Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-5709-11

Citation: 2012 FC 539

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SARDA SAMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated 25 July 2011 (Decision), which declared the Applicant's appeal from the decision of a visa officer (Second Officer) at the visa post in Buffalo, New York, was *res judicata* and declined to hear her appeal.

BACKGROUND

[2] The Applicant was born in Fiji and is a Canadian citizen. Her husband (Dhindsa) is a citizen of India.

[3] In 2005 the Applicant filed a sponsorship application to bring Dhindsa to Canada as a permanent resident under the Family Class. An officer (First Officer) with Citizenship and Immigration Canada (CIC) denied that application after he found that Dhindsa and the Applicant (Couple) did not have a genuine marriage within the meaning of section 4 of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (Regulations). The Applicant appealed that decision to the IAD and on 29 August 2007, the IAD refused her appeal (First Appeal). The Applicant did not apply for judicial review of that decision.

[4] The Applicant filed a second spousal sponsorship application on 2 March 2009 to bring Dhindsa to Canada (Second Application). Prior to making a decision on the file, CIC noted that concerns from the First Appeal about the Couple's differing religious backgrounds were still present in the Second Application. CIC felt Dhindsa's work as a Sikh priest was incongruous with his marriage to the Applicant, who is Hindu. After interviewing Dhindsa on 2 September 2010, an immigration officer (Second Officer) at the Buffalo visa post denied the Second Application, again finding that the Couple did not have a genuine marriage within the meaning of the Regulations. The Applicant appealed this refusal to the IAD.

[5] Before hearing the Applicant's appeal of the Second Officer's decision, the IAD notified the Applicant on 17 January 2011 that it appeared her second appeal was an attempt to relitigate issues

which the IAD had already decided. The IAD invited the Applicant to address this issue with written submissions, which she provided on 14 February 2011.

[6] In her written submissions, the Applicant said she had fresh, decisive evidence which she could not have presented at the First Appeal. She said she was unrepresented at the First Appeal and thought at that time that she could not call Dhindsa as a witness. She also said she had additional evidence of a continuing relationship with Dhindsa and asked the IAD to exercise its discretion to allow the Second Appeal to proceed on its merits. The Applicant also said injustice would result from a refusal to hear the Second Appeal because the Couple would have to live in separate countries. She also submitted the evidence she intended to rely on to the IAD.

[7] The Respondent made submissions on this *res judicata* issue on 29 April 2011 and said the Applicant's evidence dated from after the First Appeal and was not evidence the Couple's marriage was genuine when it was entered into. The Respondent also said the Applicant's failure to call Dhindsa on the First Appeal was her choice. Dhindsa's testimony could not be fresh evidence, given that the Applicant could have called him as a witness during the First Appeal.

[8] The Applicant replied to the Respondent's submissions on 17 May 2011, saying evidence of a continuing relationship can be evidence of commitment at the time of the marriage. She again asked the IAD to exercise its discretion to hear her appeal.

[9] The IAD considered the parties' submissions and, on 25 July 2011, refused to exercise its jurisdiction to hear her appeal because the *res judicata* principle applied. The IAD notified the Applicant of its Decision on 2 August 2011.

DECISION UNDER REVIEW

[10] The IAD noted that *Angle v Canada (Minister of National Revenue – M.N.R.)*, [1975] 2 SCR 248 establishes the following three part test for the application of issue estoppel:

a. The same question has been decided;

b. The decision said to create the estoppel was final;

c. The parties to the previous decision or their privies are the same as the parties to the proceeding in which the estoppel is raised.

[11] The IAD found all three elements were met in the instant case. The IAD's decision in the First Appeal was final and the Applicant did not ask for judicial review of that decision. The parties to the Second Appeal were the same: the Respondent and the Applicant. Finally, the same issue was in play in both appeals: whether the Couple's marriage is genuine.

[12] The RPD also noted that, in *Danyluk v Ainsworth Technologies Inc.* 2001 SCC 44, the Supreme Court of Canada found the underlying purpose of issue estoppel is to balance the public interest in the finality of litigation with the public interest in seeing justice done on the facts of the case. In *Danyluk*, the Supreme Court of Canada also held that, to prevent injustice, decision-makers have the discretion to hear matters in which issue estoppel would otherwise apply. The IAD noted that several factors may be analysed with respect to this discretion, including the wording of the decision-maker's enabling statute, procedural safeguards available to the parties, availability of an appeal, the decision maker's expertise, circumstances leading to the previous proceedings, and any potential injustice.

