Federal Court  **Cour fédérale**

Date: 20140226

Docket: T-558-13

Citation: 2014 FC 185

Ottawa, Ontario, this 26th day of February 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

CELSO V. GUMBOC

Applicant

And

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review launched pursuant to section 18 of the *Federal Courts Act*, RSC 1985, c F-7, concerning a decision made by the Review Tribunal (which has now been re-organized as the Social Security Tribunal) on March 5, 2013. The applicant is self-represented and he has done well to bring his case all the way to this Court in view of the maze that the laws, regulations and treaties applicable to his situation constitute.

[2] Mr. Gumboc contends that he should be receiving a full Old Age Security [OAS] pension, instead of 4/40^{ths} of that full pension. In order to reach that result, he argues that the Review Tribunal (the "Tribunal") has made two errors. First, the Tribunal misapprehended the conditions for his residency in Canada such that he qualifies for a full OAS pension. Second, he claims that the *Agreement between the Government of Canada and the Government of the United States of America with respect to Social Security*, SI/82-105, (the "Canada/U.S. Agreement") entered into by Canada pursuant to subsection 40(1) of the *Old Age Security Act*, RSC 1985, c O-9 (the "*OAS Act*"), allows him to claim years spent in the United States for the purpose of calculating his OAS pension.

[3] In a nutshell, Mr. Gumboc immigrated to Canada in 1968, as he was 38 years old. In the following 27 years, he worked exclusively in Canada only for four years, between 1968 and 1972. In 1972, he moved to the United States in order to be gainfully employed, became an American citizen in 1978 and he now benefits from a U.S. pension. He came back to Canada in 1995, at age 65, and argues that a 40/40th pension is owed to him. This is obviously counter intuitive and my examination of the different instruments has convinced me that the applicant's understanding of these instruments is, unfortunately for him, inadequate.

History of the proceedings and the facts

[4] Mr. Gumboc has for many years sought to have his OAS pension adjusted by the Minister of Human Resources and Skills Development. To some extent, it has become a saga. A brief summary of the proceedings that have occurred up to now will assist with the understanding of the general context.

[5] The *OAS Act* provides for payment of a full pension where the applicant meets the eligibility criteria contained at subsection 3(1) of the Act. In the event that the applicant does not qualify for a full pension, the *OAS Act* provides for the possibility of a partial pension at subsection 3(2). A partial pension is calculated at a rate of 1/40th of the full pension for each complete year of residence in Canada after age 18. The minimum period of residency necessary to qualify for a partial pension is ten years of residence in Canada. In determining residence, only actual residence and not periods of physical presence in Canada are counted.

[6] On January 11, 1995, the applicant turned 65 and on May 24 of that year he applied to the Minister, and more specifically to Human Resources and Skills Development Canada [HRSDC], for an OAS pension and Guaranteed Income Supplement. On his application, he indicated that from December 21, 1971 to January 1, 1995, he resided in Canada for 50 percent of the time and in the United States for 50 percent of the time.

[7] On June 7, 1995, the applicant advised the Minister that he was a United States citizen residing in the United States and his application was forwarded from the British Columbia section to the Minister's International Operations section for processing. On March 25, 1997, an employee of the Minister conducted a field visit to the applicant to obtain residence information, and recorded findings that the applicant had only three full years of Canada residence since immigrating to Canada in 1968.

[8] On January 7, 1999, the applicant contacted the Minister's International Operations section in Ottawa regarding his legal status in Canada. On November 11, 1999 and on April 12, 2000, he requested the status of his application from the Regional Director of Income Security Programs.

[9] On June 18, 2002, the Minister advised the applicant that he had been approved for a partial OAS pension at a rate of 3/40^{ths} under the Canada/U.S. Agreement as a result of the calculation of the applicant's residency in Canada as three years (3 years, 334 days).

[10] On September 14, 2002, the applicant sent a letter to the Minister requesting reconsideration of the decision granting him a 3/40^{ths} partial pension, and on January 17, 2003, the applicant sent a further letter to the Minister stating that he resided in Canada 80 percent of the time and had over 20 years of Canadian residency. As a result, he claimed he was entitled to receive a full OAS pension.

