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 : VB4-01861/62/63
Client ID no. / N° ID client : 5500-4281/4098/4084

Reasons and Decision – Motifs et décision

RESIDENCY OBLIGATION

Appellant(s)	Abdoolshamad Abdool Rashid CHOOLUN Narriman Bibi CHOOLUN	**Appelant(e)(s)**
and	Muhammad Ridwaa CHOOLUN	**et**
Respondent	The Minister of Citizenship and Immigration	**Intimé(e)**
Date(s) of Hearing	August 26, 2015	**Date(s) de l'audience**
Place of Hearing	Heard by teleconference in Vancouver, BC	**Lieu de l'audience**
Date of Decision	October 23, 2015	**Date de la décision**
Panel	Sterling Sunley	**Tribunal**
Counsel for the Appellant(s)	Massood Joomratty Barrister and Solicitor	**Conseil(s) de l'appelant(e) / des appelant(e)(s)**
Designated Representative(s)	Abdoolshamad Abdool Rashid Choolun for Muhammad Ridwaa Choolun	**Représentant(e)(s) désigné(e)(s)**
Counsel for the Minister	Sean Carey	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] These are the reasons and decision of the Immigration Appeal Division (the "IAD") in the appeals of Abdoolshamad Abdool Rashid CHOOLUN (the "appellant A"), Narriman Bibi CHOOLUN (the "appellant B"), and Muhammad Ridwaa CHOOLUN (the "appellant C"), collectively the "appellants," from a decision made outside Canada with respect to their residency obligations. The appellants were found to have failed to comply with the residency obligation pursuant to section 28 of the *Immigration and Refugee Protection Act* (the "*Act*").[1] This decision was communicated to them in letters dated May 1, 2014 from the Immigration Section of the Canadian High Commission in Nairobi, Kenya.[2]

[2] The appellants, who are outside of Canada and who testified by telephone, do not challenge the legal validity of the refusal and have, instead, requested that the IAD exercise its discretionary jurisdiction. Through counsel, the appellants conceded that they had not been physically present in Canada for 730 days in the relevant five year period, nor did they argue that any of the other provisions in paragraph 28(2)(a) of the *Act* are applicable in this appeal.

PRELIMINARY MATTER

[3] Pursuant to *Rule* 19 of the *Immigration Appeal Division Rules* (the "*IAD Rules*"),[3] in light of appellant C's age, and with the consent of both parties, appellant A was appointed as the designated representative of his minor son, appellant C.

BACKGROUND

[4] At the time of the hearing, appellants A, B, and C were respectively 50, 48, and 17 years of age. The appellants all presently reside in Mauritius, the country of their birth. Appellants A

[1] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
[2] Appeal Record, pp. 2-7.
[3] *Immigration Appeal Division Rules*, SOR/2002–230.

and B are the married parents of appellant C. The appellants landed *en famille* in Canada on November 12, 2007.

ISSUE

[5] The issue before me is two-fold:

a. whether or not the determination made against the appellants is valid in law; and,

b. if the determination is legally valid, whether, 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.

LAW

[6] The relevant paragraphs of section 28 of the *Act* are as follows:

> **28(1) Residency Obligation** A permanent resident must comply with a residency obligation with respect to every five-year period.
>
> **28(2) Application** 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.

EVIDENCE

[7] I have considered the documentary material proffered by the appellants' counsel and which was subsequently entered into evidence,[4] the contents of the Record, and the oral testimony of appellant A. Prior to the conclusion of the hearing, I heard oral submissions from respective counsel to the appellants and the Minister of Citizenship and Immigration for Canada.

[4] Exhibits A 1 and A 2.

[8] As observed, above, the only witness at the hearing was appellant A. Accordingly, his testimony coupled with the documentary evidence before me constitutes the basis for my decision with respect to appellants B and C (although I make a specific finding, below, with respect to the best interests of appellant C pursuant to the Supreme Court of Canada decision in *Baker*).[5]

DECISION

[9] Taking into account all of the evidence before me, I find that:

(a) the determination made against the appellants is valid in law; and,

(b) taking into account the best interests of a child directly affected by the decision, there are insufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

[10] Accordingly, the appeal is dismissed.

ANALYSIS

[11] Pursuant to paragraph 67(1)(c) of the *Act*, the IAD has been granted authority to consider discretionary relief and to thereby permit an appellant to retain their permanent resident status despite a breach of the residency obligation. The test to be applied in the exercise of discretionary jurisdiction is as follows: the IAD must be satisfied that, at the time that the appeal is disposed of, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations exist to warrant special relief in light of all the circumstances of the case.