Application of Factors

[13] Having found the three preconditions for issue estoppel existed in the Applicant's case, the IAD turned to whether it should exercise its discretion to hear her appeal anyway. The IAD noted that it has in the past recognized that new information is sufficient to overcome issue estoppel and that there is no appeal from IAD decisions, although the Applicant could seek judicial review in this Court. It also found that the IAD is a court of competent jurisdiction with expertise in immigration matters, including sponsorship appeals. It further found the circumstances which led to the Second Appeal were the same as those leading up to the First Appeal, with the only significant change being the passage of time.

[14] The IAD noted that the Applicant, in her written submissions on the *res judicata* issue, said "there is fresh evidence that supports the finding that [her] marriage to [Dhindsa] is genuine and that this evidence could not have been adduced at the earlier proceeding by the exercise of reasonable diligence." To evaluate whether it should exercise its discretion to hear the Second Appeal, the IAD determined that it would focus on the potential injustice to the Applicant if it did not. In particular, the IAD focussed on whether new evidence existed, and whether an injustice would occur if that evidence were not considered.

New Evidence and Injustice

[15] To asses whether the evidence the Applicant submitted was new, the IAD applied the test the Supreme Court of Canada set out in *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, [2000] 1 SCR 44. The Supreme Court of Canada said new evidence should not be admitted if it could have been adduced in the first proceeding with due diligence; the evidence must

bear on a decisive or potentially decisive issue; the evidence must be credible; and, if accepted, the evidence would have affected the result of the previous proceeding.

[16] The IAD noted the Applicant said the new evidence she submitted showed the Couple had a continuing relationship, which established that their commitment when they got married was genuine. The IAD also noted that, in the First Appeal, it found the Applicant did not rebut the First Officer's concerns and that her testimony raised additional concerns. The Second Officer found that the same root concerns the IAD expressed in the First Appeal still existed. In the refusal letter, the Second Officer found that he was not satisfied the Applicant had addressed his concerns about the genuineness of the Couple's marriage.

[17] The IAD noted the Applicant's assertion she did not know she could call Dhindsa as a witness at the First Appeal because she was self-represented at that time. The IAD found that self-representation and not calling Dhindsa were the Applicant's own choices. The IAD notified the Applicant before the First Appeal that she could be represented by counsel and found the fact she had since retained counsel and wished to call Dhindsa as a witness in the Second Appeal did not amount to fresh evidence. Further, the IAD found that the Applicant could have anticipated the concerns it raised in the First Appeal.

[18] The IAD also found the Applicant understood at the first hearing that she could call Dhindsa as a witness. The Applicant was a party to her marriage, so she must have understood that Dhindsa was just as well situated as she was to give evidence on the genuineness of their marriage. Further, the onus was on her at that time to establish that her marriage was genuine. Nothing had stood in the way of her calling Dhindsa to testify.

[19] The IAD further found injustice would not result if the Applicant were not able to call Dhindsa as a witness in a second proceeding. The Applicant's failure to call Dhindsa was a choice she had made, and any evidence he could provide would not be determinative of her appeal. The IAD said that *Mann v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 198 shows that calling an applicant is not always necessary, so it would not be necessary for the IAD to hear from Dhindsa.

[20] The IAD also reviewed evidence submitted by the Applicant on the Second Appeal, which she said showed her marriage is genuine. The IAD found it considered similar evidence in the First Appeal, and that this evidence was not decisive of whether the Couple's marriage is genuine. The IAD also found photographs the Applicant submitted on the Second Appeal were not decisive evidence that the marriage is genuine. Money transfer receipts the Applicant submitted were also not decisive of the genuineness of the Couple's marriage.

[21] Although the Applicant had provided telephone bills to the IAD on the Second Appeal, it found this was more evidence of what was before it in the First Appeal, so it could not add to what the IAD had already considered. This evidence was not new and not decisive of the issue at hand. The IAD also noted that, in the First Appeal, it had identified credibility concerns related to the same evidence; on the Second Appeal, it found the additional evidence did not address these concerns.

Conclusion

[22] The IAD found that the evidence the Applicant submitted on the Second Appeal did not amount to decisive new evidence that the Couple had lived together, intended to live together

permanently, or had a deeper relationship. The additional evidence did not address the concerns the IAD raised in the First Appeal about the Couple's intentions when they were married. The First Appeal failed because the Couple did not address these concerns, even though they had a fair opportunity to do so.

[23] The IAD found the three part test for *res judicata* was established and, because the additional evidence the Applicant submitted was not new or decisive, it was not in the interests of justice to exercise its discretion to hear the Second Appeal. The issues related to the genuineness of the Couple's marriage were adequately considered in the First Appeal.

