Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *F. O. v. Minister of Employment and Social Development*, 2016 SSTGDIS 104

Tribunal File Number: GP-14-4371

BETWEEN:

F. O.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Jude Samson

DATE OF HEARING: September 7, 2016
(followed by written questions and responses)

DATE OF DECISION: December 20, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant: Mr. F. O.

Respondent: Written submissions only

OVERVIEW

[1] The Appellant was born in Gabon. He studied law in France (from 1957 to 1961, and from 1968 to 1970), as well as in Switzerland (from 1965 to 1968). He arrived in Canada on April 5, 2007, and submitted a refugee claim thereafter. The Immigration and Refugee Board granted that application in November 2010.

[2] On April 27, 2011, the Appellant applied for a pension under the *Old Age Security Act* (OAS Act), but his application was refused because he did not have the 10 years of Canadian residence required to qualify for the pension (OAS pension). Essentially, the Appellant claims that he qualifies for an OAS pension because the *Agreement Between Canada and France on Social Security*, TR/81-28 (Canada-France Agreement), and the *Convention on Social Security Between Canada and the Swiss Confederation*, TR/95-112 (Canada-Switzerland Convention), enable him to totalize his years of residence in France and in Switzerland with his years of residence in Canada. However, in a letter dated July 22, 2014, the initial decision was upheld (GD2-21). That reconsideration decision is the focus of this appeal before the Social Security Tribunal (Tribunal).

[3] For the reasons set out below, the appeal is allowed in part.

MANNER OF PROCEDURE AND PROCEDURAL BACKGROUND

[4] The hearing of this appeal was by teleconference for the following reasons:

a) This method of proceeding provides for the accommodations required by the parties or participants;

b) The issues under appeal are complex;

c) There are gaps in the information in the file and/or there is a need for clarification; and

d) This method of proceeding complies with the requirement under the *Social Security Tribunal Regulations* (SST Regulations) to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[5] The hearing had initially been scheduled for June 3, 2016 (GD0), but the Appellant asked that the hearing be postponed so that he could obtain new documents (GD5). The hearing was thereby adjourned until September 7, 2016 (GD0A), and the Appellant added his new documents to the Tribunal's file as promised (GD6).

[6] By the date of the hearing, the Tribunal had received the Appellant's submissions, but it had not received submissions from the Minister or replies to its letters dated July 19, 2016, and September 6, 2016 (GD7 and GD9).

[7] The Minister did not participate in the hearing held on September 7, 2016. Nevertheless, about 30 minutes into the hearing, the Minister submitted a document entitled "Addendum to the Submissions of the Minister – Amendment of Position" to the Tribunal, but this document would not be brought to the attention of the Tribunal member until the following afternoon. Furthermore, the submissions received that day were in English, while the Appellant had chosen to pursue his appeal in French. The Tribunal received the French version of this document on September 15, 2016, and sent it to the Appellant (GD10 and GD0B).

[8] Upon review of the "Addendum of the Submissions of the Minister," the Tribunal was of the view that the document raised new issues that the parties had to address. As a result, the Tribunal reopened the hearing and presented its questions, in writing, to the parties (GD0B). The parties were given until October 21, 2016, to answer the Tribunal's questions.

[9] In a letter dated September 24, 2016 (GD11), the Appellant indicated that he could not answer the Tribunal's questions without copies of the Canada-France Agreement and the Canada-Switzerland Convention, which were provided on October 6, 2016 (GD12). The Appellant's response was received within the prescribed timeframe (GD13), but the Minister's response was once again late (GD14).

[10] On October 28, 2016, given the parties' positions, the Tribunal invited them to participate in a dispute-resolution process, under section 16 of the SST Regulations (GD15). However, this letter elicited only a somewhat incomprehensible response from the Minister (GD16). The Tribunal determines that, on the whole, the Minister's submissions fail to adequately address the delicate issues raised in this case.

THE LAW

[11] The Appellant is not claiming that he qualifies for the full pension as provided for under subsection 3(1) of the OAS Act. Subsection 3(2) of the OAS Act deals with the payment of partial pensions. The relevant provisions are as follows:

> **Payment of Partial Pension**
>
> **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
>
> 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.
>
> **Amount of Partial Pension**
>
> **(3)** Subject to subsection 7.1(3), the amount of a partial 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 18 years of age and before the day on which the application is approved, determined in accordance with subsection (4), bears to 40 years.
>
> **Rounding of Aggregate Period**
>
> **(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.

