

**Citation: *M. P. v. Minister of Employment and Social Development*, 2015 SSTGDIS 127**

**Date: November 16, 2015**

**File number: GT-125286**

**GENERAL DIVISION - Income Security Section**

**Between:**

**M. P.**

**Appellant**

**and**

**Minister of Employment and Social Development  
(formerly Minister of Human Resources and Skills Development)**

**Respondent**

**Decision by: Virginia Saunders, Member, General Division - Income Security Section**

**Heard in person on October 16, 2015, Surrey, British Columbia**

## **REASONS AND DECISION**

### **PERSONS IN ATTENDANCE**

M. P. Appellant

C. P. Witness

### **INTRODUCTION**

[1] The Appellant began receiving a partial *Old Age Security Act* (OAS Act) pension of 10/40ths and Guaranteed Income Supplement (GIS) effective August 2010. In a decision dated June 13, 2011, the Respondent determined that the Appellant did not establish residence in Canada until September 30, 2009, and that as a result he would not be eligible for OAS benefits until October 2019. That decision was maintained on reconsideration. The Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT) and this appeal was transferred to the Tribunal in April 2013.

[2] The appeal was heard in person for the following reasons:

- a) The form of hearing provides for the accommodations required by the parties or participants; and
- b) The form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

### **PRELIMINARY MATTERS**

[3] The appeal was originally scheduled to be heard in X, B.C. on July 21, 2015. It was adjourned at the request of the Appellant because his health prevented him from travelling from India to attend. The hearing was then scheduled to be heard in X on September 22, 2015. It was adjourned because the hearing room was unavailable due to flooding. The hearing took place in Surrey, B.C. on October 16, 2015.

[4] The Notice of Hearing advised the parties that they had until May 20, 2015, to file new documents or submissions (the Filing Period), and until June 19, 2015, to respond to documents filed during the Filing Period (the Response Period). No documents were filed during the Filing Period. The Respondent filed its submission on June 10, 2015. On October 9, 2015, the Appellant filed a letter from M. P. A. of the School of Engineering Science at Simon Fraser University, dated October 6, 2015. The document was sent to the Respondent on October 16, 2015.

[5] The Respondent made no submissions as to the admissibility or content of this document. The Tribunal decided to admit the document. It was not contentious, and simply confirmed the Appellant's oral testimony.

## **THE LAW**

[6] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Tribunal.

[7] An OAS pension is payable to a person who has reached 65 years of age, and who meets the residence requirements set out in subsections 3(1) and (2) of the OAS Act. The GIS is payable to an OAS recipient who is a resident of Canada and who qualifies based on income.

[8] Subsection 3(2) of the OAS Act sets out the criteria to be met for payment of a partial OAS pension:

(2) Subject to this Act and the regulations, a partial monthly pension may be paid for any month in a payment quarter to every person who is not eligible for a full monthly pension under subsection (1) and

(a) has attained sixty-five years of age; and

(b) has resided in Canada after attaining eighteen years of age and prior to the day on which that person's application is approved for an aggregate period of at least ten years but less than forty years and, where that aggregate period is less than twenty

years, was resident in Canada on the day preceding the day on which that person's application is approved.

[9] Subsection 21(1) of the *Old Age Security Regulations* (OAS Regulations) explains the difference between residence and presence for OAS purposes:

21. (1) For the purposes of the Act and these Regulations,

(a) a person resides in Canada if he makes his home and ordinarily lives in any part of Canada; and

(b) a person is present in Canada when he is physically present in any part of Canada.

[10] Section 21 then sets out specific circumstances in which a person may or may not be considered or deemed to be a resident. The provisions that are relevant to this appeal are:

a) Subsection 21(2.1) states:

(2.1) Notwithstanding subsection (1), a person who is not a Canadian citizen or a permanent resident of Canada does not reside in Canada for the purposes of the Act and these Regulations during any period in which he is present in Canada

(a) for the purpose of carrying out his duties as a properly accredited diplomat, consular officer, representative or official of

(i) a country other than Canada,

(ii) the United Nations or any of its agencies, or

(iii) any intergovernmental organization in which Canada participates;

(b) as a member of a military force present in Canada for training or for any other purpose in connection with the defence or security interests of Canada or under any treaty or agreement between Canada and another country;

(c) as the spouse, common-law partner or dependant of a person referred to in paragraph (a) or (b) or the dependant of that person's spouse or common-law partner; or

(d) as a member of the staff of or as a person otherwise accompanying a person referred to in paragraph (a), (b) or (c).

b) Subsection 21(4) states:

(4) Any interval of absence from Canada of a person resident in Canada that is

(a) of a temporary nature and does not exceed one year,

(b) for the purpose of attending a school or university, or

(c) specified in subsection (5) shall be deemed not to have interrupted that person's residence or presence in Canada.

