



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *LM v Minister of Employment and Social Development*, 2020 SST 1089

Tribunal File Number: GP-19-1036

BETWEEN:

L. R.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Teleconference hearing on: September 14, 2020 and October 16, 2020

Date of decision: November 10, 2020

DECISION

[1] The Claimant is entitled to an increased partial *Old Age Security* (OAS) pension of 34/40th of the full OAS pension with payment starting as of February 2017. He is not entitled to a full OAS pension.

OVERVIEW

[2] The Claimant was born in Colombia in January 1952. He was 24 years old when he came to Canada in January 1976. In March 1986, he became a permanent resident. In 1990, he became a Canadian citizen. In January 2017, he turned 65. In May 2017, he applied for the OAS pension.¹ He indicated that he wanted his payments to start as soon as he was eligible, which was the month after he turned 65.²

[3] The Minister approved his application in September 2018.³ It granted him a partial OAS pension at 24/40th of the full pension with an effective payment date of February 2017 (the month after he turned 65). It accepted that he had been a resident of Canada from January 30, 1976 to October 1, 2000 (24 years and 247 days). It determined that he ceased to be a resident of Canada as of October 1, 2000.

[4] The Claimant requested a reconsideration of the period of residence. His position was that he was entitled to a full pension because he continued to be a resident of Canada after October 2000. The Minister denied the request for reconsideration. The Claimant appealed to the Social Security Tribunal.

ISSUES

1. Was the Claimant a resident of Canada during the disputed period from October 1, 2000 to January 2017 (the month the Claimant turned 65)?
2. If so, during what periods?

¹ GD2-14

² GD2-15

³ GD2-22 -23

ANALYSIS

[5] The OAS Regulations distinguish between the concepts of residency in Canada and presence in Canada. A person resides in Canada if he makes his home and ordinarily lives in any part of Canada.⁴ A person is present in Canada when he is physically present in any part of Canada.⁵

[6] I must weigh all the facts of the case and the Claimant's circumstances. The Claimant's intention to live in Canada is not enough on its own to show residence. The determination of residency is a factual issue that requires an examination of the whole context of the Claimant's circumstances.

[7] I must consider a number of non-exhaustive factors when determining if a person makes their home and ordinarily lives in Canada. These factors include, but are not limited to⁶:

- Ties in form of personal property (i.e. house, business, furniture, automobile, bank account, credit card);
- Social ties in Canada (i.e. membership with organizations or associations or professional memberships);
- Other ties in Canada (i.e. hospital and medical insurance coverage, driver's license, rental, lease, loan or mortgage agreement, property tax statements, electoral voter's list, life insurance policies, contracts, public records, immigration and passport records, provincial social services records, public and private pension plan records, federal and provincial income tax records);
- Ties in another country;
- Regularity and length of stay in Canada and the frequency and length of absences from Canada; and
- The person's mode of living (i.e. whether his living in Canada is substantially deep rooted and settled)

⁴ Paragraph 21(1)(a) of the OAS Regulations

⁵ Paragraph 21(1)(b) of the OAS Regulations

⁶ *Canada (MHRD) v Ding*, 2005 FC 76 and *Duncan v Canada (AG)*, 2013 FC 319.

[8] The Claimant's Canada Border Services travel records indicate that he entered Canada on⁷:

- May 5, 2001
- April 5, 2004
- April 7, 2005
- April 1, 2006
- April 4, 2007
- April 9, 2008
- April 3, 2009
- April 7, 2010
- April 6, 2011
- April 10, 2012
- April 8, 2013
- April 11, 2014
- April 13, 2015
- April 11, 2016
- April 10, 2017

[9] The Claimant's Colombian and Canadian passport records between 2013 and 2018 indicate the following travel history⁸:

- July 22, 2013: Entry to USA ⁹

⁷ GD2-72, Minister's submissions, GD6, para 13; GD2-80, no entry information exists prior to August 2000 and no exit information exists prior to June 30, 2013.

⁸, GD2-29, Minister's submissions, GD6, para 19

⁹ The Claimant stated that he sometimes travelled through the USA on his way to and from Colombia

- April 11, 2014: Entry to USA
- April 12, 2015: Exit from Colombia
- October 14, 2015: Entry to Colombia
- April 11, 2016: Exit from Colombia
- April 11, 2016: Entry to USA
- October 13, 2016: Entry to Colombia
- April 10, 2017: Exit from Colombia
- October 13, 2017: Entry in Colombia
- April 10, 2018: Exit from Colombia

The Claimant continued to be a resident of Canada until October 2003

[10] The Minister does not dispute that the Claimant was a resident of Canada from January 1976 to October 2000. It disputes that he was a Canadian resident after that date. The Claimant stated that he worked the full year in Canada in 2000, 2002, and 2003.¹⁰ He also stated that he spent six months in Colombia and six months in Canada in 2001.

[11] As set out below, I do not accept his evidence that he spent the full years in Canada in 2000, 2002, 2003. Although he spent all of 2002 in Canada, he was not in Canada for the full year in 2000 and 2003.

[12] The Claimant's exit records for those years are not available. Based on his entry records when considered in the context of his evidence about his pattern of alternating stays in Canada and Colombia for six month periods, I am satisfied that it is more likely than not that he:

- left Canada for Colombia in about October 2000, and returned in May 2001;
- spent all of 2002 in Canada;

¹⁰ GD1-5, GD2-70

- left Canada for Colombia in about October 2003, and returned to Canada in April 2004;¹¹ and
- thereafter, spent about six months in each of Colombia and Canada every year. He usually left Canada for Colombia in October and returned to Canada the following April.

[13] The Claimant was absent from Canada on only one occasion during the three year period between October 2000 and October 2003. This was for about six months from October 2000 to May 2001. He did not give up his strong ties to Canada where he had resided continuously since January 1976. There is no evidence that he established strong ties to Colombia during this absence.

[14] I find that this absence did not interrupt the Claimant's longstanding residence in Canada. Accordingly, he continued to be a resident of Canada until October 1, 2003. This means he is entitled to be credited with an additional three years of residence in Canada.

The Claimant was a resident of both Canada and Colombia after October 2003

[15] Both parties agree that by October 2003, the Claimant established a pattern of being away from Canada for about six months each year. He would usually leave Canada for Colombia in October and return in April. He divided his time equally between Canada and Colombia - spending six months a year in each country.¹²

[16] He also had strong ties in each country. The Minister submits that the Claimant had stronger ties in Colombia. I disagree. I believe that a fair assessment of the various factors establishes that he had relatively equal ties to both countries.

[17] I now turn to the factors set out in paragraph 7, above.

¹² Questionnaire: GD2-87; Minister's submissions: GD6, paras 13, 19, 20

Lifestyle and ties in Canada and Colombia¹³

[18] The Claimant stayed with his siblings, when he first started to spend six months in Colombia. In 2005, he met his girlfriend. In 2006, he bought a house. Since then he has lived in the house with his girlfriend when he is in Colombia. He never owned a house in Canada. After 2003, he usually rented space in friends' houses. In Alberta, he rented the basement in the home of a friend with whom he worked in construction. In British Colombia, he rented a room. He stayed a few times in houses while they were being renovated. He had work clothes, tools, and a truck in Canada. He left them at a friend's house. He had auto insurance in Canada. He cancelled the insurance when he went to Colombia, and reinstated it when he came back. He didn't have a car in Colombia.

[19] In Canada, he worked in construction. Although, he was allowed to work in Colombia, he didn't look for work because he believed he would not be able to get a job because of his age. He lived off savings when he was in Colombia. His girl friend had a small grocery store that kept her busy but didn't make any money. She wouldn't come to Canada because she had worse problems with the cold than he did, and she didn't speak English.

[20] He had three siblings in Colombia. He had relatives in Canada. He had friends in both countries. He had passports from both countries. Last year he renewed his Canadian passport for 10 years. He always filed tax returns in Canada. He didn't file tax returns in Colombia.

[21] He had a health card in Canada. He didn't have medical coverage in Colombia. He had library cards in both countries. He had bank accounts in both countries. He had a Canadian credit card. He didn't have a Colombian credit card. When he travelled to Colombia, he usually bought a return ticket with a specific return date.¹⁴

Regularity and length of stays in Canada and Colombia

[22] Starting in 2003, he regularly spent six months in Canada— from mid April to mid October. He also spent six months in Colombia - from mid- October to mid-April.

¹³ I have grouped the first four factors in para 7 together

¹⁴ Oral evidence at hearing: GD1-5,

Mode of living and roots in Canada and Colombia

[23] Except for 2001, the Claimant lived in Canada on a full-time basis from 1976 to October 2003. He became a permanent resident and then a citizen. His deep rooted and settled ties in Canada were his work, his citizenship, and his longstanding residence. His deep rooted and settled ties in Colombia were the warmer winter weather, his house, and his girl friend.

[24] I find that the Claimant's ties to, and time in, each country have been relatively equal since October 2003.

[25] The Minister submits that a person can only be considered a resident of one country at a time. However, it does not provide any statutory or case authority for this. In a non-binding decision, a member of the Appeal Division (AD) of this Tribunal disagreed. She stated that it may be an error of law to conclude that a person can only reside in one country for OAS purposes. The primary consideration is a weighing of the factors set out in paragraph 7, above.¹⁵

[26] Although I am not bound by the AD decision, I find it helpful. After October 2003, the Claimant spent equal time in Canada and Colombia. In addition, he had a deep rooted and settled connection as well as equal ties to both countries. He was resident of Canada from October to April. He was a resident of Colombia from October to April. I find that it is more likely than not that the Claimant's residence alternated between Canada and Colombia for six months of each year.

[27] I have considered paragraph 21(4)(a) of the OAS Regulations. Under that provision any interval of absence from Canada of a temporary nature that does not exceed one year shall be deemed not to have interrupted a person's residence in Canada. I do not consider this provision applicable. This is because a pattern of lengthy absences for 13 consecutive years is not "of a temporary nature". A temporary absence is one that is meant to last only for a limited time. Although the Claimant's absences were for a limited time in each year, the pattern of absences was for an indefinite time.

¹⁵ *A.D. v. Minister of Employment and Social Development*, 2015 SSTAD 1267, para 11

[28] The Claimant is entitled to be credited with an additional period of residence for six months of each year from October 1, 2003 to October 1, 2016 – an additional 6 ½ years of residence. He is not entitled to be credited with any additional period of residence from October 1, 2016 to January 13, 2017. This is because he was a resident of Colombia during that time.¹⁶

The Claimant's recalculated period of residence

[29] Based on my findings in paragraphs 13 and 27, above, I have calculated the Claimant's period of residence in Canada until the effective date of his OAS application of February 2017 as follows:

- The Minister calculated that he had 24 years and 338 days of residence as of October 1, 2000.
- The Claimant is entitled to be credited with an additional three years of residence for October 1, 2000 to October 1, 2003.
- The Claimant is also entitled to be credited with an additional 6 ½ years (6 years and 182 days) of residence for October 1, 2003 to October 1, 2016.

[30] The Claimant was a resident of Canada for 34 years and 155 days. Since the years are rounded down, he is entitled to a partial pension of 34/40th of the full OAS pension.¹⁷

The Claimant is not entitled to a full pension

[31] Since the Claimant does not have 40 years of residence in Canada, to qualify for a full OAS pension he must:

1. have been 25 years old and resided in Canada on July 1, 1977;
2. be sixty five years old; and
3. have resided in Canada for ten years immediately preceding the day his application was approved, *or* been present in Canada for a combined period at least equal to three times his combined period of absence from Canada during the ten years prior to his application being approved, *and* resided in Canada for at

¹⁶ The period of residence is based on the Claimant's days in Canada after reaching 18 until the day the effective day as of which his OAS application was approved. Sections 3(2), 3(3), and 8(2) of the OAS Act and 5(2) of the OAS Regulations. In this case, the effective day the application was approved was January 13, 2017, when the Claimant turned 65.

¹⁷ Section 3(4) of the OAS

least one year immediately proceeding the day on which the Minister approved his application.¹⁸ (emphasis added)

[32] The Claimant has satisfied the first two conditions. However, based on my findings, he has not satisfied the third condition. This is because he was not a resident of Canada for at least one year immediately preceding that day the Minister approved his application – he was a resident for only about six months of that year.

[33] I find that the Claimant is not entitled to a full OAS pension.

CONCLUSION

[34] The Claimant is entitled to an increased partial OAS pension of 34/40th of the full pension with payment starting as of February 2017. He is not entitled to a full OAS pension.

[35] The appeal is allowed in part.

Raymond Raphael
Member, General Division - Income Security

¹⁸ Paragraph 3(1)(b) of the OAS