



Citation: *DK v Minister of Employment and Social Development*, 2023 SST 147

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant: D. K.
Representative: David McWhinnie
Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated April 21, 2021 (issued by
Service Canada)

Tribunal member: Wayne van der Meide
Type of hearing: Videoconference
Hearing date: November 28, 2022
Hearing participants: Appellant
Appellant's representative
Appellant's witness
Respondent's representative
Decision date: February 17, 2023
File number: GP-21-1574

Decision

[1] The appeal is allowed in part.

[2] The Appellant, D. K., is eligible for a partial Old Age Security (OAS) pension of 15/40. Payments start as of February 2011.

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

Overview

[4] The Appellant was born in Palestine. She first arrived in Canada in 1990. She came with her family. Since then, she has spent time in and outside of Canada.

[5] The Appellant applied for an OAS pension and the Guaranteed Income Supplement (GIS) in May 2010.¹ She said she wanted her pension to start as soon as she qualified.

[6] The Minister of Employment and Social Development (Minister) granted the Appellant a partial pension of 20/40 and GIS beginning February 2011.²

[7] In November 2019, the Minister said that the Appellant never resided in Canada and did not qualify for either benefit. The Minister said it overpaid the Appellant by \$141,464.17 and asked the Appellant to return this overpayment.³

[8] The Appellant asked the Minister to reconsider its decision.⁴ The Minister reconsidered and upheld its decision.⁵

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

¹ See GD2-6 to GD2-9.

² The Minister of Employment and Social Development (Minister) manages the Old Age Security programs for the Government of Canada. See GD2-21 to GD2-24.

³ See GD2-26 and GD2-27.

⁴ See GD2-32 and GD2-25 to GD2-41.

⁵ See GD2-3 to GD2-5.

[10] The Appellant says that she has resided in Canada since she first arrived.

[11] The Minister says that the Appellant has only ever been present, but never resident in Canada since she first arrived.

What the Appellant must prove

[12] To receive a **full** OAS pension, the Appellant must prove she resided in Canada for at least 40 years after she turned 18.⁶ This rule has some exceptions. But the exceptions don't apply to the Appellant.⁷

[13] 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.

[14] To receive a partial OAS pension, the Appellant must prove 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 was approved, she must prove she already has 20 years of residence.⁸

Matters I must consider first

I accepted documents sent in after the hearing

[15] In her pre-hearing submissions, the Appellant focused on arguments about the fairness of the Minister's decision to investigate her and the process of its investigation. In these circumstances, I felt it was important to give the Appellant an opportunity to submit additional evidence and make submissions about when she was present and

⁶ 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.

⁷ See section 3(1)(b) of the OAS Act.

⁸ See section 3(2) of the OAS Act.

resident in Canada. Therefore, I gave the Appellant a chance to do this.⁹ The Minister did not object.

[16] I explained to the Appellant that if she wanted to provide post-hearing documents, my decision would be delayed. The Appellant provided post-hearing documents.¹⁰ The Minister made submissions responding to these documents.¹¹ I have considered both sets of documents.

Reasons for my decision

The Minister's decision to investigate was exercised judicially

[17] One of the reasons the Minister decided to investigate the Appellant was because she was listed as a client of a man convicted of fraudulently assisting people to get government benefits. The Appellant says the Minister's reason for investigating her shows that the Minister was biased.

[18] The Minister can investigate someone's eligibility before **or after** the approval of an application.¹²

[19] The Minister's decision to investigate is a discretionary decision. The Minister's discretion must be exercised judicially.¹³

[20] This means that the decision maker must not have:

- acted in bad faith
- acted for an improper purpose or motive
- taken into account an irrelevant factor
- ignored a relevant factor
- acted in a discriminatory manner¹⁴

⁹ See GD9 and See GD11.

¹⁰ See GD13.

¹¹ See GD15.

¹² See section 23(1) and (2) of the *Old Age Security Regulations* (OAS Regulations). See also *Canada (Attorney General) v. Burke*, 2022 FCA 44.

¹³ See *Canada (Attorney General) v. Uppal*, 2008 FCA 388.

¹⁴ See *Canada (Attorney General) v. Purcell*, [1996] 1 FC 644.

[21] I agree with the Appellant that one of the reasons the Minister began its investigation was because of her association with a man convicted of fraud.¹⁵ However, this decision was made judicially. Concern that the Appellant may have had the assistance of a man convicted of helping people to get government benefits fraudulently is a proper purpose, does not indicate bad faith and is a relevant factor for deciding to investigate. I also see nothing discriminatory about this decision.

