



Citation: *FZ v Minister of Employment and Social Development*, 2021 SST 854

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: F. Z.

Respondent: Minister of Employment and Social Development
Representative: Jordan Fine

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated March 2, 2020 (issued by
Service Canada)

Tribunal member: Pierre Vanderhout

Type of hearing: Questions and answers

Decision date: November 15, 2021

File number: GP-20-797

Decision

[1] The appeal is allowed in part.

[2] The Claimant, F. Z., has been resident in Canada for 6 years and 41 days, as of March 2, 2020. This is more Canadian residence than the Minister granted in its reconsideration decision of March 2, 2020.

[3] However, the Claimant is still not eligible for an Old Age Security (“OAS”) pension or the Guaranteed Income Supplement (“GIS”). This means she must repay the benefits she received from August 2012 to June 2019. She may have Canadian residency after March 2, 2020. This means she may qualify for the OAS pension and the GIS at some point in the future.

[4] This decision explains why I am allowing the appeal in part.

Overview

[5] The Claimant is 76 years old. She was born in Iran and first entered Canada on July 24, 2002. Her legal status is “permanent resident” of Canada. She does not appear to have become a Canadian citizen.

[6] In July 2011, the Claimant applied for an OAS pension. She was granted a partial (10/40^{ths}) OAS pension, effective August 2012. She also applied for and received the GIS, effective August 2012. She received the GIS for several years. The Minister eventually investigated her eligibility for the OAS pension and the GIS. Her benefits were suspended after the June 2019 payments, as the Minister decided that she had resided in Canada for very few of the preceding 17 years.

[7] The Minister determined that the Claimant had only 5 years and 81 days of residence in Canada. As a result, she was never eligible for either the OAS pension or the GIS. The Minister demanded a repayment of \$89,440.45. This represented the Claimant’s OAS pension and GIS payments from August 2012 to June 2019. On May 14, 2020, the Claimant appealed to the Tribunal.

[8] The Claimant said the Minister originally determined she had resided in Canada, so she should be able to rely on the Minister's expertise and approval. She added that she mostly lived in Canada. She also said that she was living in a bad situation because she had no property, income, job or money.¹

[9] The Minister says that some periods of Canadian residence granted to the Claimant were improper because she did not disclose all her absences from Canada in her application. Some of her time in Canada was mere "presence" as opposed to "residence". Her frequent long absences from Canada show that she was residing in Iran. As a result, the Minister says she only resided in Canada for four periods totalling 5 years and 81 days. This means she was never entitled to the OAS pension and GIS.

What the Claimant must prove

[10] For the Claimant to succeed, she must first prove that she was entitled to an OAS pension. To do this, she must prove she was "resident" in Canada for at least ten years. Furthermore, she can only receive the GIS if she is entitled to an OAS pension and also meets the GIS financial criteria. Finally, if she does qualify for the OAS pension and the GIS, she can only continue to get them if she still resides in Canada.²

Matters I have to consider first

The Claimant didn't participate in the hearing

[11] The Claimant wanted her hearing conducted by written questions and answers.³ Written questions were sent to her and the Minister on May 20, 2021, with a response deadline of June 21, 2021.⁴ Neither party answered the questions. On August 17, 2021, the Tribunal gave the Claimant and the Minister a final deadline of October 1, 2021, to answer the written questions. The parties were told that the Tribunal could make a final

¹ GD1-5

² This assumes she is entitled to these benefits before accumulating 20 years of Canadian residence. As the Claimant first entered Canada in 2002, it is impossible for her to have accumulated 20 years of Canadian residence by the time of the decision.

³ GD1-1

⁴ GD0-1

decision after that deadline. Only the Minister answered.⁵ The Claimant was even given a further month to comment on the Minister's answers.⁶ However, nothing was heard from her. Attempts to reach her by phone have not been successful: the numbers she provided were not in service. I note that the Claimant must advise the Tribunal "without delay" of any change in her contact information.⁷

[12] A hearing can go ahead without the Claimant if she got the notice of hearing.⁸ I decided that the Claimant got the notice of hearing because the Tribunal sent everything to the London, Ontario, address given by the Claimant. None of the letters were "returned to sender." Documents mailed by the Tribunal are deemed to have been received 10 days after mailing.⁹ This means the original questions are deemed to have been communicated to the Claimant on May 30, 2021. So, the hearing took place by written questions, but without any answers from the Claimant.

Reasons for my decision

[13] Before I consider the Claimant's periods of residence in Canada, I must first decide whether the Minister is allowed to revisit the original decision to grant an OAS pension to the Claimant. The Minister made the original decision less than three months after receiving the Claimant's application for the OAS pension.¹⁰

Can the Minister revisit the original eligibility decision?

