

Federal Court



Cour fédérale

Date: 20200116

Docket: IMM-2255-19

Citation: 2020 FC 57

Ottawa, Ontario, January 16, 2020

PRESENT: Mr. Justice Boswell

BETWEEN:

AMRITVEER SINGH BAINS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Amritveer Singh Bains, applied for a work permit based on his marriage to a foreign national who was studying full-time in Canada. In a letter dated February 6, 2019 an Officer in the visa section at the High Commission of Canada in New Delhi, India, refused the application. The Officer found Mr. Bains inadmissible to Canada under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for directly or indirectly

misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*.

[2] Mrs. Bains has now applied under subsection 72(1) of the *IRPA* for judicial review of the Officer's decision. He asks the Court to issue a declaration setting aside the decision and refer the matter back for determination in accordance with such directions as the Court considers appropriate. The issue, therefore, is whether this relief should be granted.

[3] For the following reasons, Mr. Bains' application for judicial review will be dismissed.

I. Background

[4] Mr. Bains is a citizen of India. He worked with his father as a farmer since completing his grade 10 education. Mr. Bains says he has been hard of hearing since he was seven or eight years old and needs hearing aids to communicate.

[5] Mr. Bains deposes that the couple's respective families arranged his marriage to Simranjeet Kaur, and that they first met approximately two years before their marriage when their families started to discuss the couple's future.

[6] Mr. Bains further deposes that his family considered several factors prior to agreeing to the marriage, including the good reputation of Ms. Kaur's family in the community, they were landowning Sikhs, they were close in age, and Ms. Kaur's family were devout Sikhs. Mr. Bains

and Ms. Kaur became engaged in early October 2016. Their marriage occurred in early May 2018.

[7] Prior to the marriage, Ms. Kaur went to Canada in May 2017 to study. After the marriage, Mr. Bains lived with his spouse for approximately two weeks. His spouse then returned to Canada in late May 2018 to resume her studies. Mr. Bains states that in September 2018 his spouse moved in with his mother, father, sister, and brother who had immigrated to Canada under the farm investor program. Mr. Bains' spouse continues to live with them.

[8] In June 2018, Mr. Bains applied for a work permit as the accompanying spouse under the student program. The application was originally approved but later cancelled due to concerns about the genuineness of his marriage.

[9] In early November 2018, Mr. Bains received a letter convoking him for an interview at the visa office in New Delhi. The letter stated that Mr. Bains was required to attend an interview in order to continue processing his application, and that he should bring all required documentation to the interview. The interview took place on November 20, 2018 at the High Commission in New Delhi.

II. The Officer's Decision

[10] The Officer refused Mr. Bains' application for a temporary work permit as an accompanying spouse because the Officer was not satisfied that Mr. Bains had truthfully answered all questions asked of him during the interview. The Officer therefore found Mr. Bains

inadmissible to Canada under paragraph 40(1)(a) of the *IRPA* for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*. In the refusal letter, the Officer informed Mr. Bains that, under paragraph 40(2)(a), he would be inadmissible to Canada for a period of five years from the date of the refusal letter.

[11] The Global Case Management System [GCMS] notes show that two officers reviewed Mr. Bains' application, the visa officer who conducted the interview and the Officer who made the decision under review.

[12] The visa officer who interviewed Mr. Bains and his spouse recommended that Mr. Bains be found inadmissible to Canada in accordance with section 40 of the *IRPA*. The visa officer was not satisfied that the relationship between Mr. Bains and his spouse was a genuine marital relationship. The officer believed Mr. Bains' family had orchestrated the marriage for immigration purposes.

[13] It was unclear to the visa officer whether Mr. Bains had medical issues other than the hearing impediment he disclosed. The officer noted that Mr. Bains was wearing a hearing aid during the interview and he had not demonstrated that he was unable to hear the questions posed to him. Based on the interview and supporting submissions, the visa officer concluded that the marriage was entered into only for an immigration purpose; namely, for Mr. Bains to gain admission into Canada as a spouse.

[14] The Officer remarked in the GCMS notes that, at the interview, the visa officer informed Mr. Bains of their concerns and the consequences of a finding under section 40 of the *IRPA*. In the Officer's view, Mr. Bains provided insufficient information or explanation concerning the progression of his relationship with Ms. Kaur to support a conclusion that their marriage is genuine.

