

Docket: 2010-1746(IT)I

BETWEEN:

TEHSEEN FATIMA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 16, 2012 at Toronto, Ontario

Before: The Honourable Justice J.M. Woods

Appearances:

Agent for the Appellant: Shaukat A. Malik
Counsel for the Respondent: Rachel Doran
 Louis L'Heureux

JUDGMENT

The appeal with respect to determinations made by the Minister of National Revenue under the *Income Tax Act* is allowed, and the determinations are referred back to the Minister for reconsideration and redetermination on the basis that the appellant is entitled to the child tax benefit for the period from March 2006 to June 2008. The appeal with respect to benefits under the *Universal Child Care Benefit Act* is quashed. The appellant is entitled to her costs.

Signed at Toronto, Ontario this 13th day of February 2012.

“J. M. Woods”

Woods J.

Citation: 2012 TCC 49
Date: 20120213
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BETWEEN:

TEHSEEN FATIMA,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] The question to be decided is whether Tehseen Fatima was a resident of Canada during the period from March 2006 to May 2008 when she lived in Pakistan.

[2] The appeal relates to determinations that Mrs. Fatima was not entitled, during the relevant period, to the child tax benefit under the *Income Tax Act* and the universal child care benefit under the *Universal Child Care Benefit Act (UCCB)*.

[3] The residence requirement is contained in the definition of “eligible individual” in s. 122.6 of the *Income Tax Act*. This term is relevant for the complex formula providing for the child tax benefit in subsection 122.61(1) of the *Act*, and specifically “A” of that formula.

[4] The Crown submits that Mrs. Fatima did not satisfy the residence requirement during the period that she was in Pakistan.

Universal Child Care Benefit Act

[5] At the hearing, I raised a question as to whether the Tax Court of Canada has jurisdiction with respect to the *UCCB*. Counsel for the Crown responded that the residence issue was the same under both statutes and that the Court's decision concerning the child tax benefit under the *Income Tax Act* would be followed for purposes of the *UCCB*. This may be a satisfactory practical solution in this case, but the jurisdiction issue should have been mentioned in the Reply.

[6] In *Moise v The Queen*, 2009 TCC 187, Sheridan J. concluded that the Tax Court of Canada did not have jurisdiction with respect to the *UCCB*. I see no reason to depart from this decision. The appeal with respect to benefits under the *UCCB* will therefore be quashed.

Factual background

[7] Mrs. Fatima was originally from Pakistan and came to Canada in August 2005. At the present time, she is a Canadian resident and lives in Toronto with her husband, Khalid Mahmood, and their five children. She was married on February 2, 1998.

[8] Mr. Mahmood was also from Pakistan but he came to Canada earlier than his wife. He immigrated on July 29, 1997, which was prior to the marriage. He is now a Canadian citizen and is employed in Toronto as a systems analyst.

[9] Although Mr. Mahmood resided in Canada at the time of the marriage, Mrs. Fatima did not come to Canada to join her husband at that time. According to the evidence, which I accept, she stayed in Pakistan until August 2005 in order to assist with an ill family member. Mr. Mahmood visited Pakistan when he could and the couple had three children during this period.

[10] The family finally came together when Mrs. Fatima and her three children moved to Canada in August 2005.

[11] Mrs. Fatima had been in Canada only for a short period, about six months, when the entire family went to Pakistan on a temporary basis. In what was described by Mr. Mahmood as a surprise, he was offered a job to open up an office in Islamabad for a Canadian computer company, Disk Doctors. Mr. Mahmood had not previously worked for the company. The family left for Pakistan in February 2006.

[12] Mr. Mahmood's contract with Disk Doctors was for a two-year term. During this time, the family surrendered their rental apartment in Toronto and left their

belongings with a relative. In Islamabad, they rented new accommodation and borrowed most household items from their parents.

[13] The Disk Doctors contract was extended for a further two years and was terminated when the family moved back to Toronto in 2009. The family has remained in Toronto since that time.

