Citation: *AP v Minister of Employment and Social Development*, 2022 SST 707

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	A. P.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated August 25, 2021 (issued by Service Canada)

Tribunal member:	François Guérin
Type of hearing:	Questions and answers
Decision date:	June 17, 2022
File number:	GP-21-2228

Decision

[1] The appeal is dismissed.

[2] The Appellant (A. P.) has been a resident of Canada as per the *Old Age Security Act (OAS Act)* from April 10th, 1999 to July 1st, 2006 only. She has therefore accumulated a total of 7 years and 83 days of actual Canadian residence.

[3] As Canada has signed an Agreement with Serbia, and because of this Agreement, she is eligible to have her OAS partial pension paid to her outside of Canada as a result of the totalization of her actual years or residence in Canada and her contributions to the Serbian social security.

[4] The Appellant is entitled to a partial OAS pension at the rate of 7/40th of a full OAS pension.

Overview

[5] The Appellant was born on X in Pula, Istria, then part of Italy. It later became part of the Socialist Republic of Croatia (SR Croatia), a constituent republic and federated state of the Socialist Federal Republic of Yugoslavia (SFRY). It is now part of the Republic of Croatia. The Appellant submitted her OAS pension application while residing in the Republic of Serbia, which was received by Service Canada's International Operations on August 10, 2018.[1] The Minister approved her application on January 15th, 2021 for a partial OAS pension at the rate 7/40th of a full pension using the Agreement with Serbia to totalize the periods of residence.[2]

[6] The Appellant submitted a request for reconsideration of the decision on March 30th, 2021.[3] The Minister confirmed its decision and maintained the Appellant's OAS partial pension at the rate of 7/40th of a full pension[4] based on the Appellant's actual residence in Canada.

[7] The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on October 29th, 2021.[5]

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[1] GD2-7 to 10
[2] GD2-53 to 55
[3] GD2-11 to 13
[4] GD2-3 to 6 and GD1-2
[5] GD1

What is the Appellant's position?

[8] The Appellant disagrees with the Minister's calculation as the Minister did not take into consideration her periods of work and contributions in Serbia to calculate the amount of her pension.[6]

What is the Minister's position?

[9] The Minister believes that the Appellant's partial OAS pension has been correctly determined as per the *OAS Act*. The period of Canadian residence commenced on April 10, 1999[7] and ended on July 1st, 2006, as reported by the Appellant on her OAS application.[8] This represents a total of 7 years and 83 days.

[10] The OAS partial pension was approved at a rate of 7/40th effective September 2017 using the Agreement between Canada and the Republic of Serbia to totalize the periods of residence and make the Appellant eligible to receive her partial OAS pension outside of Canada.

Matters I have to consider first

Format is Questions and Answers

[11] On her Notice of Appeal to the Tribunal, the Appellant requested that the hearing be conducted by phone and added a hand written note indicating "or in paper questions-answers".[9] During a phone call with the Tribunal's Operations on March 9th, 2022, the Appellant explained that she preferred a "Questions and Answers" format as she was not confident with the phone system in Serbia. The Tribunal accepted the Appellant's request.

[12] On March 18th, 2022, the Tribunal sent a Notice of Hearing[10] to the Appellant including 7 questions. The Tribunal gave the Appellant until April 15th, 2022 to respond to these questions. The Tribunal did not ask the Minister any question on the Notice of Hearing.

[13] The Tribunal received a response from the Appellant on March 29th, 2022 via email.[11] This response was shared with the Minister on April 4th, 2022 and the Tribunal gave the Minister until April

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[6] GD1-3, paragraph a, b and c
[7] GD2-8, question 12
[8] GD2-8, question 14
[9] GD1-1, section 2
[10] GD0
[11] GD8

15th, 2022 to provide his comments.[12] The Tribunal received the Minister's response dated April 7th, 2022 on April 12th, 2022.[13] The Minister maintained the same position as in his submission.[14]

[14] The Appellant submitted an email to the Tribunal on Monday, April 11th, 2022.[15] This email emailed contained a copy of the Appellant's new, up-to-date, Croatian passport.[16] The Appellant's daughter also shared her observations about the Minister's OAS calculation. This document was shared with the Minister without an opportunity to respond as the only issue in this matter is the Appellant's period of residence in Canada as per the *OAS Act*.

