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.: TC1-00111
UCI: 60069373

Statement that a document was provided

On September 24, 2021, I provided the following:

Notice of Decision and Reasons

By e-mail to the Appellant Harbans Kaur TUNG
At the following address: c/o; Counsel Gurpreet Khaira

By e-mail to the Appellant's Counsel Gurpreet Khaira
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IAD File No. / Nº de dossier de la SAI : TC1-00111
Client ID No. / Nº ID client : 60069373

Reasons and Decision – Motifs et décision

RESIDENCY OBLIGATION APPEAL

Appellant(s) **and** **Respondent**	Harbans Kaur TUNG Minister of Citizenship and Immigration	**Appelant(e)(s)** **et** **Intimé(e)**
Date(s) of Hearing	July 29, 2021	**Date(s) de l'audience**
Place of Hearing	Toronto, ON	**Lieu de l'audience**
Date of Decision	September 23, 2021	**Date de la décision**
Panel	A. Jung	**Tribunal**
Counsel for the Appellant(s)	Gurpreet Khaira	**Conseil de l'appelant(e) /des appelant(e)s**
Designated Representative(s)	N/A	**Représentant(e)(s) désigné(e)(s)**
Counsel for the Minister	Jennifer Goestl	**Conseil du ministre**

REASONS FOR DECISION

OVERVIEW

[1] Harbans Kaur Tung (the Appellant) is appealing the visa officer's determination that she failed to comply with the residency obligation. Permanent residents of Canada are required to be physically present in Canada for at least 730 days in every five-year period, or otherwise meet their residency obligation through alternate means of compliance.[1] The Appellant was present in Canada for zero (0) days from March 19, 2015 to March 18, 2020.[2] She did not meet her residency obligation through other means of compliance.

[2] The Appellant is a 73-year-old citizen of India. She became a permanent resident of Canada on February 15, 2011[3] and currently resides in India. She returned to India three months after landing and has been absent from Canada since. She is widowed with two daughters. The Appellant's son died in 2014. The Appellant lives alone.

[3] The Appellant does not challenge the legal validity of the visa officer's determination and seeks to establish there are sufficient humanitarian and compassionate (H&C) grounds to warrant special relief, in light of all the circumstances of the case.

[4] The Appellant's H&C evidence supports the granting of special relief. The Appellant's reasons for leaving Canada and more significantly, the evidence pertaining to hardship, are strong positive factors. Although the non-compliance is very serious, the favourable H&C evidence cumulatively extends to sufficiently address the shortfall.

[5] The Appellant has established, 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.

[6] For the reasons set out below, the appeal is allowed.

ANALYSIS

Legal validity

[7] The visa officer's refusal is legally valid. The Appellant does not challenge the visa officer's determination that she was not present in Canada for at least 730 days during the five-

year period of review. There is no evidence the Appellant met her residency obligation through other means of compliance. The Appellant has not complied with the residency obligation pursuant to section 28 of the *Immigration and Refugee Protection Act* (the *Act*).

Humanitarian and compassionate grounds

The Appellant has not complied with the residency obligation to any extent

[8] The Appellant was absent from Canada during the entirety of the relevant five-year period and has not complied with the residency obligation to any extent. The severity of the lack of compliance weighs heavily against the appellant with respect to her H&C assessment.

The Appellant's reasons for leaving Canada is a positive factor

[9] The Appellant landed as a permanent resident of Canada on February 15, 2011. The Appellant testified she and her husband returned to India on May 15, 2011. The Appellant explained that as her husband had previously suffered a brain injury as a result of an accident, her husband's condition was quite poor with paralysis on one side of his body. After she and her husband moved to Canada her husband refused to eat and wanted to return to India to be with their son. The Appellant was her husband's caretaker since his accident and was responsible for all aspects of his care including preparing meals, feeding, and changing his clothes. The Appellant stated her husband became more and more insistent on returning to India to be with their son and the Appellant was obligated to return with him as there was nobody else who could provide the care and personal support her husband required.

[10] The Appellant testified in a straightforward, direct manner. There were no inconsistencies or discrepancies in her testimony pertaining to her reasons for leaving Canada. The reasons why the Appellant left Canada in May 2011 in order to support her husband are reasonable under the circumstances in light of his condition and personal support needs. This is a positive factor in the H&C analysis.

The lack of evidence establishing the Appellant applied to return to Canada at her earliest opportunity does not attract special relief

[11] The Appellant's son died on September 8, 2014 and the Appellant's husband's health further worsened following their son's death to the extent that he was no longer able to get up.

The Appellant's husband died two years after their son, in 2016. The Appellant explained she did not return to Canada thereafter as she could not leave her grandchildren and daughter-in-law alone in India. The Appellant stated she was responsible for managing all household matters for her daughter-in-law and grandchildren and taking care of them. Once her grandchildren and daughter-in-law left India to come to Canada, the Appellant then turned her mind to returning to Canada and submitted the Application for a Permanent Resident Travel Document in March 2020.

[12] The Minister's counsel submitted that it was understandable the Appellant remained with her husband in India after the death of their son in 2014 given that she was her husband's primary care provider; however, the Minister's counsel raised concerns with the lack of efforts made by the Appellant to return to Canada after her husband's death and after her daughter-in-law left for Canada in December 2019. The Minister's counsel submits it does not seem the Application for a Permanent Resident Travel Document was made in a timely manner. I share the Minister's counsel's concerns in this respect. It appears the Appellant made a personal decision to remain in India after the death of her husband in 2016 in order to manage the household for her daughter-in-law and grandchildren which included cooking, cleaning, and laundry. There is insufficient evidence the Appellant's daughter-in-law was unable to manage the household without the Appellant or that the Appellant's presence was necessary. There is insufficient evidence the Appellant remained in India after the death of her husband for compelling or exceptional reasons; rather, it appears the Appellant chose to remain in India with her daughter-in-law and grandchildren as a matter of personal preference at the cost of her residency obligation to Canada. The lack of evidence establishing the Appellant made efforts to return to Canada at her earliest opportunity does not attract special relief.

