Federal Court  Cour fédérale

Date: 20150206

Dockets: IMM-1478-14
IMM-3931-13
IMM-3932-13

Citation: 2015 FC 157

Ottawa, Ontario, February 6, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

HARPREET KAUR DHALIWAL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicant's appeal from an exclusion order was dismissed by the Immigration Appeal Division [IAD] of the Immigration and Refugee Protection Board [Board]. Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], the Applicant now applies for judicial review of that decision (Court File No. IMM-1478-14) and of

two interlocutory rulings by the IAD that rejected her claims of issue estoppel (Court File No. IMM-3931-13) and inadequate interpretation (Court File No. IMM-3932-13). This Court ordered that these three applications for judicial review be heard together.

[2] The Applicant seeks slightly different relief in each application. In the issue estoppel application, she asks the Court to set aside the decision and allow the application outright, or alternatively, return it to the IAD and direct that issue estoppel applies. In the inadequate interpretation application, the Applicant requests that her earlier testimony be struck from the record and that her evidence be heard again by another panel. In the merits application, the Applicant seeks an order setting aside the decision and returning the matter to a different member of the IAD with a direction that the case be re-determined in accordance with the law.

[3] The Applicant is a woman from India who, on January 14, 2001, married a Canadian citizen named Harlakhbir Dhaliwal. Shortly thereafter, Mr. Dhaliwal sponsored the Applicant's application for permanent residence in Canada. The sponsorship application was initially refused because a visa officer was not satisfied that the Dhaliwals' marriage was genuine, but Mr. Dhaliwal appealed that decision to the IAD on May 2, 2002. With the consent of the Minister of Citizenship and Immigration [MCI], the IAD ordered on November 4, 2002, that the refusal of the sponsorship application was invalid [the 2002 Decision] and the Applicant became a permanent resident of Canada on July 24, 2003.

[4] About a month later, Mr. Dhaliwal sought a divorce from the Applicant in the British Columbia Supreme Court [BCSC], claiming that he and the Applicant had been separated since

February 28, 2001. The Applicant did not defend the divorce action and their marriage was dissolved on November 29, 2003. The Applicant claims that she did not learn about the divorce until October, 2006. The Applicant later sought (after the exclusion order referred to below) to have this divorce set aside, but her application to the BCSC was dismissed by that court in reasons rendered on July 31, 2013 (see: *Dhaliwal v Dhaliwal*, 2013 BCSC 1376, 36 RFL (7th) 397 [*Dhaliwal* (BCSC)]).

[5] On February 25, 2007, the Applicant married Navdeep Singh, a man who came to Canada as a temporary foreign worker employed by a first cousin of the Applicant's father. The Applicant and Mr. Singh have had two children together, both of whom were born in Canada.

[6] Mr. Singh lost his status in Canada, but the Applicant applied to sponsor him on September 4, 2007, declaring that January 22, 2004, was the applicable date of her divorce and separation from her first husband. The discrepancies between that date (January 22, 2004) and the date of separation stated in the divorce proceedings in the BCSC (February 28, 2001) triggered a review of the Applicant's file by Citizenship and Immigration Canada [CIC]. On July 8, 2009, an immigration officer at CIC Mississauga decided that the Applicant's first marriage was "only entered into for Harpreet Kaur Dhaliwal to gain entry into Canada as a permanent resident." Pursuant to subsection 44(1) of the *Act*, the officer therefore recommended that Ms. Dhaliwal be directed to an admissibility hearing for misrepresentation contrary to paragraph 40(1)(a) of the *Act*.

[7] Pursuant to subsection 44(2) of the *Act*, the Minister of Public Safety and Emergency Preparedness [MPSEP] then referred the matter to the Immigration Division of the Board [IDB], which ultimately agreed and issued an exclusion order on December 21, 2010. The IDB found that the Applicant's "marriage to Harlakhbir Singh Dhaliwal was not genuine and was entered into for the purpose of securing permanent residence in Canada," which meant that she violated paragraph 40(1)(a) of the *Act* since misrepresenting "the bona fides of the marriage induced an error in the administration of the *Act*."

[8] The Applicant appealed the IDB's decision to the IAD. After she gave her evidence in Punjabi at a hearing on July 30, 2012, the Applicant obtained new counsel. Among other things, her new counsel made two interlocutory applications: one contended that the 2002 Decision estopped the Minister from now impugning the genuineness of the Applicant's first marriage; and the other argued that the interpretation of the Applicant's evidence at the July hearing was faulty.

II. The Decisions under Review

A. *The Interlocutory Decisions*

[9] The IAD disposed of both interlocutory applications in reasons dated May 17, 2013 [2013 Decision].

