



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *JA v Minister of Employment and Social Development*, 2020 SST 1154

Tribunal File Number: GP-20-790

BETWEEN:

J. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Claimant represented by: Ronald Cronkhite

Teleconference hearing on: December 10, 2020

Date of decision: December 30, 2020

DECISION

[1] The Claimant re-established residency in Canada on August 19, 2016, and he has continued to reside in Canada since then.

OVERVIEW

[2] The Claimant is a 74-year-old man who was born in Cuba. He defected to Canada in July 1992. He became a permanent resident of Canada in September 1993 and he became a Canadian citizen in May 1997.

[3] The Claimant applied for an Old Age Security (OAS) pension in October 2013 and again in May 2014. (It appears the Respondent misplaced his first application, but gave the Claimant a protected date of application of October 2013). In his application, the Claimant reported that he lived in Canada from July 1992 to 2007 and from April 2013 to the date of application.

[4] In October 2014, the Respondent wrote to the Claimant and told him that his OAS application was approved, and that he was eligible for a partial pension of 15/40ths effective May 2013¹. A short while later, the Respondent wrote to the Claimant and told him he was eligible for the Guaranteed Income Supplement (GIS) effective May 2013².

[5] In early 2016, the Respondent launched an investigation into the Claimant's residency in Canada. As a result of that investigation, the Respondent determined that the Claimant had not resided in Canada since August 2007. The Respondent said the Claimant would have to repay the OAS and GIS monies he received from May 2013 to April 2016, an amount totalling \$42,908.15.

[6] The Claimant asked the Respondent to reconsider its decision. The Respondent reconsidered and decided to maintain the decision. The Claimant appealed the Respondent's reconsideration decision to the Social Security Tribunal (SST or Tribunal).

¹ Page GD2-119. The periods of residency were from July 29, 1992 to August 27, 2007 and from April 11, 2013 to April 30, 2013. The Claimant had acknowledged that he did not reside in Canada from August 28, 2007 to April 10, 2013.

² Page GD2-130. It is not clear from the file why the Claimant was granted GIS retroactive to May 2013 when the application for the relevant payment period (July 2012 to June 2013) was not made until November 2014 (page GD2-128). It could be that the Respondent provided the Claimant with a protected date of application.

[7] I heard the Claimant's appeal on August 22, 2019. On August 31, 2019, I issued a decision allowing the appeal in part. I found that:

- the Respondent exceeded its authority by changing its finding about the Claimant's residency from April 2013. In other words, I found that the Claimant's residency in Canada from April 11, 2013 to March 19, 2014 was not open to reassessment by the Respondent;
- the Claimant continued to be eligible for the OAS pension and the GIS from April 2013 to September 30, 2014;
- the Claimant was not eligible for the OAS pension or the GIS for the month of October 2014;
- the Respondent exceeded its authority by changing its findings about the Claimant's residency from November 2014 to December 17, 2015. In other words, I found that the Respondent's decisions about the Claimant's residency from November 2014 to and including December 17, 2015 were not subject to change; and
- the Claimant did not reside in Canada from December 18, 2015 to August 18, 2016.

[8] In my decision, I explained that I did not assess the Claimant's residency after August 18, 2016 because the evidentiary record was focused on the period before then.

[9] The Respondent appealed my decision to the SST Appeal Division. In May 2020, a member of the Appeal Division allowed the appeal in part. The member determined that I did not err when I found that the Respondent did not have the authority to revisit its previous determination that the Claimant had re-established residency in Canada in 2013. However, the Appeal Division member also found that I refused to exercise my jurisdiction by declining to consider whether the Claimant resided in Canada after August 18, 2016.

[10] The Appeal Division member returned the matter to the General Division for a hearing (i) to make findings about the Claimant's residence after August 18, 2016 and (ii) to determine what, if any, impact those findings have the Claimant's OAS entitlement.

ISSUE(S)

[11] I must decide if the Claimant resided in Canada at any point after August 18, 2016 and before December 10, 2020 (the date of the hearing).

Eligibility Requirements for an OAS pension and the GIS

[12] To qualify for an OAS pension, an applicant must³:

- a. be at least 65 years of age;
- b. have legal resident status in Canada on the day before the day on which the application is approved; and
- c. have resided in Canada after the age of 18.

