



Citation: *DT v Minister of Employment and Social Development*, 2024 SST 170

Social Security Tribunal of Canada

Appeal Division

Decision

Appellant:
Representative:

D. T.
Marta Lisinski

Respondent:
Representative:

Minister of Employment and Social Development
Érélégna Bernard

and

Appellant:
Representative:

Minister of Employment and Social Development
Érélégna Bernard

Respondent:
Representative:

D. T.
M. L.

Decision under appeal:

General Division decision dated March 8, 2023
(GP-21-1899)

Tribunal member:

Neil Nawaz

Type of hearing:

In person

Hearing date:

January 31, 2024

Hearing participants:

D. T.
M. L.
Ms. Bernard

Decision date:

February 22, 2024

File number:

AD-23-548
AD-23-623

Decision

[1] This is a cross appeal in which both appeals are allowed in part. The parties have already agreed that D. T. (the Claimant) had at least 18 years of Canadian residence. I find that she was also a resident of Canada from November 2009 to April 2015.

Overview

[2] The Claimant was born in Macedonia in December 1948. She came to Canada in 1971 as a permanent resident. Since then, she has split her time between Canada and her native country.

[3] In January 2013, the Claimant applied for an OAS pension. She said that she wanted her pension to start as soon as she qualified.¹

[4] The Minister of Employment and Social Development (Minister) granted the Claimant a partial pension at a rate of 19/40 of the full amount.² The Minister found that the Claimant was a resident of Canada from February 1971 to August 1982 and again from June 2001 to January 2009.

[5] The Minister had previously approved the Claimant for the Allowance for the Survivor (Allowance) as of January 2009. After the Claimant began receiving her OAS pension, the Minister also approved her for the Guaranteed Income Supplement (Supplement). Like the OAS pension, both the Allowance and the Supplement depend on the Claimant's continued residence in Canada.

[6] In March 2017, the Minister received information that the Claimant was no longer a resident. Following an investigation, the Minister determined that the Claimant had not lived in Canada since May 2008. In April 2020, the Minister informed the Claimant that

¹ See Claimant's OAS application dated January 18, 2013, GD2-20. This was the Claimant's second OAS application. Her first application, submitted in December 2008, was refused by the Minister. That application is not part of this appeal.

² See Minister's letter dated November 15, 2013, GD2-29.

she was not entitled to the OAS pension, the Allowance, or the Supplement.³ The Minister also demanded repayment of all the benefits that the Claimant had received over the previous 11 years, an amount totalling more than \$115,000.⁴

[7] The Claimant appealed the Minister's decision to the Social Security Tribunal. The Tribunal's General Division held a hearing by videoconference and allowed the appeal in part. It found that the Claimant resided in Canada from February 1971 to August 1982 and again from June 2001 to September 2008, thereby qualifying her for a partial OAS pension at a rate of 18/40 of the full amount.

[8] Both the Minister and the Claimant have appealed the General Division's decision to the Appeal Division:

- The Minister now concedes that the Claimant had more than 18 years of Canadian residence. However, the Minister notes that the General Division was silent about the Claimant's residence after September 2008 and, by extension, whether she was entitled to the Allowance and the Supplement. The Minister asks the Appeal Division to find that the Claimant lived outside Canada from September 2008 to May 2019.
- The Claimant acknowledges that, between September 2008 and May 2019, she spent much of her time in Macedonia. However, she says that Service Canada gave her incorrect information, leading her to believe she was permitted to continue to collect her Canadian benefits provided she returned to Canada at least once every six months.

[9] Last year, the Appeal Division granted both the Minister and the Claimant permission to appeal. The Appeal Division then joined the appeals after concluding that they raised common questions and that considering them together would not cause injustice to either party.

³ Under 3(2)(b) of the *Old Age Security Act* (OAS Act), OAS applicants who reside outside Canada at the time of their application must prove that they had previously resided in Canada for at least 20 years.

⁴ See Minister's reconsideration decision letter dated June 1, 2021, GD2-353.

Issue

[10] As mentioned, the Minister has revised the position he took at the General Division. There, he argued that the Claimant resided in Canada for a total of 17 years and nine months. Now, he is arguing that the Claimant has 18 years and nine months in Canada, specifically between:

- February 20, 1971 and August 10, 1982
- June 23, 2001 and September 23, 2008

[11] The parties agree that the Claimant resided in Canada during the above periods. They also agree that the Claimant was **not** a resident of Canada between August 10, 1982 and June 23, 2001.

[12] The parties further agree that the Claimant resumed living in Canada on May 15, 2019. I see no reason to question any of these agreed-upon dates. That means the only subject of this appeal is where the Claimant resided in the nearly 11-year period between **September 23, 2008** and **May 15, 2019**.

Analysis

[13] I have applied the law to the available evidence and concluded that the Claimant was a resident of Canada between November 6, 2009 and April 14, 2015. I also found that the Claimant ceased to be a resident as of the latter date until May 15, 2019, when she returned to Canada and resumed living with her daughter on a permanent basis.