Additional Residence Irrelevant for Partial Pensioner

(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.

[12] In this case, it is not disputed that the Appellant was residing in Canada at the time of his claim, while subsection 3(2) of the OAS Act requires at least 10 years of Canadian residence to qualify for an OAS pension. "Residence" and "presence" in Canada are defined by the *Old Age Security Regulations* (OAS Regulations) as follows:

21(1) For the purposes of the Act and these Regulations,

a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and

b) a person is present in Canada when he is physically present in Canada.

[13] It is evident that, at the time of his claim, the Appellant did not have 10 years of residence in Canada. However, section 40 of the OAS Act provides that the Government of Canada can enter into agreements with foreign countries allowing for the totalization of periods of residence in both countries. It was for this purpose that the Canada-France Agreement and the Canada-Switzerland Convention were concluded.

ISSUE

[14] Essentially, the issue before the Tribunal is whether the Appellant is eligible for an OAS pension.

[15] The onus rests with the Appellant to prove his residence for the relevant period according to the balance of probabilities: *Saraffian v. Canada (Human Resources and Skills Development)*, 2012 FC 1532 (CanLII) in paragraph 20.

SUMMARY OF THE EVIDENCE

[16] At the hearing, the Tribunal heard the Appellant's testimony. The Tribunal took the entire record into account, including oral and documentary evidence. The most relevant evidence, according to the Tribunal, is summarized below.

[17] The Appellant's evidence was not actually contested. Born in 1935, the Appellant is a Gabonese national. He arrived in Canada on April 5, 2007 (GD2-5 and 50). On April 27, 2011, he submitted an OAS pension application (GD2-3). In his application, he disclosed that he wanted to begin receiving his pension as soon as he would become eligible (GD2-4).

[18] He also stated the following regarding his residence history (GD2-5):

Period from (yyyy-mm-dd)	**To (yyyy-mm-dd)**	**Country**
1935-07-20	1957-10	Gabon
1957-10	1961-12	France
1961	1965-07	Gabon
1965-07	1968-07	Switzerland
1968-07	1970-01	France
1970-01	2007-04-05	Gabon
2007-04-05	To the present time (document signed 2011-04-21)	Canada

[19] After a quick assessment of the file, the Minister refused the Appellant's application, saying that he had to have lived in Canada for at least 10 years, and that he had accumulated only 4 years and 79 days of Canadian residence (GD2-42). The Appellant disputed the decision as follows (GD2-40):

> [Translation]
>
> From your correspondence of June 22, 2011, you informed me of your refusal to grant me an old-age pension. You rely on the fact that I have not resided in Canada for at least 10 years, and that my stay in Gabon is disregarded because there is no international agreement between Canada and Gabon.
>
> However, I have learned that there are international agreements between Canada and France and Switzerland.

> Yet, you seem to have overlooked all the documents added to my pension application file; on April 21, 2011, I added to it university documents attesting to the fact that I had stayed in France from 1957 to 1961, when I was studying for my law degree: at the Faculty of Law at the University of Poitiers (3 years), and at the Paris Law Faculty (1 year).
>
> I came back to France again, to the National Centre for Judicial Studies in Paris, from 1968 to 1970: from 1957 to 1961 for a total of 4 years; and from 1968 to 1970, for a total of 18 months, for an overall total of 5½ in France.
>
> As for Geneva, I did my doctoral studies in penal law there, studying at the University of Geneva, from 1965 to 1968 (3 years).
>
> In total: 4 years in Canada, 5½ in France and 3 years in Geneva, for a grand total of 12½ years.

[20] The evidence of the Appellant's studies at the University of Poitiers appears on page GD2-46, and the evidence of his studies at the University of Geneva appears on page GD2-48.

[21] Given the circumstances, the file was referred to the International Operations Office for a reconsideration (GD2-38). That Canadian office contacted the social security offices in France and Switzerland to request confirmation of the periods of residence that the Appellant had claimed. However, the authorities in France and Switzerland could not accurately identify the Appellant (GD2-8 to 20). To enable them to continue reviewing the file, the Minister asked the Appellant to provide other documents, but he failed to provide them at that time (GD2-29 to 36).

