[TRANSLATION]

Citation: *KK v Minister of Employment and Social Development*, 2025 SST 640

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | K. K. |
| **Respondent:** | Minister of Employment and Social Development |
| **Representative:** | Marcus Dirnberger |

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| **Decision under appeal:** | General Division decision dated December 13, 2024 (GP-24-900) |

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| **Tribunal member:** | Pierre Lafontaine |
| **Type of hearing:** | Teleconference |
| **Hearing date:** | May 15, 2025 |
| **Hearing participants:** | Appellant<br>Respondent's representative |
| **Decision date:** | June 20, 2025 |
| **File number:** | AD-24-844 |

## Decision

[1] The appeal is allowed in part. But, the Appellant, K. K., isn't eligible for an Old Age Security (OAS) pension. He needs to have resided in Canada for at least 10 years to be eligible for an OAS pension.

[2] As of May 15, 2025, the Appellant isn't eligible for an OAS pension. But as of May 15, 2025, he had resided in Canada for 7 years and 352 days.

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

## Overview

[4] The Appellant was born in Egypt on November 18, 1947. Since an initial OAS pension application was submitted on February 14, 2012, the file has been the subject of several decisions, both by the Minister of Employment and Social Development (Minister) and the Social Security Tribunal (SST).

[5] The SST issued a decision on February 16, 2017. That decision dismissed the Appellant's appeal but recognized a period of Canadian residence between December 8, 1989, and January 5, 1996—a period of 6 years and 29 days. The Appellant didn't apply for permission to appeal or an extension of time.

[6] The Appellant submitted a second OAS pension application on January 28, 2019. The Minister refused his application because the Appellant didn't have any other periods of residence up to October 29, 2019, both in an initial decision and a reconsideration decision. That reconsideration decision wasn't appealed to the SST.

[7] The Appellant submitted a third OAS pension application on October 30, 2023. The Minister also refused that application, both in an initial decision and a reconsideration decision. On May 5, 2024, the Appellant appealed that decision before the SST's General Division.

[8] On December 13, 2024, the appeal was allowed in part. The SST's General Division found that the Appellant wasn't a resident of Canada between 2020 and June 2023, because he was absent from the country during that period. The General Division found that the Appellant had resided in Canada more recently, between June 26, 2023, and the date of the decision, December 3, 2024. This added 1 year and 161 days of residence, for a total of 7 years and 190 days. So, he didn't have the required 10 years of residence and wasn't eligible for an OAS pension.

[9] On December 14, 2024, the Appellant applied for permission to appeal to the SST's Appeal Division. The Appeal Division granted permission to appeal on January 7, 2025.

[10] The Appellant says that sometime between 2000 and today, he must have earned the 3.5 years he is missing to reach the minimum 10 years required for a partial OAS pension.

[11] The Minister, for its part, says that since the SST decision of February 16, 2017, the Appellant has never been a Canadian resident and has only been present in Canada. The Minister also says that the only period under appeal starts on October 29, 2019, and that I should not consider any period before that date.

## What the Appellant must prove

[12] To receive a full OAS pension, the Appellant has to prove he resided in Canada for at least 40 years after he turned 18. This rule has some exceptions. But the exceptions don't apply to the Appellant.

[13] 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) 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.

[14] To receive a partial OAS pension, the Appellant has to prove he resided in Canada for at least 10 years after he turned 18. But, if the Appellant didn't reside in

Canada the day before his application might have been approved, he has to prove he already has at least 20 years of residence.

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

## Reasons for my decision

[16] I find that the Appellant isn't eligible for an OAS pension. He didn't reside in Canada for at least 10 years after he turned 18.

[17] I considered the Appellant's eligibility from October 29, 2019, up to the hearing date of May 15, 2025. I will first explain why I considered only this period. I will then set out the test that I have to apply.

### Period relevant to this appeal

[18] The Appellant says that sometime between 2000 and today, he must have earned the 3.5 years he is missing to reach the minimum 10 years required for a partial OAS pension.

[19] The Minister pointed out to me in its written submissions that the only relevant period in this appeal started on October 29, 2019.

[20] First, I remember that the SST issued a decision on February 16, 2017. That decision is final, and the Appellant can't dispute a period that the Tribunal has already considered.

[21] Second, after the Appellant submitted a new OAS pension application on January 28, 2019, the Minister refused his application, both in an initial decision and a reconsideration decision. The initial decision is dated October 29, 2019, and covers the

period between February 20, 2017, and October 29, 2019.[1] The reconsideration decision confirmed the initial decision and was never appealed to the SST.

[22] At the hearing, I raised the issue of whether I could consider the period between February 20, 2017, and October 29, 2019, since the decision had been made by the Minister and not the SST.[2]

[23] The Minister argued in its written submissions that the issue decided at the time, and that the Appellant is now trying to dispute again, was whether he was a resident of Canada. It is the same factual and legal issue. The decisions that found he wasn't a resident of Canada were final, and the parties—the Appellant and the Minister—were the same. The Minister argued that the three estoppel criteria are clearly met.[3]

[24] The three conditions for applying issue estoppel were reiterated in *Danyluk*:

> (1) The same issue has already been decided.
>
> (2) The judicial decision was final.
>
> (3) The parties to the judicial decision or their privies were the same as the parties to the proceedings where the [estoppel] is raised or their privies.[4]

[25] In *MacDonald*, the Federal Court of Appeal decided that issue estoppel applied to decisions of the Minister, the Review Tribunals, and the Pension Appeals Board (now the General Division and the Appeal Division) as part of the *Canada Pension Plan*,

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[1] See GD2-323.
[2] Permission to appeal to the Appeal Division was granted because the General Division didn't cite any legal rules or legislative provisions to exclude the years between the General Division decision (as part of the first application) and the Minister's decision (as part of the second application).
[3] See AD-15-10.
[4] See *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 (CanLII), [2001] 2 SCR 460.

despite any legislative provisions to the contrary.[5] *MacDonald* was later followed by the Federal Court of Appeal in *Fleming* and the Federal Court in *Vuong*.[6]

[26] I agree with the Minister's position. I find that the three conditions for applying issue estoppel are met in this case.

[27] Should I use my discretion and refuse to apply estoppel?

[28] In using this discretion, I have to ask myself the following question: Is there, in this case, a circumstance where the normal application of the doctrine would cause an injustice?

[29] I find that there are no circumstances that could cause an injustice if I apply the res judicata rule, for the following reasons:

- The purpose of the law is the same as in the previous appeal.
- This isn't a situation where a previous decision was, in some way, different in its scope, so that it would now be logical to look at the same facts differently.
- The Appellant had every opportunity to present his case before the Minister.
- The Appellant had the opportunity to appeal the October 29, 2019, decision to the SST, like he had done before, but he chose not to.
- This isn't a situation where the previous decision was made by a decision maker with less expertise or specialization. The wording of the law that gives authority to make the decision gives the Minister and the Tribunal the authority to decide whether the Appellant was a resident at the time of the application and decision.

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[5] *Canada (Minister of Human Resources Development) v MacDonald*, 2002 FCA 48.
[6] *Canada (Minister of Human Resources Development) v Fleming*, 2004 FCA 288; and *Vuong v Canada (Attorney General)*, 2007 FC 699. The *Old Age Security Act* allows you to appeal the Minister's decision before the Social Security Tribunal.

- There is no evidence that the process leading to the Minister's decision of October 29, 2019, had flaws or breaches that would cause an injustice.

[30] What the Appellant is really asking me to do is to reconsider the period between February 16, 2017, and October 29, 2019, because he disagrees with the Minister's decision for that period. But the res judicata principle prevents holding a new hearing or a new proceeding in issues that have already been decided.[7]

[31] I find that I can't consider the period between February 20, 2017, and October 29, 2019, because the Minister has already decided that period of residence in Canada and that decision was never appealed to the SST.

# Analysis

## The test for residence

[32] 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.

[33] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.[8]

[34] A person is **present** in Canada when they are physically present in any part of Canada.[9]

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[7] Even if I were to find that the res judicata principle doesn't apply, this period could not be considered because it goes against the principle that doesn't allow collateral attacks and the finality of an administrative decision. Allowing this would affect the integrity of the scheme. So, it would be unacceptable to allow the Minister's decision, that was never appealed, to be reconsidered as part of a later pension application. See *Canada (Attorney General) v Pentney*, 2008 FC 96.
[8] See section 21(1)(a) of the *Old Age Security Regulations* (Regulations).
[9] See section 21(1)(b) of the Regulations.

[35] When I am deciding whether the Appellant resided in Canada, I have to look at the overall picture and factors such as:[10]

- 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

[36] This isn't a complete list. Other factors may be important to consider. I have to look at **all** the Appellant's circumstances.[11]

# Relevant periods of residence

## Period between October 2019 and June 2023

[37] The Appellant recognizes that he left Canada in 2020 to go to Egypt and didn't return until June 26, 2023. He explained that he was absent from Canada because of the COVID-19 pandemic.[12]

[38] The medical services record from the Régie de l'assurance-maladie du Québec [Quebec's health insurance board] (RAMQ) shows no services between November 8,

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[10] See *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76. See also *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.
[11] See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.
[12] See AD-8-1, AD-17-1, and AD-19-1. Before the General Division, the Appellant also said that he left Canada after October 29, 2019, and didn't return until June 26, 2023.

2019, and June 29, 2023. RAMQ's record of insured pharmacy services shows a slightly shorter gap between June 4, 2020, and July 15, 2023.

[39] Because the Appellant was absent from Canada for about three years between 2020 and 2023, received no services during that period, and was reluctant to talk about that period before me, I can't find that he resided in Canada for the period between October 29, 2019, and June 25, 2023.

## Period between June 2023 and today

[40] I find that, on a balance of probabilities, the evidence supports Canadian residence as of June 26, 2023, the day he returned to Canada.

[41] First, the documentary evidence provided supports this finding: driver's licence, health insurance card, and renewed Canadian passport; documented visits to the pharmacy and to the doctor; proof of the maintenance, use, and ownership of a car; and his children and grandchildren who live in Canada, as well as friends.

[42] Second, this evidence is supplemented by testimony from the Appellant, who said that he wants to stay with his family. There haven't been any trips to Egypt since he returned to Canada on June 26, 2023. He said that he is now 77 years old and sick. His health no longer lets him move or exert himself. On January 23, 2025, he had to have his health checked at the Sacré-Coeur Hospital in the nuclear medicine department. He was diagnosed with prostate cancer. He is now waiting for treatment.

[43] So, I find that the Appellant has been a resident of Canada since June 26, 2023. Up to May 15, 2025, that comes to 688 days, or 1 year and 323 days. After adding the 6 years and 29 days previously established by the SST, the Appellant now has 7 years and 352 days of Canadian residence.

[44] The Appellant didn't reside in Canada for at least 10 full years. This means he isn't eligible for an OAS pension.

## Conclusion

[45] The appeal is allowed in part.

[46] As of May 15, 2025, the Appellant isn't eligible for an OAS pension. But as of May 15, 2025, he had resided in Canada for 7 years and 352 days.

[47] The Appellant will have to continue to **reside** in Canada until June 2027 to have enough residence to qualify for a pension. The Appeal Division can't decide now whether that will happen in the future.

Pierre Lafontaine
Member, Appeal Division