



Citation: *AE v Minister of Employment and Social Development*, 2023 SST 1892

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: A. E.
Representative: J. L.

Respondent: Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated February 7, 2022 (issued by Service Canada)
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Tribunal member: Antoinette Cardillo

Type of hearing: Videoconference

Hearing date: October 4, 2023

Hearing participants: Appellant
Appellant's representative
Respondent's representative
Interpreter

Decision date: December 23, 2023

File number: GP-22-817

Decision

[1] The appeal is dismissed.

[2] The Appellant, A. E., isn't eligible for the Allowance to survivors (ALWS), the Old Age Security (OAS) pension and the Guaranteed Income Supplement (GIS).

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

Overview

[4] The Appellant was born in Columbia on March 15, 1951. She turned 60 years of age on March 15, 2011. She applied for the ALWS on July 6, 2012.¹ She indicated on her application that she arrived in Canada on May 6, 1973, and resided in Canada continuously since then. The ALWS benefit was approved on November 18, 2013, with an effective date of August 2011 (eleven months before the application was filed).²

[5] The Appellant applied for the OAS pension and GIS on November 10, 2015.³

[6] The Appellant's ALWS benefit was converted to the OAS pension, at the rate of 40/40th (full pension), from April 2016, the month after she turned 65. The Appellant also began to receive the GIS from April 2016.

[7] In January 2018, the Appellant's file was selected for a residence review. After an investigation, the Minister of Employment and Social Development (Minister) determined that the Appellant was not a resident of Canada at the time she filed her ALWS application. Therefore, she did not qualify for the ALWS benefit because it is not payable outside the country, and she was not eligible for the OAS pension because she had not accumulated 20 years of residency required for a non-resident applicant.

[8] The Minister determined that the Appellant's period of residence in Canada was from May 1973 to May 1990. The other periods in Canada were considered periods of

¹ See ALWS application at GD2-4.

² See approval letter for ALWS at GD2-46.

³ See OAS application at GD2-8.

presence, as the Appellant had not severed her ties with Colombia, her country of origin.

[9] As a result, an overpayment of \$109,922.96 was created: \$54,479.69 of ALWS benefits for the period August 2011 to March 2016, \$27,766.17 of OAS pension for the period April 2016 to February 2020 and \$ 27,677.10 of GIS benefits, for the period April 2016 to February 2020.

[10] The Appellant requested a reconsideration of the Minister's decision. The Minister maintained its decision.⁴ The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division.

Issue

[11] The issue I have to decide in this appeal is whether the Appellant has resided in Canada for any periods since May 1990 and has met the eligibility criteria to receive the ALWS, a full or partial OAS pension and the GIS.

What the law says

- Allowance to survivors

[12] The *Old Age Security Act* (OAS Act) provides for payment of the ALWS benefit to survivors of a spouse or common law partner.⁵

[13] To receive an ALWS benefit, applicants must be between 60 to 64 years old, they must have resided in Canada for a minimum of 10 years after the age of 18, and they must also be a resident of Canada at the time of the approval of their application.⁶

[14] The OAS Act does not permit the payment of the ALWS to survivors who are outside Canada, whether the person has taken up residence in another country or is

⁴ The Minister of Employment and Social Development (Minister) manages the Old Age Security programs for the Government of Canada. See the reconsideration decision at GD1-9.

⁵ See section 2 of the OAS Act.

⁶ See section 21(1) of the OAS Act.

simply absent from Canada for a significant period. The OAS Act only permits payment of the ALWS for the month of departure from Canada and the following six months. Payments may resume upon the return to Canada as a resident.⁷

- **Old Age Security pension**

[15] To receive a **full** OAS pension, the Appellant has to prove she resided in Canada for at least 40 years after she turned 18.⁸ This rule has some exceptions. But the exceptions don't apply to the Appellant.⁹

[16] If the Appellant doesn't qualify for a full OAS pension, she might qualify for a **partial** pension. A partial pension is based on the number of years (out of 40) that a person resided in Canada after they turned 18. For example, a person with 12 years of residence receives a partial pension of 12/40 the full amount.

