IMMIGRATION AND REFUGEE BOARD OF CANADA

IMMIGRATION APPEAL DIVISION

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

SECTION D'APPEL DE L'IMMIGRATION

IAD File No. / N° de dossier de la SAI : VA6-00706
Client ID no. / N° ID client : 3049-5038

Reasons and Decision – Motifs et décision

Residency Obligation

Appellant(s)	**Appelant(s)**
MAHFUZUR RAHMAN	
Respondent	**Intimé**
The Minister of Citizenship and Immigration Le Ministre de la Citoyenneté et de l'Immigration	
Date(s) and Place of Hearing	**Date(s) et Lieu de l'audience**
4 September 2007 Vancouver, BC	
Date of Decision	**Date de la Décision**
21 September 2007	
Panel	**Tribunal**
Erwin Nest	
Appellant's Counsel	**Conseil de l'appelant(s)**
Massood Joomratty Barrister & Solicitor	
Designated Representative	**Représentant désigné**
Nil	
Minister's Counsel	**Conseil de l'intimé**
Nadine Wu	

Reasons for Decision

[1] Rahman MAHFUZUR (the "appellant") appeals from the negative determination of his status as permanent resident of Canada made by an Immigration Program Manager at the High Commission of Canada in Dhaka, Bangladesh who found him inadmissible for failing to comply with the residency obligation of section 28 of the *Immigration and Refugee Protection Act* (the "*Act*").[1] More particularly, that the appellant had not complied with the residency obligation for at least 730 days in the five-year period immediately before the March 20, 2006.

[2] The Immigration Program Manager made a decision pursuant to paragraph 46(1)(b) of the *Act*.[2]

[3] It was also determined that sufficient humanitarian and compassionate considerations, taking into account the best interests of a child directly affected by the determination, justifying retention of permanent resident status were not present such as to overcome the breach of the appellant's residency obligation.

[4] This appeal is made pursuant to subsection 63(4) of the *Act*[3]and the appellant bases his appeal on paragraph 67(1)(c) of the *Act*, which provides as follows:

> **67.** (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time the appeal is disposed of,
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> > (c) other than in a the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
28(1) A permanent resident must comply with a residency obligation with respect to every five-year period.
(2) The following provisions govern the residency obligation under subsection (1):
(*a*) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are
(i) physically present in Canada,

2 **46**(1) A person loses permanent resident status
(*b*) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;

3 **63**(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

[5] The appellant did not challenge the legal validity of the determination and requested that the Appeal Division exercise its discretionary jurisdiction.

BACKGROUND

[6] The appellant is 47 years old, a citizen of Bangladesh. Upon his arrival in Canada in 1992 he claimed refugee status and after being granted status he was landed on October 10, 1996.[4] Since his arrival in Canada in 1992 until 1997 the appellant lived in Montreal, Quebec.

[7] In January 1997 the appellant went back to Bangladesh where he got married on March 24, 1997. On May 10, 1997 he returned to Canada and on July 14, 1997 he went back to Bangladesh, where he stayed until his return to Canada in January 1998. The appellant lived in Vancouver until July 28 1998, the date of his final departure from Canada to Bangladesh. The appellant was physically present in Canada for ten and a half months since his landing.

[8] The appellant submitted sponsorship application for his wife which was received by the Canadian High Commission in Singapore on July 29, 1997. The application was refused on August 4, 1998 and on August 13, 1998 the appellant filed Notice of Appeal of the refusal. The appellant did not appear at the No Show Court on January 27, 1999 and after he failed to appear at the appeal hearing either personally or through counsel on February 24, 1999 the appeal was dismissed.[5]

[9] On May 21, 1999 the appellant's wife gave birth to the couple's first child, a son, and the appellant's daughter was born on September 2002. The appellant, his wife and two children live in Dhaka, Bangladesh where he runs his own business since 2002. The appellant's father, his four brothers, female cousin and their families live in Bangladesh. The appellant and his wife have no family members in Canada.

[10] According to the appellant, he submitted an application for a travel document based on advice received from a Canadian lawyer in February 2006, and was interviewed on March 21, 2006 by the Canadian Immigration official at the High Commission of Canada in Dhaka, Bangladesh.

DECISION

[11] In looking to the circumstances in their entirety, the appellant has not made out a case for discretionary relief. The appeal is dismissed.

ANALYSIS

[12] I have considered all the testimony adduced at the *de novo* hearing, the contents of the Record, and the oral submissions from the appellant's counsel and from the Minister's counsel.

[13] The appellant was represented by counsel. The appellant testified by phone from Bangladesh.