[22] Therefore, on May 20, 2014, the International Operations Office (GD2-26) refused the Applicant's application for the first time. Essentially, the Minister noted that the Appellant did not have enough proof regarding his years of residence in France and in Switzerland.

[23] In two letters dated June 23, 2014 (GD2-23 and 25), the Appellant asked for his file to be reconsidered. The reconsideration decision issued on July 22, 2014, upholds the initial decision. The following grounds are among those invoked by the Minister to justify the reconsideration decision (GD2-21):

a) The years of residence in Canada after the age of 18 do not totalize to 10 years.

b) The authorities in Switzerland confirmed that the information provided had not enabled them to identify the Appellant in their records.

c) The authorities in France confirmed that they had found nothing in their records enabling them to accurately identify the Appellant.

d) The Minister was unable to use the period in France (from 1957 to 1961) that the Appellant had claimed, because the Canada-France Agreement does not allow for the totalization of years of residence in France after the age of 18 and since January 1, 1966.

[24] After filing the appeal, the Appellant presented other evidence, namely:

a) confirmation from the *Office cantonal de la population et des migrations de la République et du Canton de Genève* stating that the Appellant had lived in that canton from September 2, 1965, to October 15, 1968, when he announced he was leaving for France (GD6-9); and

b) confirmation from the National School for Magistrates stating that the Appellant had been educated at the National Centre for Judicial Studies in Paris from October 16, 1968, to November 1, 1969 (GD6-10).

[25] At the hearing, the Appellant specified that he had fled Gabon for Switzerland and that he had to avoid returning to his home country during that period. Furthermore, he had only a small scholarship to cover his tuition, and his entry permit forbade him from working during his stay in the country.

[26] The Appellant's fate changed drastically when a new government came to power in Gabon. It was then that his government asked him to conduct his studies at the National Centre for Judicial Studies in Paris, and he went back to Gabon thereafter.

[27] At the hearing, the Appellant stated that he had never received Swiss or French citizenship, and that he had never been granted refugee status in those countries either. It goes without saying that the situation in Gabon changed again, because in November 2010, the Immigration and Refugee Board of Canada granted him refugee status (GD2-54). Furthermore, he became a permanent resident of Canada (GD4-3 and 4).

SUBMISSIONS

[28] The Appellant submits that he is eligible for an OAS pension because he has accumulated, so far, more than nine years of Canadian residence. Furthermore, even if his years of French residence from 1957 to 1961 cannot be totalized under the Canada-France Agreement, the Appellant claims:

a) a period of residence in Switzerland from September 2, 1965, to October 15, 1968 (3 years and 45 days); and

b) a period of residence in France from October 16, 1968, to November 1, 1969 (1 year and 17 days) (GD6-3).

[29] According to the Appellant, as of April 5, 2016, he had accumulated the required 10 years of residence, as well as 34 months of additional residence (GD6-4).

[30] According to the "Addendum of the Submissions of the Minister" (GD10), the Minister now acknowledges that the Appellant has a period of residence in Switzerland from September 2, 1965, to October 15, 1968, and a period of residence in France from October 16, 1968, to November 1, 1969. As a result, the Appellant meets the residence requirements as of March 2013.

[31] However, the Minister determines that the Appellant is bound to submit a new application for the following reasons (GD10-4):

> [Translation]
>
> [The Appellant] filed his application on April 27, 2011. As a result, he is deemed to have submitted his application too early to be eligible for an Old Age Security pension, because his periods of residence in Canada, Switzerland and France totalize to 9 years and 88 days from April 5, 2007, to April 30, 2012. April 30, 2012, is the latest date on which residence can be calculated based on an application date, which is April 27, 2011.

[32] Regarding the latest date on which the Appellant's residence can be calculated, the Minister's claims are found in subsection 8(2) of the OAS Act (GD10-3 to 4, and GD14-3).

