



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. P. v Minister of Employment and Social Development*, 2018 SST 1235

Tribunal File Number: GP-17-2035

BETWEEN:

D. P.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Claimant represented by: Catherine Boutin

In person hearing on: October 31, 2018

Date of decision: November 13, 2018

DECISION

[1] The suspension of the Claimant's partial Old Age Security ("OAS") disability pension should be lifted from February 16, 2010, to the hearing date. As for the Guaranteed Income Supplement ("GIS"), any suspension based solely on non-residence in Canada should also be lifted between February 16, 2010, and the hearing date.

OVERVIEW

[2] The Claimant was born in India on X, 1940, and worked there as a farmer. He first arrived in Canada on May 21, 1995, when he was 55 years old. He worked for a few years in Canada but had retired by his 65th birthday. The Minister originally found that he was resident in Canada from May 21, 1995, to May 31, 2005, and began paying him a partial (10/40^{ths}) OAS pension in June 2005. He also received the GIS.

[3] As a much later investigation showed that the Claimant had stopped residing in Canada on October 23, 2000, the Minister stopped paying his OAS pension and GIS. However, on reconsideration, the Minister found the Claimant had stopped residing in Canada on October 7, 2008. This meant he was entitled to a partial OAS pension and had been eligible for the GIS, but the payments were suspended after he stopped residing in Canada. As his last GIS and OAS payments were made in November 2015, the Claimant owed a large overpayment to the Minister. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

ISSUES

[4] Was the Claimant resident in Canada between October 7, 2008, and the date of the hearing?

PRELIMINARY MATTER

[5] The precision of some of the evidence is in question. Although the hearing was in English and all file correspondence was in English, the Claimant cannot communicate effectively in that language. He needed a Gujarati interpreter at the hearing. A number of the Claimant's letters were written in English, but it is clear that they were written by somebody else. In addition, the Claimant's 2015 interviews were translated between Gujarati and English by an acquaintance

who was not at the hearing and was likely not a certified interpreter. As a result, the accuracy of those translations is uncertain.

[6] In addition, the hearing interpreter periodically said that the Claimant had not understood the nuances of the questions even when they had been translated into Gujarati. The Claimant also frequently stated that he was unable to remember when events had taken place. While I am not disregarding the Claimant's evidence, I am wary of placing too much reliance on it.

ANALYSIS

[7] Before determining if the Claimant was resident in Canada between October 7, 2008, and the date of the hearing, I will summarize some important background information.

[8] The Claimant has six children and a large extended family in both Canada and India. His son S. is married and lives in Montreal. His daughter I. also lives in Montreal with her husband B. and their children. S., I., and B. all gave evidence at the hearing. The Claimant also has three daughters and one son in India: the son has been running the Claimant's farm in India since the Claimant first came to Canada in 1995. The Claimant's wife came with him to Canada in 1995 but did not adapt to life in Canada and returned to India after roughly 18 months. She continues to live in the Claimant's house in India, along with their son, their daughter-in-law, their widowed daughter, and their son's sons. The house in India is separate from the farmland. However, there has been a legal dispute about the ownership of the farmland and an appeal court decision is pending.

[9] Prior to his 1995 arrival in Canada, the Claimant worked on his farmland. After returning to India with his wife in late 1996, he came back to Canada in 1997. He said he came back because S. was a bachelor at that time. He lived primarily with I.'s family, rather than on his own, so that she could make him meals and force him to eat. He said his only real tasks at home were providing support for I.'s children: he would bring them to school.

[10] At the hearing, the Claimant said he worked full-time in Canada for five or six years, commencing shortly after his return in April 1997. He said he continued working until his 65th birthday on January 1, 2005. This is not consistent with his statement of earnings and QPP contributions, which revealed income only in 1996, 1997, 1998, 1999, and 2001. He also never

had annual earnings of more than \$7,389.00.¹ Despite these inconsistencies, I accept that he was in Canada from April 2001 to November 2005.