The Appellant had a Representative

[15] The Appellant was represented by a family member with a Power of Attorney, her daughter Snezana Pavić.[17] It is her daughter who answered the Tribunal's questions.

What the Appellant must prove

[16] For the Appellant to succeed, she must prove that she was a resident of Canada as per the *OAS Act* for a longer period than the period already approved by the Minister from April 10th, 1999 to July 1st, 2006, for a total of 7 years and 83 days.

Reasons for my decision

Who is entitled to an OAS pension?

[17] A partial pension may be paid to a pensioner. The pensioner must have attained sixty-five years of age and have resided in Canada for an aggregate period of at least 10 years after attaining eighteen years of age. If the pensioner is not a resident of Canada the day preceding the approval of a pension, this person must have resided in Canada for at least 20 years after attaining eighteen years of age.[18]

[18] For the purpose of the *OAS Act* and its regulations, **a person resides in Canada if he makes his home and ordinarily lives in any part of Canada**. This concept is different from presence in

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[12] GD9
[13] GD10
[14] GD6
[15] GD11
[16] GD11-4
[17] GD2-14 to 16 – Official English Translation
[18] *Old Age Security Act*. Section 3(2)

Canada. A person is present in Canada when he is physically present in any part of Canada.[19] **A person can be present in Canada without being a resident of Canada.**

[19] Residency is a factual issue that requires an **examination of the whole context of the individual**. The subjective intentions of the person are not decisive in determining residency. The *Ding*[20] decision established a non-exhaustive list of factors to consider to guide the Tribunal when determining residency :

a. Ties in the form of personal property;

b. Social ties;

c. Other ties to Canada (medical coverage, driver's licence, rental lease, tax records, etc.);

d. Ties in another country;

e. Regularity and length of stays in Canada in relations to the frequency and duration of absences from Canada;

f. Lifestyle and mode of living of the person or is the person living in Canada significantly rooted in Canada.[21]

[20] The Appellant must prove on the balance of probabilities that she was a resident of Canada during the relevant period.[22]

Agreement on Social Security between Canada and the Republic of Croatia

[21] Section 40 of the *OAS Act* permits the Minister to enter into reciprocal agreements with the governments of other countries, and this provision contemplates that **such agreements might affect eligibility for pensions**.

[22] Subsection 21(5.3) of the *OAS Regulations* states that where, by virtue of an agreement entered into under subsection 40(1) of the *OAS Act*, a person is subject to the legislation of a country

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[19] *Old Age Security Regulations*, Paragraph 21(1)
[20] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76.
[21] *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76
[22] *De Carolis v Canada (AG)*, 2013 FC 366

other than Canada, that person **shall**, for the purposes of the *Act* and the *OAS Regulations*, be deemed **not to be resident of Canada**.

[23] Pursuant to section 40 of the *OAS Act*, Canada has entered into a number or reciprocal agreements, including an agreement with the Republic of Croatia (Croatia).

[24] The Agreement with Croatia was signed in Zagreb on April 22nd, 1998, and was proclaimed into force on May 1st, 1999. It is officially known as the Agreement on Social Security Between the Government of Canada and the Government of the Republic of Croatia (the Agreement with Croatia).

[25] As the Appellant was born in what is now the Republic of Croatia and that she submitted her OAS application on the form under the Agreement with Croatia,[23] the Minister's Operations submitted a request for confirmation of pensionable credits under Croatian laws to the Government of Croatia.

[26] The Croatian authorities confirmed that the Appellant had no pensionable credits in Croatia.[24]

Agreement on Social Security between Canada and the Republic of Serbia

[27] Section 40 of the *OAS Act* permits the Minister to enter into reciprocal agreements with the governments of other countries, and this provision contemplates that **such agreements might affect eligibility for pensions**.

