Federal Court  Cour fédérale

Date: 20141112

Docket: IMM-3244-13

Citation: 2014 FC 1061

Ottawa, Ontario, November 12, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

SARANJIT KAUR SANDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Saranjit Kaur Sandhu (the Applicant) of a decision made by the Immigration Appeal Division (IAD) dismissing the Applicant's appeal of the refusal of the sponsorship application of her spouse Kulwinder Singh Sangha. The IAD found that the marriage was not genuine and was entered into primarily for the purpose of acquiring status under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*).

[2] For the reasons that follow, I have found that this application for judicial review ought to be allowed.

I. Facts

[3] The Applicant is a Canadian citizen born in India. She was sponsored to Canada as a permanent resident by her previous husband in November 2005. Seven months later, in May 2006, she was separated from that husband and she divorced him in September 2007.

[4] The Applicant then married Kulwinder Singh Sangha on January 19, 2008. Their marriage was arranged as per the Indian culture, through a mediator. The Applicant alleges that the different customary ceremonies they had were attended by a large number of people, approximately 400 to 600 participants.

[5] The Applicant allegedly returned to Canada on March 10, 2008 after spending three months in India. On June 23, 2008 she applied to sponsor her husband. Her husband was interviewed by the High Commission in New Delhi on November 20, 2008. The visa officer was not convinced that their marriage was genuine. The visa officer determined that her husband's intention was only to gain entry into Canada. The Applicant appealed that decision to the IAD.

[6] The Applicant visited her husband in India again from January 4, 2009 to March 19, 2009 and then from January 9, 2010 to March 31, 2010. She became pregnant during this last trip.

[7] The Applicant appeared before the IAD on September 17 and December 8, 2010. The IAD rejected the appeal, but that decision was quashed by this Court on judicial review: *Sandhu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 120 [*Sandhu I*].

[8] On November 1, 2010, their daughter was born. The Applicant visited her husband in India from March to May 2011 and returned to Canada after leaving her daughter with her husband. The Applicant visited again from January to April 2012.

[9] Following this Court's decision, the Applicant re-appeared before the IAD on July 12, 2012, September 26, 2012 and January 31, 2013. In a decision dated February 14, 2013, the IAD once again rejected the appeal of the visa officer's decision in the sponsorship application.

II. Decision under review

[10] The IAD found that the Applicant did not meet the burden of proof in respect of subsection 4(1) of the *Regulations* that the marriage is genuine and is not entered into primarily for immigration purposes.

[11] The IAD noted that prior to the marriage being settled, it would have been expected that an extensive investigation into the background of the Applicant and her husband be undertaken by both families, such as for instance matters related to "monthly earnings, family history, past relationships, personal habits, lifestyle, whether they drink and smoke, prior medical problems particularly hereditary ones, temperament towards others, and propensity to tell the truth"

(Decision, p. 4). This was not done in the case at bar, and as such the IAD concluded that the marriage could not be genuine.

[12] The IAD also stated that the Applicant being a divorced woman, it would have been expected that the husband would ask more questions about the reasons for her divorce. However, he was content to know from the wedding mediator that she was divorced because her former husband drank, used drugs and was abusive to her. He alleged that he trusted the wedding mediator and as such did not ask any questions. While acknowledging the Applicant's contention in regard to how divorced women are now viewed in India relative to the older times, the IAD found it nonetheless surprising that the husband and his family would be satisfied that the Applicant was blameless for her divorce.

[13] The IAD noted as well that it is not clear whether or not the Applicant was working in Canada after her trip to India in 2010. The sponsorship application indicated that she was continuously employed from January 4, 2006 to March 28, 2008. The IAD indicated that the Applicant said that she worked again for the same employer from August 2011 to January 31, 2012. However, there is no proof to substantiate her return to employment during that period and no income tax return for 2011 was provided in the record. The Applicant's husband was not aware of how many months she worked in 2011 and what her income was.

[14] The IAD took issue with the reasons provided by the Applicant in regard to her leaving her daughter with her husband in India and returning to Canada. While initially both the Applicant and her husband claimed that she returned to Canada "because the case was rejected

and she had to take care of that", they later gave different reasons. The Applicant said that she returned early because she was under the impression that the hearing would take place any time soon and she had not asked her counsel if this indeed was the case. She also stated that because her cousin was coming to Canada on a student visa, she felt she needed to be there for her. Further, she indicated that she had rent to pay and had not thought about doing an electronic transfer of money to her cousin to pay the rent. As for her husband, he stated that the Applicant left because "it was too much hot over in India and there is the spread of malaria over there". The IAD found that genuine maternal instinct and the existence of a genuine marital relationship would have dictated that the Applicant remained with her child and her husband as long as possible, instead of rushing to come back to Canada where she was not in fact needed to support her case. The IAD further noted that if the circumstances were so unbearable for her, as claimed by her husband, she would not have left her child to suffer them. The IAD concluded that "these reasons, presented by the applicant [the husband] are so specious that they are strong indication the appellant and the applicant likely had a child in order to bolster their chances of success on appeal and the existence of their child does not reflect the existence of a genuine marriage" (Decision, p. 14).

[15] The IAD was not convinced the Applicant had to leave her daughter with her husband and return to Canada while she still had about 3 or 4 months of her maternity leave remaining, because she was needed in Canada to pursue her application further; no affidavit was provided by counsel for the Applicant to that effect. The IAD pointed out that the Applicant was able to swear an affidavit from India and as such could have provided whatever documentation and papers were required from there.

[16] The IAD took issue as well with the fact that the Applicant's husband did not know that her ex-husband's sister was married to someone from his village. The Applicant's husband claimed that he had told the Applicant to forget about the past and not to tell him about whatever had happened before they met. The IAD was not convinced with that because "in a genuine spousal relationship one would not deliberately insist on not knowing about a harmless matter regarding the appellant's [the Applicant's] family history that also has a real connection with the applicant [the husband]" (Decision, p. 19). The IAD believed that the husband made up this testimony in order to distance himself from the Applicant's former husband, who appeared to the officer to have landed in Canada after a marriage of convenience.

[17] Another factual contradiction noted by the IAD was that the Applicant stated that she moved out of the residence she shared with her former husband on March 20, 2009 and into a family friend's house (whom she called "uncle") where she rented the basement. The visa officer noted that when he telephoned the Applicant's residence, a male voice answered the phone and proceeded to call out to the Applicant in a loud voice. However the Applicant came on the line immediately. The visa officer noted that without being asked, the Applicant launched into a long explanation of how that was her uncle/family friend and she was far away in another part of the house and had to come to the phone. The visa officer noted that not only was the explanation unnecessary, it was also incongruent with the speed at which the Applicant came on the line. In the Applicant's testimony before the IAD, she stated that the visa officer called the cell phone, however the uncle/family friend stated in a statutory declaration that it was a land line that the visa officer had called. As there is a contradiction between the visa officer's understanding of what occurred and what was alleged by the Applicant and her "uncle", the IAD was of the view

that the Applicant's uncle should have testified and made himself available for cross-examination on his statutory declaration.

[18] Relying on all the evidence on file, including evidence provided post-refusal of the sponsorship application such as a record of phone calls between the Applicant and her husband made in February 2012, the IAD found on a balance of probabilities that the Applicant's marriage was not genuine and that the primary reason was for the purpose of acquiring status in Canada.

III. Issue

[19] The only issue for consideration in the case at bar is whether or not the Board's decision was unreasonable.

IV. Analysis

[20] Both parties agree, and I concur, that a finding by the Board that the Applicant's relationship is not genuine, and was entered into primarily for the purpose of gaining status under the *Act* should be reviewed on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 47, 53, 55 and 62; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 52-62.