[24] The IAD declined jurisdiction and dismissed the Second Appeal.

ISSUES

[25] The Applicant raises the following issues in this case:

a. Whether the IAD erred in finding she had not provided fresh evidence;

b. Whether the IAD failed to consider its discretion to hear the Second Appeal, even though the test for *res judicata* was made out;

c. Whether the IAD's reasons are adequate.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the

reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] The first issue the Applicant raises – whether the evidence she adduced on the Second Appeal was new – is a question in which the factual and legal issues are inextricably intertwined. The IAD was called on to determine whether the evidence the Applicant presented was relevant to or decisive of the issue in the Second Appeal. In *Dunsmuir*, above, at paragraph 51, the Supreme Court of Canada held that questions like this are to be evaluated on the reasonableness standard (see also *Smith v Alliance Pipeline* 2011 SCC 7 at paragraph 26). The standard of review on the first issue is reasonableness.

[28] On the third issue, the Supreme Court of Canada has recently held that the adequacy of reasons is not a stand-alone basis for quashing a decision (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62 at paragraph 14). Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The IAD's reasons in this case must therefore be analysed along with the reasonableness of the Decision as a whole.

[29] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[30] The standard of review with respect to the second issue in this case is correctness. In *Danyluk*, above, the Supreme Court of Canada held at paragraph 66 "The appellant is entitled at some stage to appropriate consideration of the discretionary factors [in the *res judicata* analysis]." Where the three pre-conditions for *res judicata* exist, the decision maker is then obligated to consider whether to exercise discretion to hear the matter anyway. The reviewing Court is called on to analyse whether the decision-maker complied with this obligation and will not show deference to the decision-maker's reasoning (*Dunsmuir*, at paragraph 50).

STATUTORY PROVISIONS

[31] The following provisions of the Act are applicable in this proceeding:

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	**12.** (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.
[…]	[…]
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	**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.

to issue the foreign national a permanent resident visa.	
[…]	[…]

[32] The following provisions of the Regulations are also applicable in this proceeding:

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.
[…]	[…]
116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	**116.** Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
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	*a*) son époux, conjoint de fait ou partenaire conjugal;

conjugal partner

[…] […]

ARGUMENTS

The Applicant

The IAD Unreasonably Found no new Evidence

[33] The Applicant says the IAD unreasonably concluded the evidence she submitted to support the Second Appeal was not new or decisive. Although the IAD analysed each type of evidence she submitted, it did not asses whether, in its totality, the evidence she submitted showed the Couple's marriage was genuine.

[34] She says her new evidence shows her marriage was actually genuine. She submitted evidence of a recent trip to India, which she says speaks to the IAD's concern in the First Appeal that the Couple's different backgrounds cast doubt on the genuineness of their marriage.

[35] In *Singh v Canada (Minister of Citizenship and Immigration)*, [2007] IADD No 728, the IAD held, at paragraphs 33 and 34, that

> The appellant and applicant have been married since April 2002. Their marriage has endured over five years despite two refusal [*sic*] and two appeals. All the indicia typically considered by the IAD in assessing the genuineness of a marriage are present and to a greater and lesser degree the *indicia* are positive. The evidence speaks to a relationship entered into on the basis of a traditional arranged marriage. The respective families were involved in the arrangement which, while compact in time, does not suggest an attempt to hide the marriage. The evidence considered today was found credible and it answered the concerns raised by the visa officer.
>
> When considered in its totality the evidence does not support a conclusion that the marriage was entered into in bad faith. The panel

> finds that on a balance of probabilities the marriage is genuine and not entered into primarily to facilitate the applicant's immigration to Canada.

[36] *Singh* teaches that continuing contact between the parties to a marriage can constitute fresh evidence that marriage is genuine. The Couple's marriage has lasted longer than the marriage under scrutiny in *Singh*, so the IAD should have found the length of their marriage was new evidence on the Second Appeal. The length of the Couple's marriage was part of the totality of the evidence which established their marriage was genuine.

[37] The Applicant submitted substantial evidence to show her commitment to Dhindsa since the IAD rejected the First Appeal. Dhindsa moved to the United States of America (USA) to be closer to the Applicant, and she took a long trip to India in 2011 to be with him. Both of these events show their continued commitment, but the IAD found these did not constitute new evidence. The Applicant relies on *Podai v Canada (Minister of Citizenship and Immigration)*, [2009] IADD No 291, noting that the IAD in that case found evidence of a trip and spending time together was sufficient to overcome the application of *res judicata*. She says her case should have been decided in the same way as *Podai*. The IAD also rejected evidence of phone calls and the Applicant's trips to see Dhindsa because she submitted the same type of evidence at the First Appeal. However, the Applicant points to *Brij v Canada (Minister of Citizenship and Immigration)*, [2009] IADD No 798, where the IAD accepted evidence of the same type as had been adduced in a previous appeal because the evidence was relevant to the genuineness of the marriage under scrutiny in that case.