[10] The IAD rejected the Applicant's argument that issue estoppel applied to preclude any question about the genuineness of her marriage to Mr. Dhaliwal. In its view, the 2002 Decision

was about whether the marriage was genuine, while the present proceeding was about whether the Applicant misrepresented that it was genuine. Although these were related questions, the IAD was not satisfied that it was the same issue since different considerations are engaged (citing *Ramkissoon v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 971 (QL) at paragraph 8, 6 Imm LR (3d) 223 (TD) [*Ramkissoon*]). Moreover, the 2002 proceeding was between the Applicant's sponsor and the MCI, whereas the 2013 proceeding was between the Applicant and the MPSEP. The IAD thus found that the parties were not the same and, consequently, the pre-conditions to issue estoppel were not met. The IAD further observed that it would undermine Parliament's intent relating to section 40 of the *Act* if a previous IAD finding that a marriage was likely genuine prevented later panels of the IAD from deciding whether there had been a material misrepresentation with respect to that issue.

[11] With respect to the interpretation issue, the Applicant had supplied a transcript of the proceedings prepared by Ms. Johar that included translations of everything said in Punjabi by both the Applicant and the interpreter [Johar Transcript]. The Applicant identified a number of allegedly problematic errors, but the IAD was "satisfied that they did not have a significant impact on the proceedings, nor did they cause any significant prejudice to the appellant." The IAD also did not consider the interpreter's failure to fully interpret some exchanges between the IAD member and the Applicant's then-counsel to be problematic. Ultimately, the IAD member found that oral interpretation will always be imperfect, but it is adequate so long as there is linguistic understanding, and he was satisfied that such understanding was present. The IAD thus denied the Applicant's request to re-hear her evidence.

B. *The Merits Decision*

[12] In reasons dated February 6, 2014, the IAD refused the Applicant's appeal.

[13] The IAD disbelieved the Applicant, ultimately finding that she did not intend to live with her sponsor as husband and wife when she came to Canada. Rather, the IAD believed the Applicant's former husband and sponsor when he testified that they had never consummated the marriage and that the Applicant told him that she did not want to be his wife as soon as she arrived in Canada. Since he was legally and culturally responsible for her, however, he put the Applicant up with his parents in Kelowna, British Columbia, for a while, but he moved into his business address for the duration of her stay there.

[14] The IAD gave a number of reasons for doubting the Applicant's story that she thought she was in a valid marriage until October, 2006. First, she said that she could read English well in her application for permanent residence, and she was served with the divorce papers shortly after arriving in Canada. A few months later, on January 22, 2004, she departed for a year-long trip to India without her husband, and when she returned to Canada in January, 2005, she went to live with her father's first cousin in Brampton, Ontario. Although she claimed that her sponsor kept in touch with her up until this time and promised to come pick her up, the IAD did not believe that Mr. Dhaliwal would pretend to be married to someone whom he had validly divorced a year earlier. Moreover, when she purportedly lost contact with Mr. Dhaliwal soon after her return to Canada, the Applicant did almost nothing to find him. The Applicant's claim that she was surprised to discover she was "fraudulently" divorced in October, 2006, was belied

by the fact that she did nothing to challenge the divorce order until 2013, after she was ordered removed from Canada. Even in her application to sponsor Mr. Singh, the Applicant gave dates that were inconsistent with this purported belief that she was divorced in 2006 by stating that the applicable date of divorce or separation was January 22, 2004. Consequently, the IAD was convinced that the Applicant never intended to live with her sponsor in Canada, and her misrepresentation to the contrary legally justified the exclusion order.

[15] The IAD then considered whether it should grant special humanitarian and compassionate relief under paragraph 67(1)(c) of the *Act*, stating that there needs to be compelling reasons to do so or else paragraph 40(1)(a) would become meaningless. The IAD found there were no such reasons here. Rather, the Applicant did not regret her misrepresentations and instead chose to lie even more. Although she was established here, the Applicant had spent her formative years in India and should have no trouble re-integrating. Furthermore, the IAD considered it likely that the Applicant's new husband and children would go with her, and the IAD did not consider the support from her father's first cousin and her community in Canada to be compelling in these circumstances. The Applicant would have to quit her job and sell her house, but the only reason she had these things to begin with was because she lied to get into the country. In any event, the IAD determined that this was not an important factor since she could likely get another job in India and had enough equity in the house to help her settle there.

[16] The IAD also considered the best interests of the children. The Applicant's children were established here, but the IAD noted that they were still young and would likely adapt to life in

India. The IAD was also unwilling to take judicial notice that the Applicant's daughter would face discrimination and violence as a woman. Although the IAD accepted that it would be in the children's best interests to remain in Canada, this was not enough to overcome the many negative considerations which weighed against the Applicant.

III. Issues

[17] The Applicant submits that her three applications raise numerous issues, but the primary issues can be reduced to the following:

1. What is the standard of review for each issue?
2. Did the IAD unlawfully refuse to apply issue estoppel?
3. Did the IAD unlawfully refuse the Applicant's request for a re-hearing?
4. Did the IAD unlawfully affirm the exclusion order?
5. Did the IAD unlawfully refuse to grant humanitarian and compassionate relief?

