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Reasons and Decision – Motifs et décision

REMOVAL ORDER APPEAL

Appellant(s)	Moinul BHUIYAN Maheer BHUIYAN Munira BHUIYAN	**Appelant(e)(s)**
and		**et**
Respondent	Minister of Public Safety and Emergency Preparedness	**Intimé(e)**
Date(s) of Hearing	March 26, 2021	**Date(s) de l'audience**
Place of Hearing	Toronto, ON	**Lieu de l'audience**
Date of Decision	June 16, 2021	**Date de la décision**
Panel	Catherine Gaudet	**Tribunal**
Counsel for the Appellant(s)	Joel Sandaluk	**Conseil de l'appelant(e) /des appelant(e)s**
Designated Representative(s)	N/A	**Représentant(e)(s) désigné(e)(s)**
Counsel for the Minister	Priya Sharma (by written submissions)	**Conseil du ministre**

REASONS FOR DECISION

OVERVIEW

[1] Moinul Bhuiyan ("the Appellant"), Munira Bhuiyan ("the female Appellant") and their minor son, Maheer Bhuiyan ("the minor Appellant") are all permanent residents of Canada ("PRs"). The Appellant, female Appellant, and minor Appellant (collectively "the Appellants") are citizens of Japan and Bangladesh. The Appellants landed in Canada in February 2015. Two weeks after landing, the Appellants left Canada. They returned to Canada for the first time after landing in February 2020 and were stopped at the airport on their arrival. Section 44 reports were written on all three of the Appellants.[1] In the five years prior to the section 44 reports being written, the Appellants were physically present in Canada for zero days.[2] The Appellant told the officer who interviewed him that he had not returned to Canada because he was working abroad and was not able to, while the female Appellant said their son's education was important to them and they wanted him to attend a good school in Malaysia.[3] The Appellants were admitted to Canada and departure orders were made against them in April 2020.[4] They filed appeals of the departure orders which were heard at a hearing before me.[5]

[2] The *Immigration and Refugee Protection Act (*"*the Act*") requires that PR's must be physically present in Canada for at least 730 days in every five-year period.[6] The Appellants did not have the 730 days, and they did not fall into any of the exceptions to the law.[7]

[3] The only positive humanitarian and compassionate ("H&C") factors I can weigh in the Appellants' favour are their establishment outside the period and their family ties to Canada. Also, the best interests of the minor Appellant weigh in favour of granting of special relief. All the other H&C considerations are negative or neutral. However, the minor child's situation is sufficiently compelling that I find that his interests, when coupled with the other positive factors, are sufficient to meet the threshold for special relief. The appeals are allowed.

ANALYSIS

In all the circumstances of the case, and taking into account the best interests of any minor children directly affected by the decision, are there sufficient humanitarian and compassionate considerations to warrant special relief to the Appellants?

[4] In considering the H&C grounds in a residency obligation appeal, I must consider the best interests of any minor children whose interests might be directly affected by the outcome of the appeal, along with numerous factors which I discuss in detail below, and which are not exhaustive.[8] Further, the Federal Court tells me there is no rigid algorithm that determines the outcome of this type of appeal.[9] Finally, the greater the shortfall in the number of days from the required 730 days, the more positive H&C factors the Appellant must present in order to overcome the impediment of not meeting the residency obligation.

The Appellants' breach of the residency obligation is total

[5] The Appellants have zero days of physical presence in Canada during the five-year period prior to the section 44 report.[10] This is a total breach of the requirement. The extent of the breach is a negative factor in and of itself and the Appellants require a significant amount of H&C considerations to overcome this impediment.

The Appellants' reasons for not meeting the residency are not compelling and they did not return at the first opportunity

[6] Context is required to understand why the Appellants did not meet the residency obligation. The adult Appellants were both born in Bangladesh, but their life experiences have led to them living in numerous places. They both have PhD's. The Appellant first travelled to Japan in 1990 as a student. He remained in Japan after completing his education, eventually becoming a citizen in 2006. The adult Appellants got married in Bangladesh in 1999, and the female Appellant obtained status to live in Japan as a dependent spouse in 2002. The Appellant was working in Japan for several different companies. When the female Appellant first came to Japan, she did not speak Japanese and did not have a job. She began studying at a Japanese

university, learned the language, became a citizen of Japan, and by 2006, obtained a job as a medical doctor. The female Appellant completed her PhD in public health and began working as a researcher at an Institute in Tokyo, and later for Pfizer.

[7] The Appellants were both working hard while they were in Japan, and in 2010 the female Appellant gave birth to the minor Appellant. He is a citizen of Japan as well. There was a tsunami in Japan in 2011, which was devastating to the country and Japan's economy, and the Appellant lost his job as a result. The couple heard that Malaysia was looking for skilled foreigners. They also liked Malaysia because it is closer to Bangladesh, where they retained ties, both economic and familial. They had also decided that they wanted their son to learn to speak English, and Malaysia had good schools which offered English instruction. Just before leaving Japan, they applied to immigrate to Canada,[11] anticipating it would take several years for their application to be processed.

[8] In 2012, the Appellants left Japan for Malaysia. They initially rented a property. When they hadn't heard anything back from Canada, they decided to purchase a house which they were hopeful would appreciate and which they could sell at a profit when they came to Canada. In November 2013, they purchased a property in Malaysia. The adult Appellants were both working at universities as professors, and their son was studying at a school in Malaysia where he was learning both Malay and English.

