



Citation: *BK v Minister of Employment and Social Development*, 2023 SST 583

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

Decision

Appellant:	B. K.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated January 29, 2021 (issued by Service Canada)
Tribunal member:	Salima Stanley-Bhanji
Type of hearing:	Teleconference
Hearing date:	November 8, 2022
Hearing participants:	Appellant B. K.
Decision date:	February 6, 2023
File number:	GP-21-593

Decision

[1] The appeal is allowed.

[2] The Appellant, B. K., is eligible for a partial Old Age Security (OAS) pension of 11/40. Payments start as of July 2018.

[3] This decision explains why I am allowing the appeal.

Overview

[4] The Appellant was born in Uganda on December 9, 1949.¹ He lived in the United States from 1972 to 1987.² He landed in Canada as a permanent resident in May 1987.³ He turned 65 on December 9, 2014.

[5] The Appellant's OAS pension application was received on June 13, 2019.⁴ The Minister denied the Appellant's application in March 2020 because they had not received the Appellant's residence questionnaire.⁵ The Appellant requested the Minister reconsider their decision in May 2020.⁶

[6] The Minister continued to deny the Appellant's OAS pension application in their reconsideration decision of January 2021. However, they did inform the Appellant that they had sent his application to the International Operations Office for further review.⁷

¹ See GD2-56.

² See GD2-82 and GD2-91.

³ See GD2-114.

⁴ See GD2-74 to 81.

⁵ See GD2-119.

⁶ See the reconsideration decision letter at GD2-6 to 9.

⁷ See GD2-3 to 5.

[7] Service Canada's International Operations Office informed the Appellant in April 2021 that they were reviewing his eligibility for an OAS pension under the Agreement on Social Security between Canada and the U.S. (CAN/U.S. Agreement).⁸

[8] The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division (Tribunal).

[9] The Minister requested information on the Appellant's U.S. coverage in April 2021 and September 2021 but didn't receive a reply.⁹ The Minister asked for a six-month extension which was granted by the Tribunal in March 2022, allowing until September 2022 to get the coverage record and provide submissions.¹⁰

[10] In May 2022, the coverage record was received by Service Canada.¹¹ In June 2022, Service Canada wrote to the Appellant requesting further information including the completion of an additional questionnaire within 30 days.¹² At that time, this appeal was already taking place with the Tribunal. The Appellant didn't reply to Service Canada. The Minister never made any written submissions to the Tribunal and did not attend the hearing on November 8, 2022.

[11] Because of this, I have relied on the Minister's reasons in the reconsideration decision. The Minister stated that the Appellant was not eligible for an OAS pension because he had not resided in Canada for 10 years or more since his 18th birthday.¹³

[12] The Appellant says that taking into account his time residing in both Canada and the U.S., he is eligible for an OAS pension.

⁸ See GD2-19 to 20.

⁹ See GD2-21 to 28 and GD6-1 to 8.

¹⁰ See GD9-1 to 2.

¹¹ See GD11-1 to 7.

¹² See GD11-20 to 24.

¹³ See GD2-3.

What the Appellant must prove

[13] To receive a **full** OAS pension, the Appellant has to prove he resided in Canada for at least 40 years after he turned 18.¹⁴ This rule has some exceptions. But the exceptions don't apply to the Appellant.¹⁵

[14] If the Appellant doesn't qualify for a full OAS pension, he might qualify for a **partial** pension. A partial pension is based on the number of years (out of 40) a person resided in Canada after they turned 18. For example, a person with 15 years of residence gets a partial pension of 15/40 of the full amount. To get a partial pension, a person must have resided in Canada for at least 10 years after they turned 18.

[15] The Appellant must prove he resided in Canada on a balance of probabilities. This means he has to show that it's more likely than not he resided in Canada during the time periods in question.

[16] Because of the CAN/U.S. Agreement, time where the Appellant resided in the U.S. can count towards eligibility for an OAS pension. This time will not count towards the amount of the pension received.

Reasons for my decision

[17] Here are the reasons for my decision.

The test for residence

[18] The law says that being present in Canada isn't the same as residing in Canada. "Residence" and "presence" each have their own definition. I have to use these definitions in making my decision.

¹⁴ See section 3(1)(c) of the *Old Age Security Act* (OAS Act). The Appellant also has to be at least 65 years old and a Canadian citizen or legal resident of Canada. And he must have applied for the pension. The Appellant has met these requirements.

