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 : VB5-03471

Client ID no. / N° ID client: 5384-2858

Reasons and Decision – Motifs et décision

RESIDENCY OBLIGATION

Appellant(s)	Hasnain Abid Ali DEVJI	**Appelant(e)(s)**
and		**et**
Respondent	The Minister of Citizenship and Immigration	**Intimé(e)**
Date(s) of Hearing	November 1, 2016	**Date(s) de l'audience**
Place of Hearing	Vancouver, BC	**Lieu de l'audience**
Date of Decision	January 12, 2017	**Date de la décision**
Panel	Craig Costantino	**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	Kevin Hatch	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] These are the reasons and decision of the Immigration Appeal Division (the "IAD") in the appeal by Hasnain Abid Ali DEVJI (the "appellant") from the determination made against him on October 6, 2015.[1] The appellant was found to have failed to comply with the residency obligation requirements of section 28 of the *Immigration and Refugee Protection Act* (the "*Act*").[2]

DECISION

[2] The appellant does not challenge the legal validity of this determination. Based on the evidence before me, the appellant has not met the residency obligation requirements under section 28 of the *Act*, which require 730 days residency in Canada in every five-year period. Therefore, the determination is valid in law.

[3] I also find that, taking into account the best interests of the children directly affected by the decision, the appellant has not met the onus of establishing that there are sufficient humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case. The appeal is dismissed.

BACKGROUND

[4] The appellant is a Pakistani national and was residing in Pakistan when he submitted his permanent residence application in 2004. He then moved to United Arab Emirates (U.A.E.) in 2005 where he worked for Price Waterhouse Cooper for some time before landing his current job as an auditor for ADCB Bank in Abu Dhabi. The appellant was landed as a permanent resident in

[1] Record pp. 4-5.
[2] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

Canada as a member of the federal skilled worker class on March 6, 2010 together with his wife, and his two children who were aged three and seventeen months at the time of landing. The appellant spent about a month in Canada and then returned to his job in Abu Dhabi. His wife and children settled in Canada in July 2011. From the time of his landing to the assessment of his travel document application on October 6, 2015, the appellant came to Canada to visit family members ten times and spent approximately six months in Canada over the five-year residency period assessed.

[5] While the appellant has continued to reside and work in the U.A.E., his wife and children were granted Canadian citizenship in 2014. His wife completed a Bachelor of Education at the University of British Columbia in December 2014. The appellant's only siblings, one elder sister and a younger brother are both Canadian citizens although his younger brother is currently living in Australia. The appellant's parents were sponsored to Canada in 2007 or 2008. The appellant's travel document application was submitted in part on the basis that he needed to return to Canada to see his mother who was critically ill. The appellant's mother passed away in February 2016 and his father now splits time between his own home and the home of the appellant's sister.

[6] Since obtaining citizenship in Canada, the appellant's wife and children have moved to U.A.E. to live with the appellant. The appellant's wife is employed there as a teacher and the children are both enrolled in school. All members of the family have status in the U.A.E. until June 2017 and the appellant continues to be employed as an auditor by ADCB Bank. He argues that he is compelled to stay in the U.A.E. in order to ensure that he abides by the term of his mortgage agreement and does not lose his investment in a property in the U.A.E. the development of which has been delayed. He submits that this financial issue will be resolved and the family will resettle in Canada by 2018.

ANALYSIS

[7] The appellant concedes that the decision finding him in breach of his residency obligation is valid in law but seeks relief on humanitarian and compassionate grounds. The test to be applied in the IAD's discretionary jurisdiction is, taking into account the best interests of any child directly affected by the decision, whether there are sufficient humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case.

[8] My analysis of the case is informed by consideration of the general objectives for immigration set out in subsection 3(1) of the *Act*. These objectives reflect the desire to maximize social, cultural, and economic benefits of immigration, to support and assist the development of a strong and prosperous economy, and to see that families are reunited in Canada. There is an obvious relationship between achieving those goals and the residency requirement imposed in section 28 of the *Act*, a requirement that is not an onerous one and reflects the expectation that permanent residents will establish themselves in Canada by way of physical presence.

[9] The discretionary authority of the IAD was described in the case of *Grewal*[3] as a special or extraordinary power that must be applied objectively, dispassionately and in a *bona fide* manner after carefully considering relevant factors. In the Federal Court (Court) decision of *Ambat v Canada* (*Citizenship and Immigration*),[4] at paragraph 27, the Court cited the cases of *Bufete Arce, Dorothy Chicay v Minister of Citizenship and Immigration*[5] and *Yun Kuen Kok & Kwai Leung Kok v Minister of Citizenship and Immigration*[6] confirmed the following relevant factors for consideration by the IAD to determine whether sufficient humanitarian and compassionate grounds warrant special relief:

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[3] *Grewal v. Canada (Minister of Employment and Immigration)* [1989] I.A.D.D No. 22 (QL).
[4] 2011 FC 292, 386 FTR 35.
[5] IAD VA2-02515.
[6] IAD VA2-02277, [2003] IADD No 514.

