



IAD File No. / N° de dossier de la SAI : VB5-03176 / VB5-03205

Client ID no. / N° ID client : 5716-0195 / 5716-0196

Reasons and Decision – Motifs et décision

RESIDENCY OBLIGATION

Appellant(s)	Sundya PANDOHEE Deveshsingh PANDOHEE	Appelant(e)(s)
and		et
Respondent	The Minister of Citizenship and Immigration	Intimé(e)
Date(s) of Hearing	September 14, 2016	Date(s) de l'audience
Place of Hearing	Heard by telephone in Vancouver, BC	Lieu de l'audience
Date of Decision	November 4, 2016	Date de la décision
Panel	Roxane Vachon	Tribunal
Counsel for the Appellant(s)	Massood Joomratty Barrister and Solicitor	Conseil(s) de l'appelant(e) / des appelant(e)(s)
Designated Representative(s)	N/A	Représentant(e)(s) Désigné(e)(s)
Counsel for the Minister	Gregory Zuck	Conseil du ministre

REASONS FOR DECISION

[1] These are the reasons and decision of the Immigration Appeal Division (the “IAD”) in the appeal by Sundya PANDOHEE and Deveshsingh PANDOHEE (the “appellants”) from a determination made against them August 24, 2015. The appellants were found to have failed to comply with the residency obligation of section 28 of the *Immigration and Refugee Protection Act* (the “Act”),¹ more particularly that the appellants had not resided in Canada for at least 730 days in the five-year period immediately before August 24, 2015.

ISSUE

[2] The appellants did not challenge the legal validity of the determination and requested that the IAD exercise its discretionary jurisdiction under section 67 (1) . The appellants became permanent residents of Canada on October 26, 2008. They both conceded that they were not physically present in Canada in the five-year period between August 24, 2010 and August 24, 2015. The appellants asked that I exercise my discretionary jurisdiction and allow the appeal on humanitarian and compassionate considerations.

[3] The relevant paragraph of Section 28 of the *Act* reads as follows:

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

(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,

[4] The test to be applied in the exercise of discretionary jurisdiction is that the IAD must be satisfied at the time the appeal is disposed of, taking into account the best interests of a child

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

directly affected by the decision, there are sufficient humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case. Prior decision-makers of the IAD have established the following appropriate, although not exhaustive, considerations:

- the amount of time the appellant has spent in Canada;
- the appellant's reasons for departing and continuing to remain outside of Canada;
- whether reasonable attempts to return to Canada were made at the first opportunity;
- his initial and continuing degree of establishment in Canada;
- the hardship on family members in Canada;
- the situation of the appellant in his home country; and
- whether there are unique or special circumstances present in the case.

The legislation also requires the decision-maker to take into consideration the best interests of any child directly affected by the decision.

[5] I have considered the contents of the Record prepared by the Minister of Citizenship and Immigration (the "respondent"), the testimony of both the appellants, and the materials provided by the appellants. The Minister did not appear in person but provided written submissions.

BACKGROUND

[6] The appellant Sundya PANDOHEE was born in Mauritius on July 15, 1973. In October 2008 she immigrated to Canada as a skilled worker and her son, now nineteen years old, was an accompanying dependant family member.

[7] The appellants testified by teleconference. Sundya PANDOHEE testified in the English language without the assistance of an interpreter and her son testified in French with the assistance of an interpreter. Their evidence was straightforward and credible.

[8] Ms. PANDOHEE testified that she made the decision to immigrate to Canada with her son soon after her husband was murdered in Mauritius in 2002. She testified that she considered applying to immigrate to Canada as a skilled worker as soon as 2003 and applied in 2004. Her application was accepted in 2007 and she moved to Quebec with her son after he finished school in 2008. They stayed in Canada for seven months and returned to Mauritius in 2009. They have not returned to Canada since.

ANALYSIS

[9] After arriving in Montreal the appellants resided for seven months in the province of Quebec with Ms. Pandohee's sister and her three children. She obtained work as a cashier and provided some check stubs in support of this.²

[10] Sundya PANDOHEE testified that her son, who was eleven years old, was attending the the local school. Soon after he began attending his new school, Ms. PANDOHEE was contacted by school staff in regards to Deveshsingh's serious integration problems. He was isolated and did not communicate with anyone. She testified that the school contacted her three times; her son was counselled at the school and finally, at her last meeting with school personnel, the counsellor suggested that Deveshsingh was likely depressed and it was suggested that she consider returning to Mauritius.

[11] The appellant believed her son was still suffering from the loss of his father and this loss was compounded by their recent immigration. She decided, for her son's emotional health, to return to Mauritius where he would be reunited with his grandparents, his friends and family. I accept that Deveshsingh was suffering from serious emotional difficulties when the family immigrated to Canada and this is the reason for their return to Mauritius. Ms. Pandohee attempted to collect the counselling records of her son from his former school in Quebec but the

² Record pp.46-48.

records were not available. I accept the testimony of the mother and the son regarding his emotional difficulties and I find their departure was justified and necessary at the time and this is a positive factor for both appellants.

[12] The appellants left Canada in September 2009 and have not returned since. They have not been in Canada for any time during the relevant period of August 24, 2010 to August 24, 2015 and their non compliance is absolute. This is a negative factor.

