Federal Court  Cour fédérale

Date: 20110908

Docket: IMM-1164-11

Citation: 2011 FC 1060

Ottawa, Ontario, September 8, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

LAKHWINDER KAUR DHILLON

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 Board), dated February 1, 2011, upholding a decision of a visa officer refusing the applicant's application to sponsor her husband, Harpreet Singh Khangura, from India as a member of the family class, because the officer determined that the marriage was entered into in bad faith, contrary to section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

FACTS

Background

[2] The applicant is a permanent resident of Canada. She arrived in Canada in 2007 as the sponsoree of her now ex-husband. She and her sponsor divorced on February 5, 2009.

[3] The applicant testified that she met her current husband through her husband's maternal aunt. The applicant had worked with her husband's maternal aunt and had mentioned that she was looking for a husband. Following that conversation, throughout the month of September of 2009, the families of the applicant and her husband began to investigate each other. Their families decided that the two were well-suited, and they exchanged pictures on September 30, 2009. The two spouses met in person on December 4, 2009, at which time the marriage was finalized.

[4] The engagement ceremony took place on December 9, and the marriage ceremony took place on December 10, 2009, in India. The wedding reception involved 250 guests. Following the wedding, the spouses went on a day-trip to Chandigar.

[5] The sponsorship application included photographs of the spouses' engagement, the various ceremonies that took place as part of the wedding celebration, and the day-trip.

[6] The applicant returned to Canada on January 18, 2010. She submitted a sponsorship application in March.

[7] The applicant went back to India to visit her husband on May 22, 2010, for two months. She testified that during that time she became pregnant with her husband's child.

[8] The applicant and her spouse were interviewed in relation to the sponsorship application on May 28, 2010. That same day, the visa officer refused their application. The visa officer found that the marriage was not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act. The visa officer provided the following reasons for so finding:

a. The parties did not appear compatible according to the terms usually used in arranged marriages, and could not explain why their marriage was arranged despite their incompatibility. In particular, the officer stated that the following factors demonstrated a lack of compatibility per traditional standards:

    i. In arranged marriages in the applicant's community, "it is preferred that the male partner be 4-7 years older than the female. Your sponsor, however, is older than you."

    ii. The applicant is a divorcee while her husband has never been married. The visa officer stated that "Parents would usually not arrange the marriage of their first-born young never-married son with an older divorcee."

b. The marriage appeared to have been conducted in haste, instead of with the "extensive negotiations" that are more common in the applicant's community. Moreover, given that the applicant had been divorced once before, the officer found that she would have been more careful about choosing her second spouse if she had intended to remain married to him.

c. The photographs of the marriage ceremony appeared to the officer to be posed, and that he ceremony was arranged "merely for photographs to be taken" for the purpose of the applicant.

d. The applicant's husband stated that he and the applicant had gone on their honeymoon alone, but later "admitted" that many other family members accompanied them. The officer presumed that the husband had intended to "mislead" the officer.

e. The photographs of the spouses together do not make them seem like they are comfortable with one another.

f. The husband lacked knowledge about the applicant.

[9] The visa officer also found that the applicant's husband was not a credible witness. The officer stated that the applicant's husband had not provided straightforward answers to the interview

questions. The officer was especially concerned with the following apparent discrepancies in the applicant's husband's evidence:

a. He stated that his wife had come from Canada by herself to attend the marriage, but the applicant stated that her maternal aunt and her aunt's family accompanied her on that trip.

b. He had appeared not to know much about the woman with whom the applicant lives (for example, the names of that woman's husband and children), but, in fact, the applicant's landlords are related to him: the male landlord is the applicant's "maternal aunt's husband's younger paternal uncle".

c. He stated that the couple went on their honeymoon alone, whereas in fact other family members had accompanied them.

Decision Under Review

[10] The Board had in-person testimony from the applicant and the testimony from her husband by telephone.

[11] In its decision, the Board first reviewed the concerns raised by the visa officer, and summarized them as follows:

a. The applicant is older than her husband and previously married;
b. The marriage was in haste;
c. The marriage and post-marriage photographs appear posed and not indicative of a genuine marriage;
d. The two did not honeymoon alone;
e. The husband lacked knowledge of the applicant; and
f. The husband lacked credibility.