Distinction between being “present” and being “resident”

[11] A person is “resident” in Canada if he makes his home and ordinarily lives in Canada. However, “presence” means that a person is physically present in any part of Canada.² A person can be present in Canada without being resident in Canada. The Claimant says he now spends just under six months of each year in India. He is in Canada at all other times. As he has spent extended periods of time in both countries, the distinction between “residence” and “presence” is critical in this appeal. The Claimant says he has been resident in Canada since October 7, 2008.

[12] The Minister says the Claimant’s time in Canada since 2008 has been “presence” rather than “residence”. The Minister says the Claimant’s ongoing ownership of farmland and a house in India, as well as his activities on the farmland, shows that he is actually resident in India and is merely present in Canada.

[13] Although the Claimant’s presence is not the only factor to be considered when assessing residence, it is still an important consideration. The following chart (the “Presence Chart”) sets out the known dates of the Claimant’s presence in both Canada and India.

<u>Start Date</u>	<u>End Date</u>	<u>Country</u>	<u>Duration</u>
January 1, 1940	May 21, 1995	India	55 years, 4 months and 21 days
May 21, 1995	November 26, 1996	Canada	1 year, 6 months and 6 days
November 26, 1996	April 19, 1997	India	4 months and 25 days
April 19, 1997	October 23, 2000	Canada	3 years, 6 months and 5 days
October 23, 2000	April 8, 2001	India	5 months and 17 days
April 8, 2001	November 15, 2005	Canada	4 years, 7 months, and 18 days
November 15, 2005	April 27, 2006	India	5 months and 13 days
April 27, 2006	October 7, 2008	Canada	2 years, 5 months and 11 days
October 7, 2008	February 16, 2010	India	1 year, 4 months and 10 days
February 16, 2010	December 29, 2010	Canada	10 months and 14 days
December 29, 2010	June 11, 2011	India	5 months and 14 days
June 12, 2011	March 13, 2012	Canada	9 months and 2 days
March 13, 2012	July 11, 2012	India	3 months and 29 days

¹ GD2-59

² Subsection 21(1) of the *Old Age Security Regulations*

July 11, 2012	March 6, 2013	Canada	7 months and 24 days
March 6, 2013	September 10, 2013	India	6 months and 5 days
September 10, 2013	December 1, 2014	Canada	1 year, 2 months and 22 days
December 1, 2014	May 2, 2015	India	5 months and 2 days
May 2, 2015	November 15, 2015*	Canada	6 months and 14 days
November 15, 2015*	May 14, 2016*	India	6 months
May 14, 2016*	December 1, 2017	Canada	1 year, 6 months, and 18 days**
December 1, 2017	March 16, 2018***	India	3 months and 16 days
March 16, 2018***	October 31, 2018	Canada	7 months and 16 days (so far)

[14] Most of the dates in the Presence Chart can be verified through documents such as passports or reports from the Canadian Border Service Agency (“CBSA”).³ As departures from Canada are not always documented, some of the start and end dates might be off by a day or two. Nonetheless, the Presence Chart still gives an accurate picture of his presence during those times. However, due to a lack of recent documents, the asterisked entries require further clarification.

[15] On May 14, 2015, the Claimant said he intended to visit India around November of that year.⁴ At the hearing, the Claimant said he was in India for approximately six months. As a result, the Presence Chart entries with a single asterisk (“*”) are only estimates: I infer from the limited evidence that the Claimant began a trip to India on November 15, 2015, that lasted exactly six months. There are also no documents relating to the Claimant’s December 1, 2017, trip to India. However, I assume the start date is correct because he advised the Tribunal on November 29, 2017, of his imminent departure on December 1, 2017.⁵ I also assume a return date of March 16, 2018 (“***”), based on his estimate of a trip lasting three and a half months.