(i) the extent of the non-compliance with the residency obligation;
(ii) the reasons for the departure and stay abroad;
(iii) the degree of establishment in Canada, initially and at the time of hearing;
(iv) family ties to Canada;
(v) whether attempts to return to Canada were made at the first opportunity;
(vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
(vii) hardship to the appellant if removed from or refused admissions to Canada; and;
(viii) whether there are other unique or special circumstances that merit special relief.

[10] As was noted by the IAD in *Arce*,[7] there are some humanitarian and compassionate considerations present on the facts in most appeals. The goal is to determine, through assessment of the relevant factors, whether all the circumstances of the case are such as ought reasonably to generate relief. In this case, I find that the appellant has not met the onus of establishing that special relief is warranted.

[11] The appellant's shortfall in failing to meet his residency obligation is significant and is a negative factor in his appeal. He has only accrued about six months of physical residency in Canada over the past five years. The requirement to be in Canada for 730 days out of any five-year period is not an onerous one and is sufficiently flexible to allow permanent residents to deal with various contingencies that require their presence out of Canada. There was not sufficient evidence before me to conclude that the appellant ever made any concerted effort to establish himself in Canada. It was only in anticipation of the hearing that the appellant had even turned his mind to the possibility of taking steps towards having his credentials as a Chartered Professional Accountant (CPA) in Canada recognized.

[7] IAD VA2-02515.

[12] The appellant's primary motivation for not settling in Canada and having continued working in the U.A.E. is financial. He earns a significant income in Abu Dubai and made an investment in property in the U.A.E. in 2008 obtaining a mortgage at a preferential interest rate as a bank employee. I accept his testimony that he continues to have a debt of around $550,000 CDN at an interest rate of less than 1%. I accept that when he purchased the property in 2008, the appellant had an expectation that it would be developed within a couple of years at which point he would sell the property. Further to my observation in the paragraph above, the fact that the appellant has not until recently even made any serious inquiries into having his credentials as a CPA recognized in Canada, a process which he testified could take over two years, let alone making any serious inquiries into seeking work here as well as his current plan to settle in Canada in 2018, all preclude me from finding on a balance of probabilities that the appellant has ever had a strong intention to return to Canada.

[13] While I accept that unanticipated delays in the development of the property into which the appellant has invested is part of the reason that the appellant has not yet taken any concrete steps to establish himself in Canada, I do not find that there is sufficient evidence to establish that the appellant would lose his investment or be compelled to pay the balance in full should he lose his employment. Nor do I find that it would be a hardship for the appellant to have to pay the balance of the mortgage at the bank's normal rates of 4-5% should his employment be terminated, and I do not find it credible that the appellant would face any form of financial ruin as a result of having to leave Dubai before he gets his expected return on his property.

[14] The appellant testified that his monthly income is about $20,000 CDN a month and his wife's monthly salary is between $4,000 and $5,000 CDN a month. They do not pay income tax and have never filed income tax returns in Canada. The appellant testified that after the calculation of expenses including school tuition for his children, accommodation and other necessary monthly expenses, he and his wife have a disposable income of between $5,000 and $8,000 CDN per month. He also testified that he gets a significant yearly bonus from his

employer and had approximately $100,000 CDN in savings. In his own assessment he testified that he believed that he could pay off another $300,000 CDN of his mortgage by 2018. He testified that even if the property were not developed and could not be sold by then, he would then be in a position to pay off the rest of the mortgage with the help of his father if necessary.

[15] I do not find that the appellant's inability to get his expected return on his investment in the U.A.E. is a compelling reason for failing to meet his residency requirements. He could have cut his losses early on and instead has continued paying into his investment hoping for a better return and not even intending to make an effort to return to Canada until 2018. I find the appellant's motives to be primarily financial. This is his choice to make but it is not something that is out of his control. If any hardship has arisen from the appellant's choice to prioritize his high-paying job in the U.A.E. and his very low interest mortgage over fulfilling his residency obligations or making steps towards working and establishing himself in Canada, it is a direct consequence of his choices and priorities rather than any form of hardship that was out of his control. I find his choice not to settle in Canada and remain in the U.A.E. not only for his residency period and up to his appeal but beyond that for at least another year to be a negative factor in his appeal.