IV. Analysis

A. *What is the standard of review?*

[18] Where previous cases have satisfactorily resolved the standard of review for particular issues, it is unnecessary to repeat that analysis (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 57, 62, [2008] 1 SCR 190 [*Dunsmuir*]).

(1) Issue Estoppel

[19] The Applicant contends that whether the preconditions to issue estoppel are met is a question of law reviewable on the correctness standard (*Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 at paragraph 12, 302 FTR 232 [*Rahman*]). The Respondent agrees that the Court must ensure that the IAD selects the correct test for issue estoppel, but states that the reasonableness standard should apply to the IAD's application of the test.

[20] In *Rahman* at paragraphs 12-13, Noël J. said the following about the standard of review for the application of issue estoppel by the IAD:

> [12] Whether the preconditions to the operation of issue estoppel were met is a question of law. The issue affects the individual Applicant's procedural rights and the IAD has no greater expertise in applying the doctrine relative to the Court's expertise in this area of the law. These factors point toward a strict standard of review. Therefore, the appropriate standard of review of the IAD's *res judicata* analysis at the first stage is correctness […].
>
> [13] Conversely, the second-step involves an exercise of discretion and a weighing of relevant factors to determine whether special circumstances warrant the non-application of issue estoppel in this case. Discretionary factors attract a more deferential review […]. Therefore, patent unreasonableness is the appropriate standard of review for the second-step. [Citations omitted]

[21] *Rahman* has occasionally been followed by this Court post-*Dunsmuir*, albeit without reference to the abolished patent unreasonableness standard for the second step (see e.g. *Chéry v Canada (Citizenship and Immigration*), 2012 FC 922 at paragraph 14, 416 FTR 14).

[22] In my view, however, the standard of review for the first step of the issue estoppel analysis has also been overtaken by recent cases from the Supreme Court. In *Canada (Director of Investigation and Research) v Southam Inc* (1996), [1997] 1 SCR 748 at paragraph 35, 144 DLR (4th) 1, the Supreme Court stated as follows: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests." Therefore, while selecting the test for issue estoppel is a question of law, whether the preconditions to the operation of issue estoppel were met is a question of mixed law and fact. For these types of questions, the reasonableness standard should be presumed in any case where the legal issues cannot be readily extracted (*Dunsmuir* at paragraph 53).

[23] Furthermore, although the doctrine of issue estoppel has procedural benefits for the winning parties to the litigation (see: *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paragraph 18, [2001] 2 SCR 460 [*Danyluk*]; and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at paragraph 29, [2013] 2 SCR 125 [*Penner*]), I am not convinced that whether each particular requirement is met can be collapsed into a single issue of procedural fairness. For instance, the IAD could find that someone whose previous sponsorship application failed had changed his name and so was actually the same party as before. That would be a purely factual determination, and I do not think the correctness standard should apply only because it was made to serve a procedural test.

[24] In the matter at hand, the pre-conditions to issue estoppel are neither obvious nor readily ascertained from the record. All of the disputed pre-conditions are, ultimately, questions of law,

but ones that would normally attract deference to the extent that they involve the interpretation of the IAD's enabling statute (*Dunsmuir* at paragraph 54). All the other factors also point to deference (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 54-58, [2009] 1 SCR 339 [*Khosa*]). Therefore, it is my view that the reasonableness standard applies when reviewing the IAD's application of both steps of the issue estoppel analysis.

(2) Interpretation Issues

[25] As to the inadequate interpretation issues, the parties agreed that the standard of review for deciding whether prejudice is a requirement is correctness, but the standard for assessing the adequacy of the interpretation is reasonableness. In my view, however, the standard of review for all aspects of this issue is one of correctness. Every aspect of this issue is about procedural fairness and access to a constitutional right (*Khosa* at paragraph 43; *Dunsmuir* at paragraph 58).

[26] Indeed, although my colleague Mr. Justice Sean Harrington has queried whether the quality of interpretation should be reviewed on the reasonableness standard (see: *Sohal v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1175 at paragraphs 12-13 [*Sohal*]), even he applied a correctness standard in *Sohal* and that appears to be the trend for decisions of the Board (see: e.g. *Kamara v Canada (Citizenship and Immigration)*, 2011 FC 243 at paragraph 34, 385 FTR 122 [*Kamara*]; *Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 1097 at paragraph 12; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161 at paragraph 2(a); *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at paragraph 18, 303 CRR (2d) 228). Accordingly, the IAD's decision with respect to the interpretation issues raised by the Applicant should be reviewed on a standard of correctness.

(3) The Merits

[27] The Applicant argues that correctness is the standard of review with respect to whether the existence of corroborating documentary evidence can rescue the Applicant's lack of credibility, the selection of criteria to discern the genuineness of a marriage, and the IAD's interpretation of section 40 of the *Act* (citing *Ouk v Canada (Citizenship and Immigration)*, 2007 FC 891 at paragraph 10, 316 FTR 15 [*Ouk*]; and *Khan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 at paragraph 22). For the remaining issues about the H&C determination and the misrepresentation, the Applicant acknowledges that reasonableness is the standard (citing *Dunsmuir* at paragraph 53).