Analysis

[14] The legal principles to be applied in a case such as this were described by Bowman C.J. in *Laurin v The Queen*, 2006 TCC 634, 2007 DTC 236 (aff'd 2008 FCA 58, 2008 DTC 6175). At paragraph 24 of that decision, reference is made to comments by Rand J. in *Thomson v MNR*, [1946] SCR 209, which explain the difference between residence and sojourning.

[24] At paragraph 47, Rand, J. continues:

47. The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. 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. In one case it is satisfied by certain elements, in another by others, some common, some new.

48. The expression "ordinarily resident" carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application.

49. For the purposes of income tax legislation, it must be assumed that every person has at all times a residence. It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. Ordinary residence can best be appreciated by considering its antithesis, occasional or casual or deviator residence. The latter would seem clearly to be not only temporary in time and exceptional in circumstance, but also accompanied by a sense of transitoriness and of return.

50. But in the different situation of so-called "permanent residence", "temporary residence, ordinary residence", "principal residence" and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly 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. It may be limited in time

from the outset, or it may be indefinite, or so far as it is thought of, unlimited. On the lower level, the expression involving residence should be distinguished, as I think they are in ordinary speech, from the field of "stay" or "visit".

[15] In this case, the questions to be determined are whether Mrs. Fatima became a Canadian resident when she moved here in 2005, and whether she retained that residence when she went back to Pakistan in 2006.

[16] The evidence relative to this determination is unfortunately quite sparse. It would have been helpful to have many more details as to the circumstances surrounding the family's stay in Islamabad.

[17] Based on the limited evidence that was provided, I have concluded that Mrs. Fatima did, in fact, become a Canadian resident when she moved here in 2005, and that she retained Canadian residence when the family went to Pakistan on a temporary basis.

[18] The circumstances as a whole suggest that the family had a firm commitment to reside in Canada on a permanent basis beginning in 2005. It does not otherwise make sense for Mrs. Fatima and her children to uproot to Canada in 2005. Her ties to Canada were therefore significant.

[19] The evidence revealed that Mrs. Fatima had a difficult time in 2005 adjusting to life in Canada because she did not know the English language. It was suggested by the Crown that she never became settled in Canada during the six months before the family went to Pakistan.

[20] Mrs. Fatima may not have had a chance to acclimatize to her new country in six months, but the evidence suggests that the family had decided to settle here permanently. Mr. Mahmood had been in Canada for several years. I accept that the family went to Pakistan only so that Mr. Mahmood could pursue a temporary job opportunity.

[21] I would also comment that the Canada Revenue Agency determined that Mr. Mahmood remained a Canadian resident while he was in Pakistan based on the conclusion that he maintained significant residential ties with Canada (Ex. A-3). The CRA concluded that he was subject to tax in Canada on his worldwide income during this period. Although this is not determinative of Mrs. Fatima's residence status, one would generally expect spouses to reside in the same country for tax purposes unless they lived apart for some reason.

[22] The Crown referred in support of its position to a residency questionnaire signed by Mrs. Fatima which failed to reveal any ties to Canada. This is not fatal to the appeal, however. Such forms often do not present a complete picture. In reality, Mrs. Fatima had established significant ties to Canada before the family went to Pakistan for a limited period. Those ties were acquired when she and the children came to Canada after her husband had been settled here for several years.

[23] Based on the evidence as a whole, I am satisfied that Mrs. Fatima was a Canadian resident during the period at issue in this appeal. She and her family had a settled life in Canada. This did not change when the family went to Pakistan on a temporary basis.

[24] The appeal will be allowed, with costs.

Signed at Toronto, Ontario this 13th day of February 2012.

“J. M. Woods”

Woods J.

CITATION: 2012 TCC 49

COURT FILE NO.: 2010-1746(IT)I

STYLE OF CAUSE: TEHSEEN FATIMA v.
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PLACE OF HEARING: Toronto, Ontario

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REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: February 13, 2012

APPEARANCES:

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