[38] The Applicant points out that she was unrepresented at the First Appeal and says she did not understand her rights at that time. This prevented her from calling Dhindsa as a witness. The Applicant points to *Abdollahi v Canada (Minister of Citizenship and Immigration)*, [2009] IADD

No 692, which the IAD distinguished in the Decision. The Applicant is in a similar situation to *Abdollahi* because she too has submitted new and decisive evidence.

The IAD did not Consider whether Special Circumstances Existed

[39] The IAD's analysis ended with a finding that *res judicata* applied without any analysis of whether special circumstances existed to justify exercising the discretion to hear the Second Appeal. She points to *Prasad v Canada (Minister of Citizenship and Immigration)* IAD File VA6-02979; 2007 CanLII 67704, which she says establishes the IAD must consider its discretion to hear an appeal when the three pre-conditions for issue estoppel are met. She points to *Sekhon v Canada (Minister of Citizenship and Immigration)*, [2003] IADD No 746 for the proposition that potential injustice is a factor that can lead the IAD to exercise its discretion to hear an appeal where *res judicata* would otherwise apply.

[40] Rather than considering whether to exercise its discretion to hear the Second Appeal, the IAD conflated this issue with the three part test for issue estoppel. The IAD wrote that

> The Panel will focus on whether or not there is a potential for injustice should the IAD not hear the appeal of the second refusal to grant [Dhindsa] a permanent resident visa. In particular, whether or not there is 'new' evidence which meets the test for such evidences [*sic*] which would establish an exception to the application of *res judicata* to this matter.

[41] The circumstances of the case suggest the IAD should have exercised its discretion to hear the Second Appeal. The Applicant points to the fact that the parties are an individual and the Crown and says injustice will result from the IAD's refusal to hear her appeal because the Couple will not be able to live together in the same country. The Applicant cannot move to India to live with

Dhindsa because she has health problems when she is there and does not have status in India. The interests the IAD was called on to balance are the state's interest in the administration of justice against the Applicant's interest in being united with her spouse.

[42] Although the IAD considered the Applicant's submission that the Couple would not be able to live together, it noted that family reunification is not guaranteed under the Act. However, family reunification is an important objective of the Act under paragraph 3(1)(*d*). Preventing family reunification is a potential injustice which the IAD should address when considering its discretion to hear cases. The IAD should have given the Couple's reunification significant weight when it considered whether to hear the Second Appeal.

The Respondent

[43] The Respondent says the IAD reasonably exercised its discretion not to hear the Second Appeal. It examined the evidence the Applicant submitted and concluded it did not address the concerns raised in the First Appeal. The Applicant simply disagrees with the IAD's conclusion, so the Court should not intervene.

Preconditions for *Res Judicata* met

[44] The IAD reasonably found the three pre-conditions, established in *Angle*, above, were met in the Second Appeal. The same question was at issue in both the First and Second Appeals: whether the Couple's marriage is genuine. The parties were also the same, and the First Appeal was a final determination of this issue. The Respondent says *Danyluk*, above, establishes that where the

three preconditions are met, *res judicata* must apply unless special circumstances exist for the decision maker to exercise the discretion to hear a case on its merits.

Special Circumstances Reasonably Assessed

[45] The IAD reviewed the availability of an exception to the application of *res judicata* and noted some of the factors decision-makers may take into account when deciding whether to exercise their discretion to hear a case on its merits. When it examined whether the Applicant had submitted new evidence, the IAD considered whether this would lead to injustice if the Second Appeal were not heard. In examining whether the evidence was new, the IAD reasonably applied the test for new evidence articulated by the Supreme Court of Canada in *Public School Boards' Assn.*, above. All the Applicant has done in her arguments to the Court is to reiterate the arguments she raised before the IAD; she has not demonstrated that the IAD's exercise of discretion was unreasonable.

Evidence Not New

[46] Although the Applicant has argued that she put forward fresh, new evidence about her relationship with Dhindsa, the IAD found this was not the case. It found the evidence she submitted was before the IAD on the First Appeal, that the evidence was not determinative, and that the evidence did not address its concerns. The IAD also held that it had fully canvassed the genuineness of the Couple's marriage on the First Appeal. Although the Applicant wished to call Dhindsa on the Second Appeal and said she was not aware he could have testified at the First Appeal, the IAD found the onus was on her to establish her case and it was her decision not to have him testify at that time. This was a reasonable conclusion for the IAD to draw.