[13] A full OAS pension is paid to individuals who have resided in Canada for at least 40 years after the age of 18⁴. If a person has not resided in Canada for at least 40 years, the legislation provides for the possibility of a partial pension. To be eligible for a partial pension, a person must have resided in Canada for at least ten years⁵. So, for example, if a person resided in Canada after the age of 18 for ten years (and also meets the other eligibility requirements), then the person will be eligible for a partial OAS pension of 10/40ths (or one-quarter of a full OAS pension).

[14] If a person stops living in Canada and wants to receive an OAS pension while living in another country, then the person must have resided in Canada after the age of 18 for at least 20 years⁶.

[15] The GIS is an income-tested monthly benefit that is paid to individuals who receive the OAS pension, reside in Canada, and have little to no income. If a GIS recipient leaves Canada,

³ Subsection 3(2) and section 4 of the *Old Age Security Act*

⁴ Subsection 3(1) of the *Old Age Security Act*

⁵ Subsection 3(2) of the *Old Age Security Act*

⁶ Paragraph 3(2)(b) and subsection 9(4) of the *Old Age Security Act*

that person can only receive the GIS for six months after the month of departure. This is so regardless of how many years of residency in Canada the person has⁷.

[16] 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 Canada⁸. A person is present in Canada when he is physically present in any part of the country⁹.

[17] There are a number of factors that are relevant to determining whether a person makes their home in and ordinarily lives in Canada. These factors include, but are not limited to¹⁰:

- Ties in the 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).

⁷ Paragraph 11(7)(c) of the *Old Age Security Act*

⁸ Paragraph 21(1)(a) of the *Old Age Security Regulations*

⁹ Paragraph 21(1)(b) of the *Old Age Security Regulations*

¹⁰ *Canada (MHRD) v. Ding*, 2005 FC 76

ANALYSIS

Why I found the Claimant did not reside in Canada from December 18, 2015 to August 18, 2016

[18] Before I turn to the period of time that is the focus in this appeal (i.e. the period after August 18, 2016), I will briefly explain why I previously found that the Claimant did not reside in Canada from December 18, 2015 to and including August 18, 2016.

[19] In 2019, I held that the Claimant had residential ties to Canada between December 2015 and August 2016, but not overwhelmingly so. I noted that some of his ties resulted from previous periods of residency in Canada (such as the making of CPP contributions for his retirement pension). I also noted that some of his ties (such as his medical coverage) resulted from representations the Claimant made to the provincial government, and I had no way of knowing what kind of verification process was in place for determining coverage.

[20] Ultimately, I determined that in a case where the Claimant changes accommodations frequently, does not have a lot of personal possessions, and travels extensively, it made sense to base my finding of residency on where the Claimant spent most of his time. I noted that from December 18, 2015 to August 18, 2016 the Claimant spent only about 11 days in Canada (i.e. from March 19, 2016 to March 30, 2016), and those 11 days were sandwiched between two relatively lengthy stays in Cuba. I concluded that the Claimant's time in Canada during the period from December 2015 to August 2016 was more in keeping with a visit to Canada than with residency in Canada.

Changes to the Claimant's residential ties to Canada since August 2016

[21] The Claimant's representative submits that, with two notable differences, the Claimant's residential ties to Canada have been essentially the same since before August 19, 2016.

[22] The first difference is that the Claimant is now on social assistance. He has been receiving social assistance since about October 2018¹¹. The Claimant told me that, as a recipient of social assistance, he is not allowed to leave the province for more than 30 days.

[23] The second difference, and the most important difference, is that since August 19, 2016 the Claimant has spent more time in Canada than previously.

[24] I agree that, aside from the Claimant's length of stays in Canada, not a lot has changed since August 2016 with respect to his other residential ties to Canada.

[25] I note that the Claimant's mother passed away in Cuba in April 2017. However, the Claimant still has a brother and nephew in Cuba and the Claimant told me that when he is in Cuba he stays at his brother's house. The Claimant told me that he does not own property in Cuba. He explained that, because he defected from Cuba in 1992, he is not allowed to own any property in Cuba.

[26] I also note that the Claimant's Canadian address changed in March 2020. He has provided evidence of his lease agreement¹². He has also provided evidence from his current landlord showing that the Claimant has continued to pay rent¹³, even though the Claimant was not in Canada from March 13, 2020 to October 13, 2020.

