



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 169

Tribunal File Number: GP-16-2166

BETWEEN:

K. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Virginia Saunders

HEARD ON: October 5, 2017

DATE OF DECISION: November 9, 2017

REASONS AND DECISION

OVERVIEW

[1] The Appellant applied for an *Old Age Security Act* (OAS Act) pension in January 2012. The application was approved for a partial pension of 17/40ths, payable as of May 2012. Soon after that the Appellant began receiving a Guaranteed Income Supplement (GIS) as well.

[2] In July 2015 the Respondent decided that the Appellant had not resided in Canada for a minimum of 10 years and so did not qualify for these benefits. It demanded repayment of all amounts the Appellant had received. The Respondent maintained this decision on reconsideration, and the Appellant appealed to the Social Security Tribunal (Tribunal).

[3] The appeal was heard in person because this method of proceeding was the most appropriate to address inconsistencies in the evidence. The Appellant attended the hearing, as did his representative Sundeep Burm, and a Punjabi interpreter Kirpal Bains.

[4] The Tribunal has decided that the Appellant is eligible to receive an OAS pension of 17/40ths payable since May 2012, for the reasons set out below.

EVIDENCE

Background and Immigration to Canada

[5] The Appellant was born in India on X. He first arrived in Canada on December 16, 1994, accompanied by his wife and a son and daughter who were in their teens. He testified that he intended to settle here permanently. He was sponsored by his son, M. S., who already lived in Canada. A third son remained in India because he was married with a family of his own there, but the Appellant hoped to be able to sponsor them to immigrate to Canada one day. The Appellant became a Canadian citizen in 2007.

Living Arrangements

[6] The Appellant testified that after arriving in Canada he and his family lived in a rental home in X, Ontario. His son and daughter began attending school. He opened a bank account and obtained a drivers' licence.

[7] The Appellant testified that around 1997 he moved with his wife and children into a house the family had purchased in X, Ontario. Over the next 17 years or so the family remained in X, living in three different houses that were bought and sold in succession. The Appellant recalled that two of the houses were in M. S.'s name but that he was on title as a part-owner of one of them. He believed he had signed a mortgage document for one of them.

[8] As time passed the Appellant's second son and his daughter were married. His son M. S. divorced and was awarded custody of his two children. He later remarried. Besides the Appellant and his wife, the homes were occupied at various times by their three children who were in Canada, their children's spouses, and their grandchildren.

[9] The Appellant testified that while he lived in X he attended temple off and on but not regularly. His wife provided full-time childcare for their grandchildren, and the Appellant helped her by taking the children to their soccer games or to the park. He had a family doctor named Dr. Malhotra.

[10] The Appellant testified that eventually his two sons moved out west, and he and his wife decided to join them. At first they moved to X, where the Appellant was living when he applied for his OAS pension in January 2012.

[11] The Appellant and his wife indicated in various documents that they were separated beginning in about 2011. The Appellant testified that they have never been separated in the sense of a marital breakdown, but that his children needed his wife to provide childcare and so she spent time as required in X, X and X B.C. They mistakenly thought that meant that they were separated.

[12] In August 2012 the Appellant moved to X B.C. where he continues to live. He testified that since moving there he has lived in three different rental homes with M. S. and M. S.'s wife and children. The Appellant's other son is now in X, and their daughter is in X. The Appellant's wife spends time in different places depending on the needs of her children, and as of the date of the hearing she was living in X with the Appellant.

[13] The Appellant testified that since moving to X he attends temple every day. He has a family doctor, Dr. Rai.

Work In Canada

[14] The Appellant's Record of Earnings indicated that he had earnings between \$8000.00 and \$12,000.00 for each year from 1999 to 2003; and earnings of about \$5500.00 in 2007 (GD2-12).