[15] The Officer found Mr. Bains had provided insufficient evidence or explanation as to ongoing communication between the couple before and after the marriage. The Officer referenced subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. This subsection states that a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership, or conjugal partnership was entered into primarily for the purpose of acquiring any status or privilege under the *IRPA*, or it is not genuine.

[16] The Officer concluded that, on a balance of probabilities, Mr. Bains had not provided sufficient evidence or explanation to show the marital relationship was genuine or that it was not entered into primarily for acquiring a status or privilege under the *IRPA*. The Officer noted that meeting the definition of a family member is material to the assessment of eligibility for a work permit under the spouse of a student program. Had Mr. Bains been considered a spouse, the Officer stated that, this finding could have induced an error in the administration of the *IRPA* since Mr. Bains may have erroneously been issued a work permit.

[17] The Officer thus determined that Mr. Bains was inadmissible to Canada under section 40 of the *IRPA* and refused the application. The Officer concluded his or her entries in the GCMS notes by observing that, under paragraph 40(2)(a) of the *IRPA*, a foreign national determined to be inadmissible for reasons of misrepresentation is inadmissible for a period of five years following the date of the refusal letter.

III. Is the New Evidence Admissible?

[18] The respondent objects to Mr. Bains' application record and affidavit evidence because they contain new information, explanations, and attachments, many of which post-date the refusal letter, were not before the Officer, and not supplied with his application or at the interview. The respondent contends that it is not open to Mr. Bains to supplement the record with new evidence in this judicial review or to buttress his arguments that the Officer erred.

[19] The respondent says Mr. Bains relies on evidence that was not before the Officer and the Court should strike out, or lend no weight to, Exhibits F, G, I and L attached to Ms. Kaur's affidavit. The respondent also says the affidavit of Kuldeep Singh should be given no weight because it supplements the record and provides explanations that neither Mr. Bains nor his spouse provided to create the illusion of an error on the part of the Officer.

[20] In reply, Mr. Bains says the evidence and submissions should be allowed because they support the finding that he was subjected to procedural unfairness. Mr. Bains also says new evidence may be admitted on judicial review to identify procedural defects that cannot be found in the record as it existed before the decision-maker.

[21] The evidence Mr. Bains seeks to adduce are transcripts of text messages between him and his spouse, phone call records, letters from various family members, an affidavit from his father, and a copy of the couple's joint bank accounts and life insurance.

[22] I agree with the respondent that the new evidence Mr. Bains seeks to adduce is inadmissible evidence and, therefore, must be struck from the record because it does not fit within the recognized exceptions to the general rule against permitting new evidence in a judicial review proceeding.

[23] The Court may admit new evidence on judicial review in three recognized circumstances (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 [*Access Copyright*]).

[24] First, where the new evidence provides general background and information that assists the Court in understanding the issues relevant to the judicial review but does not add new evidence on the merits. Second, where the new evidence brings to the Court's attention procedural defects not found in the evidentiary record of the decision-maker. Third, where the new evidence highlights the complete absence of evidence before the decision-maker on a finding.

[25] The new evidence does not provide general background information. Rather, it goes further and provides evidence that was relevant to the merits of the matter decided by the

Officer. Admitting this new evidence would risk the Court invading the Officer's role (*Access Copyright* at para 20). Thus, the first exception does not apply.

[26] With respect to the second exception, although Mr. Bains alleges procedural unfairness the new evidence does not bring to the Court's attention procedural defects not found in the evidentiary record before the Officer.

[27] The new evidence should not be admitted because it does not address the procedural defects Mr. Bains alleges. In Mr. Bains' view, the visa officer failed to advise him as to the nature of the interview and what documents he was required to bring to the interview and failed to give him an opportunity to address the officer's concerns during the interview. The evidence Mr. Bains seeks to adduce does not address these concerns; nor does it bring to the Court's attention procedural defects not found in the evidentiary record before the Officer.

[28] Lastly, none of the new evidence serves to highlight a complete absence of evidence before the Officer in making his or her findings. The third exception is also inapplicable in these circumstances.

