



Citation: *DS v Minister of Employment and Social Development*, 2023 SST 521

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: D. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated March 8, 2022 (issued by
Service Canada)

Tribunal member: Wayne van der Meide

Type of hearing: Videoconference

Hearing date: April 20, 2023

Hearing participants: Appellant
Appellant's Daughter

Decision date: May 9, 2023

File number: GP-22-812

Decision

[1] The appeal is dismissed.

[2] The Appellant, D. S., isn't eligible for an Old Age Security Pension (OAS). This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant is 80. He was born in India. His two children moved to Canada. His daughter came in 1999 and his son in 2001.

[4] The Appellant came to Canada with his wife as a permanent resident in May 2007. He is now a Canadian citizen. Since coming to Canada, he has spent time in India, England, and Canada.

[5] At the hearing the Appellant said he has lived in Canada since he first came here in 2007. The Appellant says that in addition to the years he resided in Canada, he is entitled to "creditable periods" under the social security agreement between India and Canada (Treaty).¹

[6] The Minister says that the Appellant hasn't resided in Canada for 10 years and isn't entitled to creditable periods under the Treaty.

What the Appellant must prove

[7] To receive a **full** OAS pension, the Appellant must prove he resided in Canada for at least 40 years after he turned 18.² This rule has some exceptions. But the exceptions don't apply to the Appellant.³

¹ Section 40 of the *Old Age Security Act* (OAS Act) allows the Government of Canada to make this agreement. See Agreement on Social Security Between Canada and the Republic of India, November 6, 2012.

² 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 he must have applied for the pension. The Appellant has met these requirements.

³ See section 3(1)(b) of the OAS Act.

[8] If the Appellant doesn't qualify for a full OAS pension, he might qualify for a **partial** pension. A partial pension is based on the number of years (out of 40) that a person resided in Canada after they turned 18. For example, a person with 12 years of residence receives a partial pension of 12/40 the full amount.

[9] To receive a partial OAS pension, the Appellant must prove he resided in Canada for at least 10 years after he turned 18. But, if the Appellant didn't reside in Canada the day before her application was approved, he must prove he already has 20 years of residence.⁴

[10] The OAS Act allows Canada to enter into agreements with other countries. These agreements can help Appellants qualify for an OAS pension by adding up the periods of residency in Canada and the other country.

Reasons for my decision

When the Appellant resided in Canada

[11] I find that the Appellant isn't eligible for an OAS pension.

[12] The Appellant hasn't resided in Canada for at least 10 years after her turned 18. The Appellant has resided in Canada for a total of 2,858 days, which is less than 10 years.

[13] The Treaty **doesn't** assist him to qualify.

[14] I considered the Appellant's eligibility from May 24, 2007, up to and including April 20, 2023. 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.

[15] Here are the reasons for my decision.

⁴ See section 3(2) of the OAS Act.

The test for residence

– What the law says about the test for residence

[16] 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.

[17] A person **resides** in Canada if they make their home and ordinarily live in any part of Canada.⁵

[18] A person is **present** in Canada when they are physically present in any part of Canada.⁶

[19] When I am deciding whether the Appellant resided in Canada, I must look at the overall picture and factors such as:⁷

- where he had property, like furniture, bank accounts, and business interests
- where he had social ties, like friends, relatives, and membership in religious groups, clubs, or professional organizations
- where he had other ties, like medical coverage, rental agreements, mortgages, or loans
- where he filed income tax returns
- what ties he had to another country
- how much time he spent in Canada
- how often he was outside Canada, where he went, and how much time he spent there
- what his lifestyle was like in Canada
- what his intentions were

⁵ See section 21(1)(a) of the OAS Regulations.

⁶ See section 21(1)(b) of the OAS Regulations.

⁷ 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.

[20] This isn't a complete list. Other factors may be important to consider. I must look at **all** the Appellant's circumstances.⁸

– **What the Appellant says about the test for residence**

[21] The Appellant seems to think that if he is present in Canada for 6 months or more in a calendar year, he is a resident for that entire calendar year. He says that if he spends less than 6 months in Canada during a calendar year, he is automatically a resident of Canada for the days he is present in Canada.⁹ The Appellant is wrong. This is not what the law says.

When and where the Appellant was present

[22] Although "residence" and "presence" are not the same, how much time an Appellant spends in and outside of Canada is a factor in determining residence.

[23] I will not include details about when and where the Appellant was present, other than when it helps explain my decision. I have carefully compared what the Appellant said in his more recent submission, against:

- What the Minister says¹⁰
- What the Appellant said before¹¹
- His passport records¹²
- Details of flights provided by the Appellant¹³
- Boarding passes and flight bookings¹⁴

[24] I find what the Appellant's says in his most recent submission about his presence is accurate.¹⁵

⁸ See *Canada (Minister of Human Resources Development) v Chhabu*, 2005 FC 1277.

⁹ See GD2-135.

¹⁰ See GD2-101, GD2-181 and GD2-182 and GD-12.

¹¹ See GD2-135 and GD2-145.

¹² See GD2-38, GD2-44 and GD2-172 to GD2-177.

