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 : VB0-02516

Client ID no. / N° ID client : 5099-8878

Reasons and Decision – Motifs et décision

RESIDENCY OBLIGATION

Appellant(s)	Oomesh Dutt SOHAN	**Appelant(e)(s)**
Respondent	The Minister of Citizenship and Immigration	**Intimé(e)**
Date(s) of Hearing	15 June 2011	**Date(s) de l'audience**
Place of Hearing	**Vancouver, BC**	**Lieu de l'audience**
Date of Decision	6 July 2011	**Date de la décision**
Panel	**Erwin Nest**	**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	David Macdonald	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] Oomesh Dutt SOHAN (the "appellant") appeals from the decision of an immigration officer at the High Commission of Canada, Immigration Section in Nairobi, Kenya that found him to be a person described in subsection 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.*[2]

[2] More particularly, the appellant had not complied with the residency obligation for at least 730 days in the five-year period immediately before the January 18, 2010 when his application for a travel document was received by the High Commission of Canada, Immigration Section in Nairobi, Kenya.

[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 appellant's residency obligation.[3]

[4] At the outset of the hearing, the appellant's counsel confirmed that the appellant did not challenge the legal validity of the determination and he requested that the Immigration Appeal Division (the "IAD") exercise its discretionary jurisdiction.

[5] This appeal is made pursuant to subsection 63(4) of the *Act*[4] and the appellant bases their appeal on paragraph 67(1)(c) of the *Act*, which provides as follows:

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
41 A person is inadmissible for failing to comply with this Act
(*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or 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 Record, page 2, page 16.

4 **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.

> **67**(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time the appeal is disposed of,
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> (c) other than in a 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.

BACKGROUND

[6] The appellant is a 52 years old citizen of India Mauritius. The appellant was granted permanent residence status in Canada on October 25, 2004 after successfully apply for immigration in a skilled worker category.[5]

[7] According to the appellant, before he arrived in Canada in 2004, he took vacation leave for a month and a half from his employer, the National Transport Authority in Mauritius, where he works as a senior road transport inspector for the purpose of finding "what is it like to live" in Canada. The appellant confirmed that during his month long stay in Canada in 2004[6] he sought employment opportunities, including a logistic job in the Canadian Pacific and a position in Walmart Canada. The appellant testified that if, at the time of his immigration, he would have been successful in finding employment in Canada, then he would have remained in Canada permanently.

[8] The appellant married his third wife in Mauritius in 2002.

[9] The appellant has a sister living in Surrey, B.C., who is married and has three children ages 15, 13 and 6 years old at present. His father's cousin is living in Calgary. Also, the appellant's wife has relatives living in Coquitlam.

[10] The appellant returned to Canada in 2005 and stayed for 19 days before departing to Mauritius.

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5 Record, page 5.
6 Record, page 6.

[11] In 2006 the appellant enrolled to study at the University of Calgary. He stayed in Canada for 35 days before traveling back to Mauritius.

[12] In April 2008 the appellant filed divorce petition against his third wife. The case was disposed in January 2009. The appellant confirmed that he and his third wife reconciled in 2009 and the divorce petition was withdrawn. The appellant and his third wife attended the Harley Street Fertility centre for In Vitro Fertilisation treatment in Mauritius in 2011.[7]

DECISION

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

ANALYSIS

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

[15] The appellant testified by phone from Mauritius.

[16] 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 appellant's failure to meet the residency obligation. The factors set out in *Ribic*,[8] and confirmed by the Supreme Court of Canada in *Chieu*,[9] 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:

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

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7 Exhibit A-1.

8 *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).

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

- the reasons for and extent of the absence(s) from Canada and the appellant's intentions in relation to residency in Canada;
- whether the appellant made reasonable attempts to return to Canada at the first opportunity;
- the length of time the appellant has spent in Canada and the degree to which the appellant is established in Canada;
- 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;
- the degree of establishment of the appellant outside of Canada;
- the best interests of any child directly affected by the decision; and
- 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.

[17] 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 the continuing reference to humanitarian and compassionate considerations, which warrant relief in any given case. Humanitarian and compassionate considerations under the former *Act* were, generally, "…taken as those facts, established by the evidence, which would excite in a reasonable man in a civilised community a desire to relieve the misfortunes of another…".[10]

[18] The appellant's counsel and the Minister's counsel confirmed after reaching the consensus that the appellant was physically present in Canada for the total of 102 days during the period under consideration. Given that the appellant was 628 days short of meeting the requirements of the residency obligation of section 28 of the *Act*, I find the degree of the appellant's non-compliance with the residency obligation to be a negative factor in this appeal.