[12] The Board stated that it did not agree with the visa officer's concerns about the relative ages of the spouses or about the legitimacy of the post-marriage photographs.

[13] The Board first addressed the question of whether the marriage was genuine. It found that each witness's testimony was "generally consistent" with the other, but that the applicant had "attempted unsuccessfully" to reconcile some of the statements made by her husband to the visa officer to the testimony that they were giving to the Board. The Board quoted from another decision of the Board in which it was stated that witness testimony at a hearing should not only be consistent with itself but should also be consistent with previous statements and materials on the record.

[14] In particular, the Board drew attention to the following areas of inconsistency in the evidence given before the Board and before the visa officer:

a. In the interview with the visa officer, the applicant's husband appeared not to know of his relationship to the applicant's landlord (he did not identify the relationship and he stated that he did not know the name of the landlord's husband or whether she had children). The Board asked the applicant about this, and the applicant testified that she became aware of the relationship on August 30, 2009, when the marriage talks started, but did not discuss this relationship with her husband prior to the interview. The Board asked the applicant's husband about this, and he stated that he, too, became aware of the relationship on August 30, 2009, and "When asked why he did not tell the visa officer about it, he testified that he was never asked this question." The Board found this explanation not credible, because of the exchange in which he was asked specifically about the applicant's landlord. The Board found that the real reason that the husband did not mention the connection was the following:

> It is far more likely that the applicant attempted to cover up this connection for fear that the visa officer might see this as a reason, other than marriage, for the applicant to wish to immigration to Canada.

b. The husband testified to the visa officer that the applicant came to India alone when they met for the first time. In fact, however, she had come to India with her husband's aunt and her aunt's family. When asked about this discrepancy by the Board, the husband stated that he misunderstood the visa officer's question, and thought that the officer was asking about the applicant's more recent trip to India in 2010. The Board rejected this explanation:

> The exchange noted above clearly refers to the marriage trip and the explanation is more likely an effort to explain away information provided to the visa officer that would otherwise

> be perceived as an effort to disguise the closeness of the relationship between the appellant and his maternal aunt prior to marriage.

c. The husband repeatedly refused to tell the visa officer that he and the applicant had gone on their honeymoon with other relatives. When he was challenged on his answers, it slowly came out that the couple had been joined on their honeymoon by the husband's aunt, her husband and their three children (the same family that had flown to India with the applicant), and their parents-in-law. When asked about why he had not revealed this information, the husband testified that he was confused by the question because he and the applicant had met the other relatives in the honeymoon destination, but had not travelled with them from their home. The Board rejected this explanation:

> It is evident that the applicant was not being truthful with the visa officer about who accompanied himself and the appellant on the post marriage trip and he made an unsuccessful attempt to hide the fact of his relatives accompanying them.

[15] The Board also noted certain discrepancies between the evidence of the two witnesses:

a. The applicant's husband testified that he and the applicant spoke by telephone on August 30, 2009, and again on September 30, 2009, when they agreed to marry each other. The applicant, however, testified that they only spoke once, on August 30, 2009, and that they exchanged pictures on September 30, 2009. The applicant testified that on September 30 the spouses' parents agreed to the match, but did not say that the spouses themselves agreed at that time;

b. The applicant had not "credibly explained" why she had not taken steps to change her name from that of her former husband to that of her new husband; and

c. The applicant was unable to tell the Board or the Minister much about her husband in their questioning – she was "vague in questioning about these details and did not demonstrate a depth of knowledge of the appellant."

[16] Moreover, despite noting the "generally consistent" testimony of the two witnesses, the Board found that the testimony was "vague and general", and, therefore, the consistency was less significant:

> ¶11. I note that while the appellant and the applicant were generally consistent in their testimony, their testimony was vague

> and general. Typically, the answers from each were along the lines of 'we discussed everything about past' and 'our parents checked everything', but without any details about what 'everything' involved. The appellant and the applicant demonstrated minimal knowledge of each other, with testimony about liking music and a preference by the appellant for spinach saag and corn roti standing out as remarkable in its detail. I had a sense that efforts by counsel, in cross examination, to obtain more detail, testimony that could be compared to determine significant knowledge of each other, was being purposely frustrated. To use Member Workun's words, "obvious areas of concern" identified in the refusal letter were not "addressed directly by cogent and probative evidence". Further, independent of the refusal letter, the appellant had the opportunity to provide substantial detailed and unscripted evidence that would establish a depth of knowledge consistent with the claimed level of contact and supportive of a genuine marriage.