¹³ See GD2-42.

¹⁴ See GD2-35 to GD2-37 and GD2-163 to GD2-171.

¹⁵ See GD9-2.

When the Appellant resided in Canada

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

- from April 29, 2012, up to and including January 23, 2014
- from March 3, 2015, up to and including October 10, 2018
- from October 28, 2020, up to and including April 20, 2023

[26] The Appellant **didn't reside in Canada** in the following periods

- from May 24, 2007, up to and including April 28, 2012
- from January 24, 2014, up to and including March 2, 2015
- from October 11, 2018, up to and including October 27, 2020

[27] Next, I will 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.

However, I will not repeatedly refer to factors that I already considered **unless** the factors changed.

[28] I will also not refer specifically refer to the Minister's position on residence other than to acknowledge that the Minister's position is that the Appellant hasn't resided in Canada for ten years. The Minister didn't specify **which periods** it says the Minister resided in Canada in its submissions. I didn't want to rely on the Minister's investigative notes because they changed overtime as more information was received.

- **The Appellant didn't reside in Canada from May 24, 2007, up to and including April 28, 2012**

[29] At the hearing the Appellant said he came to Canada with his clothes only. He moved in with his son. His daughter also lived in Canada. In India, however, he owned a home which was furnished. I will speak more about this and another home in India later.

[30] Since arriving in Canada, the Appellant says he has filed Canadian income tax returns every year since 2008. Although he only provided records for the years 2019, I

believe him.¹⁶ However, the Appellant has also continued to file income tax returns in India every year.¹⁷

[31] Although the Appellant doesn't own a car in Canada, he does drive his son's car and has an Ontario driver's licence.¹⁸ He said at the hearing he got this licence in 2012 and I believe him.

[32] He made frequent and extended trips to India and England, with his wife, where he worked as a mechanical engineer. He says he retired as a mechanical engineer in 2011. He didn't work in Canada during this period. His only significant connections to Canada during this period were his two adult children.

[33] I have considered that during one of his trips to India during this period he was advised by his doctor not to travel.¹⁹ This was only one of several lengthy trips to India.

[34] During this period, he spent a total of only 388 days (22% of the period) in Canada, and 1,412 days outside of Canada (78% of the period).

[35] The Appellant didn't spend a lot of time or establish deep connections in Canada during this period to reside in Canada. He did, however, maintain strong connections to India: he owned a home, spent a lot of time, and worked in India and until 2011.

– **The Appellant resided in Canada from April 29, 2012, up to and including January 23, 2014**

[36] The Appellant was present in Canada for this entire period, which is 634 days. He also worked in Canada for a year as a security guard.²⁰ Although he continued to own a furnished home in India, I find that he resided in Canada.

¹⁶ See GD2-41.

¹⁷ He said this at the hearing. See also GD2-40 and GD2-45.

¹⁸ See GD2-39.

¹⁹ See GD2-162.

²⁰ At the hearing he said he worked in as a security guard between January and December 2012. I think he made a mistake because for the first part of 2012 he was in India.

[37] He and his wife lived here with their son. His daughter also lived in Canada. Although he continued to own a home in India, he didn't work in India.

[38] His connections were stronger to Canada than to India.

– **The Appellant didn't reside in Canada from January 24, 2014, up to and including March 2, 2015**

[39] Although the Appellant resided in Canada in the previous period, I find that he stopped residing in Canada during this period. He spent this entire period (which was 402 days) in India.

[40] He also continued to own a home in India until some point in 2014. Even when he sold this home, he bought another home in India for his son and in his son's name. I will speak more about this property later.

[41] Although he didn't work in India, he spent this entire period living in a home he bought for his son. His connections were stronger to India than to Canada during this period.

– **The Appellant resided in Canada from March 3, 2015, up to and including October 10, 2018**

[42] During this period the Appellant spent most of his time in Canada and didn't go to India for more than 161 days at a time. He spent a total of 918 days (68% of the time) in Canada, and 428 days (32% of the time) in India.

[43] When he went to India, he lived in the house he purchased but put in his son's name. He didn't work in India and although his wife went with him when he went to India, his children remained in Canada.

[44] I find that he resided in Canada during this period. He lived with his wife and son and took trips to India.

– **The Appellant didn't reside in Canada from October 11, 2018, up to and including January 20, 2020**

[45] The Appellant spent most of this period in India. He started this period in India and stayed for 273 days. Then he returned to Canada for 192 days before returning to India for 280 days.

[46] The Appellant says he stayed longer in India longer than he intended during the first trip because he had to have triple by-pass surgery and couldn't return to Canada before that surgery.²¹

[47] He says he also stayed longer than he planned to during the second trip to India during this period because of Covid-related travel restrictions. When he left on this trip he planned to return on April 15, 2020, which would have made the trip to India about three-months long.

[48] Although the reason he stayed in India so long on these trips is relevant, I find that he didn't reside in Canada during this period. He was in India most of the time and had surgery there, whether planned or not. He lived in a house that he bought, even if his son owns it. I note that the Appellant uses this house in India far more than his son. At the hearing the Appellant said that the longest trips his son takes to India are three weeks.

