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

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Reasons and Decision – Motifs et décision

Residency Obligation

Appellant(s) / **Appelant(s)**

LUTCHMEE RAMNATH
CULYANEE RAMNATH
AKHEELESH RAMNATH
SUNDEEP RAMNATH

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**

13 September 2007
Vancouver, BC

Date of Decision / **Date de la Décision**

11 October 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**

Kevin Hatch

Reasons for Decision

[1] Lutchmee RAMNATH (the "principal appellant"), Culyanee RAMNATH, his wife, Akheelesh RAMNATH, Sundeep RAMNATH, their sons (the "appellants") appeal from the decision made by an Immigration Program Manager at the High Commission of Canada in Nairobi, Kenya pursuant to paragraph 46(1)(b) of the *Immigration and Refugee Protection Act* (the "*Act*")[1] who found them inadmissible for failing to comply with the residency obligation of section 28 of the *Act*.[2]

[2] More particularly, that the appellants did not comply with the residency obligation to be physically present in Canada for at least 730 days in the five-year period immediately before the 6 February 2006.

[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 principal appellant's and the appellant's residency obligation.

[4] This appeal is made pursuant to subsection 63(4) of the *Act*[3]and the principal appellant's and the appellants base their appeal on paragraph 67(1)(c) of the *Act*, which provides as follow:

> 67(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time the appeal is disposed of,
>
> (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.
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;

2 **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,

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 appellants' counsel stated that the principal appellant was authorized to represent the appellants at this appeal and the principal appellant confirmed at the outset of the hearing that the appellants waved their right to be heard at this hearing. The principal appellant did not challenge the legal validity of the determination and requested that the Appeal Division exercise its discretionary jurisdiction.

BACKGROUND

[6] The principal appellant is 55 years old, permanent resident of Canada originally from Mauritius. On November 16, 2000, the principal appellant, his spouse and two sons were landed in Canada.[4] The principal appellant has two maternal uncles living in Canada.

[7] According to the principal appellant, in January 2001 he was informed by his sister about his mother's serious health issues and under pressure from his family he and the appellants went back to Mauritius on January 16, 2001 to be with his mother who requested their presence before she dies. She passed away in July 2003.

[8] The principal appellant testified that he and the appellants never returned to Canada. The principal appellant has two married siblings, brother and sister and his spouse has two brothers and one sister, all living in Mauritius.

[9] The principal appellant and the appellants stated in their respective applications for a travel document that they were physically present in Canada for 63 days between November 2000 and January 2001.

DECISION

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

ANALYSIS

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

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4 Record, page 27.

[12] The principal appellant testified by phone from Mauritius.

[13] 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 appellants' failure to meet the residency obligation. The factors set out in *Ribic*,[5] and confirmed by the Supreme Court of Canada in *Chieu*,[6] 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:

a. the nature, extent and degree of non-compliance with the residency obligation;

b. the reasons for and extent of the absence(s) from Canada and the appellant's intentions in relation to residency in Canada;

c. whether the appellant made reasonable attempts to return to Canada at the first opportunity;

d. the length of time the appellant has spent in Canada and the degree to which the appellant is established in Canada;

e. 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;

f. the degree of establishment of the appellant outside of Canada;

g. the best interests of any child directly affected by the decision; and

h. 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.

[14] These factors are not exhaustive. It is important to note that none of these factors are determinative and an assessment of "all the circumstances" in any given case may involve giving lesser or more weight to one consideration than another, depending on the compelling nature of the consideration within the context of the individual case before the Panel. In this regard, I note

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5 *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).

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

the continuing reference to humanitarian and compassionate considerations, which warrant relief in any given case. Humanitarian or compassionate considerations under the former *Act*[7] 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…".[8]

[15] Given the principal appellant's admission that he and the appellants have not been in Canada during the relevant period I find the extent and degree of their non-compliance with the residency obligation to be a very negative factor in this appeal.