[28] The Respondent submits that the appropriate standard of review for the IAD's application of section 40 of the *Act* is one of reasonableness (citing *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 176 at paragraph 16, 23 Imm LR (4th) 249; and *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 419 at paragraph 12). In addition, the Respondent argues that the IAD's factual findings and determinations, such as whether a marriage is genuine, deserve deference from the Court (citing *Khera v Canada (Citizenship and Immigration)*, 2007 FC 632 at paragraph 7 [*Khera*]; *Ekici v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1133 at paragraphs 22-23 [*Ekici*]; and *Bin Chen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1227 at paragraph 8, 75 Imm LR (3d) 282).

[29] I agree with the Respondent that the appropriate standard for review of the IAD's decision on the merits of this matter is one of reasonableness. Although the Applicant argues that

the IAD misunderstood the law on various points, her arguments rely not on any misstatements of the law but on inferences from the reasons and assumptions about the evidence. For instance, the Applicant claims that the IAD failed to understand that documentary evidence can prove a claim even when an applicant otherwise seems to be uncredible, but that rests on assertions that the documentary evidence in this case was credible and indisputably proved that the marriage was genuine. Weighing that evidence and assessing its credibility, however, are obviously factual questions on which the IAD deserves deference (see e.g. *Aguebor v Canada (Minister of Citizenship and Immigration)* (1993), 160 NR 315 at paragraph 4; *Singh v Canada (Minister of Employment and Immigration)* (1994), 169 NR 107 at paragraph 3; and *Ekici* at paragraphs 22-23). At most, this issue and the others raised by the Applicant are questions of mixed fact and law from which the legal questions are not extricable, and the reasonableness standard should apply (*Dunsmuir* at paragraph 53; *Khosa* at paragraphs 52-58).

[30] This means that the IAD's decision on the merits should not be disturbed by this Court if it is justifiable, transparent, understandable, and falls within a range of outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47). Those criteria are met so long as "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708)

B. *Did the IAD unlawfully refuse to apply issue estoppel?*

(1) The Applicant's Arguments

[31] Although the IAD applied the right test for issue estoppel from *Angle v Canada (Minister of National Revenue)* (1974), [1975] 2 SCR 248, 47 DLR (3d) 544 [*Angle*], the Applicant argues that it was wrong for the IAD to find that the 2002 Decision and its 2013 Decision did not involve the same issue. The IAD would not have allowed the appeal in 2002 if the marriage was not genuine, and that settles the 2013 Decision too since the Applicant says she cannot have misrepresented the genuineness of the marriage if her marriage was, in fact, genuine (*Canada (Citizenship and Immigration) v Peirovdinnabi*, 2010 FCA 267 at paragraphs 4-5, 409 NR 161 [*Peirovdinnabi*]). This error, the Applicant says, is fatal to the 2013 Decision.

[32] The Applicant also contends that the IAD was wrong to find that the mutuality requirement was not satisfied. According to the Applicant, *Angle* clearly states that issue estoppel applies not just to parties, but to their privies. Although the 2002 Decision dealt with an appeal by Mr. Dhaliwal, it was the Applicant's permanent residence which had been denied and which was being appealed. According to the Applicant, she is clearly privy to that appeal as her sponsor was representing her interests.

[33] Furthermore, the Applicant states that there is no relevant difference between the MCI and the MPSEP. Whatever their different responsibilities, both the MCI and the MPSEP represent the Crown and they are in turn represented by the Department of Justice. They had a

full and fair opportunity to impugn the genuineness of the Applicant's first marriage at the time of the 2002 Decision, and the Applicant argues they should not get another chance.

(2) The Respondent's Arguments

[34] The Respondent defends the IAD's decision that the 2002 Decision and its 2013 Decision did not involve the same parties. The Applicant's sponsor was exercising his own rights in the first appeal to the IAD, and the fact that it might benefit the Applicant did not make her privy to the matter as that term is defined in *Black's Law Dictionary*, 9th ed., *sub verbo* "privy". Moreover, the MCI and the MPSEP have different responsibilities and do not have identical legal interests under the *Act*.

[35] The Respondent contends that the IAD rightly observed that the genuineness of the marriage is but one of several issues in the 2013 Decision (*Ramkissoon* at paragraph 8), including misrepresentations about the amount of time that the Applicant cohabited with her first husband. The issues in the 2013 Decision are, the Respondent submits, therefore broader than those to which the MCI consented to in the 2002 Decision.

(3) Analysis

[36] As the IAD recognized, there are two branches of *res judicata*. The first branch is cause of action estoppel, which "precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a court of competent jurisdiction" (*Angle* at 254). The second branch is issue estoppel, which applies to separate

causes of action and "extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings" (*Danyluk* at paragraph 24).

[37] In *Penner*, the Supreme Court of Canada succinctly summarized the test for issue estoppel at paragraph 29: "a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice." There is no question that issue estoppel can also apply to administrative decision-makers such as the IAD (*Danyluk* at paragraph 21; *Rahman* at paragraph 18), and it is uncontested that the 2002 Decision was a final decision.

