



Citation: *AA v Minister of Employment and Social Development*, 2022 SST 270

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: A. A.
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated August 29, 2020 (issued by
Service Canada)

Tribunal member: George Tsakalis
Type of hearing: Teleconference
Hearing date: February 24, 2022
Hearing participant: Appellant
Decision date: March 28, 2022
File number: GP-20-1799

Decision

[1] The appeal is dismissed.

[2] I agree with the Minister of Employment and Social Development (the Minister) that the Appellant, A. A., is eligible to receive a partial Old Age Security (OAS) pension based on 19 years of Canadian residency with a 9.0% actuarial adjustment.

Overview

[3] The Appellant was born in Nigeria in 1950. He applied for an OAS pension on October 30, 2017.

[4] The Minister wrote to the Appellant on July 10, 2018. The Minister told the Appellant that he had resided in Canada for 16 years. The Minister took the position that the Appellant was not eligible for an OAS pension because he lived in the United States at the time of his application. However, the Minister agreed to further review the Appellant's OAS application.¹ This was because Canada has a social security agreement with the United States of America. Under this agreement, the Minister can add up periods of residence in Canada and the United States in such a manner that the Appellant would be able to collect OAS benefits.²

[5] The Minister finished its investigation and made the following decision:

- The Appellant resided in Canada from June 16, 1975 to December 31, 1984, a period of 9 years, 6 months and 15 days and January 1, 1987 to August 29, 1996, a period of 9 years, 7 months and 28 days. A total residence period of 19 years, 2 months and 13 days.
- The Minister added the Appellant's 19 years, 2 months and 13 days of Canadian residence with his equivalent period of 18 years and 3 months of American residence. The Minister took the position that the Appellant

¹ See GD2-23

² See GD3-2

had a combined total of 37 years, 5 months and 13 days of Canadian and American residence. This meant that the Appellant met the 20-year residence requirement to receive a partial OAS pension while living outside Canada.

- The Appellant was entitled to an actuarial adjustment of 9.0% on his partial OAS pension. This was because there was a 15 month gap between the date the Appellant could have started receiving his partial OAS pension and the date of approval of his partial OAS pension.³

[6] The Appellant disagreed with the Minister's decision. He appealed the Minister's decision to the General Division of the Social Security Tribunal.

[7] The Appellant says the Minister made the wrong decision. The Appellant took the position at his hearing that he had resided in Canada since September 1, 1974.

Matters I have to consider first

[8] The Appellant requested a videoconference hearing. However, I could not see the Appellant on his hearing date. His camera was not working. The Appellant agreed to proceed with the hearing by way of teleconference.

What the Appellant must prove

[9] For the Appellant to succeed, he must prove that it is more likely than not that he resided in Canada since September 1, 1974.⁴

[10] To receive an OAS pension, the Appellant must have reached 65 years of age.⁵ This is not an issue in this case. The Appellant turned 65 in July 2015.

³ See GD2-3-4 and GD3-5

⁴ See *De Carolis v. Canada (Attorney General)*, 2013 FC 366

⁵ See section 3 of the *Old Age Security Act*

[11] To receive a full OAS pension, the Appellant must have resided in Canada for at least 40 years for the period after he turned 18 to the day before the approval of his OAS application.⁶

[12] To receive a partial OAS pension while living in Canada, the Appellant must have resided in Canada for at least ten years for the period after he turned 18 to the day before his application was approved.⁷

[13] To receive a partial OAS pension while living outside Canada, the Appellant must have lived in Canada for at least 20 years for the period after he turned 18 to the day before the approval of his OAS application.⁸ Where an Appellant lives outside Canada and has less than 20 years of Canadian residency, the OAS Act allows the government of Canada to enter into agreements with other countries to help them qualify for an OAS pension by adding up the periods of residency in Canada and the other country.⁹

[14] The government of Canada has entered into such an agreement with the government of the United States of America. This agreement says that where an Appellant is not entitled to an OAS pension because of insufficient periods of residence, entitlement to an OAS pension may be determined by totalizing periods of Canadian residence and periods of coverage under the American *Social Security Act*.¹⁰ The Appellant in this case became eligible for an OAS pension while living outside Canada because his Canadian residency period added to his American residence period amounted totalled more than 20 years.