[11] On June 12, 2003, the Minister responded to the applicant's letters of September 14, 2002 and January 17, 2003, informing the applicant that the original decision was maintained in regards to the granting of a partial pension based on the fact that for the period of February 1972 to the date on which his OAS pension became effective, the applicant's primary physical residence was in the United States. However, the Minister had reviewed the calculation of the applicant's Canadian residency, and had recalculated it as being for four full years, rather than three years. This re-determination resulted in a retroactive payment for the period of February 1995 to June 2003.

[12] On May 29, 2004, the applicant requested an appeal of the June 12, 2003 decision from the Office of the Commissioner of Review Tribunals [OCRT]. On September 8, 2004, the OCRT informed the applicant that his appeal could not proceed because his appeal letter was received by the office well after the expiration of the 90-day limitation period.

[13] On February 23, 2009, the applicant advanced a new claim based on his contributions to the social security program in the Philippines, his country of origin and where he resided from 1930 to 1968, before moving to Canada. The applicant submitted documentation in support of this claim with a letter dated April 8, 2009.

[14] On September 24, 2009, the applicant received a response from the Minister informing him that his application was not approved because the applicant did not meet the requirements to qualify for a pension under the *Agreement on Social Security between Canada and the Republic of the Philippines*, SI/97-32 (the "Canada/Philippines Agreement").

[15] The applicant sent letters to the Minister on October 2, October 7, November 2, and November 26, 2009 requesting a reconsideration of the September 24, 2009 decision, and alleging that an error had been made by the officer who made that decision. More specifically, the applicant argued that he was entitled to 14 years of residence in Canada, which would meet the ten-year minimum and therefore entitle him, in his view, to a full old age pension. This argument was based on the applicant's contributions to the Canada Pension Plan [CPP] and his wife's contributions to CPP. He also argued that he met the requirements of the Canada/Philippines Agreement.

[16] On December 29, 2009, the applicant received a response from the Minister denying his request. A full OAS pension could not be approved because his residence in Canada after age 18 and his creditable periods in the Philippines after age 18 did not total the ten years required.

[17] In addition, the Minister confirmed the calculation of the applicant's partial pension as 4/40^{ths} based on the applicant's years of residence in Canada.

[18] On March 2, 2010, the applicant filed an appeal pursuant to subsection 28(1) of the *OAS Act* with the OCRT, informing them that he wished to appeal the Minister's December 29, 2009 decision to a Tribunal.

[19] The Tribunal determined that, based on the evidence of the applicant's establishment in the United States, he was not a resident of Canada for the period of February 1, 1972 to the age of 65 for purposes of OAS eligibility.

[20] In respect to the applicability of the Canada/U.S. Agreement, the Tribunal held that because the applicant contributed to the United States Social Security [USSS] program from February 1, 1972 to December 31, 1982, and was subject to U.S. laws, he would be treated as a non-resident of Canada during that period for the purpose of OAS benefits pursuant to Article VI(3) of the Agreement:

Article VI (3) Except as otherwise provided in this Article, where a person referred to in Article V(2) is subject to United States laws during any period of residence in the territory of Canada, that period, in respect of that person, his spouse and dependants who reside with him and who are not employed or self-employed during that period, shall not be treated as residence in Canada for the purposes of the *Old Age Security Act*.	Article VI (3) Sauf disposition contraire du présent article, lorsqu'une personne mentionnée à l'article V(2) est assujettie aux lois des États-Unis au cours d'une période quelconque de résidence sur le territoire du Canada, ladite période - en ce qui a trait à cette personne, à son conjoint et aux personnes à sa charge qui demeurent avec elle et qui ne sont ni salariés ni travailleurs autonomes au cours de cette période - ne sera pas considérée comme période de résidence au Canada aux fins de la *Loi sur la sécurité de la vieillesse*.

[21] The Tribunal also determined that the applicant's contributions under the Philippines social security system from April 1964 to December 1967, combined with the applicant's four years of residence in Canada, did not, for totalization purposes, allow the applicant to reach the requisite ten years of combined Canadian residence. The Canada/Philippines Agreement was therefore not applicable in assisting the applicant for increased OAS benefits.