[38] The IAD found that the 2002 Decision and the 2013 Decision did not address the same issue and did not involve the same parties. The Applicant argued that if either finding is overturned, the entire decision must fall, but I disagree. All the pre-conditions to issue estoppel must be met before issue estoppel can apply, and the IAD would have to be wrong about all of such conditions before the 2013 Decision could be disturbed.

[39] In the matter at hand, the IAD said that the two proceedings leading to the 2002 Decision and the 2013 Decision did not address the same question: the original appeal dealt with whether the Applicant's marriage to Mr. Dhaliwal was not genuine or entered into primarily for the purpose of acquiring any status or privilege under the *Act*; whereas the present proceedings were

about something quite different, i.e., whether there had been a material misrepresentation by the Applicant.

[40] However, *Ramkissoon* expressly recognizes (at paragraph 8) that the misrepresentation analysis in this context "requires an assessment of the bona fides of the marriage and whether it was entered into by the applicant with the intention of residing with [her sponsor]." That was the dispositive issue in the IBD's 2013 Decision, which found that the Applicant's "marriage to Harlakhbir Singh Dhaliwal was not genuine and was entered into for the purpose of securing permanent residence in Canada."

[41] That finding was clearly the issue in the 2002 Decision as well. The officer who initially refused the Applicant's application for permanent residence told her that it was because: "I am not satisfied that the primary reason for your marriage to your sponsor [i]s other than for the purpose of your gaining admission to Canada and that you have the intention of residing permanently with your sponsor." Although the 2002 Decision that reversed this determination did not expressly say that the marriage was genuine, that is irrelevant since issue estoppel applies to any issue necessarily determined in the earlier proceedings (*Danyluk* at paragraph 24). Had the finding of non-genuineness of the marriage still stood, the Applicant would never have received permanent resident status.

[42] Consequently, while it was open to the IAD to find that other issues were raised too, it was unreasonable for the IAD to decide that this particular issue was not the same as that in the 2002 Decision.

[43] The IAD also found that the Applicant is not the same person as her sponsor, but does not seem to have considered whether the Applicant was nonetheless privy to the 2002 Decision. Privity is an elastic concept that can only be decided on a case-by-case basis (*Danyluk* at paragraph 60). In *Carl Zeiss Siftung v Rayner & Keeler Ltd* (No 2) (1966), [1967] 1 AC 853, [1966] 2 All ER 536 (UKHL), which is the case from which the Supreme Court of Canada adopted the test for issue estoppel in *Angle* at 254, Lord Reid said (at page 910) that privity can arise in many ways, but it is "essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter."

[44] Here, it was unreasonable to find that the Applicant was not privy to the 2002 decision. It is true that the Applicant's sponsor was the one who appealed the refusal of the Applicant's sponsorship application, but that is because he was the only one allowed to appeal (*Act*, s 63(1); *Immigration Act*, RSC 1985, c I-2, s 77(3) (as it appeared on 2 May 2002)). Because of paragraph 72(2)(a) of the current *Act*, applicants are not even allowed to independently seek judicial review when their applications for permanent residence are refused; they must rely entirely on their sponsor to challenge most negative decisions (*Somodi v Canada (Citizenship and Immigration)*, 2009 FCA 288, [2010] 4 FCR 26 [*Somodi*]). The Federal Court of Appeal justified that result in *Somodi* (at paragraph 29) by observing that "on a family sponsorship application, the interests of the parties are congruent" (emphasis added). Since only the sponsor was allowed to appeal the decision and represent the Applicant's interests in obtaining permanent residence, I do not think it defensible to say that she was not privy to the 2002 Decision.

[45] The IAD also found that the MCI was not the same party as the MPSEP. The Applicant claims that they are ultimately both the Crown.

[46] In *Town Investments Ltd v Department of Environment* (1977), [1978] AC 359 at 381 (UKHL), Lord Diplock held that the "Crown" can be synonymous with "government" and embraces "both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments." However, "[f]or nearly all purposes the idea of the Crown as one and indivisible is thoroughly misleading" (Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 1, loose-leaf (updated to 2014), (Toronto, ON: Thomson Reuters, 2007), ch 10 at 2), especially in a federal state like Canada.

