

Federal Court



Cour fédérale

Date: 20100105

Docket: IMM-2547-09

Citation: 2010 FC 7

Ottawa, Ontario, January 5, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

INDERJIT KAUR DHALIWAL

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Protection Board dated May 11, 2009 denying the applicant's appeal from a visa officer's refusal to issue a permanent resident visa under the family class to the applicant's spouse because the applicant's marriage is not genuine and was entered into primarily for the purpose of immigration.

FACTS

Background

[2] The fifty (50) year old applicant is a citizen of Canada who emigrated from India in 1991 with her first husband and her four children. The applicant separated from her first husband in 1999. Their divorce was finalized on March 26, 2005. I will refer to the applicant as “Mrs. D.” to avoid confusion between the applicant in this Court proceeding, the appellant before the IAD, and the applicant for a permanent resident visa.

[3] In 2005 Mrs. D. met Ms. Satendra Sharma in a pizza shop. On October 3, 2005 Ms. Sharma introduced Mrs. D. by telephone to her brother, forty-seven (47) year old Mr. Chander Parkash Singh Paul (hereinafter referred to as “Mr. Paul”). Mr. Paul, who is a citizen of India, was previously married to a Swedish national for a few months from 1990 to 1991, but was otherwise single and childless.

[4] Mrs. D. communicated with Mr. Paul on a number of occasions before travelling to India to meet him personally in November 2005. The first marriage proposal was allegedly made by Mrs. D. in November 2005 over the telephone. Mrs. D. travelled to India again in December 2005 where a second marriage proposal was made on December 26, 2005. It is unclear who proposed the second time.

[5] On January 5, 2006 Mrs. D. married Mr. Paul in Chandigarh, India. Following their marriage the couple cohabited in Chandigarh until February 27, 2006 at which time the applicant returned to Canada. The applicant made another trip to India from April 14, 2006 to May 31, 2006 to visit Mr. Paul.

[6] The evidence indicates that most of the money for the applicant's trips was financed by Mr. Paul's sister, Ms. Sharma, although Mrs. D. has repaid part from time to time.

[7] On May 1, 2007 Mrs. D. applied to sponsor her spouse Mr. Paul under the family class. This was one year and four months after the marriage.

Visa officer's decision

[8] A visa officer interviewed Mr. Paul in New Delhi on October 29, 2007.

[9] The visa officer found that the couple was incompatible in terms of age and social background. The visa officer noted that the applicant had a grade ten high school education, four children from a previous marriage, and was currently subsisting on disability support payments. Mr. Paul on the other hand possessed a Masters of Science Degree in anthropology, is three years younger than the applicant, and has no children although he was previously married to a Swedish national between 1990 and 1991.

[10] Several aspects of the January 5, 2006 marriage ceremony raised doubts as to the *bona fides* of the marriage in the mind of the visa officer:

1. the marriage was solemnized only eight days after the marriage proposal;
2. Mr. Paul's family appeared to be in complete attendance, including his Canadian sister;
3. no members of applicant's family were in attendance;
4. the couple claimed that over a hundred guests attended but the ceremony's photos indicate only about 15 attendees; and
5. the unusual nature of the wedding ceremony, evidenced by the ceremony's photos which appeared to be staged.

[11] The visa officer held that Mr. Paul provided inconsistent and contradictory statements at the interview. Mr. Paul could not satisfactorily explain the delay in submitting the sponsorship application more than a year after the couple's marriage. The visa officer was similarly unsatisfied with Mr. Paul's responses with respect to his incompatibility with the applicant.

[12] On December 5, 2007 the visa officer refused to issue Mr. Paul a permanent residence visa because he or she was of the view that the marriage upon which the sponsorship rested was not genuine and was entered into primarily for the purpose of acquiring permanent residence in Canada.

[13] On February 14, 2008 Mrs. D. appealed the visa officer's refusal to the IAD.

Decision under review

[14] On May 11, 2009 the IAD upheld the visa officer's decision and denied Mrs. D's appeal.

[15] In its decision the IAD held that Mrs. D. applicant failed to discharge her onus to show that the visa officer erred in finding that the applicant's marriage was not genuine and entered into primarily for the purpose of acquiring permanent residence.