[22] On this basis, the Tribunal dismissed the appeal on September 27, 2011.

[23] On April 17, 2012, the applicant applied for judicial review of the September 27, 2011 Tribunal's decision. The parties signed a consent judgment on August 27, 2012 agreeing that the Tribunal had erred in finding that Article VI(3) of the Canada/U.S. Agreement applied to the applicant because Article VI(3) only applies to detached workers, which the applicant was not, according to Article V(2) of the Agreement:

Article V (2) (*a*) Where an employed person is covered under the laws of one of the Contracting States in respect of work performed for an employer having a place of business in the territory of that Contracting State and is then required by that employer to work in the territory of the other Contracting State, the person shall be subject to the laws of only the first Contracting State in respect of that work, as if it were performed in the territory of the first Contracting State. The preceding sentence shall apply provided that the period of work in the territory of the other Contracting State does not exceed 60 months.	Article V (2) *a*) Lorsqu'un salarié est assujetti aux lois de l'un des États contractants relativement à un travail accompli pour un employeur ayant un lieu d'affaires dans le territoire de cet État contractant, et est ensuite tenu par cet employeur de travailler dans le territoire de l'autre État contractant, ledit salarié est assujetti aux seules lois du premier État contractant en ce qui a trait à ce travail, tout comme si ce dernier était exécuté dans le territoire du premier État contractant. La phrase précédente s'applique à condition que la période de travail dans le territoire de l'autre État contractant ne dépasse pas 60 mois.

[24] This meant that the Tribunal's finding that the applicant was a non-resident of Canada for the period of 1972 to 1982 for the purposes of an OAS pension on the basis of Article VI(3) was an error. On August 31, 2012, the Federal Court sent the matter back to the Tribunal for re-determination.

[25] On March 5, 2013, the Tribunal dismissed the applicant's appeal on the basis that the applicant did not meet the residency requirements for a full OAS pension, and that he was entitled to a partial pension of 4/40^{ths}.

[26] On April 4, 2013, the applicant filed an application for judicial review of the Tribunal's March 5 decision, thereby bringing the issue again before the Federal Court. I take it that the focus of the challenge is now solely on the period following Mr. Gumboc's immigration to Canada, and in particular the application of the Canada/U.S. Agreement to his case. No consideration is given to his period of employment in the Philippines.

Facts

[27] The facts of this case, at this stage, are not controversial. The debate turns on whether or not the applicant can claim the relief he seeks on the basis of those facts.

[28] The applicant was born in the Philippines on January 11, 1930. He entered Canada on February 2, 1968 as a landed immigrant and resided in Alberta for six months. In July 1968 he moved to Cranbrook, British Columbia, where he resided until December 1970. In January 1971, he moved to Surrey, British Columbia.

[29] On December 21, 1971, he began residing part-time in the United States. The degree to which his residence shifted to the United States is at issue in this dispute. His wife and children remained in Canada. His wife worked both in Surrey and in Washington State.

[30] From 1968 to 1972, the applicant contributed to CPP. From 1972 until 1982 the applicant contributed to the USSS program. From 1983 to 1994 the applicant contributed to both CPP and USSS. In 1995 the applicant contributed only to CPP as he came back to Canada.

[31] The applicant worked in the United States since 1972, purchased a home in the U.S. in 1975, and purchased medical insurance in the U.S. His U.S. citizenship card was issued on May 22, 1978.

[32] The applicant became a Canadian citizen on May 4, 1998.

Standard of review

[33] The applicant, understandably, did not make submissions on the standard of review applicable to this kind of judicial review. In fact, he seemed to argue his case as if the Tribunal was to be held to a standard of correctness.

[34] As pointed out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [*Dunsmuir*] an "exhaustive review is not required in every case to determine the proper standard of review" (at paragraph 51). Both the determination of residency to establish entitlement to an OAS pension and its quantum are to be reviewed on a standard of reasonableness (*Singer v Attorney General of Canada*, 2010 FC 607). To the extent that the Tribunal had to interpret its own legislation in arriving at a solution, the standard of reasonableness would equally apply (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paragraph 34; *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283).