[16] As for the double asterisk (“**”), the Claimant said he could not remember if he made any additional trips between roughly May 2016 and December 1, 2017. There are no passport or CBSA records from this period. However, he also gave evidence that he usually spent just under six months per year in India. He also found Canadian winters difficult. As a result, it is quite possible that there was an additional trip to India not reflected in the Presence Chart. However, during that period of roughly eighteen and a half months, there were appointments with two different family doctors on January 19, 2017, May 5, 2017, and May 12, 2017.⁶

³ GD2-51, GD2-74 to GD2-77, and GD2-137 to GD2-151

⁴ GD2-41 to GD2-42

⁵ GD3-1

⁶ GD6-3 and GD6-4.

Test for determining residency

[17] While a person is resident in Canada if he makes his home and ordinarily lives in Canada, these requirements can be interpreted in different ways. Residency is a factual issue that requires an examination of the whole context of the individual under scrutiny.⁷ The Federal Court has said that the following factors ought to be examined:

- (a) ties in the form of personal property (such as furniture, automobiles, bank accounts, and credit cards);
- (b) social ties in Canada (such as membership in social or professional organizations and associations);
- (c) other ties in Canada (medical coverage, driver's licence, rental lease, insurance, tax records, etc.);
- (d) ties in another country
- (e) regularity and length of stay in Canada, and the frequency and length of absences from Canada;
- (f) the person's mode of living, or whether the person living in Canada is sufficiently deep-rooted and settled.⁸

[18] For the Claimant, most of these factors are relatively consistent from his retirement through to the hearing date. Accordingly, I will examine each of these factors first before making my findings on his residency starting on October 7, 2008.

(a) *Ties in the form of personal property*

[19] The Claimant does not have a car in Canada, nor does he appear to have any furniture. He has no credit cards. Since 2010, he has had a jointly held bank account with I.⁹ S. said he also had a jointly held bank account with the Claimant since 1998: the accounts were jointly held because his father had language issues and needed help with transactions.

(b) *Social ties in Canada*

[20] The Claimant is not very active in the community and has never belonged to any clubs or associations in Canada.

⁷ *Minister of Human Resources Development v. Ding*, 2005 FC 76, at paragraph 58

⁸ *Minister of Human Resources Development v. Ding*, 2005 FC 76, at paragraph 58; *Singer v. Attorney General of Canada*, 2010 FC 607 (at paragraph 31), (affirmed 2011 FCA 178)

⁹ GD2-68 to GD2-73

(c) *Other ties in Canada*

[21] The Claimant has ongoing publicly funded medical coverage in Quebec and receives medical care from time to time.¹⁰ He does not have a driver's licence, investments, or insurance. There is some evidence that he has filed income tax returns.¹¹ He is not named on any leases or property registries. He has always lived with I. or S.

[22] The Claimant does not have Canadian citizenship but has a Permanent Resident card. He retains Indian citizenship and uses an Indian passport. When asked in 2015 why he did not have Canadian citizenship, he said that he did not know. He mentioned spending six months of each year in India.¹² He later added that he was not confident enough for the citizenship interview and was afraid he would not pass the test.¹³

(d) *Ties in another country*

[23] The Claimant's ties to India are relatively extensive. He still owns a house and lives there when he is in India. He described it as "home" (albeit through the interpreter) during the hearing. When asked why he still owned the house, he said there was no reason to transfer it to his son. He added that it was not possible to transfer the property, but then said he would only do it when his health worsened. Finally, he said that he did not want to transfer the property to anybody outside his family. During this portion of the hearing, it was unclear if the contradictory statements were intentional, unintentional, and/or attributable to translation issues.

[24] The Claimant's wife, his son, his son's family, and his widowed daughter all live permanently in the house. He and his wife have their own room there. He also has two other daughters in India. None of his children in India have ever been to Canada. His wife does not appear to have visited Canada since returning to Canada at the end of 1996. He did not describe any friends in India. He said he had a very big family but all of his brothers have died. He does not belong to any clubs or associations there. Although he has never had a car or a driver's licence in India, he reported having a motorcycle there.