The Claimant has been spending more time in Canada since August 2016

[27] In preparation for the hearing, the Claimant and his representative spent time going through the documentary evidence in an effort to provide an accounting of the Claimant's travels. At the beginning of the hearing, the Claimant's representative summarized the dates that he and the Claimant determined best represent the Claimant's travels in and out of Canada.

[28] With three exceptions, I accept that the travel dates presented by the Claimant and his representative are supported by the evidence.

¹¹ The Claimant's bank records show payments from the Province of Ontario in October 2018 (page IS6-116).

¹² Page IS6-3

¹³ Page IS6-20

[29] The first exception relates to 2017. The Claimant's representative submitted that the Claimant was in Canada from March 15, 2017 to August 9, 2017. I accept that the Claimant entered Canada on March 15, 2017. This is supported by the report from the Canada Border Services Agency (CBSA). However, I do not believe the Claimant was in Canada until August 9, 2017. I say this for two reasons.

[30] First, the Claimant had a Canadian passport issued to him in Cuba on July 7, 2017¹⁴. When the Claimant was asked if he was in Cuba at the time his passport was issued, he acknowledged he was. He also explained that it is much quicker to have a Canadian passport issued in Cuba than it is in Canada. For example, he said he was issued the passport (presumably the one of 2017) within one week of applying for it at the embassy in Cuba.

[31] Second, one of the passport stamps for August 9, 2017 appears to be for Mexico¹⁵. The Claimant appears to have arrived in Mexico on August 9, 2017 and then returned to Cuba on August 12, 2017¹⁶. Such a trip is consistent with the Claimant's evidence about his travel patterns. He told me during the 2019 hearing that he is not allowed to stay in Cuba for more than 90 consecutive days. To get around this, he takes short trips to Mexico and then returns to Cuba. During the hearing of December 2020, I asked the Claimant if it is possible that he left Cuba for Mexico in August 2017 and he acknowledged it is possible.

[32] After I explained to the Claimant why I do not think he stayed in Canada until August 9, 2017, I gave the Claimant an opportunity to provide evidence about how long he thinks he stayed in Canada after his arrival on March 15, 2017. The Claimant could not remember. He said he was in Canada when his mother passed away in Cuba in April 2017. He explained that, at the time his mother passed away, he was doing some work in a home owned by his landlord and that the work took him about two months to complete. He also said that he thinks he may have gone to Cuba in either May or June 2017.

¹⁴ Page IS9-2

¹⁵ Page IS9-4

¹⁶ Passport stamp at page IS9-29

[33] I do not know for certain when the Claimant left Canada after his arrival in March 2017, but the evidence suggests it was likely on or about May 16, 2017. This was the Claimant's last bank transaction in Canada before his next arrival in Canada in October 2017¹⁷. This date is also consistent with the Claimant's evidence that he may have returned to Cuba as early as May 2017.

[34] The second exception relates to the Claimant's time in Canada in October 2019. The Claimant's representative submitted that the Claimant was in Canada from October 5, 2019 to October 23, 2019 and that the Claimant was in Cuba from October 23, 2019 to November 2, 2019. I do not think the Claimant was in Canada until October 23, 2019. His passport stamps show he entered the United States on October 16, 2019¹⁸, and his CBSA report does not show another entry into Canada until November 2, 2019¹⁹. This tells me that the Claimant was likely absent from Canada from October 16, 2019 to November 2, 2019.

[35] The third exception relates to the Claimant's time in Canada in November / December 2019. The Claimant's representative submitted that the Claimant was in Canada from November 2, 2019 until December 13, 2019. I accept that the Claimant arrived in Canada on November 2, 2019, but I do not think he stayed until December 13, 2019. I say this because the Claimant's CBSA report shows he entered Canada via the Trudeau International Airport on December 7, 2019²⁰. He therefore must have left Canada at some point between November 2, 2019 and December 7, 2019.

[36] My findings as to the dates of the Claimant's travels in and out of Canada since August 18, 2016 are set out in the chart below.

Date of Entry²¹	Date of Departure	Country	Approximate Length of Stay
August 19, 2016	October 27, 2016	Canada	70 days
October 27, 2016 ²²	November 19, 2016	Cuba	24 days

¹⁷ Page IS6-99

¹⁸ Page IS9-6

¹⁹ Page IS8-5

²⁰ Page IS8-5

²¹ The dates of entries into Canada come from the CBSA report at page IS8-5

²² Boarding pass at page IS6-73

November 19, 2016	December 15, 2016 ²³	Canada	27 days
December 15, 2016	March 15, 2017	Cuba	91 days
March 15, 2017	Unknown, but likely not before May 16, 2017	Canada	62 days
May 16, 2017	October 10, 2017	Cuba	147 days
October 10, 2017	November 20, 2017 ²⁴	Canada	42 days
November 20, 2017	February 15, 2018	Cuba	88 days
February 15, 2018	March 13, 2018	Canada	27 days
March 13, 2018 ²⁵	May 30, 2018 ²⁶	Cuba	79 days
May 30, 2018	August 15, 2018 ²⁷	Canada	78 days
August 15, 2018	September 17, 2018	Cuba	34 days
September 17, 2018	December 5, 2018	Canada	80 days
December 5, 2018 ²⁸	January 13, 2019	Cuba	40 days
January 13, 2019	Unknown, but likely not before January 16, 2019 ²⁹	Canada	3 days
January 16, 2019	January 21, 2019	USA	5 days

²³ Boarding pass and receipt for airline baggage fee at page IS6-74

²⁴ Receipt for airline baggage fee at page IS6-105

²⁵ Boarding pass at page IS6-77

²⁶ Boarding pass and receipt for baggage fee at page IS6-78

²⁷ Bank transaction for airline baggage fee at page IS6-114

²⁸ Passport stamp at page IS9-31

²⁹ The Claimant had a bank transaction in Canada on January 16, 2019 (page IS6-119)

January 21, 2019	February 24, 2019	Canada	34 days
February 24, 2019 ³⁰	March 24, 2019	Cuba	28 days
March 24, 2019	May 11, 2019	Canada	49 days
May 11, 2019 ³¹	June 7, 2019 ³²	Cuba	28 days
June 7, 2019	July 20, 2019	Canada	44 days
July 20, 2019 ³³	August 14, 2019	Cuba	26 days
August 14, 2019	September 22, 2019	Canada	40 days
September 22, 2019 ³⁴	October 5, 2019	Cuba	14 days
October 5, 2019	October 16, 2019	Canada	12 days
October 16, 2019 ³⁵	November 2, 2019	USA	18 days
November 2, 2019	Unknown	Canada	Unknown
Unknown	December 7, 2019	Unknown	Unknown
December 7, 2019	December 18, 2019	Canada	12 days
December 18, 2019 ³⁶	January 23, 2020	Cuba	37 days
January 23, 2020	March 13, 2020	Canada	51 days
March 13, 2020 ³⁷	October 13, 2020	Cuba	215 days

³⁰ Passport stamp at page IS9-31

³¹ Passport stamp at page IS9-31

³² Passport stamp at page IS9-30

³³ Passport stamp at page IS9-44

³⁴ Passport stamp at page IS9-44

³⁵ Passport stamp at page IS9-6

³⁶ Passport stamp at page IS9-44

³⁷ Passport stamp at page IS9-44

October 13, 2020	Date of Hearing (December 10, 2020)	Canada	59 days
Total time in Canada before March 13, 2020³⁸	654 days		
Total time in Cuba before March 13, 2020³⁹	636 days		

[37] The chart (above) shows that from August 19, 2016 to March 13, 2020, the Claimant spent slightly more time in Canada than he did in Cuba.

[38] When I totalled the Claimant's time in each country, I did not include the time between March 13, 2020 and October 13, 2020. To do so would have skewed the calculation and been unfair to the Claimant. He was clearly in Cuba during that time, however, it was never his intention to spend that amount of time away from Canada. The evidence shows that he had a flight booked to return to Canada on April 11, 2020 but the airline cancelled that flight (and later ones) due to the Covid-19 pandemic⁴⁰.

[39] It is reasonable for me to infer from the Claimant's travel patterns that had it not been for the Covid-19 pandemic, he likely would have continued dividing his time (more or less) between Canada and Cuba.

