Date: 20071015

Docket: IMM-1314-07

Citation: 2007 FC 1051

Ottawa, Ontario, October 15, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JASWINDER KAUR DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This case concerns the arranged marriage between Jaswinder Kaur Dhaliwal (the applicant), a 30-year old divorcee, and Sukhdev Singh Dhaliwal (the husband), a 24-year old man who has never been married before. Both are East Indian and of the Sikh religion. The applicant sponsored her husband as a member of the family class. The Visa Officer rejected the application as he found the marriage not to be genuine and primarily entered for the purpose of gaining status in Canada. The Immigration Appeal Division (the IAD) confirmed the Visa Officer's findings. The applicant then filed an application for judicial review of the IAD's decision. For the reasons that follow, I would dismiss this application for judicial review.

BACKGROUND

[2] Ms. Dhaliwal is a Canadian citizen who immigrated to Canada from India in 1993. She obtained her Canadian citizenship through the sponsorship of her then future husband. She separated six years later in 1999 and divorced on July 2004 because of her husband's alcohol and drug problems. She has two children from this marriage, a boy and a girl.

[3] The applicant, Sukhdev Singh Dhaliwal is an agricultural worker who lives on a farm which he owns in India. He had never been married before.

[4] In September 2004, Ms. Dhaliwal's uncle and the husband's brother-in-law arranged for the two to speak. Ms. Dhaliwal then flew to India with her children to meet the applicant. They first met on November 29, 2004. Ms. Dhaliwal's main concerns in terms of a suitable partner were that he did not drink alcohol nor eat meat and that he shall treat her children well, as these were among the problematic issues in her previous marriage.

[5] The arranged marriage was celebrated on December 6, 2004 in the presence of 150 to 200 attendees. Ms. Dhaliwal's children and parents were not present. After the wedding, Ms. Dhaliwal and her children stayed in India for three weeks. She visited her husband alone in April but she had to come back earlier than planned as her son was sick. She said she phoned her husband two to three times a week.

[6] On February 3, 2005, she sponsored her husband in his application for permanent residence in Canada. An interview with the husband took place in India on April 18, 2005.

[7] The Visa Officer refused the application as he found the wedding not to be genuine for the purposes of section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*). He based his decision on the grounds that the applicant and her husband were incompatible in terms of marital backgrounds. Ms. Dhaliwal is a divorced woman as opposed to the husband who never married and is 6 years younger. He found this marriage to be unlikely in the cultural context of a Sikh arranged marriage. In addition, the husband, at the interview that took place on April 18, 2005, could not provide reasons for his marriage to a divorced woman. The Visa Officer also considered it unlikely that no further investigation of Ms. Dhaliwal was made by the husband's family to determine whether or not the marriage is desirable. He also found it improbable that the marriage was held after such a short period of time and without having arranged a meeting with Ms. Dhaliwal's children. Furthermore, the Visa Officer found the wedding pictures staged. Finally, he remarked that important members of the Ms. Dhaliwal's family were absent and that the applicant and her husband do not appear to communicate with each other on a regular basis.

IMPUGNED DECISION

[8] Ms. Dhaliwal appealed this Visa Officer's refusal to issue a permanent resident visa to her husband before the IAD. Ms. Dhaliwal, her husband and son testified at the IAD hearing.

[9] The IAD analysed the genuineness and the purpose of the wedding in order to determine whether or not section 4 of the *Regulations* applied. The officer found Ms. Dhaliwal credible. He accepted the facts that she had a difficult first marriage, that her child suffers from health issues, and that she is a hard worker. He also believed her motivations to remarry: companionship, financial and emotional support for herself and her children.

[10] The IAD officer however found the husband less credible. He considered unbelievable the fact that he could not remember his previous application for a visitor visa, that he regards Ms. Dhaliwal's children like his own even if he did not meet them before the marriage as well as his lack of knowledge of details regarding his wife's work.

[11] He then stated that there is not a "great deal of affection" between them. He considered they have less knowledge of each other that he would expect of married persons.

[12] Finally, he reiterated that he found Ms. Dhaliwal credible but was not convinced by the testimony and evidence presented by the husband that the primary purpose of the marriage is not merely to come to Canada. The IAD officer then concluded that the onus of proof was not met on determining the genuineness of the marriage.

ISSUES

[13] This application for judicial review essentially raises five issues:

- What is the appropriate standard of review?
- Did the IAD fail to observe the principle of procedural fairness?

- Did the IAD err in failing to consider the "new evidence" provided by the applicant?
- Did the IAD fail to consider the cultural context?
- Did the IAD err in making erroneous finding of fact?