[15] According to the OAS Act and Regulations, a person resides in Canada if they make their home and ordinarily live in any part of Canada. Residence is different from presence under the OAS Act. A person is present in Canada when they are physically

⁶ See paragraph 3(1)(c) of the *Old Age Security Act*

⁷ See subsection 3(2) of the *Old Age Security Act*

⁸ See subsection 3(2) of the *Old Age Security Act*

⁹ See section 40 of the *Old Age Security Act*

¹⁰ See Article VIII, *Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security*

present in any part of Canada. A person can be present in Canada without being resident in Canada.¹¹

[16] To decide whether the Appellant resided in Canada, I must weigh all the facts of the case and the Appellant's circumstances. The Appellant's intention to live in Canada is not enough to demonstrate residence. Some of the factors that I look at to determine Canadian residence are:

- ties in the form of personal property;
- social ties in Canada;
- other ties in Canada (medical coverage, driver's licence, rental lease, tax records, etc.);
- ties in another country;
- regularity and length of stays in Canada, and the frequency and length of absences from Canada; and
- the person's mode of living, or whether the person living in Canada is sufficiently deep rooted and settled.¹²

[17] The OAS Regulations say that if an Appellant makes contributions to the social security scheme of a country outside of Canada in which they are residing and that country has a social security agreement with Canada, this period cannot be considered as deemed residence in Canada.¹³

[18] The OAS Act also has a provision that calls for the rounding down of the number of years that somebody resides in Canada when calculating the number of years of Canadian residence.¹⁴

¹¹ See subsection 21(1) of the *Old Age Security Regulations*

¹² *Canada (Minister of Human Resources Development) v. Ding*, 2005 FC 76

¹³ See subsection 21(5.3) of the *Old Age Security Regulations*

¹⁴ See subsection 3(4) of the *Old Age Security Act*

Reasons for my decision

[19] I find that the Appellant resided in Canada from September 1, 1974 to December 31, 1984 and from January 1, 1987 to August 29, 1996. This means that the Appellant resided in Canada for 19 years on the day before the approval of his OAS application. This means that I must dismiss the Appellant's appeal. Although I disagree with the Minister on the date where the Appellant started residing in Canada, my calculation of the Appellant's Canadian residence still amounts to 19 years. I reached this decision by considering the following issues:

- Did the Appellant reside in Canada from September 1, 1974 to the day before the approval of his OAS application?

What did the Minister say about the Appellant's residency in Canada?

[20] The Minister says the Appellant started residing in Canada on June 16, 1975, which was the day he passed his immigration medical. The Minister disagreed with the Appellant's argument that he began living in Canada on September 1, 1974 for the following reasons:

- The Appellant's Nigerian passport showed four entry dates to Canada in 1974 and two in 1975. These dates were September 1, 1974, September 6, 1974, September 16, 1974, December 18, 1974, April 15, 1975, and September 29, 1975, with a notation that he passed a medical exam on June 16, 1975¹⁵
- The Appellant gave the Minister different dates for when he moved to Canada permanently, including September 1, 1973, February 1, 1974, September 1, 1975, and June 16, 1975;
- The Appellant told the Minister in a January 22, 2018 questionnaire that he believed he began living permanently in Canada on June 16, 1975;
- The Appellant's provincial health care coverage began December 1, 1975;

¹⁵ See GD3-3

- The Appellant obtained a Canadian driver's license on May 8, 1975; and
- The Appellant began filing Canadian tax returns in 1975 and continued doing so until August 1996.¹⁶

[21] The Minister says the years 1985 and 1986 could not be included in the Appellant's Canadian residence calculation. This is because the Appellant contributed to the American social security system in those years and he did not provide proof that he had returned to live or work in Canada in 1985 or 1986.

[22] The Minister says that the Appellant left Canada on August 29, 1996 to work in the United States and he did not provide proof that he returned to live permanently in Canada after that date.¹⁷ The Minister's investigation showed that the Appellant made contributions to the American social security system from 1985 to 1986, 1998 to 2000 and 2003 to 2016. The Appellant also worked for the American government from 1996 to 1997, part of 1998, part of 1999, 2001 to 2002, and 2017 to 2018.¹⁸

What did the Appellant say about his residency in Canada?

[23] The Appellant made submissions before the hearing. He said that he lived in Canada from September 1, 1974 to December 31, 1984 and from January 1, 1987 to August 29, 1996. He also said that he returned to Canada to join his family for three months from May 15, 1997 to August 16, 1997. He wanted these three months included in his Canadian residence period.¹⁹

[24] The Appellant testified at his hearing that he has lived in Canada continuously since September 1, 1974.