[14] The Minister's decision to reverse its original grant of an OAS pension to the Claimant is a significant one. This is especially so when considering the amount that must be repaid (\$89,440.45). The Tribunal's Appeal Division recently considered whether the Minister could do this, in a decision called *SF & CF*.¹¹

⁵ GD4-1. See also GD5 and GD6

⁶ GD7-1

⁷ Section 6 of the *Social Security Tribunal Regulations* sets out this rule.

⁸ Section 12 of the *Social Security Tribunal Regulations* sets out this rule.

⁹ See ss. 19(1)(a) and 19(2) of the *Social Security Tribunal Regulations*.

¹⁰ See GD2-10 to GD2-13.

¹¹ *Canada (Minister of Employment and Social Development) v. S.F. and C.F.*, Decision No. AP-21-132 ("*SF & CF*"). Decision issued October 8, 2021.

[15] The *SF & CF* decision said the Minister may revisit initial eligibility decisions. However, the Minister must do this “in a judicial manner.” The Minister can only reopen previous decisions if there is new information likely to change the original result. In addition, for timelines within the Minister’s control, the Minister must promptly decide whether to reopen a previous decision. The Minister must then tell the claimant about the revised decision. This is because excessive delay could be an abuse of process.¹²

[16] In this case, the Minister made the initial decision very quickly. When the Claimant applied, she said she had lived in Canada from July 2002 until the present. She applied on July 26, 2011, and her pension was approved on November 21, 2011.¹³ While the Claimant’s exact GIS application date is not clear, her GIS was approved on October 9, 2012, with an effective date of August 2012.¹⁴

[17] In response to a letter from the Minister, the Claimant filed a declaration in July 2018. She said she had spent some time in Iran.¹⁵ The Minister then asked her to complete additional questionnaires, which she filed in August 2018 and April 2019.¹⁶ The Minister received other documents between January 2019 and June 2019. These included passports, a Canada Border Services Agency (“CBSA”) report, and an Ontario Health Insurance Plan (“OHIP”) claims history.¹⁷

[18] I find that the Minister received new information in July 2018, upon which it was reasonable to decide that an investigation was necessary. A questionnaire was promptly sent. I also find that the Minister did not unnecessarily delay the process. Within a month of receiving the OHIP claims history in June 2019, the Minister decided to terminate the Claimant’s OAS pension and GIS benefits.¹⁸

¹² See paragraphs 18, 45, 51 and 54 of that decision. While Appeal Division decisions are not necessarily binding on the General Division, they can be persuasive. I find the *SF & CF* decision persuasive.

¹³ GD2-12 and GD2-13

¹⁴ GD2-111

¹⁵ GD2-108

¹⁶ GD2-93 and GD2-44

¹⁷ GD2-91, GD2-136, and GD2-39.

¹⁸ GD2-34

[19] I further find that, by June 2019, the Minister had new information that was likely to change the original decision. This began with the July 2018 discovery that the Claimant was spending time in Iran. By April 2019, the Minister found out that these absences were as long as 31 months at a time. The 31-month absence started in 2008, but the Claimant did not disclose it in her 2011 application.¹⁹ The Minister also learned that the Claimant's husband was ill in Iran.²⁰ In June 2019, the OHIP history showed "clustering" of the Claimant's medical appointments. She had gaps of up to 30 months between appointments.²¹

[20] All this information is highly suggestive of residence outside Canada. The Minister did not know any of it when approving the 2011 application. As a result, I find that the Minister was entitled to revisit the initial eligibility decision. This is consistent with the *SF & CF* decision.

[21] I will now assess when the Claimant was resident in Canada.

When was the Claimant resident in Canada?

[22] The Claimant's OAS eligibility depends on whether she was a resident of Canada for at least ten years. It is important to distinguish being "resident" in Canada from merely being "present" in Canada. A person resides in Canada if she "makes her home and ordinarily lives in any part of Canada." This is different from merely being physically present in Canada.²² A person can be present in Canada without being resident in Canada. Merely providing a Canadian address is different from residing in Canada.

[23] While being "present" in Canada does not decide the Claimant's appeal, it is still an important factor. As a result, I compiled the following chart based mostly on information provided by the Claimant.²³ It only shows "presence", so I will refer to it as the "Presence Chart".

¹⁹ GD2-12 and GD2-45

²⁰ GD2-46

²¹ GD2-40 to GD2-43

²² See s. 21(1) of the *Old Age Security Regulations*.

²³ The chart is mostly based on GD2-44 to GD2-45. However, I have added additional sources that correct or confirm these dates.