[10] *Chirwa v. Canada (Minister of Manpower and Immigration*) (1970), 4 I.A.C. 338 (I.A.B.).

[19] The appellant testified that the main reason for his prolonged absence from Canada was the need to stay in Mauritius to deal with the problems between him and his third wife. I find the appellant did not testify in a clear or persuasive manner. He was not able to provide detailed answers and thus, his answers were vague and sometimes contradictory.

[20] The appellant testified that in 2006, he no longer wanted to wait for his third wife to join him in Canada. He applied and was admitted to study at the University of Calgary. The appellant confirmed that he stayed in Canada for 35 days before departing for Mauritius. It was never adequately explained why the appellant did not continue his studies in the University of Calgary, given that the relationship with his third wife worsened significantly, and the couple continued to blame each other for their inability to have a child together.

[21] It was never adequately explained why the appellant did not return to Canada in 2005 after his nieces joined their mother in Mauritius, given his stated intention of returning to Canada to look for work. No credible evidence was adduced at the hearing to explain why the appellant did not continue with his studies in Canada in 2006, given that his marital problems progressively worsened after he obtained the permanent residence status.

[22] In looking at the efforts made by the appellant to return to Canada and when they were first made, based on the totality of the evidence before me, on balance of probabilities, I find that the appellant did not make reasonable attempts to return to Canada at the first opportunity available to him.

[23] According to the appellant, notwithstanding his marital difficulties, he decided to return to Canada in 2007 to start his life here and to meet his residency obligation. He claimed he purchased an air ticket to Canada, with a stop over in the UK in November 2007. The appellant confirmed that he did not travel to Canada as planned. He testified that in December 2007, he decided to divorce his third wife. He claimed it was difficult to find a lawyer during the Christmas season. He admitted that because the air ticket he purchased in November 2007 was non refundable, he chose to travel to the UK where he could stay with a relative to minimize the expenditures during his visit in January 2008.

[24] The appellant's marital problems preceded his immigration to Canada, and they continued from approximately 2003 until July 2009, when the couple allegedly reconciled. The appellant confirmed that he and his third wife lived separately for five years before January 2009.

[25] It appears the appellant's alleged efforts to reconcile with his third wife prior to December 2008 failed, leading him to decide to file a divorce petition against her. The appellant could not adequately explain why he could not retain a counsel in Mauritius to represent him in the divorce proceedings against his third wife while he is residing in Canada.

[26] The appellant claimed that he tried "to save" his marriage over the years. It was never adequately explained why the couple did not seek medical advice concerning the fertility issues until December 2010, after approximately seven years of their marriage, given that the appellant's and his wife's inability to have a child together was a main irritant in their relationship and the cause for the marital problems.

[27] The appellant's counsel indicated in his letter of May 16, 2011 that the appellant was in court in Mauritius on four occasions during the divorce proceedings.[11]

[28] The dates of the appellant's appearance in court in Mauritius including April 15, 2008, June 25, 2008, September 3, 2008, and January 2009. No credible documentary evidence was provided to lead me to conclude, on balance of probabilities, that the appellant's physical presence was required by the court in Mauritius on the four dates listed by his lawyer. Even if the appellant had to be present in court in Mauritius during his divorce proceeding, it was never adequately explained why the appellant could not travel to Mauritius from Canada for the purpose of attending the divorce proceeding after instructing his lawyer to find the most suitable date for his appearance.

[11] Exhibit A-1.

[29] The appellant testified that the main reason for departure from Canada for continued and lengthy stay abroad was to make efforts "to save" his marriage with his third wife. Though I find the appellant's intention to find a positive solution to his marital problems commendable, after examining the circumstances that led to the appellant leaving Canada, despite his stated intentions of returning, and whether there were reasons beyond his control, such as taking care of an ill family member that delayed his return and prevented him from fulfilling his residency obligation, I find the appellant's evidence, regarding the reason that caused him to leave Canada and the reason for his continued and lengthy stay abroad, is insufficient to warrant special relief in light of all the circumstances of the case. The appellant could not adequately explain why, after becoming a permanent resident, he resided in Canada for only brief time periods before departing. The absence of credible explanations for his short stays in Canada during the period under consideration is indicative, on balance of probabilities, that the appellant never intended to become established in Canada. I find this to be a negative factor in this appeal.

