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

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# Reasons and Decision – Motifs et décision

**Residency Obligation**

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| **Appellant(s)** | **Appelant(s)** |
| **GURKARM SHER DHINDSA**<br>**MANPREET KAUR DHINDSA**<br>**PARINAAZ DHINDSA** | |
| **Respondent** | **Intimé** |
| **The Minister of Citizenship and Immigration**<br>**Le Ministre de la Citoyenneté et de l'Immigration** | |
| **Date(s) and Place of Hearing** | **Date(s) et Lieu de l'audience** |
| **April 10, 2018**<br>**Toronto, Ontario** | |
| **Date of Decision** | **Date de la Décision** |
| **April 16, 2018** | |
| **Panel** | **Tribunal** |
| **A. Jung** | |
| **Appellant's Counsel** | **Conseil de l'appelant(s)** |
| **Harinder Singh Gahir** | |
| **Minister's Counsel** | **Conseil de l'intimé** |
| **Jay Miller**<br>**(submissions only)** | |

# REASONS FOR DECISION

## INTRODUCTION

[1] These are the reasons for allowing the residency obligation appeals filed by Gurkarm Sher Dhindsa (the appellant's husband), Manpreet Kaur Dhindsa (the appellant), and Parinaaz Dhindsa (the appellant's daughter). The appellants were determined by a visa officer to have failed to comply with their residency obligation pursuant to subsection 28(2) of the *Immigration and Refugee Protection Act*[1] (the *Act*). This provision requires that permanent residents be physically present in Canada for a minimum of 730 days in a five-year period or otherwise meet their residency obligations.

[2] The applicable five-year period identified by the visa officer is from February 19, 2011 to February 19, 2016.[2] During this 5-year period, the visa officer determined that the appellant and the appellant's daughter were in Canada for 605 days and the appellant's husband was in Canada for 590 days.[3] The appellants challenge the legal validity of the immigration officer's determination based on the grounds that the visa officer applied the wrong 5-year period and also seek to establish that there are sufficient humanitarian and compassionate (H&C) grounds to warrant special relief, in light of all the circumstances of the case.

[3] The reasons for the refusal by the visa officer are set out in the Record.[4] Exhibits include the Record and documentary evidence from the appellant and the Minister's counsel.[5] The appellant testified at the hearing.

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[1] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
[2] Exhibit R-1, pp. 7-12.
[3] Exhibit R-2.
[4] Exhibit R-1, pp. 7-12, 33-37.
[5] Exhibits R-1, R-2, A-1, A-2, A-3, A-4.

## BACKGROUND

[4] The appellants are citizens of India. They became permanent residents of Canada on June 14, 2010 and currently reside in India.

## ANALYSIS

### Legal validity

[5] The appellant's counsel submits that the visa office should have decided the appellants' residency status from the date they made their applications for a permanent resident card in January 2015. The appellant's counsel submits that there is no evidence that the appellants failed to meet their residency obligations on the date of filing of their permanent residence card application in Canada in January 2015. The appellant's counsel states in his written submissions that the "Canadian Consulate did not have jurisdiction to evaluate their residence status as of the date of making application for the Travel Document". The appellant's counsel further submits that, "The failure of the Consulate to evaluate the Appellants' residency obligations as of the date of submission of their PR Card applications is contrary to its obligations under the Act."

[6] Section 28(1) of the *Act* sets out the following:

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

[7] The *Act* clearly provides that the appellants must comply with their residency obligation with respect to **every** five-year period. No evidence was provided with respect to jurisprudence or relevant legislative provisions to support the appellant's counsel's position that the visa officer must calculate the five-year period according to the date of completion of the Application for a Permanent Resident Card and cannot consider any other five-year periods. While the appellant's counsel referred to the Federal Court decision in *Khan*[6], I note that the application for judicial

[6] *Khan v. Minister of Citizenship and Immigration*, 2012 FC 1471.

review in that case pertains to "Mr. Khan's failed attempt to renew his now-expired PR Card" and does not pertain to a refusal by a visa office of an Application for a Travel Document. The *Act* stipulates that a permanent resident must comply with a residency obligation in every five-year period and there is no evidence before me establishing that the visa office was precluded from considering the five-year period of February 19, 2011 to February 19, 2016. I therefore find that the visa officer's determination to examine the five-year period immediately prior to the date the appellants submitted their Applications for a Travel Document is valid.

[8] As there is no evidence before me that the appellants are challenging the visa officer's determination that they were physically present in Canada for less than 730 days during the period of February 19, 2011 to February 19, 2016, I find the visa officer's determination that the appellants have not met the residency obligation is legally valid.