[17] To receive a partial OAS pension, the Appellant has to prove he/she resided in Canada for at least 10 years after she turned 18. But, if the Appellant didn't reside in Canada the day before her application might have been approved, she has to prove she already has at least 20 years of residence.¹⁰

[18] The Appellant has to prove she resided in Canada. She has to prove this on a balance of probabilities. This means that she has to show that it is more likely than not she resided in Canada during the relevant periods.¹¹

- **Guaranteed Income Supplement**

⁷ See section 21(9) of the OAS Act.

⁸ 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 she must have applied for the pension. The Appellant has met these requirements.

⁹ See section 3(1)(b) of the OAS Act.

¹⁰ See section 3(2) of the OAS Act.

¹¹ See *De Carolis v Canada (Attorney General)*, 2013 FC 366.

[19] The GIS is a monthly benefit provided to Old Age Security pensioners who have a low income and live in Canada. The GIS amount during a payment period is established based on the claimant's marital status and their previous year's income.

[20] The OAS Act provides that no supplement may be paid to a pensioner for any month throughout which the pensioner is absent from Canada (absent from Canada either before or after becoming a pensioner) and having remained outside Canada before that month for six consecutive months, exclusive of the month in which the pensioner left Canada.¹²

Reasons for my decision

[21] I find that the Appellant isn't eligible to receive the ALWS benefit, a full or partial OAS pension or the GIS. She didn't reside in Canada the day before her applications were approved. This means she needed to have at least 20 years of residence in Canada. She didn't reside in Canada that long.

[22] I considered the Appellant's eligibility from May 1990, up to and including November 2013. I chose the first date because that is the date the Appellant was last considered to be a resident of Canada. I chose the second date because that is the date her ALWS application was approved. I also considered April 2016 because that is the date her OAS application was approved.

[23] Here are the reasons for my decision.

The test for residence

[24] 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.

¹² See section 11(7) of the OAS Act.

[25] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.¹³

[26] A person is **present** in Canada when they are physically present in any part of Canada.¹⁴

[27] When I am deciding whether the Appellant resided in Canada, I have to look at the overall picture and factors such as:¹⁵

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

[28] This isn't a complete list. Other factors may be important to consider. I have to look at **all** the Appellant's circumstances.¹⁶

When the Appellant resided in Canada

[29] The Appellant **resided in Canada** from May 1973 to May 1990. This period is not in dispute.

¹³ See section 21(1)(a) of the *Old Age Security Regulations* (OAS Regulations).

¹⁴ See section 21(1)(b) of the OAS Regulations.

¹⁵ 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.

¹⁶ See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.

[30] The Appellant **didn't reside in Canada** after May 1990.

[31] In both her ALWS and OAS applications, the Appellant stated that she resided in Canada continuously since her arrival in May 1973.

[32] At the hearing, the Appellant said that she got married in 1976 in Columbia. She then came to Canada in 1977 to join her husband; he then returned to Columbia, but she didn't remember the date. She explained that they separated for a period of time. He passed away in Columbia in 2010. She spent time taking care of him, about six months and then came back to Canada. During this period, she stayed at her husband's home and at times, she would go to her family's house.

[33] When asked where she lived since 1990, she said she lived with her sister in the United States (US), in Columbia and in Montreal (on X).

[34] She explained that she would stop in the US when in transit from Columbia and at times she would stay for a visit. Her sister lives in the US. She said that she did not work in the US, contrary to what the Minister said in their submissions. She helped her sister babysit her children. She did not remember any dates she stayed in the US. She said that she misunderstood the question about working in the US when she was asked by the Minister's investigator. Also, she said that she indicated by mistake on a passport renewal form that her permanent address was in the US.¹⁷

[35] When asked about her years of residency in Canada, she said that she travelled to Columbia over the years for health reasons. She had several surgeries in Columbia. However, she said that she was in Canada in 2018, in 2019 and in 2020. She did however travel to Columbia during this period and had to stay longer than planned because of the pandemic.