ANALYSIS

[33] Although the parties now agree on several issues, the Tribunal must nonetheless ensure that its decision complies with the law. In this case, the Tribunal must decide whether the Appellant qualifies for an OAS pension. This issue raises other questions that must be considered beforehand, namely:

a) Can the Appellant totalize periods of residence in the three countries?

b) Can the Appellant benefit from the Canada-Switzerland Convention?

c) Can the Appellant benefit from the Canada-France Agreement?

d) In totalizing the permitted years of residence, on what date does the Appellant meet the residence requirements?

e) What is the latest date on which the Tribunal must assess the Appellant's eligibility for the OAS pension?

[34] The Tribunal will decide on each of those questions consecutively.

[35] As the Federal Court reminds us in *Canada (Minister of Human Resources Development) v. Stiel*, [2006] 4 FCR 489, 2006 FC 466 (CanLII), in paragraph 15, any analysis of the issue of an OAS pension must comprise two distinct steps: eligibility and then calculation.

[36] In paragraph 27 of *Stiel*, Judge Snider stated the starting point with respect to the interpretation of the OAS Act:

> In Canada, statutory provisions are to be interpreted in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paragraphs 20–22). Additionally, the Canada‑U.S. Agreement must be read so that there is "coherence" with, and in the confines of, the enabling OAS Act (*Ontario Hydro v. Canada*, 1997 CanLII 5299 (FCA), [1997] 3 F.C. 565 (C.A.), at paragraph 11; *Stachowski v. Canada (Attorney General)*, 2005 FC 1435 (CanLII), at paragraph 34).

[37] The goals of the legislative plan can also influence its interpretation. In this regard, the Tribunal is relying once again on Judge Snider's grounds in paragraphs 28 to 31:

> [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* [R.S.C., 1985, c. C-8], 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, page 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.
>
> [30]By adding paragraph 3(1.1)(*b*) to the OAS Act [*Old Age Security Act*, R.S.C. 1970, c. O.6] in Bill C-35, tabled and subsequently passed by Parliament and assented to on March 29, 1977 (*An Act to Amend the Old Age Security Act*, S.C. 1976–77, c. 9, s. 1), Parliament stated quite clearly its intentions to provide some coverage to persons who were no longer resident of Canada, but limited this coverage to persons with over 20 years of Canadian residence. In the result, non-residents with less than 20 years of residence in Canada are excluded from the OAS scheme.
>
> [31]However, certain relief from this 20-year requirement was introduced as part of the same legislative package. Specifically, Parliament added the ability of the Government to enter into reciprocal agreements that are intended to "make benefits portable to and from countries with which Canada may negotiate agreements" (Hansard, page 2835).

Can the Appellant totalize the periods of residence in the three countries?

[38] The Appellant failed to respond to that question directly. The Minister presented the following submissions (GD14-2 to 3):

> [Translation]
>
> Our Department does not have access to the Agreement or to the Convention between France and Switzerland. We have done an Internet search, but we have not found a link to the Agreement between France and Switzerland. As a result, we cannot provide a copy of this agreement to the Tribunal.
>
> The "Info rapide" of every country, the guide used for processing, indicates whether the Agreement includes a provision on the totalization of periods accumulated in a third

> country. If the Agreement includes a provision on the totalization of periods accumulated in a third country, a link is provided to a document that indicates a list of the agreements in effect between that country and other countries.
>
> It is possible to use two agreements to be eligible for benefits if at least one of the countries has provisions on the totalization of periods accumulated in a third country.
>
> Even if France does not have a provision on the totalization of periods accumulated in Switzerland, Switzerland has a provision on the totalization of periods accumulated in France. As a result, because at least one of the two countries has a provision on the totalization of periods accumulated in a third country, both agreements can be used to determine the client's eligibility. The client can therefore benefit from the Agreement and the Convention at the same time. However, only the Convention with Switzerland will be used to approve the application, given that France does not have provisions on the totalization of periods accumulated in a third country.

[39] Respectfully, the Minister's submissions are of little help: they fail to refer to specific provisions, are sometimes incoherent, and comprise a mixture of arguments and testimony. For example, the Appellant asked that he receive his pension as soon as possible, but the Minister seems to indicate that he is going to disregard the years of residence in France that the Appellant has claimed. Furthermore, a brief description of what appears on the "Info rapide" of each country cannot replace a copy of the relevant agreement.