[47] The IAD also reasonably concluded that Dhindsa's failure to testify was a defect in the Applicant's presentation of her case on the First Appeal and that his testimony did not constitute new evidence on the Second Appeal. The IAD noted it had not drawn a negative inference from Dhindsa's failure to testify at the First Appeal, and found that no prejudice to the Applicant would result if he were not permitted to testify again. The IAD also reasonably rejected the Applicant's assertion she did not know she could have counsel. It pointed to the Notice of Appeal sent to her by the IAD which specifically said she had the right to counsel on the First Appeal.

[48] The IAD also reasonably concluded that the Applicant's evidence of their continuing relationship was not new evidence the Couple intended to live together permanently. The IAD was not bound to follow its previous decisions which the Applicant has cited, because these cases do not determine whether the evidence submitted in this case was new or decisive. The task before the Court is not to compare the evidence in this case with the evidence submitted in other cases; the Court is to determine whether the IAD's conclusion in this case was reasonable on the record before it.

[49] The Respondent says that *Anttal v Canada (Minister of Citizenship and Immigration)* 2008 FC 30 is similar to the instant case. Justice Judith Snider held at paragraph 19 that

> […] the IAD's reasons for refusing the first appeal involved findings which were not addressed by the Applicant's new evidence. Accordingly, it was, at the very least, open to the IAD in the Second IAD Appeal to conclude that there was no decisive fresh evidence demonstrably capable of altering the outcome of the earlier finding. I do not find that the decision by the IAD in the Second IAD Appeal not to find that there were circumstances which warranted the hearing of the case on the merits is patently unreasonable.

[50] The IAD's finding, which the Court upheld in *Anttal*, is similar to the finding the Applicant challenges in this case. The result should be the same.

[51] The IAD based its decision on an analysis of the evidence as a whole:

> Significantly, all of this evidence does not speak to the first Panel's concerns on the intent of the parties to the marriage, including the appellant's lack of knowledge and disinterest in [Dhindsa's] family and her lack of knowledge about his friends.

[52] The IAD was not bound to refer to or explain why it did not accept every piece of evidence the Applicant submitted. The IAD considered all the evidence, but this was not enough to convince it that the Couple's marriage was genuine. The Applicant simply disagrees with the way the IAD weighed the evidence before it, which is not subject to judicial review.

Other Circumstances Considered

[53] In addition to considering whether the Applicant's evidence was new, the IAD also considered the Applicant's assertion that the couple could only live together in Canada. The IAD considered this aspect of her submissions, but concluded that it was not in the interests of justice for it to hear the Second Appeal.

The Applicant's Reply

[54] The Applicant says her argument does not deal with how the IAD weighed the evidence before it. Rather, she says the IAD did not consider the evidence as whole even though it addressed the concerns the IAD raised in the First Appeal. She says Dhindsa's move to the USA showed their marriage was genuine, as did the phone bills she submitted. These bills dated from after the First

Appeal, so they demonstrated the couple's continuing commitment to one another. Further, the photos she submitted of them together with Dhindsa's family show the Applicant knew his family, which was one of the IAD's concerns in the First Appeal. On the whole, the evidence the Applicant submitted addressed the IAD's concerns on the First Appeal, so it should have exercised its discretion to hear the Second Appeal.

Insufficient Reasons

[55] The Applicant also says the IAD did not adequately treat all the evidence she submitted in its reasons. It was not enough for the IAD to say that it had considered all the evidence. It did not mention the fact that she had lived with Dhindsa for a month in 2011. This was evidence which contradicted the IAD's findings so, following *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, the IAD was bound to address it. *Dhaliwal v Canada (Minister of Citizenship and Immigration)* 2001 FCT 1425 teaches that commitment over time is capable of establishing the genuineness of a marriage.

[56] Further, the IAD also did not show in its reasons why the totality of the evidence the Applicant submitted on the Second Appeal did not address the issues raised in the First Appeal. It was not enough for the IAD to simply say that the evidence did not address these concerns. The Applicant says the Respondent has admitted that the IAD treated several pieces of evidence individually. The IAD actually considered each piece of evidence in isolation, which led it to an unreasonable conclusion.

Applicant Unrepresented

[57] Relying on *Kamtasingh v Canada (Minister of Citizenship and Immigration)* 2010 FC 45, the Applicant also says that the IAD must ensure that unrepresented parties receive a fair hearing. Dhindsa's testimony could have served to clarify the issues the IAD was concerned about at the First Appeal.