[28] Subsection 21(5.3) of the *OAS Regulations* states that where, by virtue of an agreement entered into under subsection 40(1) of the *OAS Act*, a person is subject to the legislation of a country other than Canada, that person **shall**, for the purposes of the *Act* and the *OAS Regulations*, be deemed **not to be resident of Canada**.

[29] Pursuant to section 40 of the *OAS Act*, Canada has entered into a number or reciprocal agreements, including an agreement with the Republic of Serbia (Serbia).

[30] The Agreement with Serbia was signed in Belgrade on April 12th, 2013, and was proclaimed into force on December 1st, 2014. It is officially known as the Agreement on Social Security between Canada and the Republic of Serbia (the Agreement with Serbia).

[23] GD2-7 to 10
[24] GD2-57 to 67

[31] Article 12, subsection 2.1 states that **For the purposes of determining eligibility for a benefit under the *OAS Act* of Canada, a creditable period under the legislation of the Republic of Serbia shall be considered as a period of residence in Canada.** This is the section of the Agreement with Serbia that helped the Appellant to open her right to be eligible to an OAS partial pension that could be paid to her while residing outside of Canada.

[32] The Republic of Serbia reported a total of 34 years, 4 months and 10 days of pensionable credits in Serbia.[25]

The Appellant's ties to Canada and to other countries

[33] I will now consider the factors established in the *Ding* decision in my analysis in order to decide when the Appellant was a resident of Canada. To come to my conclusion, I will use the documents submitted by both parties up to the date of this decision. The Appellant must prove on the balance of probabilities that she was a resident of Canada during the relevant period.[26]

The Appellant's submissions

[34] This Appellant submitted in her OAS application that her residence history was as follows:[27]

Start Date	End Date	Country
09/1956	07/1965	Croatia
07/1965	03/1999	Serbia
04/1999	07/2006	Canada
07/2006	Signature of OAS Application	Serbia

[35] The Appellant's OAS application is dated March 6th, 2018.[28] She stated that she has lived in Serbia from July 2006 to the date she signed her OAS application.[29]

[36] The Tribunal asked the Appellant if her residence in Canada from April 10th, 1999 to July 1st, 2006 was correct.[30] She confirmed in her answers that it was correct.[31]

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[25] GD2-100 to 114
[26] *De Carolis v Canada (AG)*, 2013 FC 366
[27] GD2-8, section 14
[28] GD2-10, section 32
[29] GD2-8, section 14
[30] GD0-2, question 1
[31] GD8-2, answer 1

[37] The Tribunal offered the Appellant to add more details about her Canadian residence history in Canada.[32]

[38] The Appellant's daughter responded that she recalled and learned from her mother that they had been travelling and were going back to her sister's place in Ottawa. She also confirmed that her parents left Canada in July 2006. She also offered as proof of her Canadian residence, her mother's Canadian multiple entry visa valid from April 7th, 1999 to December 15th, 1999.[33] She also offered as proof her mother's Canadian Permanent Resident card.[34]

[39] The Tribunal offered the Appellant to add more details about any other period of Canadian residence history and to explain why it was not provided in her OAS application.[35]

[40] The Appellant's daughter submitted two periods of additional Canadian residence only.

[41] The Appellant's daughter responded that her mother resided in Saskatoon under a "legal visa".[36] By that she meant that she was legally residing in the house of her older sister. She explained that her mother was not visiting Canada in the sense of leisure times as a tourist would do either on a personal trip or an organized tour, and that she was not staying at hotels. She explained that her mother's visa was from July 1992 to February 1993, and that her mother left before the expiry of the visa. She did not provide an exact date of departure but submitted that she was there for approximately three months. Even though her mother did not have the Permanent Resident status, she was legally residing on the Canadian soil with her daughter.[37]

