

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100610

Docket: A-42-09

Citation: 2010 FCA 156

**CORAM: NOËL J.A.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

DEBORAH ANN NEDELCU

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 26, 2010.

Judgment delivered at Ottawa, Ontario, on June 10 2010.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

DAWSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of McArthur J. of the Tax Court of Canada (the Tax Court Judge) rendered pursuant to the informal procedure. The Tax Court Judge held that Deborah Ann Nedelcu (the appellant) was not entitled to child tax benefits totaling \$23,406 which she claimed for 2003, 2004 and 2005 because she did not reside in Canada during those years.

[2] The appellant who is presently in Romania made a request that her appeal be heard by teleconference. The request was denied by direction of the Chief Justice dated March 17, 2010 and the appeal was set to be heard on May 26, 2010 in Toronto. A request for reconsideration of that

direction was dismissed by the Chief Justice on May 21, 2010. On the same day, a further direction was issued advising the parties that should the appellant not appear on the scheduled date, the panel would dispose of the appeal on the basis of the written submissions filed by the parties. As the appellant did not appear, the following reasons dispose of the appeal on the basis of the written arguments set out by the parties in their respective submissions.

THE FACTS

[3] The appellant was born in Zambia, Africa in 1964. She moved to Canada in 1979 (presumably with her parents) and settled in London, Ontario. In 1987, she moved to Toronto and obtained employment at the University of Toronto. This is where she met her husband to be, Stefan Radu Barbu Nedelcu, who was enrolled at the same university.

[4] They married in 1988 in a ceremony which took place in Toronto. Mr. Nedelcu was born in Romania. He is a citizen of both Romania and Canada. Three children were born from the marriage in Toronto in August 1990, September 1991 and January 1993. They had a fourth child born in Romania in April 1994.

[5] In 1993, the appellant, along with her husband and children, moved to Bucharest, Romania. Mr. Nedelcu owns a mini-bus and operates a transport business carrying tourists and tour groups from the airport to their respective hotels in Bucharest. During the years in issue, the appellant and her family lived in the family home owned by Mr. Nedelcu in Bucharest. The appellant's children were enrolled in Romanian schools during those years.

[6] The appellant explained that from 1993 to 2003, her legal status in Romania was that of a visa holder which had to be renewed every six months. Beginning in 2003, these visas were granted to her for a one year term.

[7] Although, they have extensive family in Canada, neither the appellant nor her husband has any business interest or real estate holding in Canada. The appellant has no memberships in any social, recreational, religious organizations, professional organizations or unions based in Canada.

[8] The appellant has been collecting child tax benefits since she left Canada in 1993. Her residency status was reviewed by Revenue Canada in 2000 when she and her family members were confirmed to be “factual residents” of Canada. A further confirmation of this status was obtained in 2002. As a result, the appellant testified that she continued to file annual returns during the three years in issue and claim the child tax benefits for her four children on the basis that she and her family resided in Canada.

[9] By notice issued in September of 2006, the Minister of National Revenue (the Minister) advised the appellant that she was no longer considered to be a resident of Canada beginning with year 2003 and throughout 2005, and that as a result she was not entitled to the child tax credits claimed during this period.

[10] The essence of the position adopted by the appellant in opposing this change in status has been throughout that all the factors which tied her and her family to Canada up to 2002 continued to be present in the following years, and that accordingly there was no basis for the change.

DECISION OF THE TAX COURT JUDGE

[11] Dealing with this last contention, the Tax Court Judge noted that no issue of estoppel is involved in the present matter, and that the Minister is entitled to adopt a position different from that adopted in the past (Reasons, para. 7). The issue to be decided was therefore whether the appellant resided in Canada during 2003, 2004 and 2005.

[12] Turning to this issue, the Tax Court Judge applied the test set out in *Thompson v. The Minister of National Revenue*, [1946] S.C.R. 209 (*Thompson*) and found as a fact that Romania was the spatial bounds within which the appellant spends her life and to which her ordered or customary living is related (Reasons, para. 16):

All the children are enrolled, and during the relevant years were enrolled, in school there as they still are. They all live as a family in her husband's home which obviously is the family home. He has a business in Romania with little or no known ties to Canada. Surely, Romania is the spatial bounds within which she spends her life to which her ordered or customary living is related.