[29] The nature of the evidence Mr. Bains seeks to adduce is such that it addresses the merits of the Officer's decision. As the Federal Court of Appeal noted in *Access Copyright* (at paras 17 and 18), this Court can only review the overall legality of what the decision-maker has done, and not delve into or re-decide the issues on the merits. Mr. Bains is essentially asking the Court to

make findings of fact on the new evidence he seeks to adduce, which is not within the purview of a court on judicial review.

[30] The new evidence adduced by Mr. Bains will not be, and has not been, considered by the Court.

IV. The Parties' Submissions

A. *Mr. Bains' Submissions*

[31] In Mr. Bains' view, the visa officer violated principles of procedural fairness in failing to advise him as to the nature of the interview, the documents to bring to the interview, and the potential consequences of the interview. Mr. Bains also claims the visa officer breached principles of procedural fairness in failing to afford him an opportunity to respond to the officer's concerns.

[32] According to Mr. Bains, a finding of inadmissibility requires a high degree of procedural fairness. Mr. Bains points out that the consequences of the finding of inadmissibility for misrepresentation were serious, since not only would he be barred from Canada for a period of five years, but also his spouse would be inadmissible to apply for permanent residence in Canada for that same period.

[33] In Mr. Bains' view, the visa officer came to a perverse conclusion or ignored evidence in determining that he had married his spouse for the purpose of reuniting with his family in

Canada. Mr. Bains says the visa officer erred as to the timing of the genesis of his relationship with Ms. Kaur vis-à-vis when his family applied for permanent residence, since they were engaged six months before his family applied for permanent residence in Canada.

[34] According to Mr. Bains, the visa officer ignored evidence and decided without regard to the evidence. Specifically, Mr. Bains refers to the visa officer's finding that the photographs Mr. Bains brought to the interview looked staged, that there were no photographs of marriage events at Ms. Kaur's place of residence, and that Mr. Bains was unaware of where his spouse was studying.

B. *The Respondent's Submissions*

[35] The respondent notes that subsection 11(1) of the *IRPA* provides that an officer may issue a temporary resident visa to a foreign national if the officer is satisfied that the applicant meets the requirements of the *IRPA*. The respondent remarks that subsection 16(1) of the *IRPA* explicitly imposes an obligation on applicants to be truthful.

[36] The respondent also notes that, under paragraph 40(1)(a) of the *IRPA*, a person is inadmissible to Canada if he or she withholds material facts relating to a relevant matter that induced or could induce an error in the administration of the *IRPA*. According to the respondent, a foreign national seeking to enter Canada has a duty of candour that requires disclosure of material facts. The respondent says the purpose of paragraph 40(1)(a) of the *IRPA* is to ensure that applicants provide complete, honest, and truthful information in every manner when applying for entry into Canada.

[37] In the respondent's view, the visa officer met the duty of fairness in providing Mr. Bains with an opportunity to respond to the concerns about the genuineness of his marriage. The respondent says the duty of procedural fairness the visa officer owed Mr. Bains was at the lower end of the spectrum because, as a non-citizen, he had no right to enter or remain in Canada and faced neither detention nor removal from Canada.

[38] The respondent contends that there is no merit to Mr. Bains' allegation that he was denied procedural fairness because the visa officer failed to advise him of the reason for the interview and did not provide him with the opportunity to respond. The respondent refers to the GCMS notes to demonstrate that the officer explained to Mr. Bains the reason for the interview, advised him of the concerns, and provided him an opportunity to respond.

[39] The respondent submits that Mr. Bains and his spouse were aware that the genuineness of their marriage was in issue; they arrived at the interview with evidence to support their claim that their marriage was genuine and not entered primarily for immigration purposes.

[40] The respondent points out that the record indicates the visa officer was fully aware of Mr. Bains' hearing loss and took steps to ensure that he understood the questions and the translator, including waiting for someone to bring his hearing aids to him because he did not bring them to the interview. The respondent notes that, according to the disability certificate Mr. Bains provided to the visa officer, his hearing loss is not absolute, and he can function with his hearing aids. The respondent also notes that there was no evidence before the visa officer that Mr. Bains did not understand the questions posed to him during the interview.

[41] The respondent contends that the Officer's findings concerning the genuineness of Mr. Bains' marriage were reasonable. The respondent notes that the onus was on Mr. Bains to provide sufficient evidence to the Officer to warrant a favourable exercise of discretion. The respondent submits that Mr. Bains failed to show any arguable issue with the decision and to show any error or misapprehension of evidence.

[42] In the respondent's view, the interview notes demonstrate valid concerns with the genuineness of the marriage. The visa officer noted that Mr. Bains had difficulty answering basic questions about the development of his relationship with Ms. Kaur including how they met, why they married, and a lack of interest in his spouse's life in Canada.

[43] The respondent says that the Officer's misrepresentation findings are reasonable. The respondent notes that in order to establish misrepresentation, there must be a material misrepresentation that could have induced an error in the administration of the *IRPA*. There is no requirement that the misrepresentation be intentional, deliberate, or negligent.

[44] According to the respondent, the test for misrepresentation, broadly speaking, requires a visa officer to be satisfied that: (i) a direct or indirect misrepresentation has occurred; and (ii) the misrepresentation could induce an error in the administration of the *IRPA*. The respondent says that the Officer determined that a misrepresentation had occurred in accordance with this test.

[45] In the respondent's view, Mr. Bains provided insufficient evidence or explanation that his marriage was genuine or that it was not entered into for acquiring a status or privilege under the

IRPA. The respondent says the Officer reasonably determined that, had Mr. Bains been considered a spouse, it could have induced an error in the administration of the *IRPA* because the Officer may have erroneously issued a work permit to him.

V. Analysis

[46] Although the parties have identified various issues, there are only two central issues to address.

[47] First, was there a breach of procedural fairness by failing to communicate the purpose of the interview, as Mr. Bains alleges? Second, was the Officer's determination that Mr. Bains was inadmissible, for misrepresentation under paragraph 40(1)(a) of the *IRPA*, reasonable?

A. *What is the Standard of Review?*

[48] The parties agree that the applicable standard of review of the Officer's decision is reasonableness. The parties also agree that the standard of review for an allegation of procedural unfairness is correctness.

[49] I agree with the parties that the Officer's finding of misrepresentation under paragraph 40(1)(a) of the *IRPA* is subject to review against the standard of reasonableness (*Li v Canada (Minister of Citizenship and Immigration)*, 2018 FC 87 at para 9 [*Li*]).

[50] The reasonableness standard of review tasks the Court with reviewing an administrative decision for internally coherent reasoning and the presence of justification, transparency, and intelligibility; and determining whether the decision is justified in relation to the relevant factual and legal constraints (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 86 and 99; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[51] If the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome; nor is it the function of the reviewing court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61 [*Khosa*]).

[52] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa*, 2009 at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[53] An issue of procedural fairness “requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation” (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal has observed: “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though,

strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

B. *Was There a Breach of Procedural Fairness*

[54] In my view, there was no breach of procedural fairness by failing to communicate the purpose of the interview. Correspondence received by Mr. Bains before the interview clearly stated that his application for a work permit depended on further examination. The interview convocation letter indicated that he was required to attend an interview and bring all required documentation in order to continue processing his application.

[55] I disagree with Mr. Bains’ argument that the visa officer owed him a high level of procedural fairness. The requirements of procedural fairness vary with the nature of the decision and its impact on the individual, and they must be assessed in the context of the legislative scheme (*Shao v Canada (Citizenship and Immigration)*, 2018 FC 610 at para 11 [*Shao*]).

[56] The jurisprudence has established that procedural fairness requirements are relatively minimal concerning applications for work permits (*Qin v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 815 at para 5; *Guo v Canada (Citizenship and Immigration)*, 2015 FC 161 at para 27; *Bautista v Canada (Citizenship and Immigration)*, 2018 FC 669 at para 17).

[57] Mr. Bains argues that the letter requesting him to attend an interview provided insufficient information to know the case to meet and failed to specify which documents were required.

[58] I disagree. This letter stated that Mr. Bains should bring “all required documentation” to the interview. The GCMS notes show that he brought engagement, wedding, and other photos to the interview. Mr. Bains knew what types of documents constituted “all required documentation”. The law is clear that an applicant for immigration bears the onus of ensuring that the documents submitted are complete and accurate (*Shao* at para 29).

[59] The GCMS notes show that the visa officer informed Mr. Bains about the concerns the officer had concerning the marriage. These notes also show that the visa officer explicitly stated that, if it was determined Mr. Bains had misrepresented his circumstances his application would be refused, and he would be inadmissible to Canada for five years.

[60] This Court has held that immigration officers have a duty to confront spouses with any inconsistencies arising during an interview to assess the genuineness of a marriage (*Huang v Canada (Citizenship and Immigration)*, 2015 FC 905 at paras 16 and 17). The GCMS notes in this case show that the visa officer conducted the interview of the couple separately, and that the officer then confronted the couple about inconsistencies in their answers by asking the interpreter to pose these inconsistencies to them. The officer gave the couple an opportunity to address these concerns, including the officer’s belief that their marriage was entered into primarily for an immigration purpose; namely, for Mr. Bains to gain admission to Canada.

[61] The visa officer determined that Mr. Bains’ spouse agreed to help his family, who had recently immigrated to Canada, to gain admission into Canada. The officer recognized that this was an arranged marriage and while arranged marriages may evolve into genuine marital

relationships, Mr. Bains had not demonstrated that this arranged marriage was entered into with a genuine intent to evolve into a genuine relationship.

C. *Was the Officer's Decision Reasonable?*

[62] The definition of misrepresentation in paragraph 40(1)(a) of the *IRPA* refers to a direct or indirect misrepresentation. This paragraph encompasses a misrepresentation even if made by a third party, including an immigration consultant, without an applicant's knowledge (*Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 35). The exception to this is narrow; it applies only "where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control" (*Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 at para 28).

[63] To establish misrepresentation under paragraph 40(1)(a) of the *IRPA*, there must be a material misrepresentation that could have induced an error in the administration of the *IRPA*. There is no requirement that the misrepresentation be intentional, deliberate or negligent (*Li* at para 10; *Sidhu v Canada (Citizenship and Immigration)*, 2014 FC 419 at para 17; *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at paras 30 to 44; *Bellido v (Minister of Citizenship and Immigration)* 2005 FC 452 at paras 27 and 28).

[64] Paragraphs 4(1)(a) and (b) of the *Regulations* state that a foreign national will not be considered a spouse, a common-law partner or a conjugal partner of a person if: (a) the marriage, common-law partnership or conjugal relationship was entered into primarily for the purpose of

acquiring any status or privilege under the *IRPA*, or (b) it is not genuine. An immigration officer must determine under subsection 4(1) of the *Regulations* that a marriage was entered into in bad faith before finding there was a material misrepresentation under paragraph 40(1)(a) of the *IRPA* (*Kaur v Canada (Citizenship and Immigration)*, 2012 FC 273 at para 17).

[65] The GCMS notes indicate that Officer first assessed the genuineness of Mr. Bains' marriage, finding he did meet the definition of a "family member" in the *Regulations*, and then proceeded to determine there was a material misrepresentation that could have induced an error in the administration of the *IRPA*.

[66] I agree with the respondent that the Officer's findings concerning the genuineness of Mr. Bains' marriage were reasonable. Under section 11 of the *IRPA*, a visa officer must be satisfied that an applicant is not inadmissible and meets the requirements of the *IRPA*. The onus was on Mr. Bains to provide sufficient evidence to the Officer to warrant a favourable exercise of discretion (*Kumarasekaram v Canada (Citizenship and Immigration)*, 2010 FC 1311 at para 9).

[67] The interview notes demonstrate valid concerns about the genuineness of Mr. Bains' marriage. Mr. Bains had difficulty answering basic questions about the development of his relationship with his spouse including how they met, why they married, and a lack of interest in his spouse's life in Canada. The Officer reasonably concluded that there was insufficient evidence to support that the marriage was genuine or that it had not been entered into primarily for acquiring a status or privilege under the *IRPA*.

VI. Conclusion

[68] The Officer's decision is internally coherent, transparent, intelligible, and justified in relation to the facts and legal constraints before the Officer. Mr. Bains' application for judicial review is therefore dismissed.

[69] Neither party submitted a question for certification.

JUDGMENT in IMM-2255-19

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed;
and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2255-19

STYLE OF CAUSE: AMRITVEER SINGH BAINS v THE MINISTER OF
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PLACE OF HEARING: TORONTO, ONTARIO

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**REASONS FOR JUDGMENT
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DATED: JANUARY 16, 2020

APPEARANCES:

David Orman FOR THE APPLICANT

Gordon Lee FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Orman FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Ottawa, Ontario