[16] Mrs. D. testified in person followed by Mr. Paul who testified by telephone. The IAD determined that neither witness was credible by virtue of their vague, contradictory, and inconsistent testimony.

[17] The IAD drew adverse inferences from the applicant's inability to recall the dates of her meetings with Ms. Sharma. It was unclear if the applicant first met Ms. Sharma in June, July, or August 2005. There was also a contradiction in the couple's testimony with respect to the first marriage proposal. The applicant testified she proposed first by telephone while Mr. Paul testified that he made the first proposal over the telephone in November 2005.

[18] The IAD heard from Mrs. D. that she was not thinking about marriage after her divorce. The IAD held that Mrs. D. could not satisfactorily explain her change of attitude towards marriage in light of January 5, 2006 marriage. She could not articulate in detail any positive characteristics which made her attractive to Mr. Paul. Mr. Paul was similarly unable to address the IAD's concerns with respect to his incompatibility with Mrs. D. He could not explain why he overlooked Mrs. D's seniority in age over him, her medical conditions, limited income, and the fact she is a divorced mother of four. Mr. Paul could only identify "niceness" and "goodness" as the main characteristics that attracted him to Mrs. D.

[19] The IAD held that the sum of inconsistencies and discrepancies in the evidence indicated that the witnesses deliberately misrepresented particular facts at the hearing. The IAD concluded that Mrs. D. and Mr. Paul were not credible. Consequently, Mrs. D. failed to meet her evidentiary burden to prove that her marriage was genuine and not entered into primarily for the purpose of immigration. The appeal was therefore dismissed.

LEGISLATION

[20] Section 4 of the *Immigration and Refugee Protection Regulations* (IRPR), S.O.R./2002-227 states that a foreign national will not be considered a spouse and therefore a member of the family class if the marriage was not genuine and was entered into primarily for the purpose of acquiring immigration status:

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.

[21] Subsection 63(1) of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 grants the sponsor a right of appeal to the Immigration Appeal Division from an Immigration Officer's denial of a permanent resident visa under the family class:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

ISSUES

[22] The first issue raised by the applicant in her memorandum was whether the IAD failed to apply the two-prong test. At the hearing, after hearing representations from counsel for Mrs. D, the Court found that the IAD did not err in applying only one prong of the two-prong test under section 4 of the Regulations. In fact, the Court thought that the IAD analysis concerned mostly the genuineness of the marriage, while counsel for Mrs. D. thought that the IAD analysis concerned mostly whether the marriage was entered into primarily for acquiring immigration status. These opposite impressions demonstrate that the IAD's analysis overlapped, and applied to both prongs of the test under section 4 of the Regulations.

[23] Accordingly, counsel for Mrs. D. agreed with the Court on this issue and the Court will not provide reasons with respect to this issue.

[24] At the hearing, the Court also considered an issue raised by counsel for Mrs. D., namely that the IAD ought to have considered the applicant's medical condition when concluding that the answers were vague and inconsistent. During the course of this argument, the Court noted that there should be medical expert evidence to explain that the vagueness and inconsistencies in Mrs. D's evidence can be explained by her medical condition. Many witnesses are vague and inconsistent and that goes to their credibility, and is not related to any medical condition. Expert evidence would be necessary to found this argument. Accordingly, the Court and counsel for Mrs. D. both agreed that the Court need not deal further with this issue.

[25] The two remaining issues which counsel relied upon at the hearing are:

1. whether the IAD breached the principles of natural justice by making remarks in its reasons that demonstrate a bias against the applicant; and
2. whether the IAD member breached natural justice by a finding during the hearing (which is on the transcript) that the applicant was credible, and then making a contradictory finding in its decision that the applicant was not credible.

STANDARD OF REVIEW

[26] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question (see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53)."

[27] Mrs. D. alleges reasonable apprehension of bias and a breach of natural justice. These are reviewable on a correctness standard of review: *Alexander v. Canada (MCI)*, 2006 FC 1147, [2006]

2 F.C.R. 681, per Justice Dawson at paragraph 24; and my decision in *Santos v. Canada (MCI)*, 2006 FC 1476, at paragraph 7.