[35] A standard of reasonableness brings with it deference to the Tribunal's decision, which in turn implies that a court sitting in judicial review will not intervene if the decision made falls within a range of possible, acceptable outcomes. It may be useful to refer again to the oft-cited paragraph 47 of *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities

> that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Issues

[36] The issues in this judicial review application are basically:

1. Does the applicant meet the residency requirements contained at subsection 3(1) of the *OAS Act* necessary to qualify for a full OAS pension?

2. If the applicant does not meet those residency requirements, does the Canada/U.S. Agreement allow the applicant to claim an OAS pension?

Analysis

[37] The applicant makes two arguments. The first one is that he has met the residency requirements in spite of the fact that he worked in the United States for an extended period of time. According to his argument, his residence was in Canada because he would spend significant time in Canada, including most weekends and holidays.

[38] The main argument seems to have become the applicant's understanding of the legislation, and its regulations, in conjunction with the Canada/U.S. Agreement applicable in cases such as the present one.

[39] The applicant reads Articles VIII and IX of the Agreement as conferring on him the residency in Canada required to give him a full pension. He argues that Article VIII of the Agreement once applied to his situation means that he is entitled to a full pension in Canada.

[40] In regards to the Agreement, the applicant contends that the Tribunal erred in applying Article VI(6) to all of the years during which he contributed to the USSS. He contends that this provision should not be applied to the years 1973 to 1982 because during that time he contributed only to the USSS, and not the CPP.

[41] Rather, the applicant contends that the years 1973 to 1982 should be counted as periods of Canadian residency pursuant to Article VIII(1)(*a*), (1)(*b*) and (2)(*a*) and Article IX(1) and (2) of the Canada/U.S. Agreement. At the hearing before the Court, the applicant insisted that Article IX(2) is dispositive of the issue.

[42] Once read in context and properly understood, I am afraid the only conclusion that can be reached is that Mr. Gumboc has been awarded what he was entitled to under the law. Part of the difficulty comes from the difference that must be made between the entitlement to a pension and how it is to be calculated. Unfortunately, this has become a saga because the applicant takes words in complex legal instruments out of their context. Putting Articles VIII and IX in context takes us to a different place.

[43] Before reaching what seems to have become the applicant's main argument, we should dispose first of the argument about residence in Canada, based on the *OAS Act* and its regulations

alone. In order to qualify for a full OAS pension, an applicant must meet the requirements contained in subsection 3(1) of the *OAS Act*:

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; and

(*c*) every person who

(i) was not a pensioner on July 1, 1977,

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

(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.

3. (1) Sous réserve des autres dispositions de la présente loi et de ses règlements, la pleine pension est payable aux personnes suivantes :

a) celles qui avaient la qualité de pensionné au 1er juillet 1977;

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;

c) celles qui, à la fois :

(i) n'avaient pas la qualité de pensionné au 1er juillet 1977,

(ii) ont au moins soixante-cinq ans,

(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.

[44] In the applicant's case, he can only qualify for a full pension if he satisfies the requirements of paragraph (*b*); this means that he would have had to reside in Canada from January 11, 1985 to January 10, 1995 (the ten years immediately preceding the day on which he turned 65); or from January 11, 1994 to January 10, 1995 (the year preceding the day on which he turned 65), and between the time he turned 18 and January 10, 1985, for an aggregate period three times greater than his aggregate periods of absence from Canada between January 11, 1985 and January 10, 1995.

[45] The first hurdle faced by the applicant was the issue of his residence. Paragraph 21(1)(*a*) of the *Old Age Security Regulations*, CRC, c 1246 (the "*OAS Regulations*"), states that a person resides in Canada if he ordinarily lives in any part of Canada:

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;	*a*) une personne réside au Canada si elle établit sa demeure et vit ordinairement dans une région du Canada;

[46] This is of course a question of fact to be determined according to the particular circumstances (*Perera v Canada (Minister of Health and Welfare)* (1994), 75 FTR 310 [*Perera*]) and in line with the evidence offered by an applicant for a pension. The burden of proof is on the applicant.