[13] While the Minister concedes that the appellants may have had some good reasons for remaining outside of Canada for some time during the relevant period, he argues that the evidence does not support the appellants' position that they could not return to Canada more frequently for short periods in order to meet their residency obligation. Sundya PANDOHEE testified that her son was doing well in Mauritius, he was involved in counselling in 2009³ and his emotional health improved. I agree with the Minister that little efforts were made to come to Canada periodically to fulfill their residency obligations. Ms. PANDOHEE was well intentioned and did what she felt was best for her child. Her efforts were successful and her son is doing well but she did not attempt to return to Canada periodically. This is a negative factor with respect to Sundya PANDOHEE's appeal. Her son, who was a young child and was experiencing emotional difficulties, did not have the capability to make these decisions. I attribute no responsibility to Deveshsingh PANDOHEE, for failing to return periodically. This is a negative factor in regards to Ms. PANDOHEE.

[14] The appellants have shown some degree of establishment in Canada while they were here. Ms. PANDOHEE was employed and her son attended school. Both appellants have family in Canada since Ms. PANDOHEE's sister continues to reside in Quebec with her husband and three children. Both appellants testified that they are close to their relatives in Canada and Deveshsingh talks to his cousins via internet twice each week. Both appellants have family in

³ Record p.55.

Mauritius, Ms. PANDOHEE's grandparents as well as an aunt, an uncle and a cousin are in Mauritius. Ms. PANDOHEE is employed as a health care assistant. Overall I find that the appellants have more establishment in Mauritius, especially Ms. PANDOHEE who has training and stable employment. Deveshsingh is still a student and has lived in Mauritius all his life except for a period of seven months when he was in Canada. Both appellants are established in Mauritius and have little establishment in Canada except for some relatives. This is a negative factor.

[15] In their testimony both appellants explained why they want to return to Canada. They testified that five members of the same family were involved in the murder of Mr. PANDOHEE (the husband and father). Two of the individuals were convicted and sentenced to eight years in prison. In 2013, these individuals were released from prison and have established themselves in a nearby village. Both appellants testified that they are fearful of these individuals. Their fear is not based on any threats or incidents. It is a subjective fear. Mr. PANDOHEE said that he encounters these two individuals twice per week in places such as the bus and the supermarket. He feels they look at him in a menacing way and he feels frightened. He believes they could harm his mother or him, he feels angry and the urge to confront them when he sees them. Ms. PANDOHEE did not testify to such encounters. The appellants were asked if they could relocate to a different part of the island of Mauritius in order to avoid chance encounters with these men. They both testified that Mauritius is a relatively small island and relocating would not alleviate their fears. I do not believe that Mauritius is so small that an encounter could not be avoided but I accept that the witnesses feel their fears would not be alleviated by relocating. There is no evidence of contact between the offenders and the appellants. The appellants did not produce medical evidence of ongoing psychological hardship related to the release of the offenders and there is little medical evidence on file to substantiate past and present psychological hardship experienced by Mr. Pandohee. In looking at the hardship to the appellants and the situation in their home country, I find the appellants have established some psychological unease but they have not established hardship.

[16] No minor child would be affected by the outcome of this appeal and thus this is not a factor in this appeal.

[17] The appellants' relatives in Canada are established in Montreal and there is little evidence that suggests they would experience hardship if the appeal is dismissed.

[18] Deveshsingh PANDOHEE, came to Canada at the age of eleven, six years after the violent murder of his father. He lived with his aunt and cousins and established a close relationship with them he continues to be in contact with his cousins via the internet each week. His mother made a parental decision and returned to Mauritius with him. The Minister correctly points out that this decision was made by his mother and for his wellbeing. The appellant was a minor at the time and he should not be blamed or held responsible for the unilateral decision of his mother.

[19] In *Lai v. Canada*, Justice Barnes states,⁴

[25] Ms. Lai challenges the Board determination that she had not made reasonable attempts to return to Canada at the earliest opportunity. It is said that, at such a young age, it could not have been otherwise and, therefore, the Board's decision was perverse. Although it is true that the failure to protect Ms. Lai's immigration status in this country cannot, for the most part, be attributed to her, I do not believe that the Board erred by considering her lengthy absences from Canada between 1996 and 2002. The Board was not finding fault or attributing personal responsibility to Ms. Lai in taking that evidence into account, but simply taking note of an incontrovertible fact.

[26] 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.

[20] Both appellants were asked what they would do if the other appellant's appeal was not successful. Both testified that it would cause them hardship to be separated from one another but Mrs. PANDOHEE stated that her son should leave even if she does not.

⁴ *Lai v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1359.

[21] Ms. PANDOHEE made a decision based on her son's best interest and decided to return to Mauritius in 2009. In doing so she put her interests after the interest of her child and she jeopardized her permanent residency for Deveshsingh's welfare. She is commended for this but in doing so she chose to re-establish herself in Mauritius and further chose not to return to Canada since 2009. The decision made for Mr. Pandohee's welfare now has unintended consequences on the appellant's permanent residency. Nevertheless, in assessing the factors in this case, I find, the negative factors in their appeal outweigh the positive factors.

[22] Based on the evidence before me and on a balance of probabilities, taking into account the best interests of any child directly affected by the decision, there are not sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case in the appeal of Sundya PANDOHEE and Deveshsingh PANDOHEE . Therefore the appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed.

(signed)

"Roxane Vachon"

Roxane Vachon

November 4, 2016

Date