[9] The Appellants were issued permanent resident visas to Canada in late 2014, and they landed in February 2015. The Appellant had lost his job in Malaysia at the University just prior to landing, but the female Appellant retained her job at Monash University in Malaysia on a contract. The Appellants came to Canada and stayed for two weeks.

[10] The female Appellant testified that when she, her husband and child first came to Canada in 2015, they had two weeks to observe. While they were very positive about Canada, they met some of their former classmates who were living in Canada and were struggling to have their credentials recognized. It was taking them years to pass medical board exams here in Canada. The Appellants concluded that it was difficult to get a leg up in Canada without Canadian

experience and it would be a struggle for the first two to three years. As a result, they decided to sell their house in Malaysia and bring the money to Canada as it would be difficult to survive in Canada in the beginning without a buffer of funds. They anticipated the process taking no more than a year.

[11] After landing, the Appellant applied for numerous other jobs in Malaysia, and he appealed his dismissal from his original job in Malaysia. The Appellant's actions, in staying in Canada for two weeks then returning to look for work abroad suggest that he was not ready to put down roots in Canada at that time. The Appellant was asked by his counsel why he did not consider remaining in Canada with his wife continuing to work at her job in Malaysia and coming later. He said the payments on their home in Malaysia were high and his wife could not pay them on her own.

[12] The Appellant testified that he had applied for jobs in Canada, but he did not submit any evidence to corroborate this assertion, despite having highly competent counsel. I do not accept that the Appellant applied for jobs in Canada as he stated.

[13] By May 2015, the Appellant had obtained a job in academia in Bangladesh. He held this job from May 2015 to January or February 2019. While he was in Bangladesh, his wife and son remained in Malaysia. The Appellant left Bangladesh to work in Japan in 2019. By February 2020, the family returned to Canada for good.

[14] In submissions, counsel cited several reasons as to why the Appellants did not meet the residency obligation. They include: that they were unable to sell their property in Malaysia; that the Appellant was engaged in and became obsessed with estate litigation concerning his family's property in Bangladesh; and estrangement between the couple which led to the Appellant filing for a divorce.[12]

[15] The reasons cited at the hearing were not the reasons cited when the Appellants were first interviewed at the airport in Toronto when they returned in 2020. Indeed, the litigation that the Appellant was involved with does not appear at any point in the Record, nor does the divorce,

later withdrawn. This shift in reasons for not meeting their residency obligation has not been explained with a credible reason and I find that the contradictory evidence undermines the credibility of the adult Appellants. I will explain.

The Appellant was involved in protracted litigation in Bangladesh

[16] There is evidence before me that the Appellant was involved in litigation in Bangladesh over his father's estate between 2015 and 2020.[13] The Appellant testified that his portion of his father's estate totalled approximately $20 million CAD. There is a document which appears to be a Statement of Claim relating to the property of the Appellant's father, where he is the Plaintiff.[14] There is another document from a court in Dhaka, which indicates that the suit was filed in November 2015.[15] The Appellant has counsel in Bangladesh who provided a letter indicating the litigation is ongoing.[16] The court document has a judge in Dhaka signing and sealing a document in February 2021, but it is unclear what this means.[17] The evidence establishes that the Appellant was involved in some litigation in Bangladesh which began in 2015.

[17] However, what remains unclear is why this litigation kept the Appellant in Bangladesh, and why he remained in the country after retaining counsel to represent his interests in the litigation. It is difficult to understand why the Appellant would not have returned to Canada and attempted to set up roots here after he was represented by counsel in Bangladesh. The Appellant testified that he had to be physically present in Bangladesh during this time because he didn't think he'd be able to maintain everything from outside the country, and he had to stay there to maintain control over the properties that are subject to the litigation. The Appellant agreed with his counsel that he made a conscious choice to remain in Bangladesh to maintain his financial gains.

[18] In addition, the Appellant testified that by the time he left Bangladesh in 2019, the litigation was still not resolved. The Appellant has now been outside of Bangladesh for more than two years and his Bengali counsel is representing his legal interests in Bangladesh. This tells me the litigation could have been maintained by his counsel while he came to Canada.

Accordingly, I do not accept that the litigation was the reason he resided in Bangladesh during this period.

[19] Furthermore, the Appellant testified that he had a job at a University in Bangladesh from May 2015 to January or February 2019. In February 2019, the Appellant left his job in Bangladesh, and returned to Malaysia, where he spent two months with his wife and child. He then made the choice to accept a job with the Kurosawa company in Japan, where he worked from June 2019 until he came to Canada in February 2020. This is consistent with his evidence in the Record.[18] The Appellant had another ideal opportunity to come to Canada after he left Bangladesh in February 2019, and he again chose not to do so but instead opted to pursue employment in Japan.

[20] I find that the fact that the Appellant had a job at a university in his field was the more likely reason that he remained in Bangladesh from 2015 to 2019 than that the litigation required him to remain in Bangladesh. Caselaw tells me that not meeting the residency obligation due to holding a job elsewhere is contrary to the provisions of the Act.[19] The Appellant has been employed outside of Canada working in his field of academia for nearly the entire duration of the five-year period.