[12] There is considerable jurisprudence provided to the IAD by various Courts which serves to assist the former to exercise its discretionary jurisdiction; of particular importance are *Ribic*,[6]

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[5] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
[6] *Ribic, Marida v. M.E.I.* (I.A.B. 84-9623), Davey, Benedetti, Petryshyn, August 20, 1985.

Chirwa,[7] and *Chieu*.[8] With this guidance in mind, I will consider the following non-exhaustive factors:

(a) The extent of non-compliance with the residency obligation;

(b) The reasons the appellants left and remained outside Canada;

(c) Whether efforts were made to return to Canada at the first opportunity;

(d) The appellants' degree of establishment in Canada;

(e) The appellants' family ties to Canada;

(f) Any hardship that would be caused to the adult appellants;

(g) Any hardship that would be caused to any adult family members in Canada if the appellants were to lose their status in Canada; and,

(h) The best interests of a minor or dependent child or children directly affected by the decision.

[13] At the hearing, it was agreed by both parties that the appellants have spent none of the required 730 days in Canada during the relevant period. In my view, the appellants' respective breaches are highly significant, particularly given that they have not set foot in Canada at any time subsequent to their initial landing. The evidence shows that the appellants left Canada only 15 days after landing on November 12, 2007; it was, according to appellant A, a "planned" departure. I find the extent of the non-compliance in this case to be very serious.

[14] Appellant A testified that the reason for the hasty return to Mauritius was to deal with various "outstanding matters" that had been left unresolved prior to departing Mauritius due to the brief notice the family had received from Citizenship and Immigration Canada. Normally, a visa allows a reasonable amount of time to settle affairs in the immigrant's home country before moving to Canada; in the case at bar, Appellant A testified that he had inadequate lead time to sell the family house and to advise his employer of the family's pending emigration from Mauritius. Appellant A added that it was his family's preference to "move" to Canada the

[7] *Chirwa v. Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 388 (I.A.B.).
[8] *Chieu v. Canada* (*Minister of Citizenship and Immigration*), 2002 SCC 3.

following summer when the weather was warmer. While I have considered the explanations provided, in my view departing Canada very shortly after landing with the intention of not returning for six months is inconsistent with the typical behaviour of a family genuinely seeking to make Canada their permanent place of residence.

[15] Even if I were to accept appellant A's explanation for returning to Mauritius so soon after landing at face value, his reasons for his family remaining outside of Canada are not, in my view, generally credible. For example, he states that the family had to stay in Mauritius because his father was ill with colon cancer. Yet the evidence shows that his father's surgery took place in July 2009, approximately 19 months after the appellants' original landing in – and departure from – Canada. There was no satisfactory explanation for why the family had to remain in Mauritius during that time. Nor is there satisfactory evidence that they were taking any concrete steps during those 19 months to deal with the aforementioned "outstanding matters" which appellant A testified were so pressing.

[16] There is no satisfactory explanation provided with respect to why Appellant A – who had close family members living in Mauritius at the time– was the only one able to provide post-operative care for his father, particularly given the former's testimony that it took "one or two years" to care for his father. While he may have a cultural duty to care for his father, it does not necessarily follow that he personally needed to be *in situ* as his father's primary care-giver.

[17] Appellant A was asked why he did not return following his father's recovery, which he testified occurred in 2013. If appellant A is telling the truth about his father needing "one or two years" of filial care following his 2009 surgery, his father should have been well enough for the appellants to return to Canada in 2011; yet the evidence shows they did not apply to return to Canada until early 2014, nearly five years after his father's surgery. Once again, I do not find this answer, which in my view generally lacks the ring of truth, to be consistent with what one would expect to hear from a man who genuinely intends to make Canada his family's permanent home. Nor do I find appellant A's testimony that he and his family were impacted by circumstances beyond their control to such an extent that they could not even seek to return to Canada until 2014 to be credible.

[18] In sum, I find, on a balance of probabilities, that the reasons provided by the appellants for their long absence from Canada are quite simply inadequate in light of the breach involved. I also find it likely, on a balance of probabilities, that the appellants could have returned to Canada as early as 2008 but chose not to do so and, furthermore, that their explanations for not seeking to return to Canada until 2014 are not credible.