[47] The Tribunal held that the applicant did not ordinarily live and make his home in Canada between 1972 and 1994, based on the following evidence of the applicant's establishment in the United States:

1. Contribution to the USSS for 23 years.

2. Lack of Canadian passport since immigrating to Canada in 1968 and obviously after 1972.
3. Purchase of a home in the U.S.
4. Purchase of U.S. health coverage.
5. Obtention of U.S. citizenship in 1978.
6. Failure to obtain Canadian citizenship until 1998.

Mr. Gumboc argued throughout that he resided in Canada because he came back regularly to Canada where his family kept a house. However, it was found that he was not commuting between Washington State and Canada, but rather that he would come to visit. Whenever he would come to Canada, he would use his U.S. Alien Card or his U.S. Citizenship Card starting in 1978. Indeed, he earned his living mostly in the United States during the whole period. Such conclusions are very much facts specific and a reviewing court will show significant deference to findings. Only if they are unreasonable will these findings be overturned.

[48] This evidence led the Tribunal to conclude that the applicant ordinarily lived and made his home in the U.S. between February 1972 and December 1994, and therefore did not meet the residency requirements contained at subsection 3(1) of the *OAS Act*. That conclusion of fact has been found consistently throughout the saga and is in my view reasonable on the basis of the available evidence. It was a possible, acceptable outcome in view of the facts and the law.

[49] The examination of the Canada/U.S. Agreement does not bring either a remedy to Mr. Gumboc for the purpose of being granted a full pension. However, as we shall see, the Agreement allowed Mr. Gumboc to qualify for a partial pension, which was calculated at 4/40^{ths} of a full pension.

[50] In respect to the applicability of the Canada/U.S. Agreement, Article V(1) of the Agreement states that an employed person will be covered under the legislation of one country only, and this will be the country in which the work is performed. Contributions will be payable only to the social security scheme of that country for the work in question:

Article V (1) Except as otherwise provided in this Article, an employed person who works in the territory of one of the Contracting States shall, in respect of that work, be subject to the laws of only that Contracting State.	Article V (1) Sauf disposition contraire du présent article, le salarié qui travaille dans le territoire de l'un des États contractants sera assujetti, en ce qui a trait à ce travail, aux seules lois dudit État contractant.

[51] Subsection 21(5.3) of the *OAS Regulations* states that a person subject to the legislation of another country shall be deemed not resident in Canada for purposes of the *OAS Act*:

21. (5.3) Where, by virtue of an agreement entered into under subsection 40(1) of the Act, a person is subject to the legislation of a country other than Canada, that person shall, for the purposes of the Act and these Regulations, be deemed not to be resident in Canada.	**21.** (5.3) Lorsque, aux termes d'un accord conclu en vertu du paragraphe 40(1) de la Loi, une personne est assujettie aux lois d'un pays étranger, elle est réputée, pour l'application de la Loi et du présent règlement, ne pas être un résident du Canada.

[52] Read together, these provisions confirm that while working in the U.S., the applicant cannot argue for the purposes of the OAS to be a Canadian resident, regardless of any ties maintained to Canada. Put simply, because he is working in the U.S. and is subject to its social security legislation, Mr. Gumboc is deemed to be a non-resident of Canada.

[53] In regards to the periods during which the applicant worked in both the U.S. and Canada, Article VI(6) of the Canada/U.S. Agreement states that people living in the U.S. and performing

services which are covered as employment or self-employment in both the U.S. and Canada shall not be treated as residents of Canada for OAS purposes:

Article VI (6) If a person referred to in paragraph (4) or (5) of this Article performs services which are covered as employment or self-employment under United States laws and simultaneously performs other services which are covered as employment or self-employment under the Canada Pension Plan or a comprehensive pension plan of a province, that period of employment or self-employment shall not be treated as a period of residence for the purposes of the *Old Age Security Act*.	Article VI (6) Dans le cas d'une personne mentionnée au paragraphe (4) ou (5) du présent article, qui exerce une activité reconnue comme emploi ou travail autonome aux termes des lois des États-Unis, et qui exerce simultanément d'autres activités reconnues comme emploi ou travail autonome aux termes du Régime de pensions du Canada ou du régime général de pensions d'une province, la période d'emploi ou de travail autonome en question ne sera pas considérée comme période de résidence aux fins de la *Loi sur la sécurité de la vieillesse*.