Jurisprudence

[58] Although the Respondent says the IAD was not bound by its previous decisions which the Applicant has cited, the IAD failed to consider how these cases established the relevance of the evidence she submitted. The cases she cited establish that evidence of an ongoing relationship can demonstrate the marriage was genuine when it was entered into, which the IAD did not appreciate in this case.

[59] *Anttal*, which the Respondent has said should govern the outcome of this case, is distinguishable on its facts. Although Justice Snider upheld the IAD in finding that the evidence presented in *Anttal* did not address the concerns the IAD raised in the first appeal, the Applicant says her evidence in this case addressed the IAD's concerns in the First Appeal. Hence, the IAD should have exercised its discretion to hear the Second Appeal.

Potential Injustice

[60] Although the IAD said it would analyse the Applicant's case in terms of the potential injustice which would result from not considering any new evidence she adduced, the Applicant says the IAD only evaluated some of the evidence she submitted on the Second Appeal. The IAD

did not analyse whether injustice would result if it did not hear the Second Appeal. The IAD's failure to consider how the Couple would be separated if it did not hear the Second Appeal renders its Decision unreasonable.

ANALYSIS

[61] In the Decision, the IAD concluded that the preconditions for the application of *issue estoppel* as outlined in *Angle*, above, were met:

> The Panel is satisfied that, on the basis of the information before it, the preconditions to the operation of *issue estoppel* exist in the instant matter. First, the previous IAD decision was final. There was no application for judicial review of the previous decision. Second, the parties to the decision are the same, namely the appellant (and the applicant) and the Minister of Citizenship and Immigration. Third, the issues are the same, that is, the genuineness of the marriage.

[62] The IAD then went on to decide whether, notwithstanding that the preconditions for *issue estoppel* were met, it should exercise its discretion in accordance with the governing jurisprudence and hear the appeal:

> The Panel will focus on whether or not there is a potential for injustice should the IAD not hear the appeal of the second refusal to grant the applicant a permanent resident visa. In particular, whether or not there is "new" evidence which meets the test for such evidences which would establish an exception to the application of *res judicata* to this matter.

[63] Essentially, the Applicant's case before the IAD for an exception to *res judicata* and an exercise of its discretion in her favour was that there was fresh evidence to support a finding that the marriage was genuine, and that this evidence could not have been adduced at the earlier proceeding by the exercise of reasonable diligence.

[64] I find that the issue of whether the preconditions for *res judicata* were satisfied in this case was decided correctly by the IAD.

[65] The preconditions for *res judicata*, as set out by the Supreme Court of Canada in *Angle*, above, are as follows:

a. The same question was decided in earlier proceedings;

b. The judicial decision which is said to create the estoppel was final; and

c. The parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.

[66] In the present case, the IAD determined that these preconditions were all met. The question to be determined, the genuineness of the Applicant's marriage, and the parties to the decision were the same as those in the previous IAD decision. The IAD is a court of competent jurisdiction with the authority to dispose of sponsorship appeals. Therefore, the previous decision was final, and the IAD was correct in finding that the preconditions for *res judicata* were met.

[67] The case law has established that, where the preconditions are met, issue estoppel must apply unless special circumstances exist which would warrant hearing the case on its merits. The Supreme Court of Canada has determined that an evaluation of the special circumstances requires the decision-maker to ask whether, taking into account all of the circumstances, the application of issue estoppel would result in an injustice. See *Danyluk*, above, at paragraphs 64 to 67.

[68] The essence of this application before me is the Applicant's contention that the IAD's analysis ended with the determination that the three prerequisite issues for the application of *res judicata* applied. The Applicant says that the IAD did not consider whether special circumstances

existed to justify allowing the appeal, nor did it consider whether or not to exercise its discretion to allow the appeal to proceed, given the injustice that would result to the Applicant, as is required by the common law on the application of *res judicata*. In failing to consider whether the exercise of discretion was warranted, the IAD committed an error of law, which the Applicant says begs the intervention of this Court.

[69] In other words, did the IAD reasonably, as a matter of discretion, determine that *issue estoppel* or *res judicata* ought to be applied in the Applicant's case?

[70] The Applicant claims that, instead of considering her new evidence in its totality, the IAD evaluated each type of evidence separately and failed entirely to take into account her most recent trip to India, which went directly to concerns about the genuineness of the marriage and, in particular, about the Applicant's lack of interest in her husband's family.