STATUTORY SCHEME

[14] Section 13 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *Act*) provides that a Canadian citizen or permanent resident can sponsor a member of the family class. However, section 4 of the *Regulations* establishes an exception to that provision:

4. For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.	**4.** Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait, le partenaire conjugal ou l'enfant adoptif d'une personne si le mariage, la relation des conjoints de fait ou des partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

[15] Section 4(3) of the previous *Immigration Regulations* established a test in order for a spouse to be disqualified as a member of the family class. It had to be proven that a spouse entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class; and that it was not his or her intention to reside permanently with the other spouse.

[16] Since the coming into force of section 4 of the *Regulation*, the residency intention was abolished and a two pronged test was established. A foreign national is not considered a spouse

when the marriage is not genuine; and was entered into primarily for the purpose of acquiring any status or privilege under the *Act*. Justice Mosley analysed this provision in the following terms:

> [18] It is clear that the test to be applied under the old regulation for determining whether a marriage was genuine was the time of the marriage itself. However, the new regulation does not state that this is the time at which the relationship is to be assessed. It speaks in the present tense for a determination of the genuineness of the relationship and in the past tense for assessing the purpose for which it was created. This seems to be consistent with the practice followed by Immigration Officers in assessing spousal sponsorship applications. It appears, from the cases which the Court has seen, that in interviews with claimants and their putative spouses the officers focus on whether there is a continuing relationship.
>
> [19] The drafters of section 4 may thus have left the door open to marriages of convenience found to be sincere and enduring at the time of the assessment. But does that avail the applicant in these proceedings? Regardless of the interpretation to be given to section 4 of the regulations, the officer in this case, in the exercise of her discretion, determined that the common law relationship between the applicant and his spouse was not genuine. It is up to the applicant to demonstrate that this finding was made in reviewable error.
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> See: *Donkor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1089.

[17] The two conditions are conjunctive and, in order to succeed in her judicial review, the applicant has to demonstrate that a reviewable error occurred in respect to only one of these two branches of the test, see: *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 at paras. 4-5.

ANALYSIS

Standard of review

[18] Both parties agree the applicable standard of review is patent unreasonableness for findings of fact by a Tribunal in sponsorship matters and on credibility findings, see*: Canada (Minister of Citizenship and Immigration) v. Navarrette*, 2006 FC 691 at para. 17; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1673 at para. 6. In *Rosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 117 at para. 23, Justice Barnes also observed that the determination of the genuineness of a marriage is mainly factual and "require[s] the sorting and weighing of evidence and the assessment of credibility – a process which the Board is well situated to carry out". Consequently, the Federal Court should review these matters with the greatest amount of deference to the impugned decision-maker.

[19] As for questions of procedural fairness, the standard of correctness applies, see: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249; *Canada (Attorney General) v. Sketchley*, 2005 FCA 404.

Did the IAD fail to observe the principle of procedural fairness?

[20] The applicant submits that there was a breach of procedural fairness because the IAD did not take into consideration the video of her marriage. In his refusal letter, the Visa Officer stated a concern that the wedding photos looked staged. The applicant thus submitted to the IAD a video of the wedding to meet this concern. However, that video was not initially admitted into evidence at

the hearing because the IAD wished to ascertain the necessity of it, mainly as there was a time constraint.

[21] At the end of the hearing, the IAD asked the applicant's counsel if he had something to add: "…All right. So that's your case then?" The applicant's counsel responded in the affirmative. The IAD member then mentioned that the video was not part of the case and thus, that he will return it to the applicant. Despite these opportunities given by the IAD member, the applicant's counsel did not make any attempt to revisit the question of the video evidence. Therefore, I believe the applicant clearly waived her opportunity to introduce this evidence.

[22] In any event, I do not believe that the viewing of a wedding video would have made any difference in the IAD member's finding that the marriage was not genuine. Consequently, I can not agree with the applicant's submission of a breach of procedural fairness.

Did the IAD err in failing to consider the "new evidence" provided by the applicant?

[23] The applicant considers that the IAD failed to take into account the documentary evidence that was tendered to rebut the Visa Officer's conclusion about lack of regular contact: an airline ticket and related documentary evidence; evidence of telephone contact; and written correspondence. In fact, one of the Visa Officer's concerns was that "you and your sponsor do not appear to communicate with each other on a regular basis. There is limited evidence of contact between you and your sponsor".

[24] The IAD officer stated in his reasons that “all the circumstances and evidence must be weighed and looked at as a whole so the decision is a reasonable conclusion flowing from the facts presented”. There is however no specific mention of this documentary evidence in the IAD’s reasons.