[28] It is clear that as a result of *Dunsmuir, supra* and *Khosa, supra*, at para. 58 that questions of the reasonableness of the IAD's decision with respect to credibility are to be reviewed on a standard of reasonableness: see my decision in *McBean v. Canada (MCI)*, 2009 FC 1149, per Justice Gauthier at para. 27; *Strulovitz v. Canada (MCI)*, 2009 FC 435, per Justice Shore at para. 40.

[29] In reviewing the IAD's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir, supra* at paragraph 47, *Khosa, supra*, at paragraph 59).

ANALYSIS

Issue No.1: Whether the IAD breached the principles of natural justice by making remarks in its reasons that demonstrate a bias against the applicant

[30] Mrs. D. submits that the IAD displayed a reasonable apprehension of bias in its reasons based on Mrs. D.'s medical condition, age, parenthood, and employment status.

[31] Mrs. D. cites paragraphs 15 and 21 of the IAD's reasons as giving rise to a reasonable apprehension of bias:

¶15 ...no trustworthy evidence was adduced at the hearing to help the panel understand why the applicant's sister thought that a disabled, unemployed, divorced woman, with four adult children, who is older than her brother is a suitable match for him other than for immigration purpose...

¶21 The applicant could not adequately explain why he chose a woman, who is older than him, has mental and other health issues, whose only source of income is the government program which provides financial and health-related assistance to adults with a disability, who is estranged from her adult children and grandchildren, is less educated than him and requires care and assistance to be a suitable candidate for marriage.

Mrs. D. submits that:

1. the above paragraphs mean that a disabled person, with a low level of education, who is a parent, and is older, cannot be a suitable match for a younger person who does not face the same barriers; and
2. such a conclusion is discriminatory, closed-minded and raises a reasonable apprehension of bias.

[32] Mrs. D. provided the IAD with a physician's letter which detailed her medical conditions as follows:

1. morbid obesity with oedema of legs (swelling)
2. hypertension
3. depression; and
4. fracture of right ankle causing severe pain

[33] The test for a reasonable apprehension of bias was set out by Justice Grandpré of the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369. The Court stated at page 394:

As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

The Court further held that the standard for impartiality is adjustable in accordance with the circumstances of the particular tribunal that rendered the decision under review (see also *Ahumada v. Canada (MCI)*, 2001 FCA 97, per Justice Evans at paragraph 21).

[34] The IAD panel member extensively questioned Mrs. D. in regard to her suitability as a match for Mr. Paul:

Q Well, what I'm curious is as a result of your first marriage or failure of your first marriage, you suffered from depression. You ultimately had to rely on the government assistance to help you through and you lost contact with your children. So you -- why did your husband's sister, your current husband's sister thought that you are a suitable candidate for a match for your husband?

A Well, when she met me, I was in good spirits and I was doing fairly well and she found me a happy person and I could get happy with simple things...

...

Q So why do you think he finds you -- so what qualities do you have that he finds attractive?

A I give him a lot of attention. I am aware of his needs. I am also a good cook and he enjoys that about me, as well.

Q When you say you attend to his needs, can you give me an example?

A Like, the time a husband and wife spend together and the attention they give each other. When I am in India, I cook for him. I take care of his breakfast. I spend time listening to what he says and going -- you know, we discuss things, and that is the way a man and woman are meant to be and probably that's what compatibility is.

[35] The transcript reveals the IAD's efforts to explore the couple's attraction for each other.

The focus of the inquiry was to reveal Mrs. D's positive characteristics that made her attractive to her spouse. She failed to provide a single characteristic that is not general and common to every relationship.

[36] The IAD's questions are not phrased in a language that betray pre-judgement or an obsession with one aspect of the applicant's character. The panel member in this case did not state its view on a particular subject at the outset as the member of the Refugee Protection Division of the Immigration and Refugee Board member did in *Santos, supra*, at paragraph 25.

[37] The absence of objections to the IAD's inquiries confirms the Court's finding that none of the hearing's participants considered the topic of the applicant's suitability to be inappropriate. An examination of Mr. Paul's testimony reveals no improper remarks on the part of the IAD and raises more concerns with regards to the *bona fides* of the marriage:

Q What qualities or characteristics do you like about Inderjit, what--why you married her?

A When I first made contact with her and when she was here in India, I found her to be a very nice person and she is a sober kind of nature.