[71] In this regard, I accept the Applicant's argument that the IAD addressed the evidence in a piecemeal fashion and effectively failed to address the crucial point that evidence of a continuing commitment which was not adduced, and could not have been adduced, at the previous hearings can speak to the parties' intention at the time of the marriage.

[72] The IAD also found that the Applicant's evidence did not address the first panel's concerns regarding the intent of the parties to the marriage. In *Dhaliwal*, above, at paragraphs 7 and 8, Justice Douglas Campbell found that subsequent proof of commitment can be considered proof of commitment at the time of marriage:

> The Federal Court of Appeal held in Kaloti that an "abusive attempt to relitigate" can be an abuse of process. Implicit in Kaloti, and accepted in Kular, is the point that, in matters such as this, new

> applications cannot be made without new evidence pertaining to a spouse's intent at the time of marriage. The Applicant argues that the evidence of continuing commitment is new in that its current nature was not present in the previous hearing, and that it speaks to the parties' intention at the time of marriage. I agree with this submission.
>
> It is not contested that the IAD typically uses evidence of subsequent conduct (see: *Ugwu v. Canada (Minister of Citizenship and Immigration),* [2001] F.C.J. No. 1241 (QL) (F.C.T.D.) and *Meelu v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 25 (QL) (F.C.T.D.). In addition, s.5.9.1 of the Immigration Overseas Processing Manual lists several factors that visa officers should consider when deciding if a marriage is a marriage of convenience, including whether spouses have lived together. This guideline recognizes that evidence of commitment over time is capable of establishing bona fides at the time of marriage. The weight to be afforded to such evidence is a decision to be made after hearing the evidence. [emphasis added]

[73] I think the Applicant is also correct to say that continued contact between the parties can constitute fresh evidence, and the IAD has found it sufficient in the past to refuse the application of *res judicata*. In *Singh*, above, at paragraphs 32 to 34, the IAD found the length of the marriage between the parties indicated their marriage was genuine. The IAD had this to say on point:

> The panel does not feel bound to consider only the new evidence. The panel did not hear the previous matter. It cannot look behind the reasoning of the panel at that time. The panel has conducted a hearing *de novo* and considered all the evidence, both new and old, and the submissions of the parties and made a new decision. The panel makes no apologies for its decision nor does it attempt to distinguish its reasoning from that of the previous panel which speaks for itself on the evidence that the panel considered in the same way this decision speaks for itself on the evidence that this panel considered.
>
> The appellant and applicant have been married since April 2002. Their marriage has endured over five years despite two refusal and two appeals. All the indicia typically considered by the IAD in assessing the genuineness of a marriage are present and to a greater and lesser degree the *indicia* are positive. The evidence speaks to a relationship entered into on the basis of a traditional arranged

> marriage. The respective families were involved in the arrangement which, while compact in time, does not suggest an attempt to hide the marriage. The evidence considered today was found credible and it answered the concerns raised by the visa officer.
>
> When considered in its totality the evidence does not support a conclusion that the marriage was entered into in bad faith. [emphasis added]

[74] As the Applicant points out, her marriage to her husband has endured even longer than the five-year marriage in *Singh*. The Applicant has been married to her husband since 2004, throughout both sponsorship refusals and both IAD appeals. Unlike IAD Member Patel, the IAD in *Singh* considered the entirety of the evidence rather than conducting a piecemeal analysis of each category of evidence.

[75] Also of relevance to this case is that in *Podai*, above, the IAD considered new evidence of visits to India, the couple spending time together, photos, and the documentation to show their communication through the Internet and mail and concluded that this new evidence was sufficient to refuse the application of *res judicata*. Similarly, in *Patel*, above, the IAD considered evidence of trips to India, time spent with the spouse's family in India, photos, and proof of continuous contact when deciding that *res judicata* should not apply.

[76] I agree with the Respondent that each case has to be decided on its facts and that previous decisions of the IAD do not constitute binding precedents. However, they are indicative of the kind of evidence that can be used to overcome *res judicata* and of what is likely to be persuasive. In the present case, the Applicant presented substantial evidence to show her commitment to her husband in the years following her first IAD appeal in 2007. Her husband had moved temporarily to the USA for work from 2007 until 2010. Since they were closer to each other, the Applicant was able to

visit her husband more often, and saw him several times each year. Proof of the trips to the USA, a joint bank account, money transfers, telephone bills, photos, and gifts bought for each other were submitted to the IAD in counsel's submissions on 14 February 2011. In addition, the Applicant's longer trip to India in 2011 was also put forward as proof of her subsequent commitment to her husband, and evidence of the trip was faxed to the IAD on the 5 July 2011.