[16] The principal appellant and his spouse are well educated individuals, who held senior positions in their chosen professions, as the Executive Officer at the Development Bank in Mauritius and the Education Officer at the College in Mauritius, respectively. The principal appellant testified that the main reason for his and the appellants' prolonged absences from Canada was the need to provide care to his mother, who suffered from a heart attack on November 9, 2000, the day he left Mauritius together with his spouse and sons to relocate permanently to Canada. The principal appellant emphasized a number of times through his *viva voce* testimony that before leaving Mauritius he told his family that he is leaving "for good and not coming back". In his letter of January 31, 2006[9] to the Canadian High Commission in Nairobi, Kenya, the principal appellant writes "I arrived in Vancouver accompanied with my wife and two sons on 16/11/2000 as a Permanent resident, leaving Mauritius my mother, my little sister and my elder brother and his families who are my sister- in-law, nephew and niece. At that very moment I left Mauritius I had made up my mind to make a good and successful career for myself, my wife and to give a good education to my two sons since they had in mind to become a Doctor and the younger one wants to become an Aerospace Engineer." Furthermore, the principal appellant stated in the letter that "My brother was against my leaving Mauritius for immigration purposes to Canada because at that time he did not had a permanent job. I was responsible for running the house financially since I had in my responsibility my mother and my little sister. … He even made a family get together where I was brainstormed by my relatives not to leave my old mother and my little sister who was studying." The principal appellant confirmed that he did not have contact with his family in Mauritius until January 2001.

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7 *Immigration Act*, R.S.C. 1985, c.I-2 as amended.
8 *Chirwa* v. *Canada (Minister of Manpower and Immigration*) (1970), 4 I.A.C. 338 (I.A.B.).
9 Record, page 8-10.

[17] The principal appellant testified that his mother's health condition was good before his immigration to Canada. He also claimed that he has not learned about his mother's heart attack and her deteriorating health situation until January 2001, when he received a phone call from his sister urging him to return to Mauritius. Given the principal appellant's admission that he had and continues to maintain good relationship with his maternal uncles in Canada, who were in contact with his family in Mauritius, I find not credible his explanation that he knew nothing about his mother's medical condition for the most part of his stay in Canada. I find it curious that the principal appellant would decide to relocate permanently with his immediate family to Canada, given his mother's, younger sister's and an older brother's financial dependency on him. I find the principal appellant's inadequate explanations regarding his intentions in relations to residency in Canada given his familial obligations in Mauritius detract from his credibility.

[18] The principal appellant's testified that he made a decision to return to Mauritius with the appellants under pressure from his siblings and in order to accommodate his mother's dying wish. I find the principal appellant's evidence of withdrawing the amount $25,000.00 from his bank account, the funds he brought with him from Mauritius for the purpose of settling in Canada inconsistent with his stated intent to return to Canada shortly after the visit with his mother.

[19] The principal appellant submitted a letter from an emergency room physician confirming that the principal appellant's mother suffered an episode of Cerebral vascular accident on November 9, 2000 and she was discharged from the hospital following a week stay after being prescribed physiotherapy sessions and drugs for her diabetes and hypertension.[10] No evidence was adduced at the hearing with respect to the need for nursing assistance in providing daily care for the principal appellant's mother. The principal appellant's testified that he and his spouse delivered daily care for his mother, who was bed ridden, which consisted of giving her a bath, feeding her taking her to physiotherapy sessions and for medical checkups with a physician. The principal appellant confirmed that since January 2001 and until July 2005 he and his spouse did not work and he supported his family from the income generated by leasing his sugar cane plantation and the interest from his fixed deposit in the bank. Given that his brother and his wife moved to the country side away from the home they shared with the principal appellant's mother and his sister I find not credible the principal appellant's explanation for not finding alternative

[10] Exhibit A-1, page3.

arrangements for his mother's care by hiring a domestic helper after realizing that while his mother's medical condition was not good it was not terminal. I am not satisfied with the principal appellant's explanation for not creating an opportunity for his spouse and children to

return to Canada to continue on the path of establishing themselves there while he would stay in Mauritius looking after his mother's needs, with assistance of a hired help if necessary. I note absence of evidence to support the conclusion that the principal appellant could not afford to pay for assistance in care for his mother because of financial considerations. On the balance of probabilities based on the evidence before me, I find that the principal appellant and the appellants did not take reasonable steps to return to Canada between 2001 and July 2003, when the principal appellant's mother passed away.

[20] The principal appellant wanted the Panel to believe that he and his spouse were required to stay for another two years in Mauritius following the death of his mother by fulfilling the requirements of the Puranic version of the Hindu religion, which include active participation in the rituals conducted every six months for a period of two years after the death of a close relative. I find no satisfactory explanation why the principal appellant and his spouse could not have traveled from Canada to participate in the rituals while continuing their establishment in Canada. Given his previous testimony that he decided to relocate to Canada permanently in 2000 despite his family's objections I find not credible the principal appellant's explanation that further delay in his decision to return to Canada after his mother's death was his responsibility to arrange his sister's marriage. No credible evidence was adduced at the hearing as to why the principal appellant's older brother together with other family members residing in Mauritius could not assist in his sister's marriage. I find the evidence on the balance of probabilities inconsistent with the principal appellant's claim of making reasonable attempts to return to Canada at the first opportunity, whether in 2003 or in 2005. I find this to be negative factor in this appeal.