[16] I also find the appellant's very limited establishment in Canada to be a strong negative factor in his appeal. He was selected as an immigrant to Canada largely on the basis that his professional abilities would bring Canada economic benefits and help support the development of a strong and prosperous Canadian economy. However, after more than six years the appellant has never worked here in any capacity, nor has he put himself in a position where he could transfer his skills to the Canadian market. He does not have any assets in Canada although he submits that he has plans to acquire property in Canada in the future. Almost seven years after landing, with his professional qualifications and experience and monthly salary of about $20,000 CDN, the only real evidence of any establishment that the appellant has to show for himself is an active

Canadian bank account.[8] The appellant has not filed Canadian tax returns on the basis that he obtained advice that he did not have to do so as a non-resident. While I accept that the appellant has at least one friend in Canada (with whom he used to work in U.A.E.) and likes to participate in his religious community while in Canada, the appellant has not adduced any evidence that he has established himself in the community in any meaningful or impactful way.

[17] The appellant has strong family ties to Canada that are a positive factor in his appeal but I cannot conclude that there would be any significant dislocation hardship caused by the refusal of his appeal considering that his wife and children are living with him in the U.A.E. and the appellant and his family have no plan to return to Canada until 2018. Of course, the appellant also has an aging widower father and a sister as well as her family in Canada, and a brother who is also a Canadian citizen but is currently residing in Australia. The appellant's father has visited him in the U.A.E. previously and while I accept that he likes Canada better than the U.A.E., it was not suggested that he would not come back to visit again. While I accept that the appellant's father would rather live with the appellant and his father due to cultural norms rather than his daughter, I also find any hardship to the appellant's father significantly mitigated by the presence of other family support in Canada. Nor is the appellant precluded from applying for a visitor visa to visit family in Canada. Finally, the appellant's wife can sponsor him or he could re-apply for permanent residence based on his professional credentials again at a point in which the appellant is actually prepared to settle in Canada. Ordinarily some hardship may arise given the length of time that such applications take to be processed but that concern is not relevant in this case given that the appellant does not intend to return to Canada until 2018. While the appellant and his spouse must establish that they intend to re-settle in Canada in order for the appellant to be issued a permanent residence visa on the basis of any possible future spousal sponsorship, this is less a hardship than the actual obstacle that has prevented the appellant – and more recently his wife and children – from making Canada their home.

[8] Exhibit A-1 pp. 42-44.

[18] I also can only give limited weight to the appellant's arguments that he would suffer some hardship in Pakistan and in the U.A.E. as a result of his appeal being refused given that not only the appellant but his wife and children as well have decided that they plan to continue residing in the U.A.E. through 2018 before returning to Canada. The appellant testified that he suffered from depression and anxiety which he ascribed partly to being separated from his family and from the frustrating setbacks to the development of his property and I accept this as credible although the documentary evidence filed in support of this assertion was lacking. However the appellant receives treatment for his health issues and his wife and children are now with him. He argues that he now has limited ties to Pakistan and it would be unsafe for him to return there. He also argues that the U.A.E. is now unstable due to economic recession and increased instability for foreign workers particularly Pakistani Shiites, yet he also submits that his position at the bank is stable and that he will be secure in his job through 2018. There is no way of enforcing his stated plan to re-settle in Canada in 2018. Moreover, assuming his wife and children continue to reside with him, he also would be able to maintain his residency requirements without having to set foot back in Canada. I find that if the appellant were truly concerned about hardship in the U.A.E. or being returned to Pakistan, he would have made a more concerted effort to establish himself in Canada before now, and that he would take steps towards returning to Canada with his family at the earliest opportunity rather than having a vague plan for return some time in 2018 towards which he has not yet taken any tangible steps.

[19] I do not find that the best interests of the appellant's children are adversely affected by dismissing the appeal. The children's best interests are currently being met. They are residing with both of their parents and their parents are paying for their education in the U.A.E. As Canadian citizens whose mother is also a Canadian citizen and whose parents make a significant

combined income, the choice of where the children live and go to school is in their parents' control. While there is some possibility of separation from their father if the children return to Canada without their father, this is an arrangement which was maintained by and large by the choice of their parents from 2011 through 2014, and would force me to speculate on a chain of contingencies that may never come to pass. If the appellant and his wife determine that it is in the best interests of their children to live in Canada with both their parents and surrounded by other extended family in Canada and they make this a priority for the family, they have the opportunity to have the appellant's wife sponsor him back to Canada. Until then, the children are living with both parents and attending school in the U.A.E. and their parents intend to maintain this arrangement independent of any immigration process or decision. I do not find that my decision impacts this arrangement.

CONCLUSION

[20] The appellant has not met the onus of proof. Based on the evidence before me and on a balance of probabilities, taking into account the best interests of the children directly affected by the decision, I find that there are not sufficient humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case.

[21] The appeal is dismissed.

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NOTICE OF DECISION

The appeal is dismissed.

(signed) **"Craig Costantino"**

Craig Costantino

January 12, 2017

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 for this application.