[15] The Appellant testified that beginning in 1995 he had a seasonal job from about April to October transporting workers for a farm in X, Ontario. He recalled that it took him six attempts before he was able to pass the test to get the driver's licence that he needed for this job. He testified that he was employed by the farm for nine years and that for the first few years he and the other workers were paid in cash. Later they would work for several months and then collect Employment Insurance (EI) benefits. In 2007 he found a factory job through an agency. However, after this job ended he was not called for other work. In 2011 he tried to work picking berries, but earned very little because he had to stop due to back pain.

Travel Outside Canada

[16] The Appellant testified that he is the fourth of eight children and that all of his siblings live in Canada, the United States, or the United Kingdom. Before immigrating to Canada the Appellant and his wife and children lived with the Appellant's mother in the family's home in India. His father had passed away.

[17] The Appellant explained that his father's name was still on title to the home, and that the Appellant had a greater entitlement to it over his siblings because he had worked on the property and had cared for his parents. However, in practice whichever family member was in the village lived in the house. After the Appellant moved to Canada his mother remained in the house along with his son who had stayed in India, his son's wife, and their children.

[18] The Appellant testified that all of his siblings would visit their mother in India from time to time but because he had lived with her before he moved to Canada he felt a greater obligation to return when his mother needed help. He therefore made numerous trips back to India beginning in March 1995. His evidence is that all of these trips were for six months or less and that after each trip he returned to Canada as soon as he was able to.

[19] The Appellant testified that his mother died in October 2004. He went to India for several months to attend to funeral matters, returning to Canada in February 2005. He had to go back to India in November 2005 because his Indian son had become seriously ill with liver disease.

[20] The Appellant's evidence is that he returned to Canada in February 2006, and that over the next three years he travelled to India to see his son from August to November 2006; January to August 2007; January to June 2008; and October 2008 to January 2009. His son died in March 2009, and so the Appellant returned there for two months at that time as well.

[21] The Appellant's evidence is that since his son's death he has spent significant amounts of time in India as set out at pages GD4-7-9. He testified that he makes these trips out of concern for his son's widow and her two children – the Appellant's granddaughters – as it is difficult for women to live alone in India. He testified that he doesn't actually do much while he is there. His presence signifies to the community that there is a male in the women's lives. He decides when to go to India based on their need, and when he is not needed he returns to Canada. His older granddaughter now attends university in Toronto and lives with the Appellant's daughter in X. He is trying to arrange to have the younger one do the same in 2018. He testified that once both his granddaughters are in Canada he does not plan to return to India.

[22] The Appellant testified that since the document at GD4-7-9 was completed in January 2017, he has travelled to India for three months from April to June. He was planning to return for one month this fall to settle the younger granddaughter into her school there.

[23] The Appellant testified that since 1995 whenever he goes to India he brings some of his clothing and personal items with him, and he takes all of these with him when he goes back to Canada. While in India he stays in the family home there, along with his mother and son when they were alive, his daughter-in-law, and his two granddaughters. The house has four or five bedrooms, and the Appellant stays in a room that is also used by other family members when they visit. He has an Indian drivers' licence and he drives his deceased son's car when necessary.

[24] The Appellant testified that his wife has travelled with him to India only once or twice. She has remained in Canada to be with their children and to look after their grandchildren.

[25] The Appellant testified that besides visiting India he sometimes take trips to the US and the UK to see his siblings and other relatives who live there. He has also visited an aunt who lives in Malaysia.

Financial Arrangements

[26] The Appellant testified that when he first arrived in Canada he opened a bank account. He co-signed a mortgage of one of the family properties, and he had a line of credit. He testified that when he was working he gave all of his earnings to M. S. to help pay for the family's expenses. Since his OAS payments have stopped he does not have any funds so he does contribute at this time.

[27] The Appellant testified that he does not have a bank account in India. His mother used to look after his expenses when he was there, and now his daughter-in-law does.

SUBMISSIONS

[28] The Appellant submitted that the Minister's decision was based on a failure to consider all of the time he spent in Canada, or his lifestyle here. He submitted that he has strong roots in Canada and only leaves for a specific family purpose that does not change the fact that he makes his home and ordinarily lives here.