[14] I regard the following factors to be the appropriate considerations in the exercise of discretionary jurisdiction in the context of an appeal based on the appellant's failure to meet the residency obligation. The factors set out in *Ribic*,[6] and confirmed by the Supreme Court of Canada in *Chieu*,[7] albeit modified to reflect the case of a failure to comply with a residency obligation, provide some guidance as to what can be considered when looking at "all the circumstances of the case". These factors may include, but are not limited to:

- the nature, extent and degree of non-compliance with the residency obligation;
- the reasons for and extent of the absence(s) from Canada and the appellant's intentions in relation to residency in Canada;
- whether the appellant made reasonable attempts to return to Canada at the first opportunity;
- the length of time the appellant has spent in Canada and the degree to which the appellant is established in Canada;
- the continuing connections the appellant has to Canada, including connections to family members here and the hardship and dislocation to family members in Canada if the appellant ultimately ceases to be a permanent resident as a result of his or her non compliance; and

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4 Record, page 31
5 Exhibit R-1, pages 1-4.

- the degree of establishment of the appellant outside of Canada;
- the best interests of any child directly affected by the decision; and
- the degree of hardship that would be caused to the appellant by loss of status in Canada, including the conditions in the likely country of removal.

[15] These factors are not exhaustive and the weight given to each may vary depending on the circumstances in each individual case. In this regard, I note the continuing reference to humanitarian and compassionate considerations, which warrant relief in any given case. Humanitarian or compassionate considerations under the former *Act*[8] were, generally, "…taken as those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another…".[9]

[16] The appellant testified that upon his return to Bangladesh in July 1998 he was held back from returning to Canada by the circumstances beyond his control caused by a four months flood and the need to provide care to his elderly father whose health condition deteriorated significantly. Furthermore, he claimed that the refusal of his wife's application combined with her difficult pregnancy in 1998 and his belief that he has lost his status by residing outside of Canada for more than six months were the main reasons for his prolonged absence from Canada. I note the absence of any easily obtainable medical evidence to corroborate the appellant's claim of his father's health issues that necessitated the appellant's continuous stay in Bangladesh. The appellant testified that he has been working full time in a factory since 1999 while assisting his wife in caring for his son who according to him was born with "brain problems". No reliable evidence was adduced at the hearing to explain the appellant's lack of alternative care arrangements for his father given that he had four brothers living in Bangladesh. I find inadequate the appellant's explanations for his absence from Canada because of the need to care for his father. The appellant admitted that he was advised by his friends and received conflicting advice with respect to the issues pertaining to retention of permanent resident status in Canada. He confirmed that he was counseled by the Canadian immigration officer at the time of his departure from Canada regarding residency requirements and the consequences for permanent

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6 *Ribic, Marida v. M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985 (See CLIC, No.86, May 14, 1986)

7 *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] S.C.J. No. 1 2002 SCC 3.

8 *Immigration Act*, R.S.C. 1985, c.I-2 as amended.

residents for residing for more that six months outside Canada.[10] The appellant testified that after the flood had ended he consulted with lawyers in Bangladesh about retention of his status in Canada and was advised to contact lawyers in Canada but did not follow on this advice. I note absence of evidence of the appellant's reasonable efforts to return to Canada at the first opportunity and I find that the appellant did not try to create an opportunity by initiating inquires with respect to the retention of his status. The appellant has not returned to Canada since 1998. I find inadequate the appellant's explanations for the nature and degree of non-compliance with residency obligation and I find this to be a negative factor in this appeal.

[17] I find the evidence in this case on the balance of probabilities does not indicate that the appellant's intent was to establish permanent residency in Canada for himself and his family as claimed. While he testified that because he was ignorant of the Canadian immigration law and was under impression that he lost his status after residing for more than six months in Bangladesh he did not make any efforts to contact the Canadian immigration officials in Bangladesh or in Canada. I find his testimony not credible. The appellant has been involved with the Canadian immigration process since his arrival in Canada in 1992 where he received assistance from a government appointed advocate who assisted him in processing his successful claim for the refugee status. Based on the evidence before me I reject the appellant's counsel's submission that the appellant's limited efforts to retain his permanent resident status in Canada until 2006 are result of his lack of education and sophistication. His previous experience in coming to Canada, making successful refugee claim, returning to Bangladesh to get married, settling and establishing a business there do not hold a hallmark of lack of education and sophistication. I find that ignorance of the law and adherence to the faulty legal advice does not constitute persuasive arguments in determination of discretionary relief. I find not credible the appellant's explanations for the extent of the absences from Canada. I find this to be negative factor in this appeal.

[18] There were unexplained inconsistencies between the information he provided previously to the immigration official[11] and his testimony at the hearing. The appellant told the visa officer that he did not appeal his wife's refusal of the application because he thought that he cannot return to Canada therefore he did not see benefit in it. At the hearing he confirmed that he was

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9 *Chirwa v. Canada (Minister of Manpower and Immigration*) (1970), 4 I.A.C. 338 (I.A.B.).