[11] None of the circumstances specified in subsection 21(5) apply to this appeal.

[12] Subsections 9(1) and (3) of the OAS Act relate to payment of the OAS pension while a person is absent from or ceases to reside in Canada:

9. (1) Where a pensioner, having left Canada either before or after becoming a pensioner, has remained outside Canada after becoming a pensioner for six consecutive months, exclusive of the month in which the pensioner left Canada, payment of the pension for any period the pensioner continues to be absent from Canada after those six months shall be suspended, but payment may be resumed with the month in which the pensioner returns to Canada.

...

(3) Where a pensioner ceases to reside in Canada, whether before or after becoming a pensioner, payment of the pension shall be suspended six months after the end of the month in which the pensioner ceased to reside in Canada, but payment may be resumed with the month in which the pensioner resumes residence in Canada.

[13] Paragraphs 11(7)(b), (c) and (d)) of the OAS Act deal with payment of the GIS when a person is absent from or ceases to reside in Canada:

(7) No supplement may be paid to a pensioner for

...

- (b) any month for which no pension may be paid to the pensioner;
- (c) any month throughout which the pensioner is absent from Canada having commenced to be 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;
- (d) any month throughout which the pensioner is not resident in Canada, having ceased to reside in Canada, either before or after becoming a pensioner, six months before the beginning of that month.

## **ISSUE**

[14] The Tribunal must decide if the Appellant meets the residency requirements to qualify for a partial OAS pension and the GIS and, if so, when those requirements were met.

## **EVIDENCE**

[15] There is no dispute as to the Appellant's whereabouts at least up to September 30, 2009. He and his wife gave oral evidence to further explain his reasons for being in various places, and to provide evidence of where he was after that date. This evidence was not challenged by the Respondent, and the Tribunal accepts it as credible. The Tribunal found the Appellant to be a careful historian with an excellent memory. Documents in the file are consistent with the oral evidence. The Tribunal notes that the Appellant disclosed all of his absences from Canada in his OAS application.

[16] The Appellant was born in India in June 1940. He lived there until he came to Canada on September 14, 1966 on a student visa, to pursue graduate studies in chemistry and act as a teaching assistant at the University of British Columbia in X (UBC). Soon after arriving he moved into rental accommodation on the UBC campus, opened a bank account, obtained a social insurance number, enrolled for medical coverage and obtained a B.C. driver's licence. He had given up his rented home in India, and he left no assets there.

[17] The Appellant testified that he and his wife were married in India in July 1966, and that due to financial constraints she did not accompany him to X at first. After he left for Canada she

moved in with her parents until she was able to join him. She arrived in X in June 1967 and they began living together at UBC. Their son was born in X in X X.

[18] The Appellant worked at UBC until March 15, 1973, when he completed the requirements for his PhD. He and his wife testified that they lived in X throughout this period, and made no trips to India. They made friends, socialized and took part in community activities. He purchased a car and obtained a department store credit card. He paid federal and provincial income taxes, and contributed to the Canada Pension Plan.

[19] The Appellant testified that when he arrived in Canada he did not necessarily intend to remain here after completing his studies, but he had no firm plans to return to India either. However, in 1971 his brother died, leaving young children and a widow in India. The Appellant began supporting them financially. By 1973 he was concerned about their well-being as well as his poor employment prospects in Canada. On March 26, 1973, he returned to India to explore job opportunities. He found employment and so decided to stay. His wife and son returned with him.

[20] The Appellant remained in India for many years, except for periods spent in the United States in 1979 and 1986. He did not come back to Canada until 1997, when he spent several weeks here because his son, who was now living here, was ill. After retiring from his job in India in 2000, he returned to Canada to pursue a potential business opportunity. He was here on a visitor's visa from August 2000 to April 2003. The business opportunity did not materialize, and he returned to India. Although the Appellant indicated in correspondence when he first applied for his OAS pension that he intended to settle here permanently during that period, he testified at the hearing that he was here as a visitor, staying with his son, and that he does not consider that he resided here at that time.

[21] In 2006 the Appellant decided to move to Canada so that he could pursue research opportunities in his retirement. He and his wife arrived here as landed immigrants on November 30, 2006. They moved into their son's townhouse in a X suburb, and this continues to be their living arrangement in Canada. They share an entrance and a kitchen with their son and his family, and occupy a separate bedroom and bathroom suite in the basement. Their son provided the furniture and household goods. They brought some personal belongings from India and sent

the rest in the ensuing months. They help with the running of the household and, when their grandchildren were younger, they provided childcare.