[42] The Appellant's daughter also mentioned another trip in the fall of 1995 when her parents legally remained at their daughter's place in Ottawa for a little more than a month even though their visa was valid for a longer period. She explained that, like for the 1992 trip, her mother was not visiting Canada for tourist-leisure reasons and did not came to Canada with a tourist organization. Her mother was legally residing in Canada with her daughter.[38]

[43] The Tribunal appreciates the fact that the Appellant was in Canada legally for these two short stays and that she has a daughter in Canada however, a person can be present in Canada without

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[32] GD0-2, question 2
[33] GD2-86
[34] GD5-31 and GD2-42
[35] GD0-2, question 3
[36] GD5-22 to 25
[37] GD8-3, answer 3a
[38] GD8-3, answer 3b

being a resident of Canada. For the purpose of the *OAS Act* and its regulations, **a person resides in Canada if he makes his home and ordinarily lives in any part of Canada**. This concept is different from presence in Canada.

[44] Even if the Tribunal would give the benefit of the doubt to the Appellant that these two periods were periods of residence in Canada as per the *OAS Act*, it would not be sufficient to increase the Appellant's partial OAS pension from 7/40th to 8/40th of a full pension given the duration of these two stays and the lack of detail, exact dates of entry and exit, regarding those periods. Furthermore, these two periods are short in nature and not well defined by the Appellant. Nevertheless, the two main factors that would apply after an examination of the Appellant's own context would be the factor pertaining to the regularity and length of stays in Canada in relations to the frequency and duration of absences from Canada, and the factor pertaining to the lifestyle and mode of living of the person or if the Appellant is significantly rooted in Canada. The Tribunal finds that the Appellant was not a resident of Canada as per the *OAS Act* during those two periods.

Appellant's residence in Canada

The Appellant WAS a resident of Canada from April 10th, 1999 to July 1st, 2006

[45] The Tribunal finds that, on the balance of probabilities, the Appellant was a resident of Canada from April 10th, 1999 to July 1st, 2006 as per the Appellant's submission in her OAS application.[39] This represents a total of 7 years and 83 days.

[46] The Tribunal offered the Appellant to add more details about any other period of Canadian residence history and to explain why it was not provided in her OAS application.[40]

[47] In her response to the Tribunal's questions, the Appellant's daughter submitted two additional stays in Canada of a little more that three months in 1992 and a little more than one month in 1995. A person can be present in Canada without being a resident of Canada. For the reasons indicated above, the Tribunal finds that the Appellant was not a resident of Canada as per the *OAS Act* during these two periods.

[48] The Tribunal finds that, on the balance of probabilities, the Appellant was only a resident of Canada, as per the meaning of the *OAS Act*, during the period she reported in her OAS application,

[39] GD2-8, section 14
[40] GD8-2, answer 3

from April 10th, 1999 to July 1st, 2006. This represents a total of 7 years and 83 days of Canadian residence.

Conclusion

[49] The Tribunal finds it important to state again that the calculation of an OAS pension amount is NOT based on work or pensionable work contributions in a foreign country. Work or pensionable work contributions in a foreign country with which Canada has an agreement is only used to open the right to receive a Canadian pension. A spouse cannot be a beneficiary of a deceased partner either. **OAS pension, full or partial, is based exclusively on actual residence in Canada as explained above.** The Appellant may want to see what benefits are available to her in Serbia for the contributions she and her deceased husband made when they were working in Serbia and the SFRY.

[50] The Tribunal finds that, on the balance of probabilities, the Appellant was only a resident in Canada as per the *OAS Act* from April 10th, 1999 to July 1st, 2006. She has therefore accumulated a total of 7 years and 83 days of actual Canadian residence.

[51] As Canada has signed an Agreement with Serbia, because of this Agreement, she is eligible to have her OAS partial pension paid to her outside of Canada as a result of the totalization of her actual years or residence in Canada and her contributions to the Serbian social security.

[52] The Appellant is entitled to a partial OAS pension at the rate of 7/40th of a full OAS pension.

[53] This means the appeal is dismissed.

François Guérin
Member, General Division – Income Security Section