[21] Furthermore, despite being provided with two ideal opportunities to come to Canada and establish himself within that five-year period, when he had ceased his employment, the Appellant opted not to do so. The Appellant did not return at the first opportunity and his reasons for not meeting the residency obligation in the period are not compelling from a H&C perspective. This is a negative H&C factor.

Difficulties in selling the house in Malaysia

[22] The Appellants also argue that difficulty in selling the house in Malaysia is another reason that they did not meet the residency obligation. By the time they got to Malaysia, the Appellants had not yet heard back from Canadian immigration authorities and they had anticipated it would take several years for the applications to be processed. The Appellants opted

to purchase a house in Malaysia in November 2013. They paid 1,050,000 Malaysian dollars for this property.[20] They sold this property in August 2019 for 968,000 Malaysian dollars.[21] In his questionnaire, the Appellant stated that he did not meet the residency obligation because they had to "avoid the breach of a home loan agreement and continue high monthly debt with bank."[22] The Appellant explained that if they sold this house within five years they had to pay the government an extra 30% of the whole price. He reasoned that if the family sold the house, they would have to sell the house at the lower price plus pay the 30%. The female Appellant testified that the period was only three years where the 30% obligation existed, and that by the end of 2017 or beginning of 2018, she realized she had to get rid of the house as it was causing her significant financial and emotional stress. The contract with the real estate agent indicates that the Appellants listed the property in November 2017, although according to the female Appellant, the three-year holding period ended in November 2016.[23] The house was finally sold in August 2019. When the Appellants purchased the home, it was during a boom time for real estate in Kuala Lumpur, and they thought they would be able to sell the house soon, with a profit, but the market took a downward turn.

[23] I make several findings about this reason for not meeting the residency obligation. First, the Appellants waited until 2017 to list this house, and it took nearly two years to sell. When they finally did sell, they did not have to pay the 30% to the government because they made no profit on it and sold after the holding period of either three or five years. The Appellants were both working during the entire timeframe when they owned the house. They discovered that the house was expensive, and they sought to get rid of it but couldn't do so for several years. This is a reason for not meeting the residency obligation, and it is one that is faced by many newcomers to Canada. Again, while I find the testimony credible, I do not find it to be a favourable H&C consideration.

The situation of the female Appellant/Appellant seeks a divorce

[24] I will briefly discuss the situation of the female Appellant and her reasons for not meeting the residency obligation, and whether she came back at the first opportunity or not. I think it's important to include it here because she and her husband were living apart for a significant

amount of time during the five-year period. During the time the Appellant was in Bangladesh, she was working from July 2013 until August 31, 2019 as a senior lecturer in the faculty of medicine at SEGi University in Malaysia.[24]

[25] Their son was attending private school in Malaysia, and the need to support their son's education in Malaysia was cited as one of the reasons they had not met the residency obligation.[25] I will discuss the minor Appellant's school situation in further detail when I examine his best interests. The female Appellant testified that her son faced a lot of pressure at the Malaysian school and that his reading was okay in grade 1 and 2, but by grade 3, he was not progressing at all. She further noted that in Malaysia punishment is available to teachers and that her son was sometimes scared to go to school as a result. She also testified that she was working 12 hours a day and at the end of the day had to come and study with her son for two hours to improve his grades. I infer from this that the female Appellant was unsatisfied with the education her son was receiving in Malaysia, and it was stressful for her to be working full-time as a single parent and supporting his educational efforts at his school.

[26] Furthermore, the Appellant had been living in Bangladesh, while the female Appellant and minor Appellant were residing in Malaysia. This caused difficulty in their relationship and the marriage floundered badly, to the point that the Appellant filed a decree of divorce in March 2017, which he withdrew three months later.[26] This would have been an ideal opportunity for the female Appellant to pull up roots in Malaysia and return to Canada with her son and enjoy the support of her sister. It would have made sense particularly given the female Appellant's complaints about the difficulties she was experiencing in Malaysia.

[27] The female Appellant was asked about this at the hearing. In response, she stated that after she found out about the divorce, she reached out to her sister, who lives in Vancouver. Her sister was very welcoming to her and told her to come to Vancouver and that she would take care of her. The female Appellant said at that point she was thinking of going to either Toronto or Vancouver, but she didn't know what to do with the house. She felt responsible for the loan and was not that brave to leave for Canada, so she remained in Malaysia until she went to Japan in December 2019, then left in February 2020 with her husband and son to come to Canada.[27] The

female Appellant made a choice to prioritize the financial consequences related to the house loan over her obligation to be present in Canada as a permanent resident. Again, this is a reason, but it is not a compelling one from an H&C perspective.

[28] I ultimately find that the main reason the female Appellant did not meet her residency obligation was because she was working in her field abroad, which is contrary to the objectives of the *Act*. Additionally, while she had opportunities to come to Canada in the five-year period, she made no efforts to do so.