¹⁵ See section 3(1)(b) of the OAS Act

[19] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.¹⁶

[20] A person is **present** in Canada when they are physically present in any part of Canada.¹⁷

[21] When I am deciding whether the Appellant resided in Canada, I have to look at the overall picture and factors such as:¹⁸

- where he had property, like furniture, bank accounts, and business interests
- where he had social ties, like friends, relatives, and membership in religious groups, clubs, or professional organizations
- where he had other ties, like medical coverage, rental agreements, mortgages, or loans
- where he filed income tax returns
- what ties he had to another country
- how much time he spent in Canada
- how often he was outside Canada, where he went, and how much time he spent there
- what his lifestyle was like in Canada
- what his intentions were

This isn't a complete list. Other factors may be important to consider. I have to look at **all** the Appellant's circumstances.¹⁹

When the Appellant resided in Canada

[22] The Appellant **resided in Canada** in the following periods:

- May 24, 1987, up to and including October 7, 1995;

¹⁶ See section 21(1)(a) of the *Old Age Security Regulations* (OAS Regulations).

¹⁷ See section 21(1)(b) of the OAS Regulations.

¹⁸ See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76. See also *Valdivia De Bustamante v Canada (Attorney General)*, 2008 FC 1111; *Duncan v Canada (Attorney General)*, 2013 FC 319; and *De Carolis v Canada (Attorney General)*, 2013 FC 366.

¹⁹ See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.

- October 11, 1996, up to and including October 8, 1997; and
- October 8, 2015, up to and including November 8, 2022 (hearing date).

[23] I will now discuss each period above, starting with the earliest one. For each period, I will explain why I have decided that the Appellant resided in Canada.

– **The Appellant resided in Canada from May 1987 to October 1995**

[24] The Appellant resided in Canada from May 1987 to October 1995.

[25] The Appellant left the U.S. and landed in Canada as a permanent resident in May 1987.²⁰ At the hearing, he said he had been living in Seattle prior to this time with his two children. He was working and left his job in Seattle. His wife was a Canadian citizen and was already living in Vancouver. He had a lot of family in Vancouver and little family in Seattle.

[26] The Appellant said he drove across the border bringing things that would fit in his car. He said he thought he shipped some items later but didn't remember when. He kept a storage in Seattle.²¹ The family stayed with the Appellant's brother in Vancouver.

[27] The Appellant said he had a difficult time finding work in Vancouver because he wasn't educated and there was a lot of discrimination. He testified that he never worked in Canada. His wife however did find some part-time work in Vancouver.

[28] The Appellant travelled back and forth between Vancouver and Seattle during the period. From his testimony at the hearing, it seems that the Appellant was going to Seattle to work, and because of challenges in his marriage. He would rent a private room and travel back to Vancouver to see his wife and two children, mostly on the weekends, but sometimes during the week.

[29] At the hearing, the Appellant said his cell phone has always been a U.S. number, even at the present, because of cheaper rates. He had owned a car in the U.S.

²⁰ See the immigration letter at GD2-94 to 95, the Immigration Status Verification at GD2-114 confirming the date the Appellant became a permanent resident of Canada, and the hearing recording.

²¹ The stored items were later lost due to non-payment of the storage rental fee.

and was unsure if and when the car was transferred over to British Columbia. During the period, the Appellant didn't own any other property anywhere because his family didn't have the financial means. He had bank accounts in the U.S. and Canada. He recalls having provincial health care in British Columbia. He said that he took part in his faith-based community in both Vancouver and Seattle.

[30] The Appellant provided three documentary accounts of his presence in Canada and the U.S. in the documentary evidence in June 2019, May 2020, and January 2021.²² In the January 2021 questionnaire completed by the Appellant, he explained that these discrepancies were because he thought if he had left Canada for less than six months, he didn't have to declare the absence. However, after talking to someone at the pension office, he was told otherwise.²³ This accounts for some of the discrepancies, but not all.

[31] I accepted the Appellant's January 2021 account of his presence in Canada and the U.S. This account coincides with his oral testimony at the hearing, and although it contradicts the May 2020 account, it is not in contradiction with his June 2019 account. It is also the final and most detailed account provided in the documentary evidence.

[32] From May 1987 to October 1995, the Appellant identified the following periods when he resided in the U.S.:²⁴

- January 5, 1988 to April 8, 1988
- January 5, 1989 to May 5, 1989
- March 18, 1992 to July 16, 1992
- September 19, 1993 to December 27, 1993
- August 1, 1994 to November 4, 1994

²² See GD2-13, GD2-41 and GD2-33 to 34.

²³ See the Appellant's written note at GD2-33.

²⁴ See GD2-33 to 34.

[33] None of the above absences from Canada reported by the Appellant were greater than four months' long.