[40] Aside from the absence from March 13, 2020 to October 13, 2020, the only other absence of any significant length is the absence of about 147 days from May 16, 2017 to October 10, 2017. This absence did not interrupt the Claimant's residency in Canada. First, the OAS

³⁸ The total includes the short trips the Claimant took to the United States. This total does not include the Claimant's time in Canada following his entry into Canada on November 2, 2019. This is because I do not know the exact length of his stay in Canada.

³⁹ The total does not include the length of the Claimant's stay in Cuba at the end of 2019. This is because I do not know the exact length of his stay in Cuba.

⁴⁰ Pages IS3-3 to IS3-11

Regulations state that absences from Canada that are of a temporary nature and that do not exceed one year shall be deemed not to have interrupted a person's residence in Canada. Second, this absence from Canada was shortly after the Claimant's mother passed away, and so it is understandable why the Claimant may have needed an extended stay in Cuba.

The Claimant re-established residency in Canada on August 19, 2016

[41] The evidence shows that the Claimant likely re-established residency in Canada on August 19, 2016.

[42] First, when the Claimant returned to Canada on August 19, 2016 he stayed for about 70 days. This was the longest time he had spent in Canada in quite some time.

[43] Second, as I mentioned previously, the Claimant's other residential ties to Canada (aside from his stays in Canada and absences from Canada) stayed about the same after August 2016. The Claimant did not for example sever residential ties to Canada in or after August 2016.

[44] Third, since August 19, 2016, the Claimant has spent slightly more time in Canada than in Cuba (except for the period from March 13, 2020 to October 13, 2020)⁴¹.

The Claimant is eligible for a partial OAS pension of 15/40ths effective May 2013

[45] I must now consider how my findings impact the Claimant's eligibility for the OAS pension.

[46] The Claimant is eligible for a monthly partial OAS pension of 15/40ths effective May 2013⁴². There are two exceptions.

- The Claimant is not eligible for the OAS pension for the month of October 2014. This is because the Claimant left Canada in March 2014 for more than six months, and at the time of his departure from Canada the Claimant had less than 20 years of residency in

⁴¹ I am not including the Claimant's time in Cuba from March 13, 2020 to October 13, 2020 because this lengthy absence is directly related to circumstances beyond his control (i.e. the Covid-19 pandemic).

⁴² His periods of residency in Canada were from July 29, 1992 to August 27, 2007 and from April 11, 2013 to April 30, 2013.

Canada. He was therefore only eligible to receive the pension for six months after the month of his departure⁴³.

- The Claimant is not eligible for the pension for the month of July 2016. This is because the Claimant stopped residing in Canada in December 2015 and at that time he did not have at least 20 years of residency in Canada. He was, therefore, only eligible for the pension for six months after the month he stopped residing in Canada⁴⁴.

[47] The Claimant's absence from Canada from March 13, 2020 to October 13, 2020 does not affect his pension. This is because the Claimant had acquired at least 20 years of residency in Canada by March 31, 2020.

[48] Although the Claimant's pension (not GIS) became portable when he reached 20 years of residency in Canada, his monthly OAS pension does not increase beyond 15/40ths. This is because the OAS legislation states that once a person's application for a partial monthly pension has been approved, the amount of the pension may not be increased on the basis of subsequent periods of residence in Canada⁴⁵.

[49] As for the GIS, assuming the Claimant met the application and income requirements, the Claimant is not eligible for that benefit for any month he was not eligible for the OAS pension. This is because a person must be receiving an OAS pension to get to the GIS⁴⁶. The Claimant would therefore not be eligible for the GIS for the months of October 2014 and July 2016. Although the Claimant was absent from Canada for more than six months from March 13, 2020 to October 13, 2020, this absence would not affect his GIS (again assuming the application and income requirements are met) because the legislation allows the GIS to be paid for six months after the month of departure⁴⁷. The Claimant returned to Canada in the seventh month after the month of departure.

⁴³ Subsection 9(1) of the *Old Age Security Act*

⁴⁴ Subsection 9(3) of the *Old Age Security Act*

⁴⁵ Subsection 3(5) of the *Old Age Security Act*

⁴⁶ Paragraph 11(7)(b) of the *Old Age Security Act*

⁴⁷ Paragraph 11(7)(c) of the *Old Age Security Act*

CONCLUSION

[50] The appeal is allowed.

Shannon Russell
Member, General Division - Income Security