The Appellant's lack of establishment in Canada is a negative factor

[13] The degree of the Appellant's establishment in Canada is low. The Appellant became a permanent resident of Canada at the age of 62. She does not have a history of employment, education, volunteer work, or community involvement in Canada. There is no evidence the Appellant holds property, savings, or other assets in Canada. The Appellant's overall lack of significant establishment in Canada does not attract special relief considerations.

The Appellant's family ties to Canada is a positive factor

[14] The Appellant has several close family members in Canada: a daughter, son-in-law, and four grandchildren. The Appellant's daughter-in-law is also currently residing in Canada but does not have permanent resident status at this time. The Appellant maintains close family bonds with her family members in Canada. The Appellant's family ties to Canada are a positive consideration in the H&C assessment.

Hardship is a positive factor

[15] Given the Appellant's close family ties in Canada, emotional hardship arising from family separation in relation to her family in Canada is a positive consideration in the H&C analysis.

[16] The Appellant also testified of the lack of family support available to her in India. The Appellant does not have any siblings and her parents are deceased. The Appellant has a daughter in Canada and while her other daughter resides in India, the Appellant explained her daughter in India is unable to provide any help to her as her daughter's in-laws do not wish for the Appellant to reside with them. The Appellant's daughter in India comes to visit the Appellant once a year and the Appellant does not have any way to visit her daughter. The Appellant stated she is alone in India without anybody to help care for her. The Appellant stated her health is failing and spoke of an accident that occurred approximately six months after her daughter-in-law left India when the Appellant fell which resulted in an injury to her back with a slipped disc. The Appellant has been unable to resume normal activities since and there was nobody available to take the Appellant to the hospital. The Appellant has difficulty walking, standing, and doing daily chores such as grocery shopping, cooking, and cleaning. The Appellant stated she was bedridden for quite some time following her accident. The Appellant's daughter was not able to come and see the Appellant following the injury and has not provided any support aside from telephone calls to check up on the Appellant. The Appellant has no means of transportation to go anywhere and walks with a walking device to the doctor and the store as needed. The Appellant stated when she has to go to the store, she brings her purchases home one by one and explained she cooks once and then eats a little bit of the food in portions. On days when the Appellant's condition is poor, she manages with what she has. The Appellant stated her condition is worsening with time and is having a very hard time managing on her own in India. The

Appellant does not have any assets or savings in India and is currently residing alone in a small home on land that are both in her grandson's name. The Appellant earns a small income from the land that is rented out.

[17] The Minister's counsel raised concerns in submissions that there is insufficient evidence establishing the Appellant is unable to care for herself. The Minister's counsel pointed to the affidavits submitted by the Appellant's daughters and the absence of any reference of the Appellant's inability to care for herself or of her back injury.[4] The Minister's counsel questions why the decision was made to leave the Appellant on her own when the Appellant's daughter-in-law left for Canada in December 2019 if the Appellant could not be self-sufficient in some capacity. The Minister's counsel stated that perhaps there was not enough evidence establishing the Appellant is not self-sufficient. The Minister's counsel did not raise credibility concerns with the Appellant's evidence.

[18] The Appellant was a credible witness and no credibility concerns arose in respect of the Appellant's evidence relating to her back injury in 2020 or her worsening health conditions and her physical limitations to carry out daily household and personal activities. While the Minister's counsel raised concerns why the Appellant would have been left alone if the Appellant was not self-sufficient when the Appellant's daughter-in-law left India in 2019, the evidence is that the Appellant's injury and resulting physical limitations occurred approximately six months after the Appellant's daughter-in-law left India. While the Appellant may have been self-sufficient in 2019 and in early 2020, the Appellant's testimony is her health significantly declined since her accident. The hardship related to the Appellant's current health situation and the lack of family support available to her in India is a factor supporting the granting of special relief.

Best interest of the children

[19] The Appellant has six grandchildren who are all adults. There is no evidence of the best interests of any children to consider in this appeal.

CONCLUSION

[20] The evidence presented in this appeal supports the granting of discretionary relief. The Appellant has strong family ties to Canada. She presented a reasonable explanation for her departure from Canada which was compelling and unforeseen. Hardship is the strongest and

more compelling factor in this appeal and I give a significant amount of weight to this factor in favour of granting special relief given the clear, cogent, and convincing evidence of hardship arising from family separation, the lack of family support in India, the Appellant's advanced age, and the Appellant's poor health condition. While the factors of a delay in returning to Canada at the earliest opportunity and the Appellant's establishment in Canada do not weigh favourably in granting special relief, it is the weight of the hardship and the close ties the Appellant has in Canada that tip the balance in the Appellant's favour. Although the non-compliance is very serious, the favourable H&C evidence cumulatively extends to sufficiently address the shortfall.

[21] The Appellant has established, 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.

[22] The appeal is allowed.

NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and an officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

(signed by) A. Jung

A. Jung

September 23, 2021

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.

[1] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, Section 28.
[2] Record, pp. 4, 20.
[3] Ibid., p. 46.
[4] Exhibit A-1, pp. 9-12.