[13] He further held that the appellant's infrequent visits to Canada to see relatives, when considered in light of the other relevant circumstances, were not sufficient to make the appellant a resident of Canada (Reasons, para. 17):

... I find she visits here occasionally, perhaps 50 days over a 1,000-day period being the relevant one before us. She has relatives here but no residence, property or means of support other than the [child tax benefits]. She stated that she did not know when she would return to Canada although she would like her children to attend university here.

ALLEGED ERROR

[14] In support of her appeal the appellant contends that the decision of the Tax Court Judge reveals a number of errors and omissions. First, she argues that the Tax Court Judge failed to address the duality of her residency (Memorandum, p. 9, para. 1).

[15] Second, she contends that no consideration was given to the fact that she filed *bona fide* tax returns and claimed child care benefits for the years 2000 to 2006 in accordance with Revenue Canada's finding made in 2000 that she was a factual resident of Canada (Memorandum, p. 9, para. 2).

[16] Third, she alleges that no consideration was given to the retroactive nature of the assessments, which required the repayment of benefits already paid out for the period February 2004 to 2006 (Memorandum, page 9, para. 3).

[17] Fourth, she contends that the Tax Court Judge erred by improperly identifying the period under investigation; by stating that sojourn is the only requirement for residency; by inaccurately stating the appellant's place of birth; by proceeding on the basis of presumptions rather than law; by assuming the Minister's reply to be correct; and by not considering the temporary nature of her status in Romania (Memorandum, p. 10, para. 4).

[18] Fifth, she contends that a number of irregularities were committed during the hearing of the appeal before the Tax Court Judge. The appellant bases her contentions on a review of the transcript which, according to her, shows that the Tax Court Judge was distracted, hearing-impaired, inattentive, and confused (Memorandum, pp. 11 and 12, para. 5).

ANALYSIS AND DECISION

[19] In my respectful view, the Tax Court Judge determined the issue of the appellant's residence applying the proper test, and the evidence supports the conclusion that he reached. Despite the appellant's extensive submissions, I can detect no error in the decision of the Tax Court Judge.

[20] Contrary to what she asserts, the Tax Court Judge, having found that the appellant resided in Romania (Reasons, paras. 15 and 16), did not have to address the notion of dual residency. While a person who becomes resident in another country does not necessarily lose this status in Canada when close personal and economic ties are maintained, the Tax Court Judge was obviously of the view that no such ties had been maintained with Canada. This is a conclusion that was open to him when regard is had to the evidence.

[21] The fact that the appellant believed in good faith that she was entitled to the child tax benefits as she asserts and that these benefits were taken away retroactively is also of no assistance to her. As was noted by the Tax Court Judge, the Minister is not bound by his assessment for prior taxation years, and a reassessment by its nature operates retroactively. No taxpayer can assume that his or her tax affairs are finally settled until the statutory reassessment period has expired.

[22] Turning to the alleged specified errors, the appellant asserts that the Tax Court Judge did not properly identify her place of birth. However, this error could not have had any impact on the decision which he reached and is therefore immaterial. The same applies to the appellant's claim that the investigation period begun in January 1994 rather than July 1994 as stated by the Tax Court Judge.

[23] In the same vein, the appellant alleges that the Tax Court Judge erred in stating that the sojourn rule is the only requirement for granting residency (Reasons, para. 2). However, when the paragraph is read in context, it becomes apparent that the statement in question is that unless the appellant can establish that she resided in Canada or bring herself within one of the deemed residency rules such as sojourning for 183 days, she cannot succeed. I can detect no error in this regard.

[24] The appellant correctly points out that the Tax Court Judge did not address the temporary nature of her status in Romania. However, given that she had been living in Romania for almost 15 years when the appeal before the Tax Court was heard, one can understand why the Tax Court Judge did not place emphasis on the "temporary" nature of her status.

[25] Finally, with respect to the "irregularities" that are alleged to have taken place during the hearing of the appeal, I have carefully reviewed the transcript of the proceedings and can detect no basis for interfering with the decision of the Tax Court Judge.

[26] I would dismiss the appeal with costs.

“Marc Noël”

J.A.

“I agree.

Eleanor R. Dawson J.A.”

“I agree.

Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-42-09

**(APPEAL FROM AN ORALLY JUDGMENT OF THE HONOURABLE JUSTICE
McARTHUR OF THE TAX COURT OF CANADA DATED AUGUST 8, 2008, DOCKET
NO. 2007-4337(IT)I.)**

STYLE OF CAUSE: DEBORAH ANN NEDELCO and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 26, 2010

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

DATED: May 10, 2010

APPEARANCES:

Jack Warren
Ronald MacPhee

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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