[34] U.S. earnings between \$3,282 and \$13,199 were received during the years where these reported absences from Canada took place, suggesting more part-time rather than full-time income. However, the coverage record shows that in 1988, 1989, 1992, 1993 and 1994, wages were received in all quarters of those years, not just during the quarters where the Appellant reported being in the U.S.²⁵

[35] Unfortunately, there is no documentary evidence to show the Appellant's entries between the U.S. and Canada. However, I believe it is more likely than not that the Appellant was working very casually in the U.S. during the entire period and would go back and forth between Canada and the U.S. It is possible that during the time periods where the Appellant reported longer absences from Canada, he was working more concentrated hours and renting a room on a more continuous basis in Seattle.

[36] From 1990 to 1991, the Appellant had no U.S. earnings.²⁶ At the hearing, he said he was sick. He believes he was staying with his brother in Vancouver at the time. I accept this testimony.

[37] In 1993, the Appellant became a Canadian citizen.²⁷

[38] Although there was not a lot of documentary evidence, and it was hard for the Appellant to recall the details of his life from more than 25 years ago at the hearing, I found the Appellant to be credible.

[39] The Appellant spent time and worked in the U.S. during the period and maintained some ties in the U.S. However, he reported, and I believe, that he spent a lot more time and had greater ties in Canada where his family was living. When he was

²⁵ See the U.S. Coverage Record at GD11-6.

²⁶ See the U.S. Earnings Record at GD2-86 and the U.S. Coverage Record at GD11-6.

²⁷ See GD2-108 to 109.

unwell, he didn't work in the U.S. and was living in Vancouver. His U.S. earnings were not significant. He had more consistent housing in Vancouver with his brother.

[40] As a result, I find that it is more likely than not that the Appellant resided in Canada during the period.

– **The Appellant resided in Canada from October 1996 to October 1997**

[41] The Appellant resided in Canada from October 1996 to October 1997.

[42] In the January 2021 questionnaire and at the hearing, the Appellant stated that he lived in Canada during the period.²⁸

[43] The Appellant had U.S. earnings in 1996 and 1997.²⁹ The earnings don't put into question the Appellant's evidence given that they represent partial annual earnings.

[44] The Appellant's wife was still living in Vancouver at the time and they were still married. There is no other evidence to contradict the Appellant's evidence that he lived in Canada during the period.

[45] Although there is little evidence outside of what the Appellant has said to support his residence in Canada during the period, I have relied on his written and verbal testimony and I find that it is more likely than not the Appellant resided in Canada during the period.

– **The Appellant resided in Canada from October 2015 to present**

[46] The Appellant resided in Canada from October 2015 to present.

[47] In the January 2021 questionnaire and at the hearing, the Appellant stated that he had lived in Canada from October 2015 to the present time.³⁰

²⁸ See GD2-34.

²⁹ See the U.S. Earnings Record at GD2-86 and the U.S. Coverage Record at GD11-6. Earnings were \$16,401 in 1996 (during which he said he was in the U.S. from January to October) and \$10,717 in 1997 (during which he said he was in the U.S. from October to December).

³⁰ See GD2-34.

[48] At the hearing, the Appellant said he filed for divorce around 2014-15.³¹ He sold his Seattle property and moved back to Vancouver to live with his sister in 2015 because he couldn't manage on his own. It was a difficult time for him personally and his sister was very helpful. Around 2017-2018, the Appellant said he was hospitalized for heart issues in Vancouver.

[49] In 2019, the Appellant decided he didn't want to continue to burden his sister, he couldn't afford to live independently in Vancouver, and he had some cousins and good friends in Calgary. Initially when he moved to Calgary, he stayed with his cousins for a brief time before buying a townhouse. At the time of the hearing, the Appellant said he was still living in the same townhouse in Calgary.

[50] At the hearing, the Appellant said he travelled to Miami to visit family from time to time from 2015 to 2018. Since 2019, the Appellant said has gone back to the U.S. twice for visits of a few days or less. The Appellant shared that his children now live in the U.S., but he does not have a connection with them.

[51] A 2018 Tax Assessment and 2020 Tax Return Summary both from Canada were given as evidence of income received by the Appellant in Canada during the period.³² At the hearing, the Appellant stated that he receives about \$16,000 CAD annually in U.S. social security payments. This is consistent with these two taxation documents and further supports that the Appellant has been residing in Canada during the period.

[52] I find that the Appellant resided in Canada during the period.

When the Appellant resided in the U.S.

[53] The Appellant **resided in the U.S.** in the following periods:

- November 3, 1972, up to and including May 23, 1987;
- October 8, 1995, up to and including October 10, 1996; and
- October 9, 1997, up to and including October 7, 2015.

³¹ U.S. Certificate of Dissolution of Marriage from 2018 is at GD2-88.

³² See GD3-2 to 4.