[47] In *Ontario v OPSEU*, 2003 SCC 64, [2003] 3 SCR 149 [*OPSEU*], the Supreme Court considered whether the same parties' requirement for issue estoppel was fulfilled by separate provincial ministries. In that case, two government employees were convicted of sexually assaulting people under their care, and were fired because of it. The unions grieved their terminations, and the arbitrators declined to consider the convictions as conclusive proof of the offences. The Supreme Court decided (at paragraph 11) that issue estoppel did not apply for the following reasons:

> [T]he Crown, acting as prosecutor in the criminal case, is not privy to the Crown acting as employer. The employer ministries played no role in the criminal proceedings nor could they have participated as parties to these proceedings. The Attorney General, under whose authority criminal prosecutions are conducted, does not represent the interest of any particular party, but represents the public interest. Despite their legal personality, and their designation for the purpose of judicial proceedings, the ministries

> in question here as employers share no relevant relationship to the Crown as prosecutor. [Emphasis added]

[48] As such, the pertinent question is thus whether the MCI and the MPSEP share a relevant relationship pertaining to the 2002 Decision. Certainly, their interests under section 4 of the *Act* are very closely aligned. In situations like this, their overall objective is the same; both are trying to ensure that people do not immigrate to Canada unless they meet the requirements to do so. The MCI tries to keep unqualified immigrants out, and the MPSEP evicts the ones who nevertheless make it in. At risk of over-simplifying the matter, they play different positions but they are on the same team. Indeed, even though the MPSEP referred this case to the Immigration Division, the subsection 44(1) report was prepared by an officer at CIC.

[49] Furthermore, subsection 4(3) of the *Act* authorizes the Governor in Council to set out specific responsibilities for each Minister by order, which it has done with the *Order Setting Out the Respective Responsibilities of the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness Under the Act*, SI/2005-120. It seems artificial to treat them as completely different entities when, by a simple executive action, they could easily take on responsibilities that the other had been doing. By the IAD's reasoning, if, for instance, the Governor in Council should ever decide to transfer responsibility for spousal sponsorship decisions to the MPSEP, every spousal sponsorship appeal in the past would suddenly cease to be a basis for issue estoppel. That would be, to say the least, a bizarre consequence.

[50] Nevertheless, when one looks at the IAD's decision on this issue as a whole, it was reasonable.

[51] The IAD probably would have exercised its discretion to hear the case against the Applicant even if it had been satisfied that the pre-conditions to issue estoppel were met. At paragraph 28 of its decision, the IAD said that it would undermine the Parliamentary intent underlying section 40 of the *Act* to "hold that a previous IAD decision that a marriage is likely genuine is binding on future panels that are required under the [*Act*] to assess whether there was a material misrepresentation under section 40."

[52] That is a reasonable conclusion. A material misrepresentation is one that "induces or could induce an error in the administration of this Act" (*Act*, s 40(1)(a)). This expressly recognizes that the misrepresentation could have already induced an error in the administration of the *Act*, and the IAD should not be precluded from exploring this possibility only because it was the IAD itself that was allegedly induced into error.

[53] Moreover, even the Applicant recognized at paragraphs 24 to 26 of her reply memorandum that significant new evidence could reasonably justify a decision not to apply issue estoppel. The IAD had evidence before it that the Applicant's sponsor divorced her just one month after her arrival in Canada, with a separation date well before when she obtained permanent residence, and the Applicant's sponsor specifically advised CIC that the Applicant only married him to get into Canada. Although the IAD never expressly considered its discretion to not apply issue estoppel, it is readily apparent that it would have decided to hear the case against the Applicant even had it been convinced that the pre-conditions were met.

[54] Consequently, while the IAD's decision on this point may not have been perfect in all respects, it was nonetheless reasonable.

C. *Did the IAD unlawfully refuse the Applicant's request for a re-hearing?*

(1) The Applicant's Arguments

[55] The Applicant argues that the IAD made essentially two errors in deciding the inadequate interpretation application. First, the Applicant says that the IAD required her to demonstrate that the errors in translation caused her significant prejudice, which was contrary to the leading cases of *R v Tran*, [1994] 2 SCR 951 at 994-995, 117 DLR (4th) 7 [*Tran*], and *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at paragraph 4, [2001] 4 FCR 85 [*Mohammadian* (FCA)].

[56] The second error, the Applicant says, is that the IAD unreasonably decided that the interpretation was adequate. The Applicant reproduces a number of the alleged errors in her memorandum, and claims that the IAD failed to assess those errors against the standard of precision set out in *Tran*. Indeed, the Applicant asserts that the IAD's summary of the Applicant's testimony was wrong in material respects.

[57] Furthermore, the Applicant contends that linguistic understanding is but one of the requirements of adequate translation, with some of the others being precision, continuity, contemporaneousness, and impartiality. According to the Applicant, the IAD's obsession with

significant prejudice blinded it to these other factors, and the Applicant argues that was unreasonable.

(2) The Respondent's Arguments

[58] The Respondent argues that word-for-word interpretation is difficult and, in some respects, impossible insofar as perfection cannot always be obtained. The Respondent therefore says that one cannot apply a microscope to the translation, as the Applicant attempts to do, and unduly focus on precision. All that is required, according to the Respondent, is that the various elements of linguistic understanding have been maintained.

[59] Although the IAD mentioned prejudice, the Respondent contends that it never made that a requirement. On the contrary, the IAD used that phrase in the sense of there being sufficient linguistic understanding for the Applicant and in assessing whether the parties understood each other, which is all that was required (*Boyal v Canada (Citizenship and Immigration)*, [2000] FCJ No 72 (QL) at paragraph 7, 181 FTR 158 [*Boyal*]). Whatever errors the interpreter may have made, the Respondent states that at no time did the parties misunderstand each other.