**Humanitarian and compassionate grounds**

***Extent of the non-compliance***

[9] The appellants became permanent residents of Canada on June 14, 2010. The appellant and the appellant's daughter were physically present in Canada for 605 days during the relevant five-year period of February 19, 2011 to February 19, 2016.[7] The appellant's husband was present in Canada for 590 days during the same period.[8] The appellant's and the appellant's daughter's compliance with the residency obligation amounts to approximately 83% and the appellant's husband's compliance amounts to approximately 81%. I do not find the appellants' non-compliance to be a severe infraction of the residency obligation.

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[7] Exhibit R-2.
[8] Ibid.

***Reasons for leaving Canada***

[10] In October 2012, the appellant sustained extensive and serious injuries from an accident that required surgeries and intensive medical care. The appellant testified that she was unable to work, unable to care for her daughter, and unable to maintain the household due to the physical and mental trauma of the accident. By December 2012, the appellant and her husband had decided to return to India where they would be able to avail themselves of family support during the appellant's recovery. The appellant explained that neither she nor her husband have any immediate family members in Canada and while the appellant did have a cousin residing in Canada, the appellant's cousin was not in a position to provide extended long-term care to the appellant nor was she able to provide childcare to the appellant's daughter. The appellant also testified that prior to their decision to move back to India, the appellant made efforts to have her mother visit Canada on a visitor's visa to assist the appellant following the accident; however, the appellant's mother's visitor visa application was denied. The appellant also explained that because she could no longer maintain employment due to her injuries, the appellant and her husband were facing financial difficulties in meeting their mortgage payments. The appellant testified that they sold their home in Canada to address their financial problems and decided to temporarily move to India during the appellant's recovery period.

[11] The appellants have provided documentary evidence of the appellant's medical needs following the accident. I find there is sufficient evidence before me of the compelling circumstances that led to the appellants having to leave Canada. This weighs positively in the appellants' H&C analysis.

***Efforts made to return to Canada at the earliest opportunity***

[12] Since the appellants' relocation to India, the appellant testified that she and her family returned to Canada four times during holidays and summer vacations. The appellants submitted applications for a travel document in 2016. Given the long-term medical care as well as the

family assistance required by the appellant, I find the appellants made reasonable efforts to return to Canada at their earliest opportunity. This weighs positively in the H&C analysis.

***Establishment in Canada***

[13] The appellant testified that both she and her husband established themselves in Canada upon landing. Up until the time of the appellant's accident, both the appellant and her husband were employed. The appellant's daughter attended school in Canada from junior kindergarten and was in grade 1 at the time of the accident. The appellant and the appellant's husband bought a house where they were residing. The appellant and her husband also owned a vehicle. The appellants still maintain an active bank account in Canada in which they hold their savings. Further to the appellants' establishment in Canada, the appellant also has a cousin residing in Canada and testified of a number of close friendships she formed and maintains in Canada.

[14] By all accounts, the appellant and her family established themselves in Canada in a meaningful manner since their landing. I find the appellants' establishment in Canada weighs positively in the H&C assessment.

***Hardship***

[15] The appellant testified of the difficulties her daughter has faced since moving to India and the difficulties faced by her husband in finding independent employment. While it is unfortunate that the appellant's daughter had difficulties adjusting to a different education system, I find there was little evidence of hardship presented pertaining to the appellants' living circumstances in India. The appellants were living with the family of the appellant's husband and the appellant's husband was employed in a business that his father operates. The appellants have the support of immediate family members in India. There was no evidence presented that established the medical care required by the appellant was unavailable or deficient in any manner in India.

***Best interests of the children***

[16] The appellant's daughter is now 11 years of age and the younger daughter, who was born in India, is now 2. The appellant testified that her elder daughter has missed Canada very much and was experiencing difficulties with the education system in India. There was little evidence presented that the best interests of the appellant's children would be adversely impacted by the appellants' loss of permanent residence status or that they were experiencing hardship with their living circumstances in India.

**CONCLUSION**

[17] The appellants have provided reasonable explanations for why they were compelled to leave Canada, have made efforts to return to Canada within reasonable timeframes, and have established themselves in Canada. Given the moderate extent of non-compliance with the residency obligation, I find the positive H&C factors sufficiently address the shortfall.

[18] I find the immigration officer's refusal is valid in law. I find the appellants have established that, taking into account the best interests of a child directly affected by the decision, there are sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

[19] The appeals are allowed.

## DECISION

The appeals are allowed. The decision of the officer made outside of Canada on the appellants' residency obligation is set aside. The Immigration Appeal Division finds that the appellants have not lost their permanent resident status.

A. Jung
A. Jung

April 16, 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.