The Canada-Switzerland Convention

[40] The Canada-Switzerland Convention has a provision on the totalization of periods accumulated in a third country. Therefore, there exists the possibility of a multilateral interpretation, if all the conditions of the Convention are met. The relevant provisions are as follows:

> **Part IV – Provisions Concerning Benefits**
>
> **Chapter I – Application of the Legislation of Canada**
>
> **Article 11**
>
> **1.** If a person is not entitled to a benefit solely on the basis of the periods creditable under the legislation of Canada, eligibility for that benefit shall be determined by totalizing these periods and those specified in paragraph 2, provided that these periods do not overlap.

2.

a) For purposes of determining eligibility for a benefit under the Old Age Security Act, a period of insurance under the legislation of Switzerland or a period of residence in the territory of Switzerland, after the age at which periods of residence in Canada are creditable for purposes of that Act, shall be considered as a period of residence in the territory of Canada.

b) For purposes of determining eligibility for a benefit under the Canada Pension Plan, a calendar year including at least three months of insurance under the legislation of Switzerland shall be considered as a year for which contributions have been made under the Canada Pension Plan.

3. Notwithstanding the provisions of paragraphs 1 and 2, if a person is not entitled to a benefit under the legislation of Canada, eligibility for that benefit shall be determined by taking into account creditable periods under the legislation of a third State with which both States are bound by an international social security instrument which provides for totalizing of periods.

[Underline added]

[41] Therefore, based on the underlined text, for the Appellant to benefit from the multilateral aspect of the Canada-Switzerland Convention, Canada and Switzerland must be bound to France by an international social security instrument providing for the totalization of periods. The Tribunal acknowledges that such an agreement exists between Canada and France, but there is no evidence before the Tribunal that such an international instrument exists between Switzerland and France. If such an international instrument does exist, it is part of foreign law and must therefore be proven. It is not something the Tribunal can find out in-house. In the absence of this international instrument, the Tribunal cannot, for example, assess whether it provides for the totalization of periods of residence.

[42] Because the Tribunal received no evidence pertaining to an international social security instrument between Switzerland and France that provides for the totalization of periods of residence, the Tribunal determines that the Appellant is not entitled to benefit from Article 11.3 of the Canada-Switzerland Convention.

The Canada-France Agreement

[43] According to the Minister's submissions, the Canada-France Agreement is an exclusively bilateral agreement. The Tribunal is also of the view that this agreement has no provisions on the totalization of periods accumulated in a third country.

[44] The Tribunal's conclusion is consistent with the decision that the Appeal Division recently handed down in *F.M. v. Canada (Minister of Employment and Social Development)*, 2016 SSTADIS 227 in paragraphs 12 to 15, and the Tribunal sees no reason to stray from this decision. In coming to this conclusion, the Appeal Division relied upon the wording in section 40 of the OAS Act. In doing so, the Appeal Division raises an interesting question: does section 40 of the OAS Act authorize the negotiation of multilateral agreements, or does it cover bilateral agreements exclusively? Luckily, this issue is not one on which the Tribunal needs to rule in this appeal.

[45] To summarize, the Tribunal determines that the Appellant cannot simultaneously benefit from the Canada-France Agreement and the Canada-Switzerland Convention. It is therefore necessary to determine which of these two agreements will be the most beneficial to the Appellant.

Can the Appellant benefit from the Canada-Switzerland Convention?

[46] Upon receipt of the confirmation by the *Office cantonal de la population et des migrations de la République et du Canton de Genève*, the period of residence in Switzerland that the Appellant has claimed is September 2, 1965, to October 15, 1968 (3 years and 45 days) (GD6).

[47] According to the "Addendum of the Submissions of the Minister," the Minister recognizes this period of residence as one that can be totalized under the Canada-Switzerland Convention (GD10).

[48] However, the Tribunal had to ask the question: can a Gabonese national who, at the time, did not have student status, benefit from the Canada-Switzerland Convention? In answering that question, the Appellant claims that he can benefit from the Canada-Switzerland Convention because he received confirmation from the Swiss authorities, and because he

currently holds permanent resident status (GD13). According to the Minister, Article 3 a) of the Canada-Switzerland Convention applies to the Appellant's situation (GD14-2).