[60] The Respondent says the examples of misinterpretation referred to by the Applicant are not such that they clearly show, on a balance of probabilities, that the parties did not have sufficient linguistic understanding. The IAD, the Respondent says, reasonably and properly applied the applicable principles of linguistic understanding.

(3) Analysis

[61] Section 14 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, provides that:

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.	**14.** La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

[62] In *Tran*, the Supreme Court of Canada discussed the application of section 14 in a criminal context, and held that the central principle is linguistic understanding, which means that people with language difficulties "must have the same opportunity to understand and be understood as if they were conversant in the language being employed in the proceedings" (*Tran* at 985). This is assessed by criteria that "include, but are not necessarily limited to, continuity, precision, impartiality, competency and contemporaneousness" (*Tran* at 985).

[63] The same standard has been adopted with respect to immigration proceedings (*Mohammadian* (FCA) at paragraph 4; *Kamara* at paragraphs 35-37). The Applicant in this case only impugns the precision of the interpretation, for which the Supreme Court in *Tran* (at 986-987) endorsed the following quotation from Graham G. Steele, "Court Interpreters in Canadian Criminal Law" (1992), 34 Crim LQ 218 at 240-241:

> … the interpretation must be, as close as can be, word-for-word and idea-for-idea; the interpreter must not "clean up" the evidence by giving it a form, a grammar or syntax that it does not have; the interpreter should make no commentary on the evidence; and the

> interpretation should be given only in the first person, *e.g.*, "I went to school" instead of "he says he went to school".

[64] However, perfection cannot be expected, and the Supreme Court held that the standard is lower for oral interpretation than it is for the translation of documents, since the former "involves a process of mediation between two people which must occur on the spot with little opportunity for reflection" (*Tran* at 987).

[65] The Applicant is right to point out that prejudice is not a requirement (*Tran* at 994-995). As Mr. Justice J.D. Denis Pelletier has observed, "[r]equiring proof of prejudice as a condition of obtaining a remedy for infringement of a constitutionally protected right undermines the constitutional protection" (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 309 (QL) at paragraph 12, [2000] 3 FCR 371, aff'd *Mohammadian* (FCA) at paragraph 4).

[66] The IAD said that the interpretation errors alleged by the Applicant "did not have a significant impact on the proceedings, nor did they cause any significant prejudice to the appellant." This observation by the IAD, however, does not mean that it elevated the existence of prejudice to a requirement. In any event, since the standard of review with respect to the interpretation issues is one of correctness, it does not matter if the IAD erred in this regard since its determinations are afforded no deference.

[67] In my view, the interpretation was not as precise as it could have been. The interpreter occasionally interpreted in the third person instead of the first person; she paraphrased a lot; she

sometimes added information that was not said; and she was sometimes mistaken. However, as the Supreme Court has recognized, interpretation is "an inherently human endeavour which often takes place in less than ideal circumstances" (*Tran* at 987). Despite the imperfections in this case, I think the Applicant always understood what was being said and was herself understood. There was linguistic understanding between the parties on the essential issues before the IAD.

[68] Indeed, the only "significant" misunderstanding that the Applicant mentioned was that the IAD wrote that the Applicant had said that she last spoke to Mr. Dhaliwal the day of her return to Canada in 2005, when she had actually testified that she had spoken to him the day after. Not only is that detail immaterial, the interpretation cannot be faulted for the error since, at the hearing, the interpreter had accurately interpreted the Applicant's testimony at page 18 of the Johar Transcript:

> **[Counsel]:** … [English] When was the last time, you spoke with your ex-husband.
>
> **Interpreter:** [Punjabi] When is the last time, you have spoken with your ex-husband.
>
> **[Appellant]:** [Punjabi] When I came here in Brampton, when I reached here. I called second day.
>
> **Interpreter:** [English] When I had called him, on second day after reaching in Brampton at my uncle's house. [Bold added]

[69] The Applicant also complained that the most serious interpretation problem was that some exchanges between the member and counsel were not interpreted at all. However, those conversations were purely about administrative matters, and the Supreme Court said in *Tran* (at 993-994) that "where a lack of or lapse in interpretation occurs in respect of some purely

administrative or logistical matter which does not involve the vital interests of the accused, such as scheduling or agreeing to a recess, this will not be a violation of s. 14 of the *Charter*."

[70] Accordingly, the interpretation between the parties before the IAD was adequate and I reject the Applicant's arguments to the contrary.

D. *Did the IAD unlawfully affirm the exclusion order?*

(1) The Applicant's Arguments

[71] The Applicant claims that the IAD made three legal errors.

