensure that those years would be where a person could most contribute to the economy."

> present context. For example, she noted that in *W-76940 v. Minister of Human Resources Development* (December 19, 2003), the RT determined that the appellant's Canadian residence began on the day she formalized her intention by applying for permanent residence.
>
> […]
>
> [36] Although each case cited was carefully reviewed by the Court, there is no need to comment further on them for, as mentioned, they do little more than confirm that the test is a fluid one. Sometime the fact that a person has obtained or applied for a permanent status will be relevant while in others it will not. This is true for most factors.

[48] In the final analysis, I think that the common law definition of residence is relevant to consideration of the term under both the *OASA* and the *ITA* and, thus, that the Respondent is correct to assert that the material factors to be considered in determining "residence" may be the same under both acts. That said, as stressed in *Thomson* and *Singer*, above, the meaning of the term may vary not only in the contexts of different matters, but also in different aspects of the same matter, and one must be wary of precedent, such that the context of the act in question as well as a claimant's specific factual circumstances must always be kept in mind.

[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 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. In arriving at this conclusion, he cites paragraph 8 of *Schujahn v Canada (Minister of National Revenue)*, [1962] Ex CR 328 (QL):

> It is quite a well settled principle in dealing with the question of residence that it is a question of fact and consequently that the facts in each case must be examined closely to see whether they are covered by the very diverse and varying elements of the terms and words "ordinarily resident" or "resident". It is not as in the law of domicile, the place of a person's origin or the place to which he intends to return. The change of domicile depends upon the will of the individual. A change of residence depends on facts external to his will or desires. The length of stay or the time present within the jurisdiction, although an element, is not always conclusive. Personal presence at sometime during the year, either by the husband or by the wife and family, may be essential to establish residence within it. A residence [page 332] elsewhere may be of no importance as a man may have several residences from a taxation point of view and the mode of life, the length of stay and the reason for being in the jurisdiction might counteract his residence outside the jurisdiction. Even permanency of abode is not essential since a person may be a resident though travelling continuously and in such a case the status may be acquired by a consideration of the connection by reason of birth, marriage or previous long association with one place. Even enforced coerced residence might create residential status.
>
> [Emphasis Added]

[51] As described above, residence, however one is to interpret it, 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 residence under the *OASA* even clearer. In tying the notion of residence to a person's home ("demeure" in the French version) and using the words "ordinarily lives" ("vit ordinairement" in the French version),

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.

[52] Applying *Ding*, if the Review Tribunal is found to have based its decision regarding Mr. Duncan's lack of residency solely on the basis that he had no intention of establishing his residency in Canada, it may have committed a reviewable error. It is not to be denied that the Review Tribunal placed significant weight on the Applicant's OAS application as probative evidence of the Applicant's mindset that he was not a resident of Canada at the time of application. It is clear from the reasons, however, that the Review Tribunal was aware of the relevant case law and the appropriate test. In particular, it stated that in *Ding* this Court "found that the determination of residency is a factual issue that requires an examination of the whole context of the individual" (Review Tribunal decision, para 43).

[53] Although the Review Tribunal lists various documents and pieces of evidence submitted by the Applicant in support of his claim, it in no way engages with that evidence in its decision. The Respondent submits that the Review Tribunal "reviewed in detail the voluminous evidence submitted by the Applicant in support of his residence in Canada for the period 2002 to 2008" (Respondent's Memorandum, para 60), but makes no submissions regarding the substance of that review. A careful review of the decision reveals that, while citing the proper test and even noting that the Applicant's intention to resume his residency in Canada in 2002 cannot be considered determinative of residency under the *OASA* (Decision, para 46), the Review Tribunal goes on to rely entirely on the Applicant's (allegedly erroneous) statements that he did not intend to become a resident, as stated in his OAS application and various other communications with government. Lone

comments regarding a "pattern of late and over due payments of invoices since 2002" and the fact that the Applicant spends time in each of England, Spain and Canada constitute the only references to the "patchwork of evidence" dismissed by the Review Tribunal, apart from the annotated but non-exhaustive lists of the evidence reviewed.