[30] The appellant confirmed that he was aware of the residency obligation of section 28 of the *Act* from the time he immigrated to Canada. Given the absence of reliable evidence that the appellant took steps to ensure that he is meeting residency obligation before departing from Canada in November 2004, I question his intentions in relation to his residency in Canada after being granted permanent residence status. I find the preponderance of reliable evidence in this case leads me to conclude that the appellant's intent with respect to his residency in Canada during the period under consideration was to continue his ties with Mauritius rather than meeting his residence obligation for at least 730 days in the five-year period immediately before the January 18, 2010. I find, on balance of probabilities that the appellant planned to continue to establish himself in Mauritius during the period under consideration. The totality of the evidence in this case leads me to conclude, it is more likely than not, the appellant intends to return to Canada after he retires from his current work in Mauritius.

[31] I find the appellant's present intention in relation to residency in Canada does not overcome the degree of his non-compliance with the requirements of the *Act*. I consider the appellant's lack of intent to establish permanent residency in Canada during the period under consideration to be a negative factor in this appeal.

[32] I am not persuaded that the appellant took steps to find out how he can facilitate his return to Canada at the earliest opportunity after he departed from Canada in November 2004. I find this to be a negative factor in the appeal.

[33] As indicated earlier, the appellant did not stay continuously in Canada from the time he immigrated in 2004. The appellant has no property, assets, or investments in Canada. He has no bank account. He has never worked in Canada, and he never paid taxes in Canada. The appellant claimed that he was involved in the community by volunteering with S.U.C.C.E.S.S. in 2009. No documentary evidence was provided to support the appellant's claim of volunteering for S.U.C.C.E.S.S. I find not significant the degree of the appellant's establishment in Canada from the time he was granted permanent status. I find that the appellant's current establishment in Canada is not meaningful as he chose to establish himself personally in Mauritius for the last seven years. I find this to be a negative factor in this appeal.

[34] There is no documentary evidence before me to support the appellant's claim of looking for employment in Canada in 2004. The appellant's claim of looking for employment opportunities in Canada during the period under consideration is not supported by credible documentary evidence.

[35] I have considered the quality of the relationship between the appellant and his family in Canada. The appellant testified that he has a close relationship with his sister and her family in Canada. He also has a good relationship with his relative in Calgary. There is no evidence before me that the appellant's family in Canada is financially dependent on him, or that they cannot continue contact by phone with the appellant, as has been a practice, during his prolonged absence from Canada. No evidence was adduced at the hearing to suggest that the appellant's immediate family in Canada cannot visit him in Mauritius, or he cannot visit them in Canada. I have considered whether or not there are unique or special circumstances present in this case, such as to meet the *Chirwa*[12] standard for discretionary relief. In looking at the connections the appellant has 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 non-

[12] *Supra*, Footnote 10.

compliance, I find no evidence of hardship to the appellant's family in Canada to justify the exercise of discretionary relief in all the circumstances of this case.

[36] Based on the degree of the appellant's establishment in Mauritius, I find no evidence of hardship in the appellant's financial situation. The appellant continues to work in the same position, employed by the same company he worked for before immigrating to Canada. He confirmed that the income he generates from his employment is sufficient to support his immediate family. He has parents and two sisters living in Mauritius. The appellant has a close relationship with his family members in Mauritius. The appellant reconciled with his third wife, and the couple is making efforts to have a child through the artificial insemination in the future.

[37] I have considered the degree of hardship that would be caused to the appellant by loss of status in Canada. The permanent residency in Canada comes with rights and obligations. The section 28 of the *Act* outlines what are the requirements for meeting the residency obligation. Credible evidence in this case failed to establish that the appellant immigrated to Canada with the view to establish himself permanently in Canada. In looking at all the circumstances in this case, I find no evidence of hardship to the appellant and to his family members in Canada if he loses his status as a result of his non-compliance with the residence obligation of section 28 of the *Act*.

[38] The appellant has no children. There is no evidence before me of the best interests of the appellant's sister's children in Canada being directly affected by the decision.

CONCLUSION

[39] In conclusion, the exercise of discretionary relief is always a weighing process. I conclude the appellant has not met the onus on him of demonstrating that, taking into account the best interests of a child or children directly affected by the decision, sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of this case.

[40] The appeal of Oomesh Dutt SOHAN is dismissed in law and on discretionary grounds.

NOTICE OF DECISION

The appeal is dismissed.

(signed) **"Erwin Nest"**

Erwin Nest

6 July 2011

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.