[49] According to its terms, the Canada-Switzerland Convention applies only to individuals that Article 3 covers:

> **Article 3**
>
> Unless otherwise provided, this Convention shall apply to:
>
> a) nationals of either State, as well as to their family members and survivors to the extent that their rights are derived from these nationals;
>
> b) refugees, within the meaning of the Convention on the Status of Refugees of July 28, 1951 and of the Protocol on the Status of Refugees of January 31, 1967, as well as to their family members and survivors to the extent that their rights are derived from these refugees, provided that, as regards the application of Swiss legislation, these persons reside in the territory of one of the States;
>
> c) with respect to Switzerland, stateless persons, within the meaning of the Convention on Status of Stateless Persons of September 28, 1954, as well as to their family members and survivors to the extent that their rights are derived from these stateless persons, provided that these persons reside in the territory of one of the States;
>
> d) nationals of third States;
>
> who are or who have been subject to the legislation of one of the States or who have acquired rights under that legislation.

[50] The underlined words are defined by the Canada-Switzerland Convention as follows:

> **Part I - Definitions and Legislations**
>
> **Article 1**
>
> **1.** For the purposes of applying this Convention:
>
> **a)** […]
>
> **b)** "national"
>
> means, as regards Switzerland, a person of Swiss nationality, and as regards Canada, a Canadian citizen;

c) "legislation"

means the laws and regulations specified in Article 2;

Article 2

1. This Convention shall apply:

a) with respect to Switzerland:

i) to the *Federal Law on Old Age and Survivors Insurance* of December 20, 1946;

ii) to the Federal Law on Disability Insurance of June 19, 1959;

b) with respect to Canada:

i) to the *Old Age Security Act*;

ii) to the *Canada Pension Plan*.

[51] Viewed in its context, the Tribunal determines that the Appellant is not a national of one of the two countries as the Minister claims (Canada-Switzerland Convention, Article 3 a)). According to the evidence on file, the Appellant has never held Swiss nationality and has never been a Canadian citizen.

[52] Furthermore, it is unclear whether the requirements of the Canada-Switzerland Convention must be applied temporarily. In other words, is it essential that the Appellant meet the requirements provided for by the Canada-Switzerland Convention at the time he was living in Switzerland (from September 2, 1965, to October 15, 1968), or is it sufficient that the Appellant met that criteria at a given time? The Minister's submissions seem to indicate that the provisions regarding the application of the Canada-Switzerland Convention and the Canada-France Agreement must be applied in a temporary manner.

[53] Given that the OAS Act must be interpreted broadly and in such a way that favours individuals' eligibility (*Stiel*, paragraph 39), the Tribunal is satisfied that the Canada-Switzerland Convention applies to the Appellant, given that:

a) the parties are in agreement;

b) the confirmation of the *Office cantonal de la population et des migrations* certifies that the Appellant lived in Geneva during the period in question (GD6-9);

c) Canada granted the Appellant refugee status; and

d) Article 3 d) of the Canada-Switzerland Convention covers third-state nationals.

[54] Regarding the temporary application of the Canada-Switzerland Convention, the Tribunal does not need to rule on that issue. The Minister is best positioned to assess whether the Appellant was subject to Swiss legislation or whether he acquired rights under said legislation. Although the Minister's submissions fail to directly answer that question, it is understood that the answer is yes because the Minister's submissions indicate that the Canada-Switzerland Convention must be applied in a temporary manner, and because the Minister acknowledges that this period can be used for totalization purposes. The Minister amended his position after the Appellant's presentation of the confirmation from the *Office cantonal de la population et des migrations*. Therefore, that document establishes the Appellant's entitlement to benefit from the Canada-Switzerland Convention.

[55] If the Canada-Switzerland Convention does not need to be applied in a temporary manner, it is also probable that, since his arrival in Canada, the Appellant has been subject to or has acquired rights under the relevant Canadian legislation.

[56] The Tribunal therefore recognizes 3 years and 45 days of residence in Switzerland, which can be totalized with the years of Canadian residence.

Can the Appellant benefit from the Canada-France Agreement?

[57] The periods of residence in France that the Appellant claimed are as follows:

a) from October 1957 to December 1961, during his law studies in Poitiers and in Paris (GD2-46 to 47 and GD6-3); and

b) from October 16, 1968, to November 1, 1969, during his studies at the National Centre for Judicial Studies (GD6-10).