[54] Therefore, the period from 1983 to 1994, when the applicant was residing in the U.S. and performing services covered as employment in both the U.S. and Canada, cannot be counted towards eligibility for an OAS Pension. Thus, the period during which the applicant was living in the U.S. and employed in both the U.S. and Canada was excluded, first by Article V(1) of the Canada/U.S. Agreement and subsection 21(5.3) of the *OAS Regulations*, and additionally by Article VI(6) of the Agreement. In this case, the applicant was not a Canadian resident by application of the *OAS Regulations* as well as by the operation of the Canada/U.S. Agreement.

[55] However, the Canada/U.S. Agreement is of benefit to the applicant in order to help him being found eligible for a partial pension in accordance with subsection 3(2) of the *OAS Act*:

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

(*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.

a) ont au moins soixante-cinq ans;

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.

On the face of subsection 3(2), Mr. Gumboc should not receive any pension because he did not reside in Canada for ten years. That is a conclusion reached by a straight application of section 21 of the *OAS Regulations*, but also by the application of the Canada/U.S. Agreement. In order to qualify for a partial pension, another instrument must be put to contribution. It will be Article VIII.

[56] Article VIII of the Agreement allows applicants who have not accumulated the required years of residence to qualify for a partial pension by using their periods of coverage in the U.S. to establish a notional residence in Canada. The applicant contends, without accounting for Article VIII and Article IX(1), that Article IX(2), on the contrary, entitles him to a full pension. These two articles read:

Article VIII

(1) (*a*) If a person is not entitled to the payment of a benefit because he or she has not accumulated sufficient periods of residence under the *Old Age Security Act*, or periods of coverage under the *Canada Pension Plan*, the entitlement of that person to the payment of that benefit shall, subject to sub-paragraph (1)(*b*), be determined by totalizing these periods and those specified in paragraph (2), provided that the periods do not overlap.

Article VIII

(1) *a*) Lorsqu'une personne n'a pas droit au versement d'une prestation faute de périodes de résidence suffisantes en vertu de la *Loi sur la sécurité de la vieillesse*, ou de périodes de couverture en vertu du *Régime de pensions du Canada*, le droit de ladite personne au versement de ladite prestation, sous réserve de l'alinéa (l) *b*), est déterminé par la totalisation de ces périodes et de celles précisées au paragraphe (2), pour autant que les périodes ne se chevauchent pas.

(*b*) In the application of sub-paragraph (l)(*a*) of this Article to the *Old Age Security Act*:

(i) only periods of residence in Canada completed on or after January 1, 1952, including periods deemed as such under Article VI of this Agreement, shall be taken into account; and

(ii) if the total duration of those periods of residence is less than one year and if, taking into account only those periods, no right to a benefit exists under that Act, the agency of Canada shall not be required to pay a benefit in respect of those periods by virtue of this Agreement.

(2) (*a*) For purposes of determining entitlement to the payment of a benefit under the *Old Age Security Act*, a quarter of coverage credited under United States laws on or after January 1, 1952 and after the age at which periods of residence in Canada are credited for purposes of that Act shall be considered as three months of residence in the territory of Canada.

b) En appliquant l'alinéa (l)*a*) du présent article à la *Loi sur la sécurité de la vieillesse* :

(i) seules les périodes de résidence au Canada ayant pris fin le 1er janvier 1952 ou après cette date, y compris les périodes considérées comme telles aux termes de l'article VI du présent Accord, seront prises en compte; et

(ii) lorsque la durée totale de ces périodes de résidence est inférieure à un an et que, en ne tenant compte que de ces périodes, aucun droit à une prestation n'existe en vertu de cette loi, l'organisme du Canada ne sera pas tenu de verser une prestation relativement à ces périodes en vertu du présent Accord.