[19] During the hearing, appellant A testified that his son had been accepted into a Canadian university and that the cost of tuition was a major consideration for him. In my view, appellants' counsel's submission that appellant C should, at a minimum, not lose his permanent resident status is most likely explained by the significantly lower tuition a permanent resident pays versus that required of a foreign national. Nor is there a satisfactory explanation as to why the family is now prepared to separate at this stage when family unification was one of the reasons given for previously not leaving Mauritius to return to Canada. I find, on a balance of probabilities, that the sudden decision in 2014 to return to Canada was motivated by the financial saving which would accrue to the family's economic benefit if Appellant C retains his permanent resident status.

[20] The appellants have no assets in Canada, nor are they associated with any community groups or religious organizations based in Canada. None of the appellants have ever worked in Canada, nor is their evidence that they have ever filed Canadian income tax returns. The appellants have no relatives in Canada.

[21] In my view, the extent of the appellants' decision to remain outside of Canada since 2007 and their extensive establishment in Mauritius and in no other country severely weakens the extent to which I can find that any hardship would be visited upon appellants A and B in the event the appeal is dismissed.

[22] The appellants have no immediate adult family members presently living in Canada and, accordingly, this is a neutral factor in this appeal.

[23] In considering the best interests of the child in this case, I have borne in mind the IAD's decision in *Noorani*,[9] wherein the IAD found that ". . . the appellant's breach of the residency obligation was attributable to decisions taken by his parents and, also, by the [*Act's*] objective of family reunification."[10] While I accept that appellant C was not in a position to make independent decisions regarding where he lived, I find that the Federal Court's (the "Court") decision in *Lai*[11] sums up my view with respect to the weight to be ascribed to parental decisions in assessing humanitarian and compassionate factors. At paragraph 26, the Court found:

> In the case of a dependent child of relatively tender years there is little, if any, opportunity to independently fulfill the residency obligation required to preserve landed status or to create the genuine ties to Canada that are typically necessary for H&C relief. In most cases the child can only accomplish that which the parents are prepared to allow and support. **Ms. Lai's status in Canada may have been jeopardized by the decisions of her parents, but her claim to relief should not be enhanced by those parental decisions**. [my emphasis]

[24] Appellant A feels that it is in his minor son's best interest if the latter is allowed to keep his permanent resident status and, given that he has gained admission to more than one Canadian university it is understandable that he might feel that way. There was no evidence before me, however, that Appellant C's education - in Canada or elsewhere - was contingent upon him retaining his permanent resident status in Canada. As I have found, above, it is simply less expensive to pay for that education if Appellant C's permanent resident status is retained. While economic considerations are often relevant in assessing the best interests of a child affected by the decision, and I have afforded them positive weight in making my decision, I am not persuaded that they are sufficient to overcome Appellant's C's long absence from Canada. In the case at bar, Appellant A has a long history of providing financial security for his family; there is no reason to doubt that he will be unable or unwilling to continue to do so if the appeal is dismissed.

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[9] *Noorani v. Canada* (*Citizenship and Immigration*), 2008 CanLII 76420 (CA IRB).
[10] *Noorani v. Canada* (*Citizenship and Immigration*), 2008 CanLII 76420 (CA IRB).
[11] *Lai v. Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1359.

CREDIBILITY

[25] When I consider his oral evidence in this case, I find that appellant A was not a credible witness. For example, under cross examination, appellant A conceded that during his absence from Canada he had travelled to Madagascar and to parts of Europe. In my view, this undermines his *viva voce* testimony that he would have liked to return to Canada but "could not." Appellant A testified under cross examination that his failure to tell his employer he was immigrating to Canada prior to landing in 2007 was one of the "outstanding matters" that he needed to return to Mauritius for, shortly after landing. In the event, he did not leave the company (in fact, the evidence shows that he was promoted after returning to Mauritius) until 2013 when he left to start his own business. In my view, these statements conflict with his earlier testimony that he and his family had made a final decision to make Canada their home after landing in Canada in 2007. Another example is appellant A's insistence that he needed to remain in Mauritius for several years so as to help change his father's colostomy bag and ensure that the post-operative follow ups were undertaken. Under cross examination, it was adduced that appellant A's father had an external colostomy bag for less than three months and that the aforementioned "follow up" consisted in taking his father to appointments and talking to his doctor. When I consider his evidence as a whole, I find it likely, on a balance of probabilities, that appellant A was at times evasive and tended to exaggerate his father's health problems during the relevant period after he landed in Canada.

CONCLUSION

[26] The removal order is valid in law. After reviewing the documents and considering the testimony of the witness in this matter, I find that taking into account the best interests of a child directly affected by the decision, there are not sufficient humanitarian and compassionate considerations to warrant special relief in light of all of the circumstances of the case.

[27] The appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

(signed) **"Sterling Sunley"**

Sterling Sunley

October 23, 2015

Date

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