[77] The Decision shows that the IAD rejected the Applicant's proof of her trips to see her husband, her photographs, and phone records, because the same type of evidence had been adduced at the first IAD appeal. However, what seems to have been left out of account here is the point made in *Brij*, above, that continuous communication, and the length of the relationship between the parties could have changed the result of the first appeal. As the Applicant points out, some of the evidence submitted in *Brij*, was the same type that was submitted in the first appeal, but the IAD still accepted the new evidence because it went to the genuineness of the marriage.

[78] I agree with the Applicant that there is considerable jurisprudence to support the notion that proof of subsequent commitment can represent proof a marriage was genuine when it was entered into. The Applicant and Dhindsa adduced evidence to show that they have strengthened their marriage over the past seven years, and that they continue to be committed to their relationship. They provided substantial documentation to the IAD to show their commitment towards one another. There is also jurisprudence that new evidence can be relevant, even if the same type of evidence was submitted at the first appeal.

[79] If a relationship is genuine and continues over time, it stands to reason that more photographs, cards, letters, and telephone bills will become available. Although evidence of the same kind may have been introduced before, it speaks to an aspect of the marriage which was not

previously present: the commitment over time. Also, in this case, the IAD appears to have completely disregarded the evidence of the Applicant's most recent trip to India. I accept the Applicant's position that the IAD unreasonably erred in its assessment of the facts and ignored the existence of fresh and decisive evidence.

[80] The Respondent takes the position that the IAD had the discretion to determine whether, in the circumstances of this case, the evidence the Applicant provided constituted new evidence which would allow the exception to the application of *res judicata*. The Respondent says it was reasonable for the IAD to determine that the evidence put forward as a result of the length of time that had passed in the alleged relationship did not amount to decisive new evidence of the Couple having lived together, of their intention to reside together permanently, or of a deeper relationship.

[81] I agree that the IAD has this discretion. However, I think the Applicant is right to say that the IAD failed to consider the evidence as a whole, even though it addressed the concerns expressed at the first IAD appeal. Counsel for the Applicant submitted evidence that addressed the major concerns at the first appeal, namely the Applicant's knowledge of her husband's family, and the Couple's intent at the time of marriage. As the Applicant points out, the evidence she submitted pertained to the following important issues:

Cohabitation in the USA and India

Dhindsa moved to be closer to the Applicant

[82] The Applicant's husband made a significant change in his life when he obtained a visa to work in the USA from 2007 to 2010. His primary purpose for selecting the USA as his place of employment was to be closer to his wife. The Applicant submitted new evidence of Dhindsa's move

to the USA, including his American visa, with the second sponsorship. She also provided significant documentary evidence including boarding passes, photos, bus tickets, hotel receipts, purchase receipts and itineraries as proof of her trips to the USA, as well as proof of the Couple's visit to one another during that period. The Applicant's husband also bonded with the Applicant's daughter when the Applicant flew to the USA to visit him in June 2007.

Applicant visited India in 2011

[83] The Applicant spent time with Dhindsa and his family in her most recent trip to India from April 22, 2011 to May 15, 2011. This trip addressed concerns from the first appeal about the Applicant's knowledge of her husband's family.

Ongoing Communication between the Couple

[84] All telephone bills submitted by Applicant's counsel dated from after the first refusal and demonstrated the constant communication between the Applicant and her husband.

Applicant's Knowledge of Dhindsa's Family

[85] The photos the Applicant submitted show her and Dhindsa enjoying each other's company on their various trips to see one another. They also show the Applicant spending time with Dhindsa's family in India. These photographs directly address the first IAD Panel's concerns about the Applicant's knowledge of her husband's family and their intent at the time of marriage.

Ongoing Financial Support

Joint Account and Money Transfers

[86] The Applicant submitted proof of her and Dhindsa's joint bank account as well as money transfers that show that she received financial support from him after the first appeal.

Receipts from purchases

[87] Several receipts from items purchased together while the Applicant and her husband visited each other in the USA demonstrate the time they spent together and further corroborate evidence of their visits from 2007-2010.

Conclusion

[88] Considered collectively, I agree with the Applicant the evidence she submitted directly addressed the IAD's initial concerns about the Couple's intentions at the time of their marriage, and the Applicant's knowledge of her husband's family. They have cohabited numerous times since the first IAD appeal, maintained ongoing communication, and have shown some financial dependence on one another.

[89] All in all, I think the Applicant has made her case for reviewable error on this central issue.

[90] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed, the decision is quashed and the matter is referred back to a differently constituted IAD for reconsideration.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5709-11
STYLE OF CAUSE:	**SARDA SAMI**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 28, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	May 4, 2012

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