(2) *a*) Pour établir le droit au versement d'une prestation en vertu de la *Loi sur la sécurité de la vieillesse*, un trimestre de couverture en vertu des lois des États-Unis crédité le 1er janvier 1952 ou après cette date et après l'âge auquel les périodes de résidence au Canada sont comptabilisées aux fins de cette loi sera compté comme trois mois de résidence au Canada.

Article IX

(1) If a person is entitled to the payment of an Old Age Security pension or a spouse's allowance solely through the application of the totalizing provisions of Article VIII, the agency of Canada shall calculate the amount of the pension or spouse's allowance payable to that person in conformity with the provisions of the *Old Age Security Act* governing the payment of a partial pension or a spouse's allowance, exclusively on the basis of the periods of residence in Canada on or after January 1, 1952 which may be considered under that Act or are deemed as such under Article VI of this Agreement.

Article IX

(1) Lorsqu'une personne a droit au versement d'une pension de sécurité de la vieillesse ou d'une allocation au conjoint uniquement en application des dispositions relatives à la totalisation prévues à l'article VIII, l'organisme du Canada calcule le montant de la pension ou de l'allocation au conjoint payable à ladite personne conformément aux dispositions de la *Loi sur la sécurité de la vieillesse* régissant le versement d'une pension partielle ou d'une allocation au conjoint, uniquement en fonction des périodes de résidence au Canada depuis le 1er janvier 1952 ou après cette date qui peuvent être prises en compte en vertu de cette loi ou sont considérées comme telles aux termes de l'article VI du présent Accord.

(2) Paragraph (1) shall also apply to a person outside Canada who would be entitled to the payment of a full pension in Canada but who has not resided in Canada for the minimum period required by the *Old Age Security Act* for entitlement to the payment of a pension outside Canada.	(2) Le paragraphe (1) s'applique également à une personne résidant à l'étranger qui aurait droit au versement d'une pleine pension au Canada, mais qui n'a pas résidé au Canada pendant la période de résidence minimale requise par la *Loi sur la sécurité de la vieillesse* pour l'ouverture du droit au versement d'une pension hors du Canada.

[57] Article VIII is helpful. When applying the *OAS Act* leads to denying any pension because the residency requirements of ten years cannot be met, Article VIII comes to the rescue in that it allows for a pension to be paid. It entitles someone to a pension. However, the Article is silent as to how the pension is to be calculated. The answer is given at Article IX(1). Without Article VIII, Mr. Gumboc receives no pension in spite of his acknowledged four years of residency between 1968 and 1972. With Article VIII, Mr. Gumboc can be eligible to a pension because he is credited with years spent in the U.S. However, the years spent in the U.S. are of limited value because they cannot be used in the calculation of the pension. This requires a further elaboration, especially due to the insistence of the applicant that Article IX(2) is the source of a complete remedy, allowing him to collect a full pension.

[58] Mr. Gumboc reads Article IX(2) in isolation and understands it to grant him a full pension in Canada. Unfortunately for him, the two articles, Article VIII and Article IX, must be read together. Article IX(2) refers to the application of Article IX(1) which itself refers to Article VIII.

[59] More importantly, when read together, one can see that Article VIII merely provides for the eligibility to a pension while Article IX tells us how that pension is to be calculated. To put it

another way, Article VIII is informative as to who can get a pension; Article IX is informative as to how much that pension will be. Indeed Article IX(2) finds no application in this case.

[60] Thanks to Article VIII, the applicant can count time spent in the U.S. in order to satisfy the eligibility criterion of residency in Canada. On that basis, the applicant has at least the "ten years but less than forty years" referred to at subsection 3(2) of the *OAS Act* which allows for a partial pension. But that is all Article VIII does: it makes the applicant eligible to a pension.

[61] Once eligibility is established, Article IX provides for how much that pension will be. The Article makes it clear that the pension is to be calculated "exclusively on the basis of the periods of residence in Canada". In the case at hand, that is only the four years, from 1968 to 1972, before the applicant moved to the U.S., until his return in 1995.