I cannot decide whether the Minister's investigation was fair or unfair

[22] The Appellant argues that the Minister's investigative process was unfair. By extension, she argues that its decision-making process was unfair. The Appellant says it was unfair because she did not know the case to be met.

[23] I do not have the authority to decide whether the Minister's processes were fair.¹⁶

[24] However, I will say that it is the Appellant who must prove she resided in Canada. She must prove this on a balance of probabilities. This means that she must show that it is more likely than not she resided in Canada during the relevant periods.¹⁷

The Appellant is credible

[25] The Minister began its investigation because it had questions about the Appellant's credibility. So it is important to make a finding on this issue.

[26] I find that the Appellant is credible. I also find that she **did not** fabricate or establish connections to Canada for the purpose of securing benefits.

[27] The Minister said that it started the investigation because of a discrepancy regarding the Appellant's marital status.¹⁸ Specifically, the Appellant was separated from her husband when she reported that she was married in income tax returns.

¹⁵ See GD2-494 to GD2-497.

¹⁶ See *Canada (Attorney General) v Purcell*, [1996] 1 FC 644.

¹⁷ See *De Carolis v Canada (Attorney General)*, 2013 FC 366.

¹⁸ See GD2-280.

[28] The Appellant says she says did this because she never got divorced and to do so would not be good for her family.¹⁹ I find that she did not intend to mislead anyone about her marital status. I will say more about this later.

[29] The Minister also investigated the Appellant because she was on a client list of a man convicted of fraudulently helping people to secure benefits.²⁰ Since she found out, the Appellant has consistently said that this man only assisted her to file income taxes.²¹ I believe her.

[30] There is no evidence that the Appellant attempted to fabricate evidence.

When the Appellant resided in Canada

[31] I find that the Appellant is eligible for a partial OAS pension of 15/40.

[32] The Appellant has resided in Canada for 26 years and 140 days.

[33] I considered the Appellant's eligibility from December 8, 1990, up to and including November 28, 2022. I chose the first date because that is the date the Appellant first arrived in Canada. I chose the second date because that was the date of the hearing and I have enough evidence to make a finding up to that date.

[34] Here are the reasons for my decision.

The test for residence

[35] 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 must use these definitions in making my decision.

[36] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.²²

¹⁹ See GD2-253.

²⁰ See GD2-494.

²¹ See GD3.

²² See section 21(1)(a) of the OAS Regulations.

[37] A person is **present** in Canada when they are physically present in any part of Canada.²³

[38] When I am deciding whether the Appellant resided in Canada, I must look at the overall picture and factors such as:²⁴

- 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

[39] This isn't a complete list. Other factors may be important to consider. I must look at **all** the Appellant's circumstances.²⁵

When the Appellant resided in Canada

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

- December 8, 1990, to December 31, 1996
- July 5, 2002, to November 28, 2022

[41] The Appellant **didn't reside in Canada** from January 1, 1997, to July 4, 2002.

²³ See section 21(1)(b) of the OAS Regulations.

²⁴ 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.

²⁵ See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.

[42] I will now discuss each period, starting with the earliest one. For each period, I will explain why I have decided that the Appellant did or didn't reside in Canada.

– **The Appellant resided in Canada from December 8, 1990, to December 31, 1996**

[43] The Appellant resided in Canada from December 8, 1990, to December 31, 1996.

[44] The Minister says that the Appellant never resided in Canada because:²⁶

- she “had regular occurrences of frequent long-term absences”
- she did not have a rental agreement on a mortgage in her name; the address she gave where she lived was owned by her husband and then her daughter
- she continued to file income tax as “married” for many years after her separation from her husband
- she did not provide “proof of residency” for much of the time she claims to have been a resident of Canada
- when she was present in Canada, she was only present and not resident

[45] As I have said earlier, the Appellant was not being deceitful about her marital status. Since she was not actually divorced, it was important and accurate **to her** to say that she was married. For the Appellant, this was the culturally appropriate way to report on her relationship.

[46] I do not agree with the Minister that the Appellant was frequently absent from Canada for long periods during this period. The Appellant said at the hearing that between 1990 and 1996 she only went to the United Arab Emirates (UAE) for a couple weeks about twice a year to visit family and friends. I believe her.