The Appellants cited different reasons for not meeting their residency obligation when they first came to Canada

[29] As noted, the Appellants were interviewed when they arrived in Canada in February 2020. They said the reasons for not meeting their residency obligation were because the Appellant was working and they wanted their son to attend a good school in Malaysia.[28] They were asked if there were any other reasons, and they said no.[29] In the questionnaires they completed a few days later, the Appellants said they did not meet his PR status because they had to avoid breach of a loan agreement and high monthly debt with the bank and that they had to keep working to support their son's education.[30]

[30] However, at the hearing before me, the Appellants were asserting that they came to Canada to protect their lives and they were afraid of the Appellant's brother. The Appellant testified that due to the conflict over the litigation, his brother injured his finger when he came back from Japan for the final discussion. The hearing was the very first time the litigation or the abusive brother had been mentioned as a reason for not meeting the residency obligation.

[31] Before the hearing, neither of the adult Appellants made any mention whatsoever of this acrimonious litigation that had gone on for years and had kept the Appellant in Bangladesh. The Appellants completed questionnaires on March 9, a few days after they were first interviewed, which specifically asked "are there any humanitarian and compassionate considerations that would justify the retention of your permanent resident status and overcome any breach of your residency obligation?"[31] They referred to their son being able to access Canada's "best education

system, universal healthcare, multicultural society, prohibiting discrimination based on ethnicity.[32]" As for their own H&C considerations, they stated "family tie in Canada, higher mental satisfaction in workplace."

[32] Further, CBSA held a second interview to see if there were any extenuating H&C circumstances to make a favorable decision.[33] There was again no mention of the litigation or the fact that the Appellant's older brother was violent and had broken his finger a few weeks earlier. The Appellants themselves provided a letter to the immigration superintendent dated March 12, 2020,[34] which again makes no mention of physical violence by the Appellant's brother or the fear experienced by the female Appellant, nor is there any mention of the litigation which had dragged on for years. I carefully scoured the entire Record, and I could find no mention at any point in the entire document of the ongoing litigation in Bangladesh or the physical violence against the Appellant by his brothers. This omission is troubling.

[33] The Appellant was asked about this shift in evidence. He stated that he did not mention it because he did not have any papers about the lawsuit and they were all hidden. He had no evidence to explain. His counsel pointed out that he was not asked to produce documents, and when his own counsel pressed him, the Appellant stated that his understanding was not that clear and he had no evidence and could not explain, but now that he has the papers, he can disclose all these things. I am not persuaded by this explanation, particularly given the Appellant's level of education, command of English and his sophistication. I have therefore carefully considered the evidence the Appellants have filed in support of the assertions that they are afraid for their lives in Bangladesh to see if it is credible.

[34] There is some limited medical evidence regarding the Appellant's broken finger, including a doctor's note from here in Canada which I find to be credible and reliable, dated February 11, 2021, and stating that he had fractured his finger approximately 11½ months ago.[35] There is a document from a hospital in Dhaka which indicates that the Appellant sought treatment for a fractured finger on February 24, 2020.[36] This is not a contemporaneous medical document or an actual admission report and it was attested in 2021. I accept that the Appellant

may have injured his finger, but neither of the medical letters speak to the circumstances of that injury.

[35] Indeed, neither of these documents indicates that the Appellant's finger was broken in an altercation. This fact alone likely means nothing. However, it is alleged that the Appellant's brother broke his finger the same day he left Bangladesh,[37] and very soon before they arrived in Canada. The Appellants arrived in Canada on February 29, 2021, coming on a flight from Minneapolis. When they were questioned at the point of entry to Canada, the Appellants did not express a fear of returning to Bangladesh, nor did they mention that the Appellant's brother had broken his finger just a few days earlier.

[36] I carefully examined the documents from Bangladesh to see if the Appellant had previously complained about his brothers' conduct. The Appellant's lawyer in Dhaka has provided a statement in support of this appeal entitled "Legal opinion on behalf of (the Appellant) the clarification of unable to meet the residency obligation by spending a total of 730 days in the five year period inside Canada.[38]" Contrary to the testimony of the Appellant, this document also states that the Appellant "completely lost his rights, responsibilities and ownership of hard earned properties more than Canadian $20 million from his two elder brothers while his absence in Bangladesh."[39] The lawyer also states that the Appellant was mentally tortured, physically injured and hospitalized.[40] The statement indicates that the Appellant had to file a general diary in a few different police stations to come under protection of the law.[41] The lawyer's letter that states the Appellant lost his rights is contradicted by the evidence of the Appellant himself who said the litigation was ongoing. And it remains unclear what the lawyer meant about the Appellant having to write letters to obtain legal protection.

[37] A letter from the Appellant to the police seeking their intercession from July 2015 states that the Appellant's older brother was "spreading threatening rumours to third persons that assets distribution among siblings is not easy and that it could lead to murders." All of these violent statements have invoked fear in us and as to the chance of getting what rightly is ours as well."[42] There are two more letters from the Appellant to police in Dhaka, one from September 2015 and one from October 2015 which state that the Appellant's brother threatened to kill him.[43] A letter

to the police from the Appellant from February 2019 states that his brother had "misbehaved, threatened and pushed him by the neck, throwing him on the ground injuring him when he went to the house." The brother threatened to kill him when the Appellant visited the house again.[44] It is noteworthy that there is no actual police report contained anywhere in the documents from Bangladesh regarding these serious allegations of criminal conduct. Further, the Appellant said the police did not give him a solution because his brothers were influencing the local government. I take this to mean that the police did not act on the Appellant's complaints.

[38] In his testimony, the Appellant said that his brothers tried to hit him and threatened that they would kill him. He said they injured his finger. However, the Appellant's sister in Bangladesh, with whom he lived after his brother allegedly kicked him out of their father's house, provided a letter saying that two brothers had mentally tortured and injured the Appellant which required emergency medical treatment.[45] Indeed, this sister went further and said, "my brothers tried to kill him."[46] The documents from Bangladesh make serious allegations of criminal conduct. However, the only medical evidence to corroborate the allegations of physical violence against the Appellant are the document I have already referred to about the Appellant's finger, and another one, also not contemporaneous which states that the Appellant had been admitted to the hospital in 2015 after suffering from diarrhea, vomiting and abdominal pain that lasted for two weeks.[47]

[39] I make a number of findings about this evidence. First, this evidence alleges a serious pattern of abusive conduct by the Appellant's brothers over several years. The Appellants made no mention of this serious criminal conduct when they returned to Canada in 2020, in their forms, or when they were interviewed a second time to determine if there were any extenuating circumstances in his case. Given the levels of education of the Appellants, this omission is difficult to understand, and the Appellant's explanation strains credulity. It is also telling that despite the letters from the Appellant from 2015 interceding for police assistance and alleging threats and abuse by the Appellant's brothers, the Appellant remained in Bangladesh despite having status in Canada, Japan, and Malaysia at that point. Deeds speak. The conduct of the

Appellant tells me that the reasons that he did not meet his residency obligation are much more prosaic than those which were advanced at the hearing. He and his wife were working.

[40] I find that the allegation of abusive conduct by his brothers has been either manufactured or embellished to bolster the H&C considerations in this appeal. I also find that the Appellants' evidence at the hearing is different than in the Record. This undermines their credibility on a material point. Further, the documents from Bangladesh from the Appellant's lawyer and relating to the issues around the litigation contradict the testimony of the Appellant. I find them to be unreliable and I assign them limited weight as a result. As previously noted, the Appellants failed to produce any police reports regarding the allegations of serious criminal conduct by the Appellant's brother nor was a credible explanation provided for the lack of this documentation. On a balance of probabilities, the evidence before me does not credibly establish that the Appellants were subjected to violence or abuse by the Appellant's brothers.

[41] When I consider the individual situations of both the Appellant and the female Appellant, I conclude that neither of them has provided a reasonable explanation for not meeting the residency obligation nor did they return to Canada at the first opportunity. These factors do not weigh in favour of the granting of special relief.

The Appellants have establishment in Canada outside the period

[42] The Appellants have only ever spent two weeks in Canada prior to their return in 2020. The only establishment they can point to during the five-year period being examined are notices of assessment for 2015-2019 which show limited income in Canada for the Appellant and the little to no tax paid in this country.[48] The female Appellant has filed revised notices of assessment which indicate she had income for the years 2015 -2019 ranging from $10,000 - $13,000 approximately, and limited amounts of tax paid.[49]

[43] In her submissions, the Minister's counsel notes that these taxes were all reassessed after the departure orders were issued and it's "not clear why employment income was not declared for the Appellants given their near continuous employment overseas for those years.[50]" She

suggests that the taxes were reassessed to bolster the evidence for this appeal. The Appellants did not provide any testimony about why they refiled their taxes in Canada or where the income that they declared was coming from or whether they had paid tax. I find instead that the Appellants were not present in Canada at any point in the five-year period, the income declared was low, and the tax evidence does not bolster their claim of establishment during the period. The Appellants' establishment during the period is negligible and this factor weighs against the granting of special relief.

[44] However, the Appellants have made concerted efforts to establish themselves after they arrived in Canada in February 2020. The Appellant obtained a job with Amazon fulfilment in late October 2020 making $17 an hour.[51] He also obtained a job teaching at the Toronto Japanese language school on contract from September 1, 2020 to June 30, 2021.[52] The Appellant earns $305 per month for this work. Both adult Appellants have enrolled at the CDI College as of October 2020, studying cybersecurity. The fee for this course is $25,000 per person.[53] It appears the Appellants received some financial support through and the Ministry of Training, Colleges and Universities. The couple have bank accounts and credit cards here in Canada. They purchased a used car in October 2020. They have resided in rental properties for the duration of their stay. The couple enrolled their son in school here in Canada. The female Appellant volunteered for a Covid-19 awareness news segment.[54] The Appellants have made what I find to be solid efforts to establish themselves in Canada and their establishment now is commensurate with that of people who are newcomers to Canada and have only recently begun to put down roots. The Appellant's willingness to take work that is not reflective of his skills or experience suggests a sincere interest in remaining in Canada despite the adverse employment conditions. The Appellants' current establishment is a strongly positive factor in this appeal, and one that suggests they are here to stay this time. However, the establishment after the period stands in stark contrast to that during the period being examined which is negligible. In my overall analysis under the establishment heading, I find that the Appellants' establishment in Canada is positive.