[54] I will now discuss each period above, starting with the earliest one. For each period, I will explain why I have decided that the Appellant resided in the U.S.

– **The Appellant resided in the U.S. from November 1972 to May 1987**

[55] The Appellant resided in the U.S. from November 1972 to May 1987.

[56] The Appellant left Uganda in 1972 and immigrated to the U.S. The Appellant resided in the U.S. until May 1987. The Appellant's written evidence and testimony at the hearing consistently support this.³³

[57] The Appellant began earning income in the U.S. in 1972 and received U.S. income every year during the period.³⁴

[58] There is no conflicting evidence to suggest the Appellant was living anywhere else during the period.

[59] I find that it is more likely than not that the Appellant was residing in the U.S. during the period.

– **The Appellant resided in the U.S. from October 1995 to October 1996**

[60] The Appellant resided in the U.S. from October 1995 to October 1996.

[61] In the January 2021 questionnaire, the Appellant stated that he lived in the U.S. during the period. At the hearing, he said that during this time he had to make some money and that was the reason he would go back to the U.S.

[62] The Appellant had higher on average U.S. earnings during the period (when compared to prior earnings) of \$11,360 in 1995 and \$16,401 in 1996. This supports that the Appellant spent more time in the U.S.

³³ See GD2-13, GD2-41 and GD2-33 to 34.

³⁴ See the U.S. Earnings Record at GD2-85 to 87.

[63] There is no other evidence to contradict the Appellant's evidence that he lived in the U.S. during the period.

[64] I find that it is more likely than not the Appellant resided in the U.S. during the period.

– **The Appellant resided in the U.S. from October 1997 to October 2015**

[65] The Appellant resided in the U.S. from October 1997 to October 2015.

[66] In the January 2021 questionnaire and at the hearing, the Appellant said he lived in the U.S. during the period. Except for 2006 and the last three quarters of 2004, there were U.S. earnings consistently from 1997 until the first quarter of 2008. There were no earnings reported after that (at which time the Appellant would have been close to 60).³⁵

[67] At the hearing, the Appellant said he made Seattle home during the period. He believes he bought a place in Seattle around 1998 or 1999. At that time, his children were grown and both in their 20s. Given that the Appellant's marriage was struggling, he didn't have strong ties to Canada during the period.

[68] There is no other evidence to contradict the Appellant's evidence that he lived in the U.S. during the period.

[69] I find the Appellant resided in the U.S. during the period.

The Appellant qualified for a partial OAS pension in June 2018

[70] The Appellant qualified for a partial OAS pension of 11/40 on June 3, 2018. At that time, he had been in Canada or the U.S. for the minimum 10-year qualifying period after he turned 18, was already 65 years old, a Canadian citizen, and it was one year prior to applying for the pension.³⁶

³⁵ See GD2-85 to 86 and GD11-6.

³⁶ Sections 3 to 5 of the OAS Act set out these requirements. The date of application for the pension is the date the application was received.

[71] The Appellant met the age requirement for an OAS pension on December 9, 2014, when he turned 65. He had resided the U.S. for 10 years after he turned 18 on November 3, 1982. He applied for the pension on June 3, 2019. One year prior to the application date is June 3, 2018.

[72] The latest of these dates is June 3, 2018. That is when the Appellant qualified for a partial OAS pension.³⁷ The number of years he had resided in Canada by that date determines the amount of the OAS pension.

[73] As of June 3, 2018, the Appellant had resided in Canada for 11 years and 237 days after he turned 18:

- From May 24, 1987 up to and including October 7, 1995 a total of 8 years and 137 days;
- From October 11, 1996 up to and including October 8, 1997, a total of 363 days; and
- From October 8, 2015, up to and including June 3, 2018, a total of 2 years and 239 days.

[74] The Appellant is eligible for a pension 11/40 the full amount. This is because he had resided in Canada for 11 full years when he qualified for the OAS pension.³⁸

When payments start

[75] OAS pension payments start the first month after the pension is approved.³⁹ The Appellant's pension was approved in June 2018.

[76] The Appellant's pension started in July 2018.

³⁷ Per s.5(2) of the OAS Regulations, approval of an OAS pension will be effective as of the latest of the following dates:

- The day that is one year before the day on which the application was received
- The day on which the applicant attained the age of 65 years
- The day on which the applicant became qualified for a pension

³⁸ The period of residence is rounded down to the lower multiple of a year when it isn't a multiple of a year. See section 3(4) of the OAS Act.

³⁹ See section 8(1) of the OAS Act.

Conclusion

[77] The Appellant is eligible for a partial OAS pension of 11/40.

[78] This means the appeal is allowed.

Salima Stanley-Bhanji
Member, General Division – Income Security Section