[21] The principal appellant confirmed that he and his spouse and children have no substantial connections to Canada. The principal appellant found a part time work as accounts clerk in a Subway franchise, while his spouse did not find employment because of lack documents required for accreditation. The principal appellant and his immediate family lived in a one bedroom suite and he had no property in Canada. His two sons attended schools in the Surrey area. The principal appellant attended the Hindu temple in Surrey and he confirmed that he did not belong to any professional or community based organizations or formed friendships while in Canada. I find the degree of the principal appellant's and the appellants' establishment in Canada to be limited and not meaningful. I find this to be a negative factor in this appeal.

[22] Against this I consider that the appellants are well established in Mauritius. The principal appellant owns the sugar cane plantation, has income from his bank deposits, he owns property, the old and a new house, which would generate rent upon completion. In 2005 the principal appellant returned to his former employment in the Development bank and his spouse is tutoring. He and his spouse have most of their families in Mauritius and the principal appellant was able to provide quality secondary and post secondary education for two of his sons. He and the appellants lived only 63 days away from their home and a life they made for themselves in Mauritius.

[23] The principal appellant claimed that as early as August 2003 he contacted the Canadian Embassy in Nairobi for the purpose of clarifying validity of the appellants' permanent status in Canada however he never received a reply to his inquiries. Moreover he told the Panel that in 2004 he sent a second letter to the Canadian Embassy, in which he asked for re-issuance of his entry visa. According to him, he received a reply from the Canadian Embassy stating that the Embassy can not issue a visa. The appellant claimed that he was not informed by the Canadian Embassy "that, his visa was only valid for five years". Given the principal appellant's level of education, degree of sophistication and his familiarity with Canadian immigration system as the successful applicant in a skilled worker category I find his ignorance of the law not credible. I find not credible the principal appellant's explanations for the extent of the absences from Canada. I find this to be negative factor in this appeal.

[24] While the principal appellant has maternal uncles living in Canada with whom he maintains a regular phone contact 2-3 times a week, he confirmed that there is no financial interdependency between his family in Canada and that his uncles visited him in Mauritius. Asked to explain the hardship caused to his uncles by loss of his status he stated that they will be sad. The principal appellant's maternal uncle can continue their contact with the appellants in Mauritius through phone calls and visits as they have done in the past. I find there is no issue of hardship or of dislocation to family members in Canada if the appellant ultimately ceases to be a permanent resident.

[25] The evidence supports the conclusion that the principal appellant helped his sons to realize their educational goals by sending his son Akheelesh to India in 2003 to study in Medical Science, Benaras Hindu University in Vanarasi and Akeelesh is expected to graduate shortly by obtaining M.B.B.S. The principal appellant sent his other son Sundeep to study in Malaysia in

2004. After two years of studying in the university in Malaysia Sundeep is currently enrolled in the University of Manitoba in a twining program with the university in Malaysia, pursuing his degree in Engineering in Aerospace. I am satisfied that the principal sons' best interests were best served by continuing their education in Mauritius under care of their parents in the language they were fluent in a familiar and supportive environment. I find on the balance of possibilities that the principal appellant's sons were able to pursue their education in the post secondary institutions outside of Canada without any evidence of hardship. I note absence of reliable evidence that the principal appellant made reasonable efforts to find Canadian academic institutions in 2003 or 2004 for his sons. In its totality the evidence does not support the conclusion that the return to Canada for employment, permanent residence or educational purposes was a priority for the principal appellant and the appellants. I have taken into account the impact on the principal appellant's sons as a result of their loss of status and I find no evidence of hardship present in this case. I find it curious that while the principal appellant claimed that his sons will be sad if the appeal fails because they would like to live and work in Canada for the rest of their life, however none of his sons, who are 24 and 22 respectively and are close to graduation were present at the hearing in support of their appeals. No satisfactory explanation was adduced at the hearing to explain their absence. In looking at the best interest of the principal appellant's children I find that issues of hardship do not present in this case.

[26] No specific evidence was presented at the hearing with respect to the appellant's wife's circumstances in this case to assist the Panel in regarding factors for appropriate consideration in the exercising of its discretionary jurisdiction.

CONCLUSION

[27] The appellants did not meet the onus on them of 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.

[28] The appeals of Lutchmee RAMNATH, Culyanee RAMNATH, Akheelesh RAMNATH, Sundeep RAMNATH are dismissed.

NOTICE OF DECISION

The appeals are dismissed.

"Erwin Nest"
Erwin Nest

11 October 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.