[22] After arriving in 2006 the Appellant began to visit the UBC library, and to attend free conferences and lectures there to pursue his interest in chemistry. He obtained BC medical coverage. He has filed income tax as a Canadian resident since 2006. He kept an Indian bank account into which his Indian pension was deposited, as that was the only way he could receive it. His only other asset in India was a piece of land that was unsold. He did not maintain a home there. He did not obtain a BC driver's licence because he no longer drives. His Indian licence expired in 2005 and he did not renew it.

[23] On January 16, 2007, the Appellant left Canada with his wife. They went to India for their daughter's wedding, and remained there until June 26, 2007 to see her settled. They returned to Canada, and did not expect to go back to India any time soon. However, in October 2007 their daughter became very ill with a pregnancy, and the Appellant and his wife went back to India on October 28 to care for her. They brought most of their personal belongings, but testified that they did not have many to begin with. They kept their bank account open in Canada. They intended to stay in India until their daughter did not need them. They stayed in the guest room at their daughter's home. While they were away from Canada, their suite at their son's home remained unused, in the condition they had left it.

[24] The Appellant and his wife remained in India until September 30, 2009. The Appellant testified that his daughter required bed rest after her baby was born in February 2008, and that he and his wife stayed with her after that because she needed help and had no one else. They were not covered by India's health care system, but were able to receive medication coverage through their daughter's employer. If they saw a doctor they had to pay for the visit out of their own pocket. By September 2009 they felt that their daughter could manage on her own, and they missed their home in Canada, so they returned.

[25] The Appellant testified that since returning to Canada in September 2009 he has gone back to India as follows:

- a) from March 19 to September 19, 2010, to visit his daughter;



- b) from November 10 or 11, 2011 to April 29, 2012, to visit his daughter and to see his nephew married;
- c) from November 2013 to February 8 or 9, 2014, for a wedding and to present a research paper in Mumbai;
- d) from January 29 to September 6, 2015, to give a lecture and to be with his daughter for the birth of her second child in February. He had intended to return to Canada in July, but had an attack of vertigo and was told not to fly.

[26] He testified that he has no present plans to return to India. He and his wife have had their citizenship interviews and expect to become Canadian citizens soon.

[27] In 2011 the Appellant established a connection with nearby Simon Fraser University (SFU), doing research and providing guidance to master`s students. He has office space at SFU, and was spending five or six hours a day there although not as much when he does not have a student. He has prepared research papers that have been presented at conferences. He identifies himself professionally as a volunteer researcher.

## **SUBMISSIONS**

[28] The Appellant submitted that:

- a) he resided in Canada between 1966 and 1973;
- b) he resumed residence in Canada on November 30, 2006, when he arrived here and received status as a permanent resident. He maintained that his visits to India were allowed because he complied with rules established by citizenship and immigration allowing him to be absent for 730 days in 5 years on November 30, 2006, and because they were required to help with his daughter`s serious medical situation; and
- c) he has continued to be resident in Canada since November 30, 2006.

[29] The Respondent submitted that:

- a) the Appellant cannot be considered to have resided in Canada while at UBC because he did not intend to stay here after he completed his studies;
- b) the Appellant's absences from Canada after November 30, 2006, do not fall under the exceptions in s. 21(4) of OAS Regulations, because he had not established a centralized mode of living in Canada prior to leaving, and
- c) the Appellant currently makes his home in India

## **ANALYSIS**

[30] As set out in the legislation reproduced above, a partial OAS pension is payable to a person who has resided in Canada for at least 10 years if he resides in Canada on the day before the application is approved. The amount of a partial pension is calculated based on the number of years out of forty that a person resided in Canada after turning eighteen. For example, a person who resided in Canada for ten years receives a pension of 10/40ths of the full amount.

[31] Payment of the OAS pension is suspended after a person is absent from Canada for six consecutive months, not including the month he or she left, but is resumed with the month in which the person returns. The pension is also suspended six months after the end of the month in which a person ceases to reside in Canada, and is resumed with the month in which residence is resumed.

[32] The GIS is payable to a recipient of an OAS pension who resides in Canada and whose income is below a certain level. The GIS is not payable to a person who is absent from Canada for six consecutive months, exclusive of the month in which he or she left Canada; nor is it payable six months after a person has ceased to reside in Canada.