¹⁷ See passport renewal form at GD2-138.

[36] The Régie de l'assurance maladie du Québec (RAMQ) history of medical visits report confirms that the Appellant had :¹⁸

- frequent medical visits until May 1990;
- one in March 1991;
- one in May 1993;
- one in February 1997;
- three in September and two in October 1999;
- seven visits between September and December 2002;
- seven visits between October and December 2003;
- four visits between January and April and seven visits between September and November 2004;
- seven visits between March and July 2005;
- visits every month from February to November 2006;
- two visits in October and one in December 2007;
- four visits in January and February and six visits between June and November 2008;
- one visit in June 2009;
- 11 visits between August and December 2010;
- visits every month from January and October 2011;
- three visits between June and November 2012;
- 15 visits between April and December 2013;
- five visits between May and October 2014;
- seven visits between May and November 2015;
- 11 visits between May and December 2016; and
- 12 visits between June to November 2017.

[37] The Appellant was asked the reason why there were frequent medical visits until 1990 and then few visits from 1991 to 2003. She said that she remembers having some

¹⁸ See report at GD2-92.

visits after 1991 but could not provide more details. She also said that she was treated in Columbia during this period.

[38] The Appellant had a Canadian passport valid from April 1993 to April 1998, issued in Montreal, Quebec.¹⁹

[39] She then applied for a Canadian passport in 2001 indicating on the application form that her permanent address was in the US in Pennsylvania.²⁰

[40] The Appellant's next Canadian passport valid from December 2007 to December 2012 was issued in Montreal, Quebec.²¹

[41] Her subsequent passport application in 2013 was signed in Bogota on February 18, 2013. She indicated a cellular number from Columbia and mailing address in Columbia but her permanent address in Montreal, Quebec. The passport was valid from February 2013 to February 2018 and was issued in Bogota.²²

[42] A passport renewal form in 2017 indicated that the Appellant's permanent address was in Montreal, Quebec.

[43] The entries and exits document from the Colombian authorities show that between 2005 and 2018, the Appellant spent the following months in Columbia:²³

- three months from December 7, 2004 to March 20, 2005;
- four months from September 16, 2005 to January 11, 2006;
- 10 months from November 18, 2006 to September 17, 2007;
- 14 months from December 2, 2008 to February 5, 2010;
- four months from March 10, 2010 to July 16, 2010;

¹⁹ See passport GD4-10.

²⁰ See GD2-141 and 138.

²¹ See passport at GD2-168 and renewal application at GD2-146

²² See application and passport at GD2-161 and 162.

²³ See report at GD5-1.

- six months from November 18, 2011 to May 24, 2012;
- three months from December 5, 2012 to March 10, 2013;
- five months from December 11, 2013 to May 15, 2014;
- four months from December 3, 2014 to April 18, 2015;
- four months from December 1st, 2015 to April 19, 2016;
- four months from January 6, 2017 to May 2, 2017; and
- five months from November 22, 2017 to April 30, 2018.

[44] The Appellant said that she usually stays at her family's house when in Columbia and her family helps with living expenses. She did not work in Columbia during her stays, nor does she receive a pension from the Columbian government. She does have a bank account.

[45] In Canada, the Appellant said she lived on X, with her parents, and also on X but when her father passed away, she and her mother could not afford the rent and they moved out. She then went to live with her sister on X, where until today she has a bed, a TV and an armoire. She also has access to the kitchen, but space is limited. She does not have a separate room. Her bed is in the basement which is also used for storage. She shares some expenses while in Canada with her sister. She added that since 2004, she has been waiting for a government apartment, she continues to be on the waiting list.²⁴

[46] The Appellant also worked from August 2003 to September 2004, earning \$9900.²⁵ The address on her employment slip was on X in Montreal, Quebec.