¹⁰ GD2-53 to GD2-55, and GD6-3 to GD6-4

¹¹ GD1-25 to GD1-29, and GD4-3 to GD4-4

¹² GD2-42

¹³ GD2-40

[25] While taxes are payable on the Claimant's property in India, he said his son has paid them since 1995. However, when he had income, he sent money from Canada to India on an as-needed basis: he estimated that this would have been once or twice each year. He never filed income tax returns in India, as he said farmers in India do not need to declare farming income.¹⁴ He has never had insurance, investments, or credit cards in India.

[26] The Claimant still owns the farmland, although it is the subject of ongoing litigation. He was responsible for and had control of the farmland until his 1995 arrival in Canada. Since then, his son has had responsibility for and control of it. The Claimant said his son now has a Power of Attorney to take care of the ongoing litigation, so that it is not necessary for the Claimant to return to India for legal matters. His children are also paying the litigation costs.

[27] In 2015, the Claimant said that he still worked on the farmland. He supervised the growing of fruits and vegetables.¹⁵ When asked about this at the hearing, he denied having any actual responsibilities and said he just accompanied his son around the property to pass the time. His health prevented him from doing any work on the farmland. S. gave similar evidence.

[28] The Claimant said he saw a doctor in India as frequently as he saw a doctor in Canada, although the submissions made on his behalf diverged on this point. He also has his own bank account. He said he did not engage in any regular activities in India, due to his declining health.

[29] When asked if he considered returning to live in India, the Claimant said he had thought about it but "had to take care of things here". He said his wife was in India and that was why he would need to go back. He added that he liked living in Canada. S. said the cold Canadian winters were another reason for the Claimant to visit India.

(e) *Regularity and length of stay in Canada*

[30] The Presence Chart confirms that, starting on October 7, 2008, the Claimant had an increased presence in India. His stay in India for more than 16 months from 2008 to 2010 is particularly striking. He now admits spending almost six months each year in India, but also never spent significantly more than six months in India at a time after February 16, 2010. The

¹⁴ GD2-39

¹⁵ GD2-41

Claimant's estimate appears to understate his presence in Canada since then, as the Presence Chart suggests that he has actually been present in Canada for just over 70% of the time since February 16, 2010. Even if there had been an additional undocumented absence of six months between May 2016 and December 2017, the Claimant would still have been present in Canada for more than 65% of the time since February 16, 2010. In addition, each visit to India has been shorter than the stay before it in Canada.

(f) The person's mode of living

[31] Since 1995, the Claimant has spent most of his time in Canada at I.'s home. He has a bed in the living room. I. said he shared a room with one of her sons. S. also lives nearby. In 2015, the Claimant said he "does nothing" when he is in Canada and just stays at home. However, as he also said his children and grandchildren either worked or went to school, his lack of activity may only have referred to formal employment or education. The "interpreter" of that interview was not at the hearing.¹⁶

[32] The Claimant said he had some friends in Canada. One of the hearing observers met the Claimant at work about 15 years ago and has remained a friend since then. The Claimant said he also met other friends at the local shopping mall once or twice per month. When asked about lifestyle changes since 2005, he said the main difference was his health.

Distinct Periods of Time

[33] I find that there have been two distinct periods since October 7, 2008. The first lasts until February 16, 2010, when the Claimant ended an extended stay in India. The second begins with the Claimant's return to Canada on February 16, 2010, and continues until the date of the hearing. I will consider the Claimant's residence separately for each of these periods.

Did the Claimant reside in Canada from October 7, 2008, until February 16, 2010?