[29] The Respondent submitted that:

- a) A person can only be a resident of one country at a time.
- b) After the Appellant left Canada in September 1996 he spent lengthy and frequent periods in India which indicates a stronger attachment to that country. Except for the periods above, his time spent in Canada was presence rather than residence.
- c) The Appellant resided in Canada for under 10 years: from December 16, 1994, to September 14, 1996; from April 24, 1998, to November 20, 2003; and from July 11, 2004, to November 22, 2005.

- d) As the Appellant has not resided in Canada for 10 years he does not qualify for an OAS pension; and as he does not qualify for the pension he is not eligible to receive GIS.

ANALYSIS

Residence Requirements for an OAS Pension

[30] Subsections 3(1) and (2) of the OAS Act set out the eligibility requirements for an OAS pension. The applicant must be at least 65 years of age. To receive a full pension, generally an applicant must have resided in Canada for at least 40 years since age 18.

[31] To receive a partial pension, an applicant must have resided in Canada for at least 10 years if he resides in Canada on the day before the application is approved. An applicant who resides outside of Canada on the day before the application is approved must prove that he had previously resided in Canada for at least 20 years.

[32] Paragraph 21(1)(a) of the *Old Age Security Regulations* (the OAS Regulations) provides that a person resides here if he makes his home and ordinarily lives in any part of Canada. Paragraph 21(1)(b) provides that a person is present here when he is physically present in any part of Canada.

[33] The Appellant turned 65 on X, 2012, and meets the age requirement for the OAS pension. The Tribunal finds on a balance of probabilities that the Appellant resided in Canada for a minimum of 10 years, and that he resided here on the day before his application could be approved.

Credibility and Reliability of Evidence

[34] Determining the Appellant's exact dates of travel was a challenge. His record from the Canada Border Services Agency (CBSA) does not show some entries to Canada after August 2000 that are documented on the back of his landing record, and therefore is not a reliably complete record. It is difficult to discern some of the dates in the Appellant's passports. Some of the stamps are impossible to read; others are faint and can only be guessed at. It is also well-known that border agents in Canada often do not stamp passports upon entry or exit.

[35] The Appellant submitted a document called “Statement of Exits and Re-entries to Canada” showing his understanding of his travels from March 1995 to January 2017, as gleaned from his passports, his memory, and his CBSA record (GD4-7-9).

[36] The Tribunal accepts the Appellant’s evidence of his travels and of his activities and lifestyle in and out of Canada. His evidence generally conforms to what is legible in his passports and his CBSA record. The Respondent did not take issue with the Appellant’s account in its written submission and did not attend the hearing to cross examine the Appellant.

[37] The Tribunal found the Appellant to be a credible witness. Through an interpreter, he spoke with ease and displayed a familiarity with life in Canada as well as the personal circumstances of all of his family members here that suggested a close connection and supported his claim to have spent significant amounts of time here and to have been deeply involved in family life in Canada.

[38] The Tribunal acknowledges that the Appellant has not provided documentation such as medical records and bank or credit card records. The Respondent sent letters to the Appellant asking for information at various times. Some of these went unanswered. The Appellant testified that he did not receive some of these and that they likely went missing because of the family’s moves in the past few years.

[39] It is apparent from the file that the Appellant attempted to provide whatever documents he could, and that he has been somewhat overwhelmed by the process and the loss of his income. While documentation would be helpful in supporting the Appellant’s claim, it is not required in all cases, especially in this one where the Appellant has given compelling testimony.

The Appellant’s Residence in Canada

[40] Determining residence involves more than comparing the number of days that a person is in Canada as opposed to somewhere else. Case law has set out a non-exhaustive list of factors to be considered in determining whether a person has established residence here. They include personal property; social and fiscal ties in Canada; 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 and his establishment in Canada (*De Carolis v. Canada (Attorney General)* 2013 FC 366).