The Appellants have family ties to Canada, but hardship to them is limited

[45] The Appellant has three sisters here in Canada. The Appellant described that he is close to them and when they see each other they wish him well. These sisters filed a joint letter of support in this appeal.[55] This letter speaks at length about the litigation in Bangladesh and the abusive behaviour by their older brothers. The sisters say that the Appellant was threatened, mentally tortured, and physically injured by the brothers. They said that their brothers tried to kill the Appellant and that his "life is in danger because of our brothers being violent. We want him to build the secured life with his family and allowed to stay as a permanent resident holder in Canada."[56]

[46] I do not find that the Appellant was abused by his brothers as alleged, and this letter has little probative value as a result. Further, the letter does not refer to any hardship to these sisters if the Appellants were to lose their PR status. The female Appellant testified that they had lived away from these sisters for over 30 years and the bond was loose until the Appellants returned to Canada. These three women have been living in Canada while the Appellant pursued his studies and work abroad and he did not return to Canada once after landing to visit them. The Appellants stayed with his older sister for two weeks when they were present in Canada in 2015. It is unclear if these sisters visited the Appellants while they were in Malaysia, Japan or Bangladesh. I find there would be limited hardship to the sisters in Canada if the appeal was dismissed.

[47] The female Appellant has one sister in Canada who lives in Vancouver and has been present in the country for 10 years. There was no evidence regarding hardship to this sister if the appeal was dismissed or the extent of the contact between the female Appellant and her sister. I find that the Appellants have family ties to Canada, which weighs in favour of the granting of special relief, but there would be limited hardship to these women if the appeals were dismissed, which does not favour the granting of special relief.

Hardship to the Appellants

[48] The Appellants are highly educated PhD's who are clearly resourceful. They are citizens of both Bangladesh and Japan. The adult Appellants speak Japanese, English, and Bengali and likely Malay as well. They have lived in numerous countries during their lives. The adult Appellants were asked where they would go if they had to leave Canada. They were resistant to the question but eventually said they would return to Bangladesh as they did not want to go back to Japan, despite their citizenship in that country. While I likely do not need to consider the hardship to them in Japan as a result of their statements that they would return to Bangladesh, for the sake of completeness, I will consider their potential hardship in Japan.

Limited hardship to the Appellants in Japan

[49] I have read all the articles provided by counsel about Japan.[57] They all refer to foreigners or foreign nationals. The Appellants are citizens of Japan. The adult Appellants speak the language. They lived and worked for extended periods of time in the country. The minor Appellant was born in Japan. These articles do not apply to their situation. Their testimony shed a bit more light on the situation in Japan.

[50] The Appellant testified about a work culture in Japan that is "good" but requires long hours every day. The Appellant was asked about raising their son in Japan and they decided that the situation in Japan was difficult after the tsunami and they wanted their child to learn English in school, and there were opportunities in Malaysia. The female Appellant testified that her son does not speak Japanese, so she was worried about the future for him there. She also testified that some of her education from Bangladesh was not recognized in Japan. She said she had difficulty finding work after her son was born in Japan because women in Japan work long hours and it is difficult with a child. She also said there was discrimination in Japan, but limited evidence was filed in support of this allegation, and her own experience, of coming to Japan, learning the language, obtaining a PhD in the country, getting a high-level job and obtaining citizenship suggests otherwise. This is the hardship attested to in Japan. I find it to not be significant. I also

find the fact that the Appellant chose to return to Japan in 2019 to work rather than come back to Canada to be another indicator of a lack of hardship in that country.

Limited hardship in Bangladesh

[51] As noted, the Appellants all have citizenship in Bangladesh. They are all fluent in Bengali. The Appellant has family remaining in the country. The Appellant has six properties in Bangladesh with a total value of $20M CAD. These properties are tied up in the litigation. He worked in Bangladesh at a university, in the recent past. The Appellant's roots in Bangladesh are much deeper and his establishment much stronger than that in Canada.

[52] As for the female Appellant, her parents live in Bangladesh. She was educated in Bangladesh. She testified that when she was living outside of Bangladesh, she would return once a year for two weeks to visit. She returned to Bangladesh after selling the house in Malaysia in 2019. She said that when she went back to Bangladesh in 2019, she was frightened of the Appellant's brothers who harassed her and said they would hurt her if she came to their neighbourhood. She said she does not think she was safe to go back to her country. There was no objective evidence filed to corroborate this assertion, and the female Appellant did not testify about reporting her own allegations to the police. I do not accept this allegation as credible for the reasons noted above which I will not belabour here.

[53] Counsel has submitted some articles that reveal corruption is a problem in Bangladesh[58] and that "land grabbing" is another problem.[59] It is unclear how these articles relate to the experience of the Appellants, and counsel's submissions do not refer to the documentary evidence. He submits simply that it would be a hardship for the Appellants to return to Bangladesh where they have not resided for many years, or to Japan.

[54] The Appellants are well-educated people. The Appellant is seriously underemployed here in Canada, given his education and experience. The female Appellant is not working at all. They were able to obtain education and employment in their respective fields in Bangladesh, Malaysia (although they do not have status there anymore) and Japan. The Appellant may soon come into

a significant amount of money once the litigation in Bangladesh is resolved. The hardship to them appears to be here in Canada. I do not see hardship to them in either Bangladesh or Japan. The lack of hardship does not favour the granting of special relief.

The best interests of the Appellant's minor child weigh in favour

[55] There is one minor child whose interests I must consider in this appeal, and I need to be "alert, alive and sensitive" to his interests.[60] The minor Appellant is currently 11 years old and in Grade 5. He is a citizen of Japan and Bangladesh. The Appellant testified as to the difficulty in having their son and it was clear to me that they both deeply cherish this child. This little boy was born in Japan but left that country when he was young. It was asserted that he does not speak Japanese. At the tender age of 11, he has lived in Japan, Malaysia, Bangladesh and Canada. He was attending a school in Malaysia chosen by his parents so he could learn English. During the four years when the Appellant was living in Bangladesh, the minor Appellant lived in Malaysia with his mother.

[56] This child has been attending school in Canada since arriving here, right at the beginning of the pandemic. It is difficult for me to assess how he is progressing, given that he arrived in Canada just before the pandemic, most of his school experience has been online, and this has been a challenging year for both students and educators. His grade five report card suggests he has struggled to get work done on time. His teacher stated that he is "halfway there" and that he needed to continue to invest in his learning and persevere.[61] This is a child who moved to a new country during a pandemic. It is understandable that he is having some difficulties in learning online due to the pandemic.[62]

[57] The female Appellant and this child also lived in Bangladesh. They returned to Bangladesh after they sold the house in Malaysia in September 2019. The female Appellant testified that she is afraid for her son to live in Bangladesh. She said the environment is not kid-friendly and she is worried that her child is reaching his teenage years, as he is sensitive and

gangs roam the streets and there are drug dealers on every corner. There was no documentary evidence provided to corroborate this assertion, and I find it to be hyperbolic.

[58] The situation of the Appellants in Canada also appears to be quite difficult. The female Appellant testified that when they entered Canada, their money was almost gone and her husband is working at underpaid jobs which are not sufficient for them. Rent and food costs are high here in Canada. She applied for different jobs and had no response at all. She has been told that she requires Canadian experience in Canada to get a job. The Appellant himself is working in fulfillment for Amazon and is teaching Japanese. Their own counsel described them as underemployed. Money appears to be tight. It is very unfortunate that the adult Appellants have not been able to find remunerative employment in their respective areas of expertise, especially given that they have always enjoyed work that is commensurate with their education and experience. Like many immigrants to Canada, the adult Appellants' professional credentials and work experience have not been recognized – they face the difficult decision of leaving Canada (and giving up their PR status) or attempting to re-establish themselves in Canada in their fields of expertise or another field. In 2014, their choice was to leave Canada, while now they are requesting the exercise of H&C discretion to remain in Canada.

[59] However, the situation for the minor Appellant in Canada looks optimal. He arrived in Canada at the beginning of the pandemic and has done fairly well despite such challenging conditions. He has picked English up quickly, likely because he had some English language background in Malaysia. Being in Canada has enabled him to live with both his parents together, a situation which he has not enjoyed for a number of years. The physical separation of his parents led to his father filing for divorce only a few years ago. Fortunately, his parents worked it out and they made a choice to continue their relationship, due in part to their love of their son and their desire for him to have an intact family. I firmly believe that it is best for children, particularly when young, to have ready and physical access to both parents wherever possible.

[60] I accept that this is a close family. Despite their difficult situation in Canada, the minor Appellant lives with his parents for the first time in a number of years. If the appeal was dismissed, it is unclear whether he would be faced with another situation where his parents are

living in two separate countries due to their employment opportunities. It is for this reason that I find that, even though the situation of the Appellants in Canada is a bit tenuous, and it may not be the best situation for the adult Appellants to stay in Canada, it is in the best interests of the minor Appellant to remain in Canada with his parents in a loving family unit. The best interests of the minor Appellant strongly weigh in favour of the granting of special relief.

CONCLUSION

[61] I have weighed all the factors in this appeal. I considered a recent Federal Court case[63] where the court held that "the powers of the IAD concerning removal orders are highly discretionary. It also remains that the discretion is exceptional and should not be exercised routinely or lightly."[64] Counsel argues in his submissions that "the court did away with the common misconception that the H&C program is one in which an applicant must demonstrate exceptional circumstances, or something beyond the norm."[65] The case cited for this principle, *Apura*[66] was roundly rejected in a subsequent case, *Bakal*, where the court called the case "an outlier" and made a strong statement rejecting it:

> [14] ...*Apura*...which suggests that the absence of exceptional or extraordinary circumstances cannot form the basis of a decision to deny H&C relief, appears to be an outlier. **Not only does it fly in the face of well-established jurisprudence, it has been squarely rejected by this Court** in *Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29, and more recently in a decision of the Chief Justice of this Court in *Huang*.[67]

In *Huang*[68], the Chief Justice held that Apura "does not accurately reflect the existing state of the law." The Chief Justice held that applicants for H&C relief must "demonstrate the existence of misfortunes or other circumstances that are **exceptional**, relative to other applicants who apply for permanent residence from within Canada or abroad.[69]"

[62] The jurisprudence tells me that special relief should only be exercised in exceptional cases. I am also mindful of another Federal Court case which cautions me that to allow an appeal due to H&C considerations, there must be "some misfortunes that amount to more than the normal and expected consequences of removal from Canada and that need to be relieved."[70]

[63] The Appellants' family ties to Canada and their current establishment weigh in their favour in my examination of H&C considerations. Also, the best interests of the minor Appellant strongly weigh in favour of the granting of special relief. All other factors are negative or neutral.

[64] The Appellants required a significant amount of positive H&C considerations given their total shortfall in the number of days. This is a borderline case, and the embellishment of the allegations of violence in Bangladesh does not help matters. However, the Appellants' sincere efforts at establishing themselves after returning to Canada are to be commended, particularly given the Appellant's willingness to take work far beneath his education and experience to gain a foothold in Canada. The minor child's situation in this case is also unique. He is an only child who was not living with his father for four years, more than a third of his life. Being in Canada has enabled the family to finally live together under the same roof. This child appears to be doing well in his current situation. I find that his interests, in conjunction with the other positive factors, are sufficient to meet the threshold for special relief.

[65] I allow the appeals.

NOTICE OF DECISION

The appeals are allowed.

(signed by) Catherine Gaudet

Catherine Gaudet

June 16, 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] Exhibit #R-1 at pp. 7-12.
[2] Exhibit #R-1 at p. 44.
[3] Exhibit #R-1 at p. 46.
[4] Exhibit #R-1 at pp .13-15.
[5] The Appellants appeared over video. They were represented by counsel. The Appellant and female Appellant provided testimony and were questioned by counsel and the panel. The Minister's counsel did not attend and provided submissions in writing, which I have considered in my examination of the appeal.
[6] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. ("the *Act*"), section 28.
[7] Exhibit #R-1 at pp. 7-12.
[8] *Ambat v. Canada (Citizenship and Immigration)*, 2011 FC 292.
[9] *Yu v. Canada (Citizenship and Immigration)*, 2018 FC 1281 at para. 31.
[10] The five-year period ("the period") is from February 29, 2015-February 29, 2020.
[11] Exhibit #R-1 at p. 164.
[12] Appellants' counsel's submissions at p. 6.
[13] Exhibit #A-1 at pp. 160-211.
[14] Exhibit #A-1 at pp. 164-167.
[15] Exhibit #A-1 at p. 204.
[16] Exhibit #A-1 at p. 162
[17] Exhibit #A-1 at p. 204.
[18] Exhibit #R-1 at pp. 55-56.
[19] *Canada (Public Safety and Emergency Preparedness) v. Abou Antoun*, 2018 FC 540 at para. 28.
[20] Exhibit #R-1 at p. 21.
[21] Exhibit #R-1 at p. 81.
[22] Exhibit #R-1 at p. 59.
[23] Exhibit #R-1 at p. 120.
[24] Exhibit #R-1 at p. 96.
[25] Exhibit #R-1 at pp. 132 and 56.
[26] Exhibit #A-1 at pp. 154-155.
[27] Exhibit #A-1 at p. 18.
[28] Exhibit #R-1 at p. 56.
[29] *Ibid.*
[30] Exhibit #R-1 at pp. 59 and 62.
[31] Exhibit #R-1 at pp. 61 and 64.
[32] *Ibid.*
[33] Exhibit #R-1 at pp. 132, 157-158.
[34] Exhibit #R-1 at p. 118.
[35] Exhibit #A-1 at p. 157.
[36] Exhibit #A-1 at p. 159.
[37] Exhibit #A-1 at p. 12.
[38] Exhibit #A-1 at p. 161.
[39] Exhibit #A-1 at p. 161.
[40] *Ibid.*
[41] Exhibit #R-1 at p. 162.
[42] Exhibit #A-1 at p. 179.
[43] Exhibit #A-1 at pp. 192-194.
[44] Exhibit #A-1 at p. 195.
[45] Exhibit #A-1 at p .206.
[46] Exhibit #A-1 at p. 207.
[47] Exhibit #A-1 at p. 158
[48] Exhibit #A-1 at pp .68-85 and 90-108.
[49] Exhibit #A-1 at pp. 90-108.
[50] Minister's counsel's submissions at para. 17.

[51] Exhibit #A-1 at p. 25.
[52] Exhibit #A-1 at pp. 28-29.
[53] Exhibit #A-1 at p. 31.
[54] Exhibit #A-1 at p. 150.
[55] Exhibit #A-1 at p. 208.
[56] Exhibit #A-1 at p. 208
[57] Exhibit #A-1 at pp. 230-240.
[58] Exhibit #A-1 at pp. 241-275 and 291-299.
[59] Exhibit #A-1 at pp .276-290 and 300-301
[60] *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 S.C.R. 61 (CanLII).
[61] Exhibit #A-1 at p. 39.
[62] Exhibit #A-1 at pp. 139-141.
[63] *Canada (Public Safety and Emergency Preparedness) v. Abou Antoun*, 2018 FC 540 (CanLII).
[64] *Abou Antoun, supra,* at para. 19.
[65] Counsel's submissions at p. 5, citing *Apura v. Canada (Minister of Citizenship and Immigration)*, 2018 FC 762 at paras. 23-24.
[66] *Ibid.*
[67] *Bakal v. Canada (Citizenship and Immigration),* 2019 FC 417 (CanLII), at paras. 13-14.
[68] *Huang v. Canada (Citizenship and Immigration),* 2019 FC 265 (CanLII) at paras. 20 and 21.
[69] *Huang, ibid,* at para. 20.
[70] *Canada (Citizenship and Immigration) v. Tefera*, 2017 FC 204 (CanLII) at para. 46.