[17] The Board identified the following factors that support a claim that the marriage is genuine:

a. The applicant spent about five weeks in India on the marriage trip and returned for two months shortly after that;

b. The applicant is pregnant;

c. There were "photographs, phone records, money transfers and other documents in evidence which are capable of providing some support for the claim that the marriage is genuine."

[18] The Board recognized that pregnancy "is a factor that ought to give the panel pause for thought." But the Board found that the credibility concerns that it had regarding the husband's testimony undermined the value of that factor:

> ¶13. ….Given the credibility concerns in relation to the evidence before me, the evidence generally about the genuineness of the marriage and specifically regarding the claim that the appellant is pregnant with the applicant's child has not been proven on a balance of probabilities.

[19] The Board concluded that the applicant had failed to prove on a balance of probabilities that the marriage is genuine.

[20] Second, the Board addressed the "primary purpose" requirement. It stated that the husband's answers to questions from the visa officer demonstrated that his primary purpose was to obtain status or privilege under the Act:

> ¶14. …I note that the applicant does have family connections to Canada and according to the testimony before me will work with his uncle in construction, if admitted to Canada. The applicant's overall evasiveness in dealing with the visa officer appears directed toward disguising relationships that might lead the visa officer to conclude that his primary purpose was to immigrate to Canada. Considering all of the evidence before me, the appellant has not proven, on the balance of probabilities, that the primary purpose of the marriage was other than to acquire any status or privilege under the *Act*.

LEGISLATION

[21] Regulation 117 of the *Regulations* defines which foreign nationals may be considered members of the family class:

117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(*a*) the sponsor's spouse, common-law partner or conjugal partner;	*a*) son époux, conjoint de fait ou partenaire conjugal;
…	…

[22] Section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 states that a foreign national will not be considered a spouse if the marriage was not genuine or was entered into primarily for the purpose of acquiring immigration status:

4. (1) For the purposes of these Regulations, 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	4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(b) is not genuine.	b) n'est pas authentique.
. . .	. . .

ISSUES

[23] The applicant raises the following issues:

a. Did the Board make an unreasonable finding in determining that the applicant had not proven on a balance of probabilities that she was pregnant with her husband's child?

b. Did the Board ignore "a very important fact" in rendering its decision?

STANDARD OF REVIEW

[24] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 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 *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[25] Questions of credibility and of the genuineness of a marriage are questions of fact to be determined on a standard of reasonableness: see, for example, my decisions in *Akinmayowa v. Canada (Citizenship and Immigration)*, 2011 FC 171, at paragraph 18, and *Yadav v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 140, at paragraph 50, and the other decisions cited therein.

[26] In reviewing the Board'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

<u>Issue 1</u>: Did the Board make an unreasonable finding in determining that the applicant had not proven on a balance of probabilities that she was pregnant with her husband's child?

[27] The applicant submits that the Board failed to recognize the weight that should be attributed to the applicant's pregnancy. The applicant, citing *Gill v. Canada (Citizenship and Immigration)*,

2010 FC 122, submits that the consequences of a mistaken finding regarding the genuineness of the marriage will be “catastrophic to the family”, especially where there is a child to be considered.

[28] The applicant submits that the Board was unreasonable in finding that the child was not the applicant’s husband’s child. The applicant testified under oath that her husband was the child’s father. She testified that she had become pregnant during her visit to her husband, and even stated the date on which the child was conceived. This testimony was never challenged.

[29] Moreover, the applicant submits that the Board’s reasons do not provide reason for doubting the credibility of the applicant’s testimony – they speak mostly to the Board’s concerns regarding her husband’s testimony. The only concerns that the Board raised regarding the applicant’s testimony were that she had not provided a credible explanation for why she had not changed her name, that her testimony differed from her husband’s regarding how frequently they had talked on the telephone prior to meeting, and that her testimony was “vague and general.”