[34] Many explanations have been offered for this 16-month absence from Canada. In July 2015, the Claimant said he left in 2008 because his wife was sick and he wanted to take care of

¹⁶ GD2-41

her. When she felt better, he returned to Canada.¹⁷ In August 2017, the Claimant said he had not intended to stay that long, but had to prolong the trip due to “health and family issues”.¹⁸

[35] At the hearing, a much different picture emerged. The Claimant first denied that he went there to work and said he only went for a visit. He then said the main reason for the 2008 trip was to get money so that S. could get married. In order to do this, he put a mortgage on his farmland. However, he was cheated by the private mortgagee and had to go back to India to take care of matters. He said he intended to return “soon” to Canada, but his trip was extended because his Canadian Permanent Resident card expired while he was in India. He was also sick in hospital for a week. He also had to deal with the arrangements of S.’s marriage and had to remain in India because S. had not yet arrived from Canada. The Claimant initially said he was also responsible for the farmland in 2008-2010, but then said he was unwell and his son took care of the land.

[36] The Claimant could not identify any particular dates for this trip: he did not recall when he left Canada, nor did he know when S. was actually married. In fact, he said he returned to Canada in 2008. When told that his passport revealed a trip lasting from October 2008 to February 2010, he firmly stated “that’s not true”.

[37] When asked about the Claimant’s 2008 trip, S. said the Claimant did not like the Canadian winter because it was too cold. S. said the Claimant also had to do some supervisory tasks on the farmland and wanted to see his wife. S. also said the Claimant had to wait in India for S. to arrive from Canada, in order to take care of S.’s marriage, but needed money in the meantime. These delays caused the trip to last beyond the expiry of the Claimant’s Permanent Resident card, which could only be renewed in New Delhi. S. said he eventually took care of this in late 2009. S. affirmed that his father had been cheated by the mortgagee and said his father always intended to return from his 2008 trip to India.

[38] The Claimant said he was able to travel to Canada by himself at that time. This contradicted B.’s evidence. B. testified that he went to India in January 2010 for S.’s wedding and returned to Canada with the Claimant in February 2010. B. said the Claimant could not have

¹⁷ GD2-39

¹⁸ GD1-5

travelled alone to Canada and nobody else was able to travel with him. The implication was that the Claimant could not return to Canada until somebody could accompany him. However, there was no evidence to suggest that the Claimant could not travel alone to India at other times.

[39] When asked why his trips to India generally became more frequent in 2008, the Claimant said he would go whenever he had some work to do. He also would go when his wife was not well. However, S. said the Claimant went more often because of the cold Canadian winter.

[40] There are many explanations for the 2008 trip to India and for its extended length. While the Claimant may not have intended to stay that long, I assign little weight to his intention. The Federal Court has said that “intention” cannot be the sole basis for determining residency.¹⁹ The Claimant also had a very poor recollection of the trip, even denying at one point that he was in India from 2008 to 2010. His own evidence was very inconsistent, particularly when considering the 2015 interview. It is also difficult to reconcile his various explanations with S.’s evidence. Finally, there was contradictory evidence on his ability to travel alone.

[41] While it may be impossible to completely reconcile the various accounts, I find that they show an especially strong connection between the Claimant and India during that particular trip. While his life in Canada appeared to consist primarily of assisting with I.’s children, he had many more obligations in India. Regardless of the actual role he played on the farm, he still needed to raise money and make arrangements for S.’s wedding in India, attend to his sick wife, and deal with the (disputed) mortgage on his farmland. He also still owned the property, and was living with multiple family members including his wife, his son, his widowed daughter, his daughter-in-law, and some grandchildren. Two other daughters were also in India.

[42] After considering the various factors that help determine residency, I find that the Claimant’s ties in India between October 7, 2008, and February 16, 2010, were so strong that they prevail over any other factors that might favour residency in Canada. Most of those factors, such as having a shared bank account, have relatively little persuasive value. As a result, I find that the Claimant was not resident in Canada from October 7, 2008, until his return on February 16, 2010. I will now consider whether he later re-established residency on his return to Canada.