[47] The Appellant also filed her income taxes almost every year from 1990 to 2008 with some exceptions.²⁶

²⁴ See letters to Appellant regarding low-rental housing requests in 2004 at GD1-28, in 2005 at GD1-31, in 2006 at GD1-32, in 2008 at GD1-34, in 2011 at GD1-34, in 2014 at GD1-39 and in 2018 at GD1-41.

²⁵ See employment slip at GD1-19.

²⁶ See GD3-6 to 11, GD3-13 to 26, GD3-39 to 37, GD3-40, GD3-49, GD3-54 and GD3-60.

[48] The Appellant opened a bank account on July 24, 2014.²⁷ There are monthly transactions from July 2014 to January 2016.²⁸ She opened another account on November 2, 2017, and there are monthly transactions until February 2018.²⁹

[49] The Appellant also submitted different bill payments over the years for cable TV (2014-2015)³⁰, cellular phone (August 2014 and March to July 2016)³¹, storage (December 2014 and November 2016)³², auto insurance (June 2011)³³ and auto licence renewal (2016).³⁴

[50] Based on the documents and the Appellant's testimony, I cannot determine that the Appellant resided in Canada after May 1990. She lived as she said at times with her sister in the US, at times in Columbia and at times in Canada.

[51] The evidence shows that the Appellant spent time in Canada, but she also was out of the country regularly since 1990. There is not a lot of information on the Appellant's lifestyle in the 1990s.

[52] Between 2000 and 2009, the Appellant was present in Canada, but I cannot determine that she resided in Canada. In 2001, she applied for a Canadian passport indicating on the application form a permanent address in the US, in Pennsylvania.³⁵ Then, she worked in Montreal from August 2003 to September 2004, earning \$9900. However, she was absent from Canada for long periods between November 2006 to February 2010. There is one medical visit in June 2009 but none of the entry and exit documents show that she entered Canada in 2009 or left Columbia in 2009.³⁶

²⁷ See GD2-59.

²⁸ See GD2-61 to 66.

²⁹ See GD2-67.

³⁰ See GD1-48 and 49 and GD3-80 to 83.

³¹ See GD1-51 to 60.

³² See GD1-84 and GD1-62.

³³ See GD1-81.

³⁴ See GD1-111.

³⁵ See GD2-141 and 138.

³⁶ See CBSA report at GD2-124 and Columbian exit and entry report at GD5-1.

[53] From 2010 to 2018, she applied for a Canadian passport in 2013 and the application was signed in Bogota on February 18, 2013. She indicated a cellular number from Columbia and mailing address in Columbia but her permanent address in Montreal, Quebec. The passport was valid from February 2013 to February 2018 and was issued in Bogota.³⁷

[54] The travel documents show that the Appellant continued to travel to Columbia and spent about three to six months every year between 2010 and 2018.

[55] There were some bill payments in Canada between 2014 and 2016. There were also some bank transactions during the same period.

[56] It is clear from the evidence that the Appellant had ties in different countries from 1990. Her ties to Canada were limited and sporadic. Although she had a place to stay with her sister, because of the length of her stays in Canada, the ties to other countries as shown by the evidence since 1990, I determine that the Appellant was not a resident of Canada after May 1990.

The Appellant isn't eligible for the ALWS, OAS pension and GIS

[57] The Appellant isn't eligible for the ALWS, the OAS pension and the GIS because she didn't reside in Canada long enough.

[58] The Appellant didn't reside in Canada for at least 20 full years. This means she isn't eligible for these benefits.

³⁷ See application and passport at GD2-161 and 162.

Conclusion

[59] This means the appeal is dismissed.

Antoinette Cardillo

Member, General Division – Income Security Section