Residence depends on many factors

[14] To receive a full OAS pension, a claimant must prove that they resided in Canada for at least 40 years after they turned 18.⁵ To receive a partial OAS pension, a claimant must prove that they resided in Canada for at least ten years after they turned

⁵ See section 3(1)(c) of the OAS Act. The claimant must also have applied for the pension and be at least 65 years old and a Canadian citizen or legal resident of Canada.

18. If the claimant wasn't residing in Canada when their application was approved, they must prove they had 20 years of residence.⁶

[15] OAS Claimants must prove they resided in Canada on a balance of probabilities. That means that they must show that, more likely than not, they resided in Canada during the relevant periods.⁷ Being present in Canada isn't the same as residing in Canada.

[16] When I am deciding whether the Claimant resided in Canada, I have to look at the overall picture, taking into account factors such as:

- where she had property, like furniture, bank accounts, and business interests;
- where she had social ties, such as friends, relatives, and membership in religious groups, clubs, or professional organizations;
- where she had other ties, such as 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; and
- where she intended to live.⁸

⁶ See section 3(2)(b) of the OAS Act.

⁷ See *De Carolis v Canada (Attorney General)*, 2013 FC 366.

⁸ See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76. See also *Valdivia De Bustamante v Canada (Attorney General)*, 2008 FC 1111; and *Duncan v Canada (Attorney General)*, 2013 FC 319.

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

The Claimant resided in Canada for some, but not all, of the period in question

[18] In addition to the periods agreed upon by the parties, I find that the Claimant was a resident of Canada from November 6, 2009 to April 14, 2015. At the same time, I find that she was **not** a resident of Canada from September 23, 2008 to November 6, 2009 and from April 14, 2015 to May 15, 2019.

[19] The Claimant has divided her time between Macedonia and Canada for many years. Much of the available evidence suggests that her ties to each country are equally strong:

- Family — The Claimant has two adult daughters, one living in Macedonia, the other in Canada. Her husband died in 2006 and, since then, she has moved between her daughter's residences, living with them and their families for extended periods.
- Property — The Claimant has never owned real estate in Macedonia. After her husband's death, she purchased a house with her daughter in Oshawa. After a family dispute, she took her name off the title in March 2016.
- Financial — The Claimant has bank accounts in both Canada and Macedonia. She co-signed the mortgage on the Oshawa house, but otherwise did not have any loans, leases, or utility accounts in her name in either country. She receives a Macedonian pension.
- Social — The Claimant has friends in both Macedonia and Canada.
- Taxes — The Claimant files income tax returns in both countries.
- Medical — The Claimant receives most of her medical care while in Canada.

[20] In my view, none of these factors favour one country over the other. For that reason, I think it is appropriate in this case to pay special attention to the length of time in which the Claimant spent in Canada during the relevant period.

[21] Using border security data, the Minister compiled a record of the Claimant's movements during the 11-year period in question. The record shows that the Claimant spent the following periods in Canada and abroad:

Periods abroad	Days	Periods in Canada	Days
September 23, 2008 to March 15, 2009	170	March 15, 2009 to May 9, 2009	55
May 9, 2009 to November 6, 2009	181	November 6, 2009 to July 2, 2010	238
July 2, 2010 to December 19, 2010	170	December 19, 2010 to April 1, 2011	103
April 1, 2011 to September 26, 2011	178	September 26, 2011 to March 31, 2012	187
March 31, 2012 to December 21, 2012	265	December 21, 2012 to March 21, 2013	90
March 21, 2013 to September 16, 2013	179	September 16, 2013 to May 29, 2014	255
May 29, 2014 to September 28, 2014	122	September 28, 2014 to October 23, 2014	25
October 23, 2014 to January 14, 2015	83	January 14, 2015 to April 14, 2015	90
April 14, 2015 to October 7, 2015	176	October 7, 2015 to December 5, 2015	59
December 5, 2015 to April 14, 2016	131	April 14, 2016 to May 3, 2016	17
May 3, 2016 to October 23, 2016	173	October 23, 2016 to November 15, 2016	23
November 15, 2016 to April 26, 2017	162	April 26, 2017 to May 5, 2017	9
May 5, 2017 to October 29, 2017	177	October 29, 2017 to December 1, 2017	33
December 1, 2017 to May 3, 2018	153	May 3, 2018 to June 5, 2018	33
June 5, 2018 to November 26, 2018	175	November 26, 2018 to December 4, 2018	8
December 4, 2018 to May 15, 2019	162		
Total	2,660	Total	1,225

[22] The Claimant agreed that the above information was accurate and reflected her actual periods inside and outside Canada. It clearly shows that, on the whole, the Claimant spent the vast majority of her time in Macedonia over the 11-year period in question.

[23] However, that is not the end of the story. Although there is no minimum requirement for presence in Canada within a calendar year, I find it useful, for the purpose of analysis, to reorganize the above information accordingly:

Year	Days in Canada	Percentage of year
2008 (from September 23)	0	0
2009	110	30
2010	195	53
2011	187	51
2012	101	28
2013	186	51
2014	174	48
2015	149	41

2016	40	11
2017	42	12
2018	41	11
2019 (to May 15)	0	0

[24] Breaking it down this way illustrates that, after being in Macedonia for most of 2009, the Claimant resumed spending the majority of her time in Canada as of November 6 of that year. For the next 5½ years, the Claimant stayed in this country more often than not.⁹ However, after her departure from Canada on April 14, 2015, her visits became more infrequent and progressively shorter — lasting no more than five weeks at a time. As it happens, her increasing absences from Canada coincide with, and can be explained by, a period of tension between the Claimant and her Oshawa-based daughter. That tension evidently persisted until May 2019, at which point the Claimant resumed spending most of her time in Canada.

[25] All else being equal, I find that the Claimant's presence in Canada is a prime indicator of her residence in this country. During the nearly 11 years that are the focus of this appeal, the Claimant was not a resident of Canada at the beginning or the end of the period. However, from November 6, 2009 to April 14, 2015, her time spent in Canada, combined with the ties that she already had here, were sufficient to establish a period of residence.

I have no authority to remedy misleading advice offered by the Minister or his officials

[26] The Claimant has repeatedly insisted that she was misled by the Minister and his officials. She points to a document that she received from Service Canada that said: "If you leave Canada for more than **six months**, you are not eligible to receive the Supplement or the Allowance, and you may not be eligible for the Old Age Security pension."¹⁰ She says that this "six-month rule" was confirmed by Service Canada managers, who assured her she could leave Canada without jeopardizing her OAS

⁹ There is one exception to this pattern. For many years, the Claimant was scrupulous about staying in Canada for at least six months at a time under the mistaken impression that doing so would automatically preserve her Canadian residence. However, on one occasion, she remained in Macedonia for nearly nine months (March 31, 2012 to December 21, 2012) after her sister suffered a health crisis. In my view, this was an extenuating circumstance that did not interrupt the Claimant's residence in Canada.

¹⁰ See information accompanying Service Canada's notice of Supplement approval, GD2-16.

entitlements so long as she made sure her absences lasted less than six months. Based on this information, the Claimant believed that she could continue to receive her benefits wherever she was in the world, provided she was never out of Canada for more than six months in a row.¹¹

[27] Unfortunately, the Claimant was operating under a false impression. The Service Canada document is correct as far as it goes — you will in fact lose entitlement if you leave Canada for more than six months — but it doesn't say that restricting your absences from Canada to less than six months automatically preserves your Canadian residency for the purpose of qualifying for OAS benefits.¹² Leaving Canada for an extended visit abroad doesn't necessarily imperil OAS entitlement, but ceasing to be a resident of Canada does.

[28] I can't be sure what the Service Canada managers actually told the Claimant. However, even if they provided misleading information to the Claimant, there is nothing I can do about it. As a member of the Social Security Tribunal, I can't forgive an overpayment, even if I believe that Service Canada gave the recipient of that overpayment bad advice.

[29] This Tribunal is created by legislation and, as such, has only the powers granted to it by its governing statute. According to the *Old Age Security Act*, the Minister may take remedial action if he is satisfied that an applicant was denied a benefit because of erroneous advice or administrative error.¹³ Use of the words "may" and "satisfied" in this provision suggests that such a decision is purely discretionary — the Minister doesn't have to fix his mistake if he doesn't think it is warranted. Case law says that administrative tribunals, such as this one, can't force the Minister to revisit or reverse a

¹¹ For example, see Claimant's notice of appeal to the General Division dated September 8, 2021 (GD1) and her application for leave to appeal to the Appeal Division dated May 22, 2023 (AD1).

¹² See sections 9(2), 9(3), and 11(7) of the OAS Act. They say that pensioners will stop receiving OAS-Supplement payments six months after they leaves Canada; however, they don't say that limiting your absences from Canada to six months or less will preserve your entitlement to these benefits.

¹³ See section 32 of the OAS Act.

decision that he has taken voluntarily.¹⁴ In this case, since the Minister has never admitted to an error, there is nothing I can do to make him correct it.

Conclusion

[30] I have decided that the Claimant resided in Canada during the following periods:

- February 20, 1971 to August 10, 1982 or 11 years and 171 days
- June 23, 2001 to September 23, 2008 or seven years and 92 days
- November 6, 2009 to December 31, 2013 or four years and 55 days¹⁵

[31] This gives the Claimant a total of 22 years and 318 days of Canadian residence, which entitles her to a partial OAS pension at 22/40 of the full amount.¹⁶ The Claimant will be entitled to the Supplement and Allowance for those periods of Canadian residence in which she applied for those benefits, less those periods during which she was outside the country for six months or more.

[32] Both the Claimant's and the Minister's appeals are allowed in part.



Member, Appeal Division

¹⁴ See *Canada (Minister of Human Resources Development) v Tucker*, 2003 FCA 278.

¹⁵ The Claimant's years of residence are calculated up to and including the month in which she became eligible for the OAS pension — in this case, the month she turned 65 years of age. See section 8 of the OAS Act.

¹⁶ Under the section 3(4) of the OAS Act, entitlement to the OAS pension is based on the number of years of Canadian residence — rounded down to the nearest whole number.