[33] The determination of residency for OAS purposes is not related to citizenship requirements. Section 21 of the OAS Regulations governs the determination of whether a person is a resident of or present in Canada. A person resides here if she makes her home and ordinarily lives in any part of Canada. A person is present here when she is physically present in any part of Canada.

[34] Section 21 sets out specific circumstances in which a person is deemed to reside or not to reside in Canada, and in which absence from Canada is deemed not to interrupt residence or presence. Residence or presence is not interrupted by any interval or absence of a person resident in Canada that is of a temporary nature and does not exceed one year.

[35] In *Singh v. Canada (AG)* 2013 FC 437 (*Singh*), the Court noted that the onus is on an applicant to establish that he is entitled to an OAS pension, and stated:

[29] It is trite law that residency is a factual issue that requires an examination of the whole context of the individual under scrutiny: *Canada (Minister of Human Resources Development) v Ding*, 2005 FC 76 . . . at paras 57-58. Intent does not equate to residence for the purpose of the [OAS Act].

[30] There are several factors that may be considered in determining whether the residence conditions of the [OAS Act] have been observed: ties in the form of personal property; social ties in Canada; other fiscal ties in Canada (medical coverage, driver's license, rental lease, tax records, etc.); ties in another country; regularity and length of visits to Canada, as well as the frequency and length of absences from Canada; and the lifestyle of the person or his establishment here.

[36] Dealing first with the period September 14, 1966 to March 26, 1973, the Tribunal finds that the Appellant was a resident of Canada. Although when he arrived here he did not intend to remain permanently, that is not a requirement of the legislation. The fact is that he intended to and did remain here for over six years with his wife and child. He studied, worked, paid taxes and was a member of the community. His only connection to India during this period was that he had been born and raised there, and he had extended family there. Considering the factors set out in the case law, his greater connection was to Canada. For that period, he made his home and ordinarily lived here.

[37] The Tribunal notes that subsection 21(2.1) of the OAS Regulations sets out particular circumstances in which a person who is not a Canadian citizen or a permanent resident of Canada does not reside in Canada for OAS purposes although they may be present here. None of those circumstances apply to the Appellant. The existence of that provision implies that lack of citizenship or permanent resident status is not an automatic bar to a finding that a person is resident here.

[38] The Tribunal finds that the Appellant ceased to reside in Canada when he left on March 26, 1973, but that he resumed residing here when he returned as a permanent resident on November 30, 2006. He and his wife came to Canada intending to make their home here. They moved in with their son and became part of that household. The Appellant had no significant ties with India except familial ones, which he also had in Canada. He had no plans to return to reside there.

[39] The Tribunal finds that the Appellant's visit to India from January to June 2007 did not interrupt his residence here. That visit was so that he and his wife could see their daughter. They intended to return to Canada, and did so soon after five months had passed. This absence was of a temporary nature and was for less than one year, and is deemed not to have interrupted his residence by virtue of subsection 21(4) of the OAS Regulations.

[40] The Tribunal finds that the Appellant ceased to reside in Canada when he left on October 28, 2007. While he may have intended to return sooner than he did, he was absent for almost two years. He took up residence in his daughter's home, adopting a living arrangement similar to what he had in Canada. While he had ties in both countries, his greater connection during that period was to India, where he spent all of his time. Absence from Canada for medical or family reasons is not excluded by the OAS Regulations. The fact that the Appellant was in India to assist a family member who needed help is not sufficient reason to displace the weight of the evidence that establishes that he was at that time factually anchored in India.

[41] The Tribunal finds that the Appellant resumed residence in Canada on September 30, 2009, and that he has continued to reside here since then. He returned to his previous home with his wife. He is involved in the community. His trips back to India have all been for purposes one would reasonably expect someone in his position to undertake, and for reasonable lengths of time. All of them were of a temporary nature and not exceeding one year.

[42] The Tribunal finds that the Appellant resided in Canada from September 14, 1966 to March 26, 1973; from November 30, 2006 to October 28, 2007; and since September 30, 2009. He therefore had 10 years of residence here as of April 2012, and was eligible for an OAS pension of 10/40ths beginning in May 2012 pursuant to section 8 of the OAS Act and section 5 of the OAS Regulations.

[43] The Appellant was not eligible to receive his OAS pension or GIS for the month of August 2015. By this time he had remained outside of Canada for more than six consecutive months, exclusive of the month he left. He was eligible for the benefits again in September 2015, the month he returned to Canada.

## **CONCLUSION**

[44] The appeal is allowed, in part.

Virginia Saunders  
Member, General Division - Income Security