¹⁹ *Minister of Human Resources Development v. Ding*, 2005 FC 76, at paragraphs 57-59

The Claimant resided in Canada from February 16, 2010, until the date of the hearing

[43] In making this finding, I placed considerable weight on the Claimant's particular circumstances. It was evident that he comes from a very traditional cultural background. He played a major role in arranging S.'s marriage. In both Canada and India, he lived in multi-generational homes. In India, his widowed daughter had returned to the family home to live with her brother's family. While the Claimant had provided assistance to his children when he had income, they felt an obligation towards him and were now supporting him. While the Claimant does not have many common Canadian items such as credit cards and a driver's licence, he did not have many of these more "tangible" items in India either.

[44] As a result, I find that the regularity and length of the Claimant's stays in Canada, his ties in India, and his mode of living in Canada are by far the most significant factors. I will consider each of these factors for the period since February 16, 2010.

Stays in Canada

[45] Starting with his 2010 return to Canada, the Claimant has spent roughly two thirds of his time in Canada. While he makes regular trips to India, they are always for a shorter period of time than the preceding stay in Canada. The regularity and length of his stays in Canada significantly favour a finding of Canadian residency since 2010.

Ties in India

[46] The Claimant's ties in India remain strong. He has delegated litigation tasks, but still owns a house and farmland despite his son's apparent control over those properties. While the litigation may affect a transfer of the farmland, his reasons for not transferring the house to his son were not very persuasive. His wife and many of his children and grandchildren are still in India. He spoke of the need to travel to India to assist his wife. His ties to India significantly favour a finding of residency in India since 2010.

Mode of living in Canada

[47] This factor must be considered in light of his particular circumstances. While having a bed in the living room of his daughter's home may not seem deep-rooted at first, he appears to

have done so for roughly twenty years. His living arrangements in India were also multi-generational. His apparent lack of activity in Canada, other than some minor family responsibilities, mirrors a similar lifestyle in India. He also described having friends in Canada, including one (who attended the hearing) he has known for 15 years, whereas his social contacts in India appear limited to family members. I find that this factor mildly favours a finding of residency in Canada since 2010.

Assessing Residency

[48] When the three most relevant factors are given equal weight, they are in favour of Canadian residency. This appears to be a fair weighting, given the Claimant's particular circumstances. Even if slightly more weight were given to the Claimant's ties to India, it would not be enough to overcome the factors that support a finding of Canadian residency. Any lingering doubts I might have on this issue are addressed by comparing the Claimant's situation between 2005 and 2008 to his situation from 2010 forward.

[49] The Minister has already accepted that the Claimant was resident in Canada between 2005 and 2008. Most of the factors, and his mode of living in particular, are largely unchanged between 2005 and today. The Claimant says the only significant change appears to be his somewhat faltering health. However, I believe his familial responsibilities are not as extensive as they were when I.'s children were very young. It is very unlikely that the Claimant still walks them to school. They can likely "fend for themselves" much more than in 2005.

[50] On the other hand, the Claimant remains in Canada and appears to have maintained a strong connection with his family members here. His family members also appear to be heavily involved in supporting him. In fact, one of his grandchildren was in attendance at the hearing and even provided some translation assistance when a communication issue arose. His family bonds in Canada may even be stronger than they were in 2005.

[51] Even if I assigned substantially more weight to the Claimant's ties to India, I would not be persuaded that his situation has changed substantially from the 2005-2008 period when he was considered to be resident in Canada. I am also satisfied that his situation has been more or

less the same since his return to Canada in February 2010. As a result, I find that the Claimant has been resident in Canada since February 16, 2010.

CONCLUSION

[52] Although he had a period of non-residence commencing on October 7, 2008, the Claimant resided in Canada from February 16, 2010, until the hearing date. As a result, the suspension of his OAS benefits that followed his October 7, 2008, departure from Canada should be lifted as of February 16, 2010. For the GIS, any suspension based only on non-residency would not apply between February 16, 2010, and the hearing date.

[53] The appeal is allowed.

Pierre Vanderhout
Member, General Division - Income Security