[21] In *Achahue v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1210, Justice Pinard stated the following at paras 18-19:

> [18] With respect to the relevant issue, namely, whether the marriage is genuine or whether it was entered into for the purpose of acquiring a status under the Act, it is well established in the case law that reasonableness is the applicable standard (see *Chen v. The Minister of Citizenship and Immigration*, 2011 FC 1268, *Singh v. The Minister of Citizenship and Immigration*, 2006 FC 565 [*Singh*] and *Mohamed*, above).
>
> [19] This is a question of fact that boils down to the credibility of the spouses (*Sidhu v. The Minister of Citizenship and Immigration*, 2012 FC 515 [*Sidhu*]). This Court must therefore show considerable deference in determining whether the findings are justified, transparent and intelligible and fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47). It is not open to this Court to reassess the evidence that was before the panel (*Zrig v. Canada (The Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 F.C. 761 at paragraph 42).

[22] As such, in reviewing an officer's decision on a standard of reasonableness, the Court should not interfere if the officer's decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence that was before the officer.

[23] The decision at issue in this case involves the application of section 4 of the *Regulations*, which states:

Bad faith	Mauvaise foi
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	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

conjugal partnership	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.
Adopted children	Enfant adoptif
(2) A foreign national shall not be considered an adopted child of a person if the adoption	(2) L'étranger n'est pas considéré comme étant l'enfant adoptif d'une personne si l'adoption, 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) did not create a genuine parent-child relationship.	b) n'a pas créé un véritable lien affectif parent-enfant entre l'adopté et l'adoptant.
Sponsorship of adopted children	Parrainage de l'enfant adopté
(3) Subsection (2) does not apply to adoptions referred to in paragraph 117(1)(g) and subsections 117(2) and (4).	(3) Le paragraphe (2) ne s'applique pas aux adoptions visées à l'alinéa 117(1)g) et aux paragraphes 117(2) et (4).

[24] The Applicant bore the onus of proving on a balance of probabilities through clear and convincing evidence that she and her current husband entered into a genuine marriage and that the marriage was not primarily entered into for the purpose of acquiring status or privilege under the *Act*.

[25] Counsel for the Applicant submitted that the Board's reliance on the failure of the parties to carry out an extensive background investigation as a basis to find that their marriage is not genuine was unreasonable, in light of the explanations given by the Applicant and her spouse at

the hearing. I agree. It is no doubt true that a background investigation and the compatibility of the parties are generally considered the hallmarks of an arranged marriage. Yet cultural practices are fluid and not fixed in time. While divorce was taboo in older times, the Applicant testified that unmarried men are now marrying divorced women, and therefore the fact that she was a divorcee was not a significant issue for her husband. Moreover, the evidence before the Board was that there was no need for an extensive background check given that the mediator knew both families very well. In those circumstances, it was unreasonable for the Board to find it "surprising" that the Applicant's husband and his family would be "so easily satisfied" that she was blameless for her divorce, thereby discounting her evidence that times are changing with respect to how divorcees are viewed in India. As in *Gill v Canada (Minister of Citizenship and Immigration)*, 2010 FC 122 [*Gill*], the Applicant provided cogent explanations for the deviation from cultural norms, and the Board erred in failing to take those explanations into consideration.

[26] The Board also focused on the Applicant's employment history and questioned why she would leave her 6-month old infant in India when she was not returning to work as she was collecting maternity benefits. As previously mentioned, the Board ultimately concluded that it did not see the Applicant's preparation for the judicial review and attendance at the hearing as in any way justifying her departure from her daughter and husband in India. Once again, such a finding is unreasonable. The fact that the Applicant wanted to come back so that she could be more involved with her application for leave and judicial review of the previous decision made by the Board could very well attest to the genuine nature of her marriage and to the fact that she was intent on succeeding so that she could reunite with her husband permanently. The panel erroneously assumed that the Applicant's only involvement in the process concerned swearing an

affidavit, which she could have done in India. The Applicant could legitimately be of the view that being able to meet with her counsel in person would further her chances of success. Moreover, the Applicant explained in her testimony that she left her daughter in India because she would be better taken care of in India with her father and his family, whereas she was alone in Canada. In those circumstances, I agree with the Applicant that it was not only unreasonable but also cruel for the Board to say that bringing her daughter to India when she was four months old and subsequently returning to Canada to attend to her application for leave and judicial review "reflects a person who lacks interest in her daughter".

[27] It may well be, as the Board implied, that the birth of a child does not definitely prove that a marriage is genuine. Each case will turn on its own facts, although there is much to be said for the presumption that "the parties to a fraudulent marriage are unlikely to risk the lifetime responsibilities associated with raising a child": *Gill*, above, at para 8.

[28] In the case at bar, there is no evidence that having a child was a ploy to enhance the Applicant's husband's chances of obtaining permanent residence in Canada. The Applicant testified that she felt depressed and had nobody to help her raise her daughter in Canada. Given her work obligations, the Applicant's explanation that it was easier for the child to be in India with her husband and her in-laws was reasonable. Moreover, there is evidence on the record that the Applicant spent a few months every year with her husband and her daughter in India.

[29] It appears from a careful reading of the decision that the Board member was prone to speculation and disregarded significant portions of the evidence. For example, the Board member

found that because the Applicant's husband knew details about her life, including her address, that he "either memorized or read out the address of the applicant with its postal code in order to try to show he is knowledgeable" about her. Not only is this mere speculation, but it also puts the Applicant in an impossible situation: as was the case in *Paulino v Canada (Minister of Citizenship and Immigration)*, 2010 FC 542, "[a] detail … that might support the genuineness of the relationship is turned around to support a negative finding because it is likely integral to a complex scheme of fabrication" (at para 58).

[30] The same is true of the Board's inference that the Applicant is still in a relationship with her ex-husband. The Board relied for that proposition on the visa officer's notes where it was stated that upon calling the Applicant at home, a man whom the Applicant calls her "uncle" answered the phone. Yet, the Board dismissed the affidavit sworn by that man stating explicitly that he has known the Applicant's father from the time he lived in India, and that the Applicant stayed at his house as a tenant until his parents came from India. The Board chose to give no weight to that affidavit because the affiant did not testify and did not make himself available for cross-examination.

[31] The Board also seemed to make much of the Applicant's work history, the relevancy of which is far from clear. At the same time, the Board said nothing of the extensive phone records over the past five years showing daily calls between the Applicant and her husband, of the greeting cards and letters sent to each other, and of a shared bank account showing financial interdependence.

[32] In a nutshell, the impugned decision suffers from the same deficiency than the previous decision overturned by my colleague Justice Zinn in *Sandhu I,* above. I could make mine the penultimate paragraph of his decision, where he stated:

> [7] There is not a shred of evidence in the record that supports the Member's view that this couple had a child to enhance their chances of obtaining permanent residency in Canada. That finding is perverse and, in my view, tainted the Member's other findings, including her findings on credibility. Furthermore, it was a very significant factor in the Member concluding that the marriage was fraudulent. The decision must be set aside.

[33] I agree with counsel for the Respondent that the findings of Justice Zinn did not preclude the Board from finding that the marriage was not *bona fide*. Nor does my decision. Conversely, I disagree that to accept the Applicant's arguments is to preclude the Board from performing its proper function as the trier of fact. It is indeed within the Board's purview to determine, as a question of fact, whether the marriage between the Applicant and her husband "was entered into primarily for the purpose of acquiring any status or privilege under the Act or is not genuine". Such a decision, however, must rest on a reasonable assessment of the evidence and cannot be the result of irrelevant factors, peripheral considerations or, even worse, prejudice and insensitivity to cultural differences.

[34] For all of the foregoing reasons, therefore, I find that this application for judicial review must be granted. Neither party proposed a question for certification, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted.

Neither party proposed a question for certification, and none will be certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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