<u>Start Date</u>	<u>End Date</u>	<u>Country</u>	<u>Duration</u>	<u>Additional Sources</u>
October 5, 1945	July 24, 2002	Iran	56+ years	GD2-12, GD2-105
July 24, 2002	Sept. 23, 2002	Canada	62 days	GD2-12, GD2-105
Sept. 23, 2002	July 27, 2004	Iran	674 days	GD2-63
July 27, 2004	Sept. 29, 2004	Canada	65 days	GD2-63
Sept. 29, 2004	May 25, 2006	Iran	604 days	GD2-91
May 25, 2006	Nov. 11, 2006	Canada	171 days	GD2-91
Nov. 11, 2006	June 12, 2007	Iran	214 days	GD2-91
June 12, 2007	April 26, 2008	Canada	320 days	GD2-91
April 26, 2008	December 7, 2010	Iran	956 days	GD2-91
December 7, 2010	August 18, 2011	Canada	255 days	GD2-91
August 18, 2011	April 5, 2012	Iran	232 days	GD2-99
April 5, 2012	February 22, 2013	Canada	324 days	GD2-99
February 22, 2013	Dec. 27, 2013	Iran	309 days	GD2-48
Dec. 27, 2013	?	?	? days	GD2-48
?	Dec. 27, 2014	Iran	? days	GD2-98
Dec. 27, 2014	October 8, 2015	Canada	286 days	GD2-98
October 8, 2015	April 21, 2017	Iran	562 days	GD2-91
April 21, 2017	March 2, 2020	Canada	1047 days	GD2-91, GD2-15

[24] Some Presence Chart entries appear in ***bold italics***. The Minister admits that the Claimant was resident in Canada during these periods.

[25] I note that the period between December 27, 2013, and December 27, 2014, is uncertain. The Claimant suggests her apparent December 27, 2013, departure from Iran resulted in an immediate entry into Canada. However, I see no entry to Canada around December 27, 2013. In addition, the Claimant's own version of this chart wrongly suggests that she entered Canada on December 27, 2014, after leaving Canada on October 8, 2015.²⁴ This is impossible. In the circumstances, I find it likely that the Claimant did not enter Canada in December 2013. She either went to a third country at that time, or the December 2013 "exit" stamp from Iran is actually from December 2014. I also note that she did not receive any medical care in Ontario between September 2012 and January 2015.²⁵ I conclude that she was not in Canada between February 22, 2013, and December 27, 2014.

²⁴ GD2-44 to GD2-45

²⁵ GD2-40

[26] The Minister appears to have accepted much of the Claimant's presence in Canada as "residence", when such presence lasted more than six months. The lone exception is the period from April 5, 2012, to February 22, 2013 (the "2012 Stay"). I will return to the 2012 Stay later.

[27] While presence is important in determining residence, it is not the only factor. Residence is a factual issue that requires looking at the Claimant's "big picture". The Federal Court of Canada says I should consider the following factors (known as the "Ding Factors"):²⁶

- (a) ties in the form of personal property;
- (b) social ties in Canada;
- (c) other ties in Canada (medical coverage, driver's licence, rental lease, tax records, etc.);
- (d) ties in another country;
- (e) regularity and length of stay in Canada, and the frequency and length of absences from Canada; and
- (f) the person's mode of living, or whether the person living in Canada is sufficiently deep-rooted and settled.

[28] I will now apply the Ding Factors to the facts of this case.

Applying the Ding Factors

[29] The Claimant said she did not have property in any country.²⁷ As for social ties in Canada, in 2018 she reported living with her son in London, Ontario. She said her son had the authority to represent her when she was not available.²⁸ Her son called the Minister's agent in August 2019.²⁹ When she applied for the OAS pension, her son was living in a different city but some friends helped her.³⁰ I see no evidence of community participation, such as in clubs or organizations. She says her ability to communicate in English is limited.³¹ I conclude that the Claimant had some limited social ties in Canada.

²⁶ See *Canada (MHRD) v. Ding*, 2005 FC 76.

²⁷ GD2-20. See also GD1-5.

²⁸ GD2-107

²⁹ GD2-135

³⁰ GD2-46

³¹ GD2-20 and GD2-46

[30] The Claimant had some other ties in Canada, although they are not very extensive. She received medical care in Ontario from time to time, although this tended to be in clusters.³² She filed an Ontario health card that was valid from July 2017 to October 2020.³³ She said she paid rent, although she did not file a lease and her son also appears to live at the same address.³⁴ I did not see any tax or driving records.

[31] The Claimant clearly has significant ties to Iran. She retains Iranian citizenship and does not appear to have become a Canadian citizen. She admits visiting there sometimes.³⁵ She said she had to nurse and attend to her husband when he was ill in Iran.³⁶ She would stay there for up to 31 months at a time.

[32] The Claimant has had fairly regular stays in Canada, although many of them were quite short. The Presence Chart confirms that these stays were usually shorter than her stays in Iran, especially in the first few years. It was only in 2017 that the Claimant spent more than 11 months at a time in Canada. Between 2002 and 2010 alone, she had three stays in Iran that lasted more than 600 days each. She also was in Iran for a 562-day period starting in 2015, and likely was in Iran for 673 days between February 2013 and December 2014.

[33] The Claimant's mode of living in Canada was certainly not deep-rooted and settled for the first five years. Her stays in Canada during that time were all less than six months long. I see more evidence of a settled existence since 2017. The Claimant refers to the difficulty of meeting to day-to-day expenses such as rent, food and clothing.³⁷ Nonetheless, her mode of living in Canada up to 2017 still appears unsettled. She would often be out of Canada for more than a year.

[34] I accept that the Claimant has residency in Canada for the periods admitted by the Minister. These periods are shown in ***bold italics*** in the Presence Chart. Applying

³² GD2-40 to GD2-43

³³ GD2-106

³⁴ See GD1-5 and GD2-20 to GD2-22.

³⁵ GD2-108

³⁶ GD2-46

³⁷ GD1-5 and GD2-20 to GD2-22.

the Ding Factors, I also accept the 2012 Stay as a period of Canadian residency for 324 days. The 2012 Stay was longer than her previous stay in Iran, and was also longer than her previous stay in Canada (which was already accepted as residence in Canada). I give more weight to the length of her stay than to the other Ding Factors, as many of those are inconclusive. I do note, however, that she got medical care in Ontario on more than one day in September 2012.³⁸ Although I attach very little weight to it, I also note that her son said she had lived in Canada since 2012.³⁹

[35] I decline to grant the Claimant Canadian residency for the periods in Iran between periods of Canadian residency. The shortest such period in Iran was 232 days, while the longest was 956 days. These periods are too long for her to have maintained Canadian residency, as the Ding Factors are otherwise not persuasive.

[36] I am not making any findings about residency after the reconsideration decision date of March 2, 2020. While the Claimant may have earned additional Canadian residency since then, the parties have not turned their minds to this period. It would be unfair to make any findings about residency after March 2, 2020.

[37] Taken together, I find that the Claimant has 2,232 days (6 years and 41 days) of Canadian residency up to March 2, 2020. This is more than the Minister granted in the reconsideration decision of March 2, 2020. However, it is not enough to qualify for the OAS pension. In turn, with no OAS pension, she is not entitled to the GIS. At some time in the future, she might reach ten years of Canadian residency and qualify for the OAS pension.

[38] The Claimant says she should still receive the OAS pension and GIS because she will not be able to pay her living expenses without them. I agree that the GIS is intended to assist low-income seniors with living expenses. However, the GIS is only available to low-income seniors who qualify for the OAS pension. OAS pension eligibility is not based on need. It is based on age, status, and the duration of residence in

³⁸ GD2-40

³⁹ GD2-135

Canada. As the Claimant does not meet the duration requirement, her financial situation is not relevant.

What is the impact on the Claimant's OAS pension and GIS?

[39] The Claimant was never entitled to an OAS pension. As she only had 6 years and 41 days of Canadian residence up to March 2, 2020, she never had ten years of Canadian residence. This means she was never entitled to the GIS either.⁴⁰ In turn, this means that she is responsible for repaying the \$89,440.45 in benefits she received from August 2012 to September 2019.⁴¹

Must the Claimant repay the entire overpayment?

[40] The Claimant suggests that the Minister is to blame for any overpayment, and should therefore not require repayment.⁴² The law does allow the Minister to forgive part or all of the overpayment amount.⁴³ However, this is a discretionary power of the Minister. The Tribunal does not have the authority to make findings on the Minister's discretionary decisions. If the Claimant does not think she should have to repay, she will have to ask the Minister for "remission" of the overpayment. If the Claimant is not satisfied with the Minister's decision on "remission," her only recourse is applying to the Federal Court for judicial review of the Minister's decision.⁴⁴

Conclusion

[41] I find that the Claimant had 6 years and 41 days of Canadian residence up to March 2, 2020. This means she was never eligible for the OAS pension or the GIS, although she may become eligible for them in the future. As a result, she was not eligible for the OAS pension or the GIS benefits she received. This means she must repay \$89,440.45. If she believes that some or all of that amount should be waived, she must request this directly from the Minister.

⁴⁰ See ss. 3(2) and 11(1) of the *Old Age Security Act*.

⁴¹ See ss. 37(1) and (2) of the *Old Age Security Act*.

⁴² GD2-20, for example.

⁴³ See s. 37(4) of the *Old Age Security Act*.

⁴⁴ *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.

[42] The Minister had only granted the Claimant 5 years and 81 days of residence up to March 2, 2020. I granted the Claimant an additional period of Canadian residence. This means the appeal is allowed in part, even though the Claimant still has a repayment obligation.

Pierre Vanderhout
Member, General Division – Income Security Section