[62] The applicant insisted that Article IX(2) applies and gives him the right to a full pension. With respect, on its face, Article IX(2) makes the calculation of paragraph (1) applicable "to a person outside Canada". Not only is the applicant inside Canada, but Article IX(2) brings the applicant who is outside Canada back to the calculation of paragraph (1) which, as already pointed out, counts for the purpose of a pension the years of residence in Canada only.

[63] The Tribunal did not commit any reviewable errors, in that it correctly identified the issue, the legislation, the relevant test, and the relevant case-law.

Conclusion

[64] The Tribunal's finding that the applicant was not a resident in Canada from 1972 to 1995 for purposes of OAS eligibility, which was based on the *Perera* decision, above, but also on *Minister of Human Resources Development v Ding*, 2005 FC 76, and *de Bustamante v Attorney General*, 2008 FC 1111, was justified, transparent, and intelligible. As pointed out by counsel for the respondent, the record does not show any other attachment to this country other than regular visits made. There is no documentation that would support the argument that he made his home in Canada, paid his taxes in this country and that he ordinarily lived in this country.

[65] The Tribunal based its decision on the straightforward evidence that the applicant was a resident of the U.S. in the ordinary sense of the word. The evidence that the applicant was employed in the U.S. and made contributions to the USSS is uncontested. He became an American citizen in 1978. There is sufficient documentary evidence of the applicant's ties to the U.S., and insufficient documentary evidence supporting the applicant's claim that he was a resident of Canada. The Tribunal's conclusion in regards to the applicant's residency was therefore reasonable in light of the facts and the law. But even without that finding, it was reasonable for the Tribunal to conclude that the Canada/U.S. Agreement, in itself, denied the remedy sought of a full pension.

[66] In regards to the period from 1968 to 1972, when the applicant was living in Canada, the Tribunal recognized these years as the basis for the calculation of the amount of the applicant's partial pension as being $4/40^{ths}$.

[67] However, in regards to the period from 1972 to 1983, when the applicant was living in the U.S. and contributing to the USSS, Article V(1) of the Canada/U.S. Agreement states that a person employed in the U.S. must be subject to the laws of the U.S. Subsection 21(5.3) of the *OAS Regulations* states that when a person is subject to the legislation of a country other than Canada, that person shall, for the purposes of application of the *OAS Act* and the *OAS Regulations*, be deemed not to be a resident of Canada.

[68] In regards to the period from 1983 to 1994, when the applicant contributed to both the CPP and the USSS, the Tribunal applied Article VI(6) of the Canada/U.S. Agreement, which establishes that if persons living in the U.S. but working in Canada make contributions to the CPP and at the same time perform different work for which compulsory contributions to USSS are made, that these periods shall not be treated as a period of residence for purposes of the *OAS Act*.

[69] The Tribunal concluded that these provisions operate to exclude the applicant from Canadian residency for OAS purposes from 1972 to 1994. The applicant has not shown these findings to be unreasonable. These provisions can certainly accommodate that construction. No other interpretation was in fact offered. Therefore the Tribunal reached a reasonable conclusion in light of the facts and law.

[70] These Articles are not at odds with Article VIII that allows periods spent in the U.S. for the purpose of allowing eligibility to a partial pension. Indeed they may be seen as being complementary of each other. Mr. Gumboc confirmed at the hearing that he receives an American pension. Article VIII allows him to gain access to a Canadian pension, but only to the extent of his

residence in this country, through the operation of Article IX. The construction the applicant seeks to put on the Canada/U.S. Agreement would result in his view in getting a full Canadian pension, at the same time he is receiving an American pension for his years spent working in that country. It would appear fair that a partial pension be paid for four years of residency and Article VIII allows for that.

[71] The Tribunal's conclusions were reasonable, and acknowledged the applicant's arguments. The applicant has failed to identify any reviewable error which warrants intervention on judicial review.

[72] As a result, the application for judicial review must be dismissed. There will not be a cost award in this case.

JUDGMENT

The application for judicial review of the decision rendered on March 5, 2013 by the Review Tribunal (which has now been re-organized as the Social Security Tribunal) is dismissed. There is no cost award in this case.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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