[30] The applicant submits that none of these reasons was sufficient to found a general finding of a lack of credibility of the applicant.

[31] The respondent submits that the Board’s credibility findings are to be accorded a very high degree of deference, which is to endure even if others may have come to a different conclusion on the report of the evidence. The respondent submits that the Board’s concerns regarding the applicant’s credibility were not trivial; rather, the Board found that the problems with her testimony and the general vagueness of both witnesses’ responses were attempts to avoid providing details that would betray that their story was contrived. The respondent submits that in light of these concerns, it was open to the Board to find that the applicant had failed to prove the child’s paternity on a balance of probabilities.

[32] The Court agrees with the applicant. The Court finds that *Gill*, above, is directly on point. In that case, Justice Barnes cautioned the Board to be diligent in assessing the genuineness of a marriage relationship:

> ¶6. When the Board is required to examine the genuineness of a marriage under ss. 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, it must proceed with great care because the consequences of a mistake will be catastrophic to the family. That is particularly obvious where the family includes a child born of the relationship. The Board's task is not an easy one because the genuineness of personal relationships can be difficult to assess from the outside. Behaviour that may look suspicious at first glance may be open to simple explanation or interpretation. An example of this from this case involves the Officer's concern that the wedding photos looked staged and the parties appeared uncomfortable. The simple answer, of course, is that almost all wedding photos are staged and, in the context of an arranged marriage, some personal awkwardness might well be expected. The subsequent birth of a child would ordinarily be sufficient to dispel any lingering concern of this sort. Similarly, the Board's concern that Ms. Gill rushed into a second marriage can perhaps be explained by the fact that her divorce may have substantially reduced her prospects for remarriage.

[33] In this case, the Board did not doubt the existence of the child – the applicant had submitted medical documents and was also obviously pregnant. The Board doubted the paternity of the child. The Court agrees with the applicant that the Board's decision does not demonstrate sufficient reason to doubt the applicant's testimony that her husband was the child's father. The applicant provided evidence of the pregnancy and the due date, she also provided evidence that she was with her husband in India during the relevant time period. There was no evidence of any other relationship in which she may have been involved at the time. While it is open to the Board to doubt such things as a child's paternity, the Board will have to provide reasons to allow both the parties and a reviewing Court to understand how it reached that conclusion. In this case, the Board's reasons are simply that the Board does not find these witnesses to be credible. The conception of the applicant's child

coincided exactly with the time when the applicant was on her second visit to India to allegedly be with her new husband. Accordingly, the Court must conclude that the board's reasons for doubting the paternity of the applicant's child were not reasonable, or at least not adequately explained.

Issue 2: Did the Board ignore "a very important fact" in rendering its decision?

[34] The applicant submits that the Board ignored the applicant's pregnancy in reaching its decision. The applicant submits that, as stated in *Gill*, above, a failure to properly consider a child of the relationship is a fatal error.

[35] The respondent submits that the Board did consider the applicant's pregnancy, but simply found that the fact of the pregnancy did not overcome the other inconsistencies and discrepancies that it had found in the evidence. The respondent cites two cases of this Court for the proposition that "the mere existence of a child is not determinative of the genuineness of a marriage." The Court agrees that the child from the relationship does not in itself establish that the marriage was genuine and not entered into primarily for the purpose of acquiring immigration status.

[36] However, the Court also agrees with the applicant that the Board relied upon its unreasonable finding of fact regarding the husband's paternity of the child. Accordingly the Board did not conduct an analysis of whether the existence of the child overcomes the credibility concerns of the Board.

CONCLUSION

[37] For these reasons, this application for judicial review will be allowed.

[38] No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The decision of the Board dated February 1, 2011 is set aside and this matter is referred to another panel of the Board for re-determination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1164-11
STYLE OF CAUSE:	Lakhwinder Kaur Dhillon
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 1, 2011
REASONS FOR JUDGMENT:	KELEN J.
DATED:	September 8, 2011

APPEARANCES:

Mr. Christopher Elgin	FOR THE APPLICANT
Ms Sarah-Dawn Norris	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon and Associates Vancouver, BC	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Ottawa, Ontario	FOR THE RESPONDENT