10 Records, page 32.

11 Record, pages11-16.

informed by his roommate in Canada about his right to appeal. The appellant testified that he signed the Notice of Appeal provided by the roommate and forwarded by him to the Immigration Appeal Division of the IRB. Furthermore the appellant confirmed in a letter to the Minister of Citizenship and Immigration that he was appealing the sponsorship refusal.[12] The appellant testified that he does not know why the appeal was dismissed. Based on the evidence before me I am satisfied that the appellant did not follow up on his appeal process which resulted in dismissal. I found the appellant not credible with respect to his appeal of the sponsorship refusal. He did not testify in a clear, consistent and straightforward manner.

[19] I find the appellant's lack of efforts to find out about retention of his status in Canada in the eight years prior to his meeting with a Canadian lawyer in 2006 inconsistent with his claim to want to settle in Canada permanently. In looking at the appellant's intent with respect to his residence in Canada I find on the balance of probabilities that the appellant planed to establish in Bangladesh and he planned to return to Canada only when he realized that by retaining his status in Canada his son will benefit from affordable medical care, which according to him is very costly in Bangladesh. I consider the appellant's lack of intent to establish permanent residency in Canada during the period under consideration to be a negative factor in this appeal.

[20] In looking at the appellant's degree of establishment in Canada I note that while the appellant had lived in Canada from 1992 he was a recipient of welfare benefits since his arrival in Canada while working part time despite being asked to find full time employment by the Citizenship and Immigration Canada and the Quebec government. He worked briefly for a Mac's convenience store in B.C. where he received specialized training.[13] The appellant confirmed that that he had two bank accounts in Quebec and in British Columbia, currently with no deposits; he does not have any assets, investment or property in Canada. The appellant has no friends or any ties to Canada. I find that the appellant's establishment in Canada is not meaningful as he chose to establish himself in Bangladesh for the last nine years. As the appellant has no family in Canada there is no issue of hardship or dislocation to family members in Canada if the appellant ultimately ceases to be a permanent resident.

[21] I find that the appellant was successful in establishing himself in Bangladesh, working continuously since 1999 and managing his own company from 2002 as well as deriving income

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12 Exhibit R-1, page 2.

13 Record, pages 56-58.

from a joint venture in a brick field and land ownership in Bashundara city and Narayangonj. In addition the appellant has savings.[14] Based on the evidence presented to the visa officer in March 2006 the appellant accumulated assets had approximately combined value of $380,000.00. The appellant's wife does not work outside the home. The appellant testified confirmed that he is able to support his family from the income generated from his business and through investments. Members of the appellant's immediate family, all live in Bangladesh. His father lives in the ancestral village cared by a family member. I find the evidence indicates that the appellant is well established in Bangladesh.

[22] In looking at the best interest of a child directly affected by this decision, I find that in the best interest of the appellant's children is to remain in the care of their parents. While I accept that the increasing costs for the care of his son create financial pressure I find no persuasive evidence that the appellant can not afford to pay for tri-monthly treatment and consultations with the physician in Thailand. There was no evidence before me suggesting that the appellant's son receives inadequate care or treatment in Bangladesh. I note the appellant's admission that he was advised by the physicians in Bangladesh to seek specialized treatment for his son in the US and Canada. The appellant stated at the interview with the visa officer in 2006 that the reason for him to return to Canada is to bring his child for treatment as suggested his son's physician from Thailand. There was no evidence adduce at the hearing that the appellant was investigating possibility to find treatment in Canada for his child's medical condition since his birth nine years ago. I have taken into account the impact the appellant's son's condition has on his sister. There is no evidence that the appellant's children are in an uncomfortable or unmanageable situation. I find no evidence of lack of social services in Bangladesh to support the appellant's son. No evidence was adduced at the hearing to suggest that the appellant's family in Bangladesh cannot continue to provide adequate care for their children, including specialized medical care for the appellant's son in Thailand.

[23] I have considered the family re-unification objectives[15] contained in the current *Act*. Given that the all of appellant's family is in Bangladesh I find this objective is met by the appellant losing his permanent resident status in Canada.

CONCLUSION

[14] Record, page 13.
[15] *Act*, paragraph 3(1)(d).

[24] In conclusion, the exercise of discretionary relief is always a weighing process. I conclude the appellant has not met the onus on her of demonstrating that, taking into account the best interests of a child or children directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of this case.

[25] The appeal of Rahman MAHFUZUR is dismissed in law and on discretionary grounds.

NOTICE OF DECISION

The appeal is dismissed.

"Erwin Nest"
Erwin Nest

21 September 2007
Date (day/month/year)

Judicial review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.