[47] Although the Appellant has never owned or rented a home in her name, her husband bought an apartment in Montreal for their family. I see nothing suspicious about his decision to transfer that property to his daughter. Given that he separated

²⁶ See GD3 and GD15.

from his wife approximately one year after the transfer, it makes sense. Even though the apartment was not in the Appellant's name, it was a family home and she lived there.

[48] Shortly after moving to Canada with her husband and all their four children and during this period:

- the Appellant qualified for provincial health care²⁷
- she filed Canadian income taxes²⁸
- she opened Canadian bank accounts both jointly and separately from her husband and got credit cards²⁹
- her husband bought Canadian short-term investments in her name³⁰
- her husband also started a business in Canada³¹
- all four of her children were enrolled in local high schools, university, and daycare³²
- she purchased a car and got a driver's license and insurance³³
- she applied for and got a Canadian passport³⁴
- she applied for and got a social insurance number³⁵
- she went to doctor's appointments and filled prescriptions³⁶

[49] The Appellant has never worked in Canada or anywhere else after she first arrived in Canada. She raised her children.

²⁷ See GD2-237.

²⁸ See GD2-119 to GD2-144 and GD2-535 to GD2-633.

²⁹ See GD1-63, GD2-172 to GD2-174, and GD2-1047.

³⁰ See GD2-1041 to GD2-1046 and GD2-1053.

³¹ The Appellant said this at the hearing.

³² See GD1-49 to GD1-51, GD1-53, GD1-55, GD1-56, GD1-58, GD1-59, GD1-61, GD2-91 to GD2-93, GD2-98, GD2-103, GD2-105, GD2-108, GD2-111 to GD2-115, and GD13-24 to GD13-26.

³³ See GD1-28, GD2-58, GD2-61, GD2-66, GD2-69, GD1-72 to GD1-74, GD2-213 to GD2-215, GD2-219, GD2-238, GD2-347, GD2-354, GD2-362, GD2-363, and GD2-368.

³⁴ See GD2-192 to GD2-195.

³⁵ See GD2-475.

³⁶ See GD2-166 to GD2-170, GD2-378 to GD2-380, and GD2-391 to GD2-398.

[50] When I look at this period, what I see is a family that moved to and lived in Canada. The Appellant's many connections to Canada show that she made her home and ordinarily lived in Canada during this period.

[51]

– **The Appellant didn't reside in Canada from January 1, 1997, to July 4, 2002**

[52] The Appellant didn't reside in Canada from January 1, 1997, to July 4, 2002. The Appellant's life was very different in this period than it was in the period before.

[53] She said that starting in 1996 her husband began going more frequently to the UAE and returning less and less to Canada. To try to save the relationship she would go to the UAE for between two to five months at a time between 1997 and when she ended the relationship in early 2000.

[54] At the hearing, the Appellant's youngest child said she lived with her parents and went to school in the UAE during this period. At that time, she was between about 7 and 14 years old. In a letter, she added that her sister, the Appellant's second youngest child, also "resided" in the UAE.³⁷

[55] When this period started, the Appellant's two older children were approximately 21 and 24. They stayed in Montreal and attended school. At the hearing, the Appellant said that she would come back to Canada to see them.

[56] Unlike the earlier period, the Appellant was ineligible for provincial health insurance for most of this period. As part of its investigation, Service Canada asked the "Régie de l'assurance maladie du Québec" for information about the Appellant.³⁸ The agency replied that she was inadmissible for provincial health insurance between December 31, 1997, to July 24, 2002.

[57] I asked the Appellant about this document. She said she did not understand what it meant and that she was always eligible for provincial health coverage. I find that she

³⁷ See GD13-21 to GD13-23.

³⁸ This is the government agency that manages provincial health insurance in Quebec.

is mistaken. Unlike the period before and after this one, there is not a single record of a claim by the Appellant for provincial health insurance.

[58] What I see when I look at this period is that the Appellant and her two youngest daughters resided in the UAE. Although this may not have been what the Appellant intended when she first moved to Canada, or believes to this day, that is what the evidence indicates. She chose to try to save her relationship with her husband. To do that, she lived in the UAE with him and only visited Canada to see her two oldest daughters.

[59] I believe the Appellant ended her relationship with her husband in early 2000 as she said at the hearing. However, this was not the only reason she went to the UAE during this period. She also said that beginning in 1996 she went to help take care of her sick mother.

[60] Considering that, and that her two youngest daughters were in the UAE until 2002, I find that she spent most of her time and resided in the UAE until 2002, not 2000.

– **The Appellant resided in Canada from July 5, 2002, to November 28, 2022**

[61] The Appellant resided in Canada from July 5, 2002, to November 28, 2022.