[25] The Appellant testified that he first came to Canada on September 1, 1974. He told the Immigration Officer that he intended to permanently stay in Canada. He came to Canada because he dreamed of owning a dairy farm. The Appellant had come to

¹⁶ See GD2-3

¹⁷ See GD3-2

¹⁸ See GD3-4

¹⁹ See GD2-5-7

Canada from the United States. He sold all of his belongings in the United States before coming to Canada, including his car and furniture. He closed all of his American bank accounts. The Appellant said he had no property in Nigeria when he came to Canada. He obtained a Canada Social Insurance Number in 1974 and also opened a bank account. He stayed with a friend when he first arrived in Canada. He enrolled at a community college in September 1974 and eventually began living on campus.

[26] The Appellant explained the dates of Canadian entry on his Nigerian passport. He said he did not leave Canada in 1974 and 1975. He said his Nigerian passport confirmed that he entered Canada on September 1, 1974.²⁰ The September 6, 1974 date of entry was a stamp that showed the issuance of student visa so that he could attend school.²¹ The September 16, 1974, December 18, 1974, April 15, 1975 and September 29, 1975 dates of entry were all work authorizations issued by the Canadian immigration authorities.²² The September 29, 1975 date of entry contained a notation that said he passed an immigration medical examination on June 16, 1975.

[27] The Appellant explained his answer on a questionnaire that he began permanently living in Canada on June 16, 1975. He said that this answer was based on his assumption that he could not stay in Canada without passing such an examination.

[28] The Appellant testified that he began his life in Canada on September 1, 1974. He wanted to stay in Canada. He obtained the necessary student and work authorizations to stay in Canada. He had his immigration medical examination in December 1974 and he received confirmation from the Canadian immigration authorities that he passed it in on June 16, 1975. He attended the Canadian agricultural college until 1977. He got married in Canada in 1978. All three of his children are Canadian citizens. He went to an American college from 1979 to 1980, but he also worked in Canada during that time period. He lived in Canada from 1980 to 1985. He worked in the United States from September 1985 to April 1986. He returned to Canada in May 1986. He ended up purchasing two homes in Canada. He went to the United

²⁰ See GD2-59

²¹ See GD2-59

²² See GD2-60-61

States on August 29, 1996. But his wife and children stayed in Canada. He eventually sold his Canadian homes and cancelled his home insurance policies in 1998 and 1999. His children moved to the United States in 1997. His wife moved to the United States in around 2000.

[29] The Appellant testified that he worked in the United States from 1996 to 2016. He stopped holding any Canadian bank and investment accounts in 1997. He stopped using his Canadian driver's licence in 2001. He has had medical coverage in the United States since 1997. He rented in the United States and he eventually purchased a home there in 2006.

[30] The Appellant considers himself to have been a residence of Canada since September 1, 1975. He maintains a Canadian passport. The Appellant testified that he never stopped living in Canada. He never obtained American citizenship. He had to go back to Canada each year to reapply for an annual visa to stay in the United States. Sometimes he would stay for one day to really for the visa. On other occasions, he would stay in Canada for three or four days to complete the reapplication process.

My findings regarding the Appellant's residency in Canada

[31] I find that the Appellant resided in Canada from September 1, 1974 to December 31, 1984 and from January 1, 1987 to August 29, 1996. This period amounts to 19 years of Canadian residency.

[32] I agree with the Appellant that he began residing in Canada on September 1, 1974. The Appellant explained the dates of Canadian entry on his Nigerian passport in 1974 and 1975. These dates of entry showed the Appellant obtaining the necessary student and work authorizations to maintain Canadian residency. I place little weight on the Appellant's statement in a questionnaire that he began residing in Canada on June 19, 1975. I accept the Appellant's evidence that he answered the question the way he did because he thought this was the day he could finally stay in Canada because he received notice of passing his immigration medical. I accept that the Appellant began

residing in Canada before June 16, 1975. He went to school in Canada, opened a bank account in Canada, and worked before that date.

[33] I agree with the Minister that I cannot include the years 1985 and 1986 in the Appellant's years of Canadian residency. The Appellant confirmed he worked in the United States from September 1985 to April 1986. Records from the United States showed that the Appellant contributed to the American social security system throughout 1985 and 1986.²³ Since the Appellant contributed to the American social system in those years, he is subject to its social security legislation and is deemed to be a non-resident of Canada.²⁴

[34] I also agree with the Minister that the Appellant was not a Canadian resident after August 29, 1996. I know the Appellant identifies himself as a Canadian resident. But the Appellant's residency in Canada was not sufficiently deep rooted and settled after he moved to the United States on August 29, 1996. The records showed that the Appellant worked in the United States from 1996 to 2018.²⁵ The Appellant last made valid Canada Pension Plan contributions in 1996.²⁶ The Appellant confirmed that he left Canada on August 29, 1996.²⁷ His family eventually joined him in the United States. He sold his properties in Canada. He initially rented property when he moved to the United States and purchased a home in the United States in 2006. He has had medical coverage in the United States since 1997. He closed his Canadian bank account in 1997. He stopped using his Canadian driver's licence in 2001.

[35] The Appellant was frequently absent outside Canada after August 29, 1996. He testified that he would return to Canada each year to reapply for an annual visa to the United States. His visits would last one to four days. He also said that he returned to Canada to join his family for three months from May 15, 1997 to August 16, 1997. He

²³ See GD2-120

²⁴ See Article V(1) *Agreement Between the Government of Canada and the Government of the United States of America with Respect to Social Security* and subsection 21(5.3) of the *Old Age Security Regulations*. See also the Federal Court of Canada's decision in *Gumboc v. Canada (Attorney General)*, 2014 FC 185

²⁵ See GD2-120

²⁶ See GD2-121

²⁷ See GD2-7

wanted these three months included in his Canadian residence period. I agree with the Minister that the Appellant's visits to Canada after August 29, 1996 do not show Canadian residence. The Appellant spent the vast majority of his time in the United States after that date. I find that his frequency and his length of absences from Canada after August 29, 1996, showed American as opposed to Canadian residence.

[36] I therefore find that the Appellant resided in Canada from September 1, 1974 to December 31, 1984, a period of 10 years, 3 months and 30 days, and from January 1, 1987 to August 29, 1996, a period of 9 years, 7 months and 28 days. A total residency period of 19 years, 11 months and 28 days.

[37] I know that the Appellant is just shy of 20 years of Canadian residency. But I have to find that the Appellant resided in Canada for 19 years. The OAS Act says that the calculation of a partial OAS pension is based on the aggregate period that an applicant has resided in Canada after turning 18 and before the day the application is approved.²⁸ The OAS Act also says that an aggregate period must be rounded down when calculating a partial pension.²⁹

[38] I am sympathetic to the Appellant. But the Tribunal is created by legislation and only has powers granted to it by its governing statute. I must interpret and apply the law as it is set out in the OAS Act. This means that I cannot add award the Appellant 20 years of Canadian residency. I have to round down his years of Canadian residence to 19 years.

The Minister properly awarded the Appellant a 9.0% actuarial adjustment

[39] The OAS Act allows Appellants to voluntarily defer receiving their OAS pension starting the month they are entitled to receive the pension. As of July 1, 2013, Appellants who delay receiving their OAS pension can see their monthly pension

²⁸ See subsection 3(3) of the *Old Age Security Act*

²⁹ See subsection 3(4) of the *Old Age Security Act*

increase by 0.6% per month from their month of initial eligibility to the month in which their pension application is approved.³⁰

[40] The Minister properly awarded the Appellant a 9.0% actuarial adjustment on his partial OAS pension. This is because the Appellant initially became eligible for an OAS pension in August 2015, the month following his 65th birthday.³¹ The Appellant's application was approved in November 2016. November 2016 is the furthest back the Minister could have started paying the Appellant an OAS pension because it was eleven months before the Appellant applied for the OAS pension in October 2017.³² There was 15 month gap between the Appellant's initial eligibility for an OAS pension (August 2015) and the approval of his OAS pension (November 2016). This means that the Appellant was entitled to a 9.0% actuarial adjustment on his partial OAS pension (15 months X 0.6 per month).

Conclusion

[41] I agree with the Minister that the Appellant should be awarded a partial OAS pension based on 19 years of Canadian residence with a 9.0% actuarial adjustment.

[42] This means the appeal is dismissed.

George Tsakalis
Member, General Division – Income Security Section

³⁰ See subsections 7.1(1),(2), and (4) of the *Old Age Security Act*

³¹ See section 8 of the *Old Age Security Act* and section 5 of the *Old Age Security Regulations*

³² See subsection 8(1) and (2) of the *Old Age Security Act*