Federal Court  Cour fédérale

Date: 20101117

Docket: IMM-174-10

Citation: 2010 FC 1116

Ottawa, Ontario, this 17th day of November 2010

Before: The Honourable Mr. Justice Pinard

BETWEEN:

SUKHNINDER SINGH GILL

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 of the Immigration and Refugee Board (the "IAD"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the "Act") by Sukhninder Singh Gill (the "applicant"). The IAD issued a removal order for the applicant on December 21, 2009, after hearing an appeal from a decision of the Immigration Division. The IAD found, as had the Immigration Division, that the applicant had made a material misrepresentation in his application

for permanent residence under the family class, as his marriage to his sponsor was a marriage of convenience. The IAD also found that there were not sufficient humanitarian and compassionate grounds to warrant special relief for the applicant.

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[2] The applicant is a citizen of India. His parents and two sisters are permanent residents of Canada, having been sponsored in 1998 by his elder sister. The applicant was not sponsored at that time because he was over the age limit, and was not a full-time student.

[3] The applicant's first wife, Kulwinder Kaur, was either a permanent resident or a citizen of Canada (it is not clear from the record) in 2000. She went to India and took part in an arranged marriage with the applicant; the marriage was arranged by relatives of each party. The marriage took place on February 9, 2000, and the applicant alleges that the couple cohabitated for a week and consummated the marriage. Kulwinder Kaur returned to Canada a week later, allegedly to complete her studies. She sponsored the applicant under the family class, and he arrived in Toronto on February 13, 2001.

[4] The applicant alleges that upon his arrival, his wife informed him that she had a boyfriend in British Columbia, and that she no longer wished to be married to him. She left Toronto and returned to British Columbia on February 15, 2001. She filed for divorce, but the Statement of Claim was never served on the applicant, and he was not aware of the divorce proceedings until he received the divorce judgment, finalized on November 12, 2001. In the Statement of Claim for divorce,

Kulwinder Kaur alleges a separation date of February 18, 2000, and states that the parties never cohabitated.

[5] The applicant married an Indian citizen in 2004 and applied to sponsor her to Canada. As a result of this application and Canada Border Services Agency's subsequent investigation, he was reported for misrepresentation in his original application for permanent residence. When questioned, Kulwinder Kaur did not mention the boyfriend as the cause of the break-up, but stated the marriage broke down quickly because the applicant was very traditional and she was not. The applicant was the subject of a removal order dated July 30, 2008, which he appealed on August 20, 2008. Hearings were held on September 22, 2009 and November 26, 2009, and the decision of the IAD was rendered December 21, 2009.

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[6] As a preliminary matter, the IAD rejected the applicant's submission (made at the hearing) that as the impugned conduct pre-dated the Act, and was not the subject of a report under section 20 or section 27 of the former *Immigration Act*, R.S.C. 1985, c. 1, the present Act did not apply to the applicant, and no removal order could be made against him. The IAD found that there were no time limits on investigations, and that there was no need for an investigation to have been instituted under the former Act. The IAD found that the date on which the impugned conduct occurred was irrelevant for the purposes of starting an investigation.

[7] Regarding the validity of the removal order, the IAD found that the inconsistency between the applicant's testimony and his wife's divorce application regarding the date of separation, and the inconsistency in their testimonies regarding the period of cohabitation were not, on their own, fatal to the applicant's case, but that in combination with the timing of the separation after the applicant's arrival in Canada and the minimal effort by the applicant to reconcile with his wife, these inconsistencies had greater importance. The IAD found that if the marriage were genuine, the applicant would have made a greater effort to reconcile with his wife than to make a few phone calls. The IAD found that even if the marriage were consummated in India, this was only one factor. The IAD found that neither testimony was credible. The IAD determined that the marriage was not genuine, and that this constituted a misrepresentation on a material fact regarding a relevant matter that induced an error in the administration of the Act, and that the applicant should not have been granted permanent residence.