[62] The first entry by the Appellant into Canada after the start of this period is July 5, 2002. In addition to what I said earlier, this is why I have chosen that date as the start of this period.

[63] The Appellant became re-eligible for provincial health insurance on October 1, 2002. It is likely that the Appellant needed to re-establish that she lived in Canada for a period before re-enrollment. I believe this is why she was not eligible beginning in July 2002.

[64] The Appellant provided extensive evidence of her connections to Canada and her travels during this period, including:

- bank and visa statements showing online and in-person purchases in and outside of Canada³⁹
- claims on her provincial health insurance for medical services⁴⁰
- passport stamps of her entries and exits to other countries⁴¹
- Canada Border Services Agency records of her entries to Canada⁴²
- airline and train tickets and receipts⁴³
- letters from friends and family members speaking about their relationships with the Appellant⁴⁴

[65] The Appellant has been very forthcoming in providing evidence about her trips outside of Canada, even though this **could** indicate that she wasn't a resident of Canada. In addition to what I have said above, this too supports her credibility.

[66] I have examined and considered all the evidence. The Appellant travelled often and to many countries. As someone from a family that had been displaced from Palestine, her family and friends are all over the world. Many members of her family cannot come to Canada easily because they have passports that require visitors' visas. The Appellant must go to them if she wants to see them.

[67] Some years ago, the Appellant's daughter sold the family apartment in Montreal. The Appellant now lives with her youngest daughter in British Columbia. She also has another daughter who also lives in British Columbia.

[68] However, the evidence also indicates that she spent most of her time in Canada and was factually anchored to Canada. She owned a car, had a driver's license, and paid for car insurance. She had bank accounts and credit cards in Canada and used

³⁹ See GD2-853 to GD2-1018 and GD2-1055 to GD2-1231.

⁴⁰ See GD2-166 to GD2-170, GD2-378 to GD2-380, and GD2-391 to GD2-398.

⁴¹ See GD2-200 to GD2-206 and GD2-246 to GD2-249.

⁴² See GD2-177, GD2-224, GD2-390, and GD2-391.

⁴³ See GD2-328 to GD2-339.

⁴⁴ See GD13.

them regularly in Canada, and occasionally abroad. She regularly went to medical visits. She also took care of her youngest daughter, who was attending school in Montreal for some of this period.

[69] Although the Appellant's trips or absences from Canada were frequent, particularly in 2010 and 2016, they were not for long periods of time. None of these trips was for more than one year. I find that most of her trips were for two to three months or less.

[70] When I look at all the evidence about this period, the picture I see is of someone who lived and resided in Canada but travelled extensively.

The Appellant qualified for a partial OAS pension in January 2011

[71] The Appellant qualified for a partial OAS pension of 15/40 on January 1, 2011.

[72] The Appellant met the minimum residence requirement of 10 years before that date. But she still had to meet the other requirements for an OAS pension.⁴⁵ She met those requirements on the following dates:

- She met the age requirement (65) on January 1, 2011.
- She applied for the pension on May 31, 2010.

[73] The latest of these dates is January 1, 2011. That is when the Appellant qualified for a partial OAS pension. The amount of her pension is based on how many years she had resided in Canada by that date.

[74] As of January 1, 2011, the Appellant had resided in Canada for 15 years after she turned 18:

- From December 8, 1990, to December 31, 1996, she resided in Canada for 6 years and 24 days.

⁴⁵ Sections 3 to 5 of the OAS Act set out the requirements. There is no dispute that the Appellant is a Canadian citizen or legal resident of Canada. These requirements are in section 4 of the OAS Act and section 22(1) of the OAS Regulations.

- From July 5, 2002, to January 1, 2011, she resided in Canada for 9 years, 6 months, and 5 days.

When payments start

[75] The Appellant's pension starts in February 2011.

[76] OAS pension payments start the first month after the pension is approved.⁴⁶ The Appellant's pension was approved in January 2011.⁴⁷

Conclusion

[77] The Appellant is eligible for a partial OAS pension of 15/40.

[78] This means the appeal is allowed in part.

Wayne van der Meide
Member, General Division – Income Security Section

⁴⁶ See section 8(1) of the OAS Act.

⁴⁷ The law sets out several possible dates for approval of an OAS pension. The approval takes place on the latest of those dates. In the Appellant's case, the latest date was in January 2011. See section 8 of the OAS Act and section 5 of the OAS Regulations.