[58] The Minister excluded the first period of French residence that the Appellant had claimed. According to him, the Canada-France Agreement does not provide for the totalization of periods of residence completed in the territory of France before January 1, 1966 (Canada-France Agreement, Article XVI c)).

[59] As for the second period of French residence that the Appellant has claimed, the Minister's submissions are, respectfully, incoherent. On the one hand, the Minister recognizes that this period of 1 year and 17 days can be used for totalization purposes (GD10-3). However, on the other hand, he indicates that the Canada-France Agreement does not apply to the Appellant's situation (GD14-1 to 2). Subsequently, the Minister indicates that the Appellant can benefit from the Canada-France Agreement and the Canada-Switzerland Convention at the same time, but then says (on page GD14-3) that [translation] "only the Convention with Switzerland will be used to approve the application, given that France does not have provisions on the totalization of periods accumulated in a third country."

[60] Crucially, the Tribunal agrees with the Minister's argument with respect to the period claimed from 1957 to 1961. Article XVI c) of the Canada-France Agreement clearly states that only the periods of residence completed in the territory of France after January 1, 1966, can be combined with periods of residence in the territory of Canada.

> **Article XVI – Specific Provisions for the Application of the Legislation of Canada**
>
> The following specific provisions apply with respect to the application of the *Old Age Security Act of Canada:*
>
> **a)** […]
>
> **c)** For the purposes of sub-paragraph II A(1) of Article XII, any reference to insurance periods shall read "residence periods" and residence periods completed in the territory of France after January 1, 1966 shall be considered residence periods in the territory of Canada.

[61] Therefore, even if the Canada-France Agreement applies to the Appellant (issue on which the Tribunal is not ruling), the only period of French residence that could be used for the purpose of establishing the Appellant's eligibility for an OAS pension is the one from October 16, 1968 to November 1, 1969. However, because the Tribunal finds that the Appellant

cannot benefit from both agreements at the same time, it is already clear that the application of the Canada-Swiss Convention is the most advantageous for the Appellant. As a result, the Tribunal does not have to decide on the other issues pertaining to the application of the Canada-France Agreement.

In totalizing the permitted years of residence, on what date does the Appellant meet the residence requirements?

[62] Recalling that the Appellant asked to receive his OAS pension as soon as he would become eligible, and that the Minister acknowledges that he has remained a Canadian resident since April 5, 2007, the Tribunal must therefore assess the date on which the Appellant accumulates the 10 years of residence that the OAS Act requires.

[63] We have already determined that, with the help of the Canada-Switzerland Convention, the Appellant can totalize 3 years and 45 days of Swiss residence with his Canadian residence. Furthermore, because the Minister acknowledges the Appellant's Canadian residence since April 5, 2007 (GD10-2), the Appellant reached the threshold of 10 years in February 2014.

What is the latest date on which the Tribunal must assess the Appellant's eligibility for the OAS pension?

[64] The Minister maintains that the latest date on which the Appellant's residence can be considered is April 30, 2012—the last day of the twelfth month after his application date (April 27, 2011). The Tribunal can consider the reasons why the Minister would like to set a deadline, after which applicants' eligibility will no longer be considered, but if such a policy was adopted, its origin cannot be found in the OAS Act or in the OAS Regulations.

[65] In this regard, the Minister cites subsection 8(2) of the OAS Act:

> **Commencement of Pension**
>
> **8. (1)** Payment of pension to any person shall commence in the first month after the application therefore has been approved, but where an application is approved after the last day of the month in which it was received, the approval may be effective as of such earlier date, not prior to the day on which the application was received, as may be prescribed by regulation.

Exception

(2) Notwithstanding subsection (1), where a person who has applied to receive a pension attained the age of sixty-five years before the day on which the application was received, the approval of the application may be effective as of such earlier day, not before the later of

(a) a day one year before the day on which the application was received, and

(b) the day on which the applicant attained the age of sixty-five years, as may be prescribed by regulation.

[66] In no way does the Tribunal see how this provision supports the Minister's position.

[67] Section 8 of the OAS Act must be read with section 5 of the OAS Regulations. Together, these provisions limit the retroactive payments for which an applicant qualifies when he or she applies for a pension after his or her eligibility date. Section 5 of the OAS Regulations provides for the possibility that the Minister can approve a pension application on the basis of facts that occurred after the filing date of the application, *without a limit of one year or other*:

Approval of an Application for a Pension

5. (1) Subject to subsection (2), where the Minister

a) is satisfied that an applicant is qualified for a pension in accordance with sections 3 to 5 of the Act, and

b) approves the application after the last day of the month in which it was received, the Minister's approval shall be effective on the latest of

c) the day on which the application was received,

d) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and

e) the date specified in writing by the applicant.

(2) Where the Minister is satisfied that an applicant mentioned in subsection (1) attained the age of 65 years before the day on which the application was received, the Minister's approval of the application shall be effective as of the latest of

a) the day that is one year before the day on which the application was received,

b) the day on which the applicant attained the age of 65 years;

c) the day on which the applicant became qualified for a pension in accordance with sections 3 to 5 of the Act, and

d) the month immediately before the date specified in writing by the applicant.

[Underline added]

[68] Section 8 of the OAS Act is rather a provision that will result in prejudice to the Appellant if the ruling that the Minister has requested is granted. The Appellant filed his pension application on April 27, 2011, at the age of 75. However, considering the conclusions that the Tribunal has drawn, the Appellant was eligible for his OAS pension only as of February 2014. Under subsection 5(2) of the OAS Regulations, the Minister's certification therefore takes effect on that date, and the first payment of the pension is done over the course of the next month (OAS Act, subsection 8(1)). However, if the Appellant is obligated to submit a new pension application, the retroactive payments for which he will qualify will be limited to the 11 months preceding the filing date of his new claim (OAS Act, subsection 8(2) and OAS Regulations, subsection 5(2)(a)).

[69] The Tribunal's conclusion in this regard is substantiated by the Federal Court in *Stevens Estate v. Canada (Attorney General)*, 2011 FC 103, in which it was established that appellants before the Tribunal qualify for an appeal *de novo*. The Tribunal may exercise all the powers at the Minister's disposal, and it has been entrusted with the power to hold hearings and examine new evidence (OAS Act, section 28, *Department of Employment and Social Development Act*, section 54 and SST Regulations).

[70] The Tribunal therefore finds that it has the jurisdiction to assess the Appellant's eligibility for an OAS pension until the date of the hearing.

CONCLUSION

[71] The parties and the Tribunal agree that the Appellant is eligible for an OAS pension. Furthermore, the Tribunal has answered the questions raised, namely:

a) Can the Appellant totalize the periods of residence in the three countries? No. A provision on the totalization of accumulated periods in a third country exists only in the Canada-Switzerland Convention. However, to benefit from this clause, there should be an agreement between France and Switzerland. If such an agreement exists, it should have been proven before the Tribunal, but there is no such evidence in the appeal file.

b) Can the Appellant benefit from the Canada-Switzerland Convention? Yes. The Tribunal recognizes that the Appellant lived in Switzerland from September 2, 1965, to October 15, 1968. Under the Canada-Switzerland Convention and for the purpose of calculating his eligibility date, these years of residence in Switzerland can be totalized with his years of Canadian residence.

c) Can the Appellant benefit from the Canada-France Agreement? In this case, no. The Canada-France Agreement applies only to the periods of residence completed in the territory of France after January 1, 1966. It is therefore evident that the application of the Canada-Switzerland Convention is the most advantageous to the Appellant, such that the Tribunal does not need to rule on the other issues concerning the Canada-France Agreement.

d) In totalizing the permitted years of residence, on what date does the Appellant meet the residence requirements? The date on which the Appellant became eligible for the OAS pension is in February 2014.

e) What is the latest date on which the Tribunal must assess the Appellant's eligibility for the OAS pension? The Tribunal can assess the Appellant's eligibility for an OAS pension, including the required number of years of residence, until the date of the hearing.

[72] The Appellant is therefore eligible for an OAS pension as of February 2014. Under subsection 8(1) of the OAS Act, the first payment of the pension must take place during the month following the certification of the application, which is March 2014.

[73] The Tribunal's decision fails to meet the requests of one party or the other. However, the Tribunal does not have to choose between these two proposals. Rather, the Tribunal must hand down a decision that it has determined complies with the law.

[74] For the above reasons, the appeal is allowed in part.

Jude Samson
General Division – Income Security