[54] Paragraph 47 of the decision, which states that "[t]he Appellant's OAS Application is relevant to the Tribunal as it sets a number of *indicia* to indicate the Appellant has not intended to reside, nor does reside, as a matter of OAS law", is particularly indicative of the undue emphasis the Review Tribunal has placed on the Applicant's stated intentions. Apart from summarizing the Applicant's assertions that he was not a full resident after 2002, the Applicant is correct in his claim that the Review Tribunal does not describe or analyse any additional *indicia* which might establish or undermine his residency claim. In addition, their statement that the application sets out *indicia* showing not only that he did not intend to reside but that he <u>didn't reside</u> in Canada is unsupported in the reasons and cryptic in light of the evidentiary record.

[55] The Review Tribunal's statement at paragraph 56 of its reasons that the excerpts from the OAS application represent "an admission of the Appellant himself that he did not intend, nor did he submit that he was a resident of Canada from April 4, 2002 onwards" is problematic in two respects. First, the Review Tribunal has not dealt with the Applicant's proposed corrections to his initial statements, finding that he could not retroactively revise or amend them at the time of the appeal hearing. According to the Applicant, once he determined that he did not need to protect his tax status, he has consistently submitted that he was a resident from 2002 on. Secondly, as accepted by the Review Tribunal itself, the Applicant's intention or mindset is not determinative of the issue

of residency and, despite claiming that it has examined the whole context of the Applicant by applying *Ding*, the Review Tribunal risks committing the exact error described in that case by focusing its reasons on the "obvious intentions" of the Applicant to the exclusion of other factors in the case that, if considered, could arguably lead to a contrary conclusion.

[56] Despite the Review Tribunal's assertions that it has examined the whole context of the Applicant, its reasons suggest that it has based its decision on the Applicant's "obvious intentions" to the potential exclusion of other factors in the evidence that could lead to a contrary conclusion. While this was considered a reviewable error in *Ding*, the Review Tribunal properly cites and states that it is aware of the test to be applied. Nevertheless, even if it is assumed that the Review Tribunal properly applied the test for determining residency, its reasons are insufficient to permit this Court, not to mention the Applicant, to understand why it made its decision or to determine whether its conclusion is within the range of acceptable outcomes. By failing to address any of the many pieces of evidence potentially militating against its conclusion, the Review Tribunal asks this Court to supplement its reasons in order to assess the reasonableness of the decision and undermines the decision's justification, transparency and intelligibility.

[57] While the Applicant's intention is a legitimate factor to consider, it should not, as here, be relied on at the expense of all other factors. Had proper reasons been provided, the Review Tribunal's conclusion might be justifiable, as it is far from clear that the voluminous documentary evidence submitted by the Applicant should be considered sufficient or of the quality necessary to establish residence. Without prejudging the ultimate outcome, however, I find that the reasons provided are insufficient to permit me to assess whether the Review Tribunal's conclusion falls

within the range of acceptable outcomes which are defensible in respect of the facts and law. For this reason, I find that the application for judicial review should be allowed.

[58] Despite this finding, I agree with the Respondent that the Applicant likely cannot have it both ways and, given the similarities in the tests for residency under the *ITA* and the *OASA*, in the event that he were successful in establishing residency before the Review Tribunal, he may put at risk what he has described as his more valuable tax position. Although the two acts serve different aims, the passages quoted in *Singer*, above, suggest that the purpose of considering residency after age 18 in the *OASA* may link the availability of an OAS pension to the contributions a claimant has made to Canada in the years during which a person could most contribute to the economy. That said, the Review Tribunal is required to examine the whole context of the individual and, just as a claimant cannot establish residency on the basis of his or her intentions alone, the Applicant cannot deny residency if the facts establish otherwise.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, without costs.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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