[41] A person's mindset or intention is a legitimate factor to consider, but it is not determinative of the issue of residency. The Appellant must establish that Canada was, for the amount of time required by the OAS Act, the place where he was factually anchored (*Duncan v. Canada (Attorney General)* 2013 FC 319).

[42] A person is allowed to leave Canada, even for extended periods. Subsection 21(4) of the OAS Regulations states that any interval of absence from Canada of a person resident in Canada that is of a temporary nature and does not exceed one year shall be deemed not to have interrupted that person's residence or presence in Canada. An absence of more than one year does not necessarily mean that the person's residence is interrupted (*Perera v. Canada (Minister of Health and Welfare)* (1994), 75 F.T.R. 310).

[43] A person who immigrates to Canada cannot be expected to sever all ties with his country of origin. The Appellant had emotional ties to his mother and his son who remained in India. He had a filial obligation to help his mother as she grew older. He had a parental obligation to his son when he became sick, and after his death the Appellant felt a continued obligation toward his granddaughters and their mother. These obligations meant that after immigrating to Canada the Appellant returned to India periodically. As his family members' needs increased his trips there became more frequent and lasted longer.

[44] While in India the Appellant stayed in a guest room of the family home. He did not contribute to expenses. He did not have a bank account. He left most of his belongings in Canada and he did not leave anything in India when he left. He was focussed on caring for his family members, and he returned to Canada whenever he was not needed in India. His trips to other places were short and were to visit his other relatives.

[45] At the same time, the Appellant had significant ties in Canada. He had moved here intending to stay permanently. One son was already here. The Appellant brought his wife and younger children, and various members of the extended family have lived together here since 1994. The Appellant contributed what he could to the family's finances, and he and his wife

provide childcare to their grandchildren. When the Appellant went to India, his wife and children remained in Canada.

[46] The Tribunal placed little weight on the significance of the Appellant's booking a return trip from India in 2015. Given the circumstances which drew the Appellant to India, it is not unreasonable for him to plan and pay for his tickets in the least expensive and most convenient manner possible. It does not indicate that he actually resided in India or that he had a stronger attachment there.

[47] The Tribunal finds that the Appellant made multiple trips to India for family purposes, all the while maintaining a home in Canada where his wife and his surviving children lived. The Tribunal is satisfied on a balance of probabilities that at all times the Appellant's factual anchor remained in Canada and that he made his home and ordinarily lived here. That continues to be the case.

[48] This conclusion is further supported by subsection 21(4) of the OAS Regulations. As indicated above, the Tribunal accepts the Appellant's evidence as to when he was in Canada. He did not give up his residence each time he left, and he was never absent for more than one year.

Amount of the Pension and its Effective Date

[49] 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 18 (OAS Act subsection 3(3)). When the Appellant turned 65 he had resided in Canada from December 1994 to April 2012 – a period of 17 years and about 4 months. He was therefore eligible for a partial pension of 17/40ths. Subsection 8(1) of the OAS Act provides that payment of the pension begins in the first month after the application has been approved. The Appellant's pension was payable to him as of May 2012, the month after he turned 65 and the earliest date on which the application could be approved.

[50] As the Appellant was in receipt of an OAS pension, he was also eligible to receive GIS.

Absence from Canada for More Than Six Months

[51] An OAS pension and the GIS may not be paid to a person who has remained outside of Canada for more than six consecutive months, not including the month he left (OAS Act

subsection 9(1); paragraph 11(7)(c)). An exception to this exists where a pensioner has resided in Canada for at least 20 years after age 18. In such cases the pension is payable regardless of where the pensioner resides or whether or not he is present in Canada (OAS Act subsections 9(2), (4)). There is no similar provision for the GIS.

[52] The Appellant had resided in Canada for 20 years in December 2014. Thereafter his OAS pension was portable regardless of where he was. In any case, the Tribunal finds that the Appellant has never been outside of Canada for more than six months since his benefits began.

CONCLUSION

[53] The appeal is allowed.

Virginia Saunders
Member, General Division - Income Security