[25] Nevertheless, the IAD member did accept they were talking by phone two or three times a week and accepted that the applicant visited her husband in 2006 (IAD reasons, at para. 8). Even if the airplane ticket and the evidence of telephone contact were not expressly mentioned, I believe these findings imply that he did consider them. The written correspondence was however not mentioned whatsoever in the IAD’s decision.

[26] Notwithstanding, I do not believe this justifies allowing the judicial review. The IAD member did not expressly refer to the written correspondence but I believe it is of minor significance to the ultimate decision. He did consider most of the evidence and I do not believe he had to mention every piece of evidence.

[27] In *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, the Federal Court of Appeal held that:

> [10] Nor will a reviewing court infer from the failure of reasons for decision specifically to address a particular item of evidence that the decision-maker must have overlooked it, if the evidence in question is of little probative value of the fact for which it was tendered, or if it relates to facts that are of minor significance to the ultimate decision, given the other material supporting the decision.

Even if he had considered the correspondence, I do not think it would have had an impact on his final decision. The IAD member had concerns about the limited knowledge by the parties of each other. The correspondence does not address this concern. They are general, undated and without any information contradicting the IAD's finding.

Did the IAD fail to consider the cultural context?

[28] I agree with the applicant when she says the IAD had to take into account the particular cultural background. However, I do not think the IAD member was culturally insensitive or that his findings were patently unreasonable.

[29] In fact, the IAD member did take into consideration the cultural context and found that the arranged marriage did not conform to Sikh tradition. He was particularly disturbed by the lack of concern on the part of the husband regarding the previous divorce of the applicant; the lack of thorough and independent investigation by the husband's family; the significant age gap; the hasty wedding; the lack of participation of important family members; and his limited knowledge of the applicant and her life in Canada.

[30] Against the overwhelming weight of the evidence that this marriage was not in conformity with Sikh culture, the applicant main explanation for agreeing to this arranged marriage was destiny. She submits the IAD did not demonstrate openness to the concept of choosing spouses on the basis of destiny. Notwithstanding, the applicant did not provide evidence as to the role of destiny

in Sikh culture. I therefore can not agree with her on the alleged cultural insensitivity regarding destiny.

[31] Furthermore, I believe that the IAD was not being insensitive in questioning the sincerity of the husband's contention that he regarded the applicant's children as his own. At the hearing before the IAD, the applicant's counsel tried to explain the husband's belief by referring to Indian culture. However, he did not give any corroborating evidence on this matter. The IAD concluded that "[h]e was quick to state that he regarded the appellant's children as his own. However, he did not meet them until after the marriage even though they were in India before the marriage". I do not think this conclusion is patently unreasonable.

Did the IAD err in making erroneous finding of fact?

[32] The applicant states she has difficulty understanding how the IAD could arrive at the conclusion that her husband had not met the children prior to the wedding despite their three corroborating testimonies. The applicant submits that the IAD had concern about the credibility of the husband but never challenged her credibility or her son's. She mentioned that no explanation was provided as to why their testimony was rejected on this point.

[33] The IAD had the prerogative to prefer the husband's original version. In fact, in his first interview before the Visa Officer's decision, he said he did not meet the children until 4 days after the marriage. The respondent submits, rightly so in my view, that the husband could have changed his version after he learned of the Visa Officer's reasons for refusal of his application. Furthermore,

the fact that the applicant and her son corroborated his second version at the hearing is not relevant; I would simply point out that they are not independent objective witnesses.

[34] The applicant then relies on *Gill v. Canada (Minister of Citizenship and Immigration)*, IAD VA6-00327 [*Gill*] to support her contention that when there are conflicting versions, *viva voce* evidence at a hearing is to be preferred over the CAIPS notes of an interview. However, the facts here are distinguishable from those in the decision *Gill* where there were contradictions between *viva voce* evidence of a credible witness and the CAIPS notes of an interview conducted through an interpreter whose proficiency was not established. Here, the husband was found not credible by the IAD member and, moreover, the interview was conducted in his own native language. Although the applicant would have preferred the IAD to accept the second version, it was reasonably open to the IAD to prefer the husband's original version.

[35] Finally, the applicant contests the IAD's conclusion that there was a lack of affection between the parties. She believes that it could not assess the parties' affection in such an unfamiliar and stressful place, especially when the parties expressed themselves through an interpreter. Even if I were to find the IAD's conclusion hazardous on this point, the decision has to be reviewed globally and this finding does not damage the overall result.

[36] I would therefore dismiss this application for judicial review.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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