[8] On the matter of humanitarian and compassionate grounds, the IAD listed the factors to be applied as per *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, and noted that the factors were non-exhaustive and discretionary. The IAD found that the applicant's misrepresentation regarding his marriage was serious in nature, but that the applicant was well-established in his community in Canada. The IAD found that his mother was in poor health and would suffer some displacement were the applicant to be removed, but found that the applicant's sisters would be able to support the mother. It noted that the applicant's wife and child are in India, that the applicant has returned to India regularly for long periods since 2004, and that he is familiar with the video/music business there and could continue a line of work similar to what he does in Canada. The IAD considered the best interests of the applicant's son, but found that the child is

established in India, and that there is no evidence that he would be better off in Canada; this was a neutral factor. On balance, the IAD concluded that the humanitarian and compassionate grounds were insufficient to allow the applicant to remain, especially given that his removal came about as a result of his own misrepresentation.

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A. *Timeliness of the investigation into the applicant's marriage*

[9] The applicant is reiterating his argument, made at the hearing and alluded to by the IAD in its decision, that as no report had been filed under section 27 of the former *Immigration Act*, pursuant to section 321 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, (the "Regulations") the transition provisions do not apply to his case, and no report could have been issued against him. I do not agree. I find that the IAD's interpretation of the Act is correct; section 44 of the current Act does not state that the action leading to the alleged inadmissibility must have occurred subsequent to the coming in force of the new Act. In my opinion the transition provision in section 321 of the Regulations applies only to reports that were already in existence, and not to conduct that had not yet been discovered; otherwise any misrepresentation not discovered prior to the coming in force of the new Act would be immune from investigation.

B. *Genuineness of the applicant's marriage*

[10] The applicant argues that as both he and his first wife had testified that the marriage was genuine, the IAD's finding was made without regard to the evidence before it, and constituted an erroneous finding of fact. The applicant alleges that the discrepancy in the date of separation

between his testimony and the Statement of Claim for divorce came about because Kulwinder Kaur misrepresented the date in order to get a divorce more quickly than she would otherwise have been able to do. The applicant alleges that he was never able to correct this date as he did not receive any notice of the proceedings until the divorce judgment.

[11] The respondent argues that while the applicant clearly disagrees with the IAD's conclusion, he has failed to demonstrate a reviewable error that could lead this Court to overturn the decision. The respondent notes that it was open to the IAD to find that together, the inconsistencies and implausibilities in the applicant's evidence were significant enough to lead to a conclusion of a marriage of convenience. I agree with the respondent on this point; the applicant's arguments merely repeat his contention that the marriage was genuine, but do not point to any reviewable error made by the IAD.

[12] The applicant submitted a supplementary affidavit containing several additional exhibits intended to supplement his position regarding the genuineness of the marriage. I agree with the respondent that the applicant may not introduce new evidence upon judicial review in order to supplement the elements of his testimony that were disbelieved by the IAD. Cases such as *Nejad v. Minister of Citizenship and Immigration*, 2006 FC 1444, paragraphs 15 to 17, and *Deol v. Minister of Citizenship and Immigration*, 2009 FC 406, paragraphs 44 to 46, are clear on this point.

C. *Humanitarian and compassionate grounds*

[13] The applicant argues that the IAD failed to reasonably consider the evidence presented in its decision that the humanitarian and compassionate grounds were insufficient to overcome the

removal order. The applicant alleges that the IAD wrongly determined that his sisters would take care of his ailing mother, when the applicant is the sole provider for his mother. He argues that he would face hardship in India, as he has no immediate family there beyond his wife and son, and there is no guarantee that he will be able to find a job there in the video/music business and be able to support his family.

[14] The respondent argues that it is "not the role of the courts to re-examine the weight given to the different factors by the officers", according to the Federal Court of Appeal in *Legault v. Minister of Citizenship and Immigration*, [2002] 4 F.C. 358, at paragraph 11. The respondent submits that the IAD's decision was not unreasonable in light of the factors present in this case, including the seriousness of the misrepresentation, the presence of the wife and child in India and the applicant's frequent visits there, and the applicant's familiarity with the video/music business in India.

[15] In my opinion, the applicant has again failed to point to any reviewable error in the IAD's determination of this issue. He disagrees with the manner in which the factors were weighed, but merely reiterates evidence that was before the IAD and adds additional explanation, without showing that the IAD reached an unreasonable conclusion.

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[16] For the above-mentioned reasons, the application for judicial review is dismissed.

[17] No question is certified.

JUDGMENT

The application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board dated December 21, 2009 is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-174-10
STYLE OF CAUSE:	SUKHNINDER SINGH GILL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 14, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	November 17, 2010

APPEARANCES:

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