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 : VB6-03717**

**Client ID no. / N° ID client : 6368-8402**



# Reasons and Decision – Motifs et décision

## REMOVAL ORDER

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| **Appellant(s)** | Neermala Devi GOPAUL | **Appelant(e)(s)** |
| **and** | | **et** |
| **Respondent** | The Minister of Public Safety and Emergency Preparedness | **Intimé(e)** |
| **Date(s) of Hearing** | January 9, 2018 | **Date(s) de l'audience** |
| **Place of Hearing** | **Heard by telephone in** Vancouver, BC | **Lieu de l'audience** |
| **Date of Decision** | January 10, 2018 | **Date de la décision** |
| **Panel** | **George Pemberton** | **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 (by written submissions) | **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 Neermala Devi GOPAUL ("the appellant") from a Departure Order made against her on October 9, 2016. The appellant was found to be a person described in paragraph 41(b) of the *Immigration and Refugee Protection Act* (the "*Act*")[1] as inadmissible for failing to comply with the residency obligation of section 28 of the *Act.* The appellant did not challenge the legal validity of the removal order. She requested the IAD to exercise its discretionary jurisdiction to grant special relief.

## BACKGROUND

[2] The appellant is a 41-year-old citizen of Mauritius. She became a permanent resident on August 9, 2011. On October 9, 2016, she attempted to enter Canada at Vancouver International Airport. She was found to have failed to comply with her residency obligation.

[3] The appellant testified and provided documentary evidence. Counsel for the Minister of Public Safety and Emergency Preparedness provided written submissions in advance of the hearing but did not attend. I have taken into consideration the contents of the Record, the appellant's testimony and the parties' submissions.

## ISSUE

[4] There are two issues before me. The first is whether the Departure Order is valid in law. The second issue is 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.

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

## ANALYSIS

[5] Section 28 of the *Act* provides for a number of ways to meet the residency obligation. According to the questionnaire completed at the point-of-entry, the appellant was not physically present in Canada for the necessary 730 days in the relevant five-year period. She confirmed that in her testimony. There is no evidence she met the residency obligation by any other means. The appellant did not challenge the legal validity of the Departure Order. I find that the Departure Order is legally valid.

[6] Pursuant to paragraph 67(1)(c) of the *Act*, the IAD has been granted authority to consider discretionary relief and permit an appellant to obtain their permanent resident status despite a breach of the residency obligation. The test to be applied in the exercise of that jurisdiction is that 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 warrant special relief in light of all the circumstances of the case.

[7] Considerations in granting special relief are myriad and vary with each individual, but can include:

- the extent of non-compliance with the residency obligation;
- the reasons the appellant left and remained outside Canada;
- whether efforts were made to return to Canada at the first opportunity;
- the appellant's degree of establishment in Canada;
- the appellant's family ties to Canada;
- the hardship and dislocation that would be caused to the appellant's family members in Canada if the appellant lost his status in Canada; and
- the hardship that would be caused to the appellant.

I must consider the best interests of a child directly affected by the decision.

[8] The appellant gained status in 2011 in the Quebec Skilled Worker program. She entered Canada on August 9, 2011, with her husband and their two children. The family stayed in Canada only ten days, then returned to Mauritius. The appellant was not physically present in Canada at all in the relevant five year period. Prior to the departure order being made she spent a total of only ten days in Canada. She has never lived in Canada. That is a seriously negative consideration.

[9] The appellant testified that she and her family returned to Mauritius because they had a business there. They were attempting to sell the business but could not get a fair offer. In August 2014 the appellant's husband had a heart attack requiring bypass surgery. It is not unreasonable that a new immigrant would briefly return to their home country to settle their affairs. In this case three years passed between their return to Mauritius and the appellant's husband's heart attack. The appellant testified that after her husband's heart attack they hired a manager to run their business. The appellant knew the conditions of her permanent residence. By August 2014, even before her husband's heart attack, it was no longer possible for the appellant to meet her residency obligation. There was no reasonable explanation for not having hired a manager or made other arrangements to be able to return to Canada sooner. It is not reasonable that the appellant and her family did not return to Canada prior to August 2014. That delay in settling their affairs is a negative factor.

[10] In August 2014 the appellant's husband had a heart attack. He had bypass surgery in November 2014. It is reasonable that the appellant could not travel until her husband recovered. The appellant testified that by 2015, about a year after surgery, her husband had substantially recovered. The appellant did not return to Canada until October 2016. She testified that her husband had to go for periodic follow-up. She wanted to remain in Mauritius until she was satisfied everything was alright. There is little evidence that the appellant made efforts to assess whether her husband could continue his follow-up treatment in Canada. There was little evidence that he was medically prevented from travelling to Canada in 2015. The need to sell the family business and the appellant's husband's illness reasonably account for some time outside Canada.

They do not reasonably account for the failure to attempt to return until October 2016. The appellant's reasons for remaining outside Canada and not making efforts to return sooner are negative considerations.

[11] Little evidence was provided of establishment in Canada. The appellant has a bank account but has never lived or worked in Canada. Her ties are substantially in Mauritius. The appellant's lack of establishment in Canada is a negative consideration.

[12] The appellant's sister-in-law and her husband live in Canada. That is a positive consideration. The appellant's husband and children have permanent resident status but have never lived in Canada. There is no evidence of any other family living in Canada. There was little evidence that the appellant's loss of status in Canada would cause hardship or dislocation to her sister-in-law in Canada or her family.

[13] The appellant and her husband operate their own business in Mauritius. The appellant's mother-in-law has been living with the family. The appellant's mother lives in Mauritius with the appellant's sister. The only hardship identified by the appellant if she loses her permanent resident status would be that the family's longstanding dream of living in Canada would be dashed. There was little other evidence of hardship to the appellant if she continues living in Mauritius.

[14] The appellant has two daughters, aged 16 and 11. They became permanent residents of Canada in 2011. It appears that they and their father have failed to meet their residency obligations, but they remain permanent residents. The children grew up in Mauritius. They live there with their parents. They are healthy and doing well in school. Their grandmothers and other extended family live in Mauritius. There is little evidence that health, education or living standards in Mauritius are deficient or that living there is detrimental to their best interests. The girls are living with their parents, their extended family lives nearby, they are healthy, doing well in school and involved in extra-curricular activities. It is in their best interests that they continue living with their parents. The appellant's loss of status in Canada would mean the family would

continue residing in Mauritius. There is little evidence that would be adverse to the girls' best interests.

[15] Appellant's counsel submitted that the appellant is well-educated, speaks both of Canada's official languages and is now motivated to settle in Canada. He submitted that she will be committed to Canada and will make a positive contribution. Those are all positive considerations in an application to immigrate. This is not a reconsideration of the appellant's permanent resident application; it is an assessment of whether there are sufficient humanitarian and compassionate considerations to warrant special relief. There are not.

## CONCLUSION

[16] Based on the evidence before me, I find the appellant has not met the onus of proof. The Departure Order is valid in law. I find that the negative factors outweigh the positive factors. 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 the circumstances of the case.



## NOTICE OF DECISION

The appeal is dismissed.

*(signed)* **"George Pemberton"**

**George Pemberton**

**January 10, 2018**

**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.