...

Q What does that mean?

A She is a good person.

Q So can you tell us anything else about what -- other than "a good person"? Like, can you give us any examples of what you enjoy, why you enjoy her, why you enjoy her company?

...

A Yeah, I like her company.

[38] Mrs. D. and Mr. Paul failed to explain to the IAD what rendered them attractive in each other's eyes. This inquiry goes to the core of the genuineness analysis. It does not lie in the mouth of Mrs. D. to complain that the IAD found her to be unsuitable for marriage to Mr. Paul because of her characteristics when neither she nor Mr. Paul could associate any positive factors to Mrs. D. beyond being a "good" or "nice" person.

[39] In my view, an informed person viewing the matter realistically and practically would not reasonably conclude that it was more likely than not that the IAD panel, consciously or unconsciously, decided the case with bias or a prejudiced mind. A reasonably informed person

would conclude that neither Mrs. D. nor Mr. Paul could articulate any specific characteristic that rendered Mrs. D. attractive to Mr. Paul or *vice versa*.

Issue No. 2: Whether the IAD member breached natural justice by making a finding during the course of the hearing which is on the transcript that the applicant was credible and then making a contradictory finding in his decision that the applicant was not credible

[40] During the hearing, the IAD member said at page 49 of the transcript, line 29:

... let's have a brief discussion right now where ... I have outlined at the outset some of the areas of interest in this case and the appellant (Mrs. D.) provided a reasonable explanation about the circumstances of her introduction to the applicant and the role the applicant's sister played ...

[41] Counsel for Mrs. D. at the hearing submits that this finding by the presiding member of the IAD during the course of the hearing is a finding that Mrs. D's evidence was "credible". Mrs. D's counsel then states that the finding in the reasons of the IAD member that Mrs. D's evidence was not credible is contrary to this finding at the hearing, and this contradiction and inconsistency by the IAD member amounts to a breach of natural justice.

[42] Counsel for the respondent carefully reviewed several examples of inconsistent evidence from Mrs. D. and Mr. Paul.

[43] This evidence from Mrs. D. and Mr. Paul is a reasonable basis for the conclusion of the IAD that the evidence was not credible or inconsistent. I do not find such a conclusion inconsistent with the member's finding during the course of the hearing. The member did not say that he believed Mrs. D., only that she has provided a reasonable explanation about the circumstances of her introduction to Mr. Paul, and the role of Mr. Paul's sister. This is one small part of the story.

[44] I need not repeat the examples of the inconsistencies in the evidence laboriously outlined by the respondent at the hearing. Suffice to say the Court is satisfied that:

1. the Board member's finding in his decision, and his comments during the hearing, are not inconsistent. The finding during the hearing was not a finding as to credibility, only that Mrs. D has provided a "reasonable explanation". The IAD member later weighed that reasonable explanation in relation to other evidence; and
2. on the evidence it was reasonably open for the IAD to find that the evidence from both Mr. Paul and Mrs. D was not credible or consistent.

[45] The adverse credibility findings flowed from the IAD's determination that the couple misrepresented portions of the evidence during their testimony. There is no breach of natural justice.

CONCLUSION

[46] It is not the role or function of this Court to substitute its opinion for that of the IAD with respect to the genuineness of the marriage or whether it was entered into primarily for immigration purposes. The IAD has had the advantage of seeing Mrs. D while she provided her evidence, and hearing Mr. Paul when he gave his evidence by telephone. The Court cannot second guess the IAD on these issues. However, the Court can conclude that the allegations of bias and inconsistent

findings during the hearing in relation to the reasons raise real issues of natural justice and fairness, which upon careful examination the Court must conclude they are not well-founded.

[47] For these reasons, the Court must conclude that it was reasonably open for the IAD to find that this was not a genuine marriage and that the marriage was entered into primarily for immigration purposes.

CERTIFIED QUESTION

[48] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2547-09

STYLE OF CAUSE: INDERJIT KAUR DHALIWAL v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: December 16, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** KELEN J.

DATED: January 5, 2010

APPEARANCES:

Lori O'Reilly FOR THE APPLICANT

Camille Audain FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lori O'Reilly FOR THE APPLICANT
Barrister & Solicitor
O'Reilly Law Office

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada