

Federal Court



Cour fédérale

Date: 20130311

Docket: T-247-12

Citation: 2013 FC 262

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 11, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SALOMON DAUD

Applicant

and

**ATTORNEY GENERAL OF CANADA
(MINISTER OF HUMAN RESOURCES AND
SKILLS DEVELOPMENT CANADA)**

Respondent

REASONS FOR ORDER AND ORDER

[1] The following dates are essential in this matter:

- a. April 5, 1936: Mr. Daoud was born in Lebanon;
- b. October 8, 1960: he arrived in Canada as a student;
- c. December 22, 1964: he obtained a permanent resident visa;
- d. July 12, 1988: he became a Canadian citizen;

- e. From May 2001, Mr. Daoud began receiving a full Old Age Security pension and Guaranteed Income Supplement, as he is considered to have been a resident of Canada for 40 years between the ages of 18 and 65;
- f. Later the same year, his spouse fell ill during a trip to Lebanon and never returned to Canada.

[2] Mr. Daoud was given the Old Age Security pension based on his 40 years of residence in Canada. This right, once granted, is not subject to any obligation of residence. Mr. Daoud may now travel as he wishes. He could leave Canada to never return and continue to receive his full pension.

[3] However, that is not the case for the Guaranteed Income Supplement. The Guaranteed Income Supplement benefits are suspended after a period of six months of uninterrupted absence from Canada or after six months of non-residence in Canada.

[4] In June 2007, the Minister of Human Resources and Skills Development Canada opened an investigation to [TRANSLATION] “verify all entries to and exits from Canada since 03/2005 (with evidence), to determine whether the client is still a **PERMANENT RESIDENT** or rather whether he has a **PRESENCE** for the purpose of obtaining the GIS”.

[5] In April 2009, the Department informed Mr. Daoud of the findings of its investigation and advised him that he was not eligible to receive Old Age Security benefits. The payments were then interrupted and he was asked to pay back an overpayment of \$97,893.05, covering the period of May 2001 to March 2009. In review, the Department upheld the decision of April 8, 2009. The

applicant appealed this decision with the Review Tribunal. In its decision of November 4, 2010, the Review Tribunal upheld the decision to vacate Mr. Daoud's entitlement to the pension and required that he pay back the overpayment. This is the application for judicial review of that decision.

I. THE ACT

[6] The distinction between "residence" and "presence" is key. Section 21 of the *Old Age Security Regulations* states that

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 <u>resides</u> in Canada if he makes his home and ordinarily lives in any part of Canada; and	a) une personne <u>réside</u> au Canada si elle établit sa demeure et vit ordinairement dans une région du Canada; et
(b) a person is <u>present</u> in Canada when he is physically present in any part of Canada.	b) une personne <u>est présente</u> au Canada lorsqu'elle se trouve physiquement dans une région du Canada.
...	[...]
[My Emphasis.]	[Je souligne.]

[7] As stated above, it is important to make a distinction between the Old Age Security pension and the Guaranteed Income Supplement. The Old Age Security pension program is the largest public pension program in Canada. It is offered to all persons aged 65 or over who meet the criteria of residence and legal status in Canada. The Guaranteed Income Supplement, however, is an additional monthly amount allocated to low-income seniors. To be eligible for the Supplement, a person must receive an Old Age Security pension and meet other eligibility conditions.

[8] In April 2001, Mr. Daoud was made eligible to a full Old Age Security pension because of the fact that he attained the age of 65 and that he had resided in Canada after the age of 18 for at least 40 years before applying for his pension.

[9] Specifically, subparagraph 3(1)(c)(iii) of the Act states that

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 personnes suivantes :
...	...
(c) every person who	c) celles qui, à la fois :
...	...
(iii) 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 forty years.	(iii) ont, après l'âge de dix-huit ans, résidé en tout au Canada pendant au moins quarante ans avant la date d'agrément de leur demande.

Thus, the question was whether Mr. Daoud had “resided” in Canada and not merely been “present”.

[10] Section 9 of the Act provides that the Old Age Security pension benefits should be suspended after six months of uninterrupted absence from Canada or after six months of non-residence in Canada. However, this provision does not apply to persons who can establish 20 years of residence before their application is approved.

[11] With respect to the Guaranteed Income Supplement, paragraphs 11(7)(c) and (d) of the Act provide that benefits will be suspended after six months of uninterrupted absence from Canada or six months of non-residence in Canada, without exception.

II. ANALYSIS

[12] In this case, the distinction had to be made between two periods:

- a. the first, ending the day of Mr. Daoud's 65th birthday on April 5, 2001;
- b. the second beginning April 5, 2001.

However, the decision-makers do not take this distinction into account.

[13] As I mentioned previously the original investigation centred on Mr. Daoud's eligibility for the Guaranteed Income Supplement. The request for investigation had nothing to do with his eligibility for the Old Age Security pension.

[14] Moreover, the investigating officer far exceeded the original scope of the investigation by determining, in his report, Mr. Daoud's eligibility for the Old Age Security pension. The investigating officer found that Mr. Daoud did not reside in Canada and that he only came back here to obtain the Guaranteed Income Supplement. The officer noted: [TRANSLATION] "No connections to Canada, all his connections are in Lebanon. Therefore, he is present and not resident." Although this report contains some references to the period prior to 2001, the substance of the report addresses the period during which the applicant received his pension and Supplement payments.

[15] Service Canada stated the following in its original decision:

[TRANSLATION]

According to the information obtained during the investigation, it was demonstrated that you have established your principal residence in Lebanon. For this reason, you are not eligible to receive Old Age Security benefits.

[16] This statement is clearly erroneous. The officer did not state at what time Mr. Daoud established his residence in Lebanon. If the change of residence occurred after 2001, the Department could suspend the Guaranteed Income Supplement benefits, but Mr. Daoud was still entitled to receive his Old Age Security pension.

[17] Service Canada's reconsideration decision is no better. The officer noted:

[TRANSLATION]

The review showed that, indeed, you were often outside of Canada. You do not remember the dates of your trips abroad or their duration. You were unable to provide us (for your frequent comings and goings abroad) with official evidence to confirm your dates of departure and return for each of your absences from Canada.

[18] This reconsideration decision led to the Review Tribunal's decision, which is the subject of this judicial review. At this stage it was apparent that the scope of the investigation exceeded the original scope. The Tribunal wrote that it must [TRANSLATION] "determine whether Mr. Daoud was eligible for an Old Age Security pension". In other words, the investigation now concerned the period preceding Mr. Daoud's 65th birthday. Of course it follows that if it had been determined that Mr. Daoud was not eligible to receive his Old Age Security benefits, he would also lose his eligibility to receive the Supplement.

[19] It had not been clearly established that Mr. Daoud was informed of the change in the scope of the investigation. The bulk of the evidence that he submitted related to his residence or presence in Canada after his 65th birthday, which was shown to be irrelevant.

[20] The Tribunal noted the following before its conclusion:

[TRANSLATION]

[96] Mr. Daoud's connections are to Lebanon. That is where his spouse, Joséphine, has lived since 2001, and his two daughters, Rose-Marie and Caroline. His third daughter, Diana, lives in the United States.

[97] All of the evidence shows that he stays in Canada only during the summer and spring, which does not constitute ordinary residence, rather a summer residence.

[98] The fact that, during his stays in Montréal, he lives with a friend and/or in an apartment building where, every year, he has different accommodations, shows a lack of substantial and profound connections that are rooted and established in Canada.

[21] Again, and with respect, although this analysis may have had merit with respect to Mr. Daoud's residence since 2001, this has nothing to do with whether Mr. Daoud resided in Canada for 40 years before his 65th birthday. If this is indeed the case, Mr. Daoud may very well reside outside Canada and continue to receive his Old Age Security benefits, but not the Guaranteed Income Supplement.

[22] There is no doubt that the Tribunal's assessment of the period prior to granting Mr. Daoud's pension is insufficient. Further, even if it had been found that Mr. Daoud had not resided in Canada for 40 years, the analysis cannot simply end there. Besides the criteria of 40 years of residence, the Act provides other circumstances resulting in eligibility for a full pension that depend on the

number of years of residence and presence in Canada. We know that Mr. Daoud spent four years at the École Polytechnique de Montréal, that he worked for Québec Cartier Mining and we know that he became a Canadian citizen in 1988, which means that he is considered to have resided in Canada for three or four years immediately before he was granted citizenship. We also know that he worked for Hydro-Québec in Haiti and that he is considered to have resided in Canada during this period.

[23] As stated in paragraph 9 of its decision, the Tribunal's mandate was to determine whether Mr. Daoud was eligible for the Old Age Security pension. The panel found that he was not. It goes without saying that such a finding would also result in ineligibility for the Supplement.

[24] The Tribunal's failure to limit the scope of the investigation to the period preceding Mr. Daoud's 65th birthday is a fatal reviewable error. In *Canada (Minister of Citizenship and Immigration) v Savard*, 2006 FC 109, [2006] FCJ No 126 (QL), the Minister disputed the decision of the Immigration Appeal Division determining that Ms. Savard could sponsor a citizen of Morocco that she had met online as a conjugal partner. Under the regulation, the assessment should have been related to the year preceding the sponsorship application. Therefore, I find that the failure to limit the assessment to the relevant period was a reviewable error. I reach the same conclusion here.

ORDER

AND FOR THE REASONS DELIVERED HEREWITH;

THE COURT ORDERS that

1. The application for judicial review be allowed.
2. The matter be referred back to the Review Tribunal for redetermination by a differently constituted panel in a new hearing.

“Sean Harrington”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-247-12

STYLE OF CAUSE: DAOUD v PGC

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**REASONS FOR ORDER
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