[49] Although the Appellant had connections to Canada – it is where both his children live and where he sometimes lives – his absences were too long and his connections to India too strong during this period.

– **The Appellant resided in Canada from October 28, 2020, up to and including April 20, 2023**

[50] He spent most of his time in Canada, with two trips to India of 166 and 151 days. In total he spent 586 days (65% of his time) in Canada and 317 days (35% of his time) in India. I find that he lived in Canada with his wife and son and made trips to India.

²¹ See GD9-2.

Canada's agreement with India doesn't help the Appellant qualify

[51] Canada has a social security agreement with India. The Appellant says that the agreement helps him qualify for an OAS pension. He says that his contributions to the Public Provident Fund of India (PPF), when he was self-employed, are "creditable periods." The Minister disagrees.

[52] I find that the agreement doesn't help the Appellant qualify for an OAS pension.

- **The Appellant's contributions to a private employer pension fund are not creditable**

[53] the Appellant didn't make contributions to the Employees' Provident Fund of India (EPF). However, he made contributions to his employer's private pension fund.

[54] Initially, the Appellant said this employer contributed, on his behalf, to the Employees' Provident Fund (EPF).²² I asked the Appellant about this in a letter.²³ In a letter responding to my letter, the Appellant said that his employer's contributions were to a trust and that the Employees' Provident Fund Organization of India (EPFO) wouldn't have a record of his employer's contributions. He said that he was therefore "willing to surrender my claim for creditable period...."²⁴ He confirmed this at the hearing.

[55] The EPFO is responsible for the EPF, and the agreement says it is the "competent institution" in India.²⁵ The Minister wrote to the EPFO to ask if the Appellant contributed to the EPF.²⁶ The EPFO said that the Appellant didn't contribute to the EPFO.²⁷

[56] I find that the contributions that the Appellant and/or his employer made were to a private pension fund, not to the EPFO.

²² See GD2-116, GD2-124, GD2-127 and GD2-133.

²³ See GD6.

²⁴ See GD9.

²⁵ I will say more about this later.

²⁶ See GD2-103 to GD2-108.

²⁷ See GD2-75.

– **The Appellant’s contributions to the Public Provident Fund of India aren’t creditable periods**

[57] The Appellant contributed to the Public Provident Fund of India (PPF).²⁸ However, his contributions to the PPF don’t help him qualify for an OAS pension.

[58] The Appellant says that the contributions he made to the PPF when he was self-employed are “creditable periods”.

[59] The Appellant’s position is based on several arguments. I will now discuss each of those arguments.

[60] He says that Article 6 of the agreement refers to both “employed” and “self-employed” people. But Article 6 doesn’t give rights or define the meaning of a “creditable period”. It is about which country’s laws apply to self-employed people.

[61] The Appellant says that because the Agreement mentions self-employed persons, it is “missing” something. I think another way to state the Appellant’s argument is that it doesn’t make sense for the treaty to refer to “self-employed” people if contributions by self-employed are not creditable. I don’t agree. The reference does make sense, for the reason I said in the paragraph before: it is talking about which country’s law apply to self-employed people.

[62] He says that Article 1 defines a “creditable period” as “any contributions recognized as such in the legislation under which that period was completed....” He argues that his contributions to the PPF meet this definition because they are recognized in Indian legislation. I agree that his contributions to the PPF are recognized in Indian law. But the contributions are not creditable because Article 2 of the Agreement says that the only **relevant** Indian laws are those about “employed persons.”

[63] I interpret this Article’s reference to “employed persons” to mean people employed by a third party, as opposed to people who are self-employed. I interpret it in this way because in Article 6, the Agreement specifically refers to “self-employed”

²⁸ See GD2-109.

people. This tells me there is a **meaningful difference** in the Agreement between a person who is “employed” and “self-employed”.

[64] The Appellant says that the Minister should not have contacted the Employees’ Provident Fund Organization (EPFO) because the EPFO is not responsible for contributions to the PPF. I disagree.

[65] The Minister had no reason to contact the administrators of the PPF because those contributions are not creditable periods.²⁹

[66] As well, Article 1 of the Agreement defines the “competent institution” in India as the “Employees’ Provident Fund Organization” (EPFO). The EPFO agrees with the conclusion that contributions to the PPF are not “creditable periods.” In response to the Minister’s request for information, the EPFO said that the Appellant: “has himself declared in the supporting documents that he was self-employed during his period of stay in India, whereas [the] EPFO only covers those workers who are employed in formal sector.”

[67] Although I have come to my own conclusion about what the Agreement says, I think that since the EPFO is the “competent institution” in India, its interpretation of the Agreement is persuasive.

[68] To summarize, I find that the only “creditable periods” in India that the Agreement recognizes are contributions made to the EPFO. The Appellant didn’t contribute to the EPFO. Therefore, the Agreement does not assist the Appellant to qualify for an OAS pension.

Conclusion

[69] I find that the Appellant isn’t eligible for a partial OAS pension. He doesn’t meet the requirement of at least 10 years of residence in Canada after the age of 18.

²⁹ I have already explained why.

[70] This means the appeal is dismissed.

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