[72] First, she says that the IAD disregarded documentary evidence which clearly showed that the Applicant separated from her first husband on January 22, 2004, and that the earliest possible date of separation was July 23, 2003. Even if the Applicant seemed uncredible, she argues that the IAD cannot simply discard a plethora of independent and credible documentary evidence capable of supporting a positive disposition (citing *Sellan v Canada (Citizenship and Immigration)*, 2008 FCA 381 at paragraph 3, 384 NR 163 [*Sellan*]).

[73] Second, the Applicant submits that the IAD failed to distinguish between the issues of whether the Applicant's first marriage was genuine and whether she misrepresented that it was genuine. She claims that these two lines of inquiry must be kept separate (citing *Ouk* at paragraph 17).

[74] Third, the Applicant argues that the IAD erred by failing to use the criteria established in *Khera* to determine whether her first marriage was genuine (citing *Khera* at paragraph 10; and *Paulino v Canada (Minister of Citizenship and Immigration)*, 2010 FC 542 at paragraph 61, 368 FTR 188). This is inexcusable, according to the Applicant, who says that the genuineness of this marriage was at the core of the IAD's decision about the alleged misrepresentation and should have been properly assessed.

[75] The Applicant further criticizes the IAD's findings of fact and its conclusion that the Applicant was inadmissible for misrepresentation. In particular, the Applicant states that Mr. Dhaliwal is a liar whose testimony was full of contradictions, and that it was unreasonable for the IAD to find otherwise. In this regard, she argues that the IAD's finding that Mr. Dhaliwal reported his belief that the Applicant had only married him to obtain status in Canada to CIC some time after she left for India in 2004 is "flat wrong." She also says that her former husband's testimony about this report was clearly a lie, and that his testimony that he was not at his parent's home on December 14, 2003, when his sister got into a fight with the Applicant was contradicted by a police report.

[76] Further, the Applicant argues that it was unreasonable for the IAD to believe a man who submitted an application to sponsor his wife in July, 2001, appealed the refusal of his wife's application for permanent residence in May, 2002, paid for his wife's air ticket to travel to Canada in July, 2003, and then claimed that they had separated on February 28, 2001, in his application for divorce in the BCSC. If that were the case, then the Applicant argued that the

IAD must have concluded that Mr. Dhaliwal lied in order to win his appeal in 2002 and it was unreasonable to nevertheless trust his testimony.

[77] The Applicant also states that it was unreasonable for the IAD to decide that the Applicant knew that she had been divorced before October, 2006. According to her, this was based on implausibility findings about the Applicant's conduct that were unreasonably based on the IAD's preconceptions about "the typical mainstream Canadian wife" (citing *Mann v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1479, 33 Imm LR (3d) 282). She claims that this was an error since she was a "shy, traditional Indian girl" with a domineering husband upon whom she was entirely dependent. Thus, she argues that it did not make sense for the IAD to find that someone with her personality told her husband to "go to hell" as soon as she arrived in Canada despite lacking the ability to support herself in an alien land. Further, she asks, why would Mr. Dhaliwal put her up with his parents for six months if that was how she greeted him? Also, if the IAD believed her former husband, then the Applicant says it must have accepted his testimony that he had always pretended to his parents that everything was alright in the marriage. She says that it should not have been a stretch to believe that he would carry on that charade while she was in India.

[78] Furthermore, the Applicant says, that her conduct was always consistent with her personality and the culture from which she hailed. She never denied that she was served with the divorce papers, but had testified that her husband took them away from her immediately. Even if she did know about the proceedings, the Applicant argues that it was unreasonable for the IAD to expect someone with her profile to fight it expeditiously. For the same reasons, she says she

could not be expected to try and find her husband or report him missing when he disappeared, since she was sad and knew from other sources that he was still well.

(2) The Respondent's Arguments

[79] The Respondent submits that the matter at hand is, in essence, a case of "he said, she said," and this fact lies at the heart of the IAD's decision. For that reason, the IAD's "basket of choices of outcomes" is larger here. Factual determinations by the IAD, according to the Respondent, are owed a great degree of deference.

[80] In this regard, the Respondent says that the IAD's treatment of the evidence was reasonable. Although the Federal Court of Appeal found that a lack of credibility is not necessarily fatal to a refugee claim in *Sellan*, the Respondent argues that case does not apply to the present dispute where the stakes are much lower. In any event, the Respondent says that the evidence used to dupe the IAD in 2002 was neither independent nor credible, since it was generated and submitted by the Applicant herself to show the genuineness of a marriage that other evidence now proves was fraudulent. The Respondent thus argues that the evidence was not ignored; it was simply overshadowed and rendered impotent by the discovery of the Applicant's scheming dishonesty.

[81] The Respondent also rejects the contention that the IAD mixed up the issues of, on the one hand, whether the Applicant was inadmissible under paragraph 40(1)(a) of the *Act* for misrepresentation, and on the other, whether her marriage was *bona fides* under section 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*]. First, the

Respondent states that *Ouk* is outdated because it applied jurisprudence from before section 4 of the *Regulations* was amended. Second, the Respondent argues that a fair reading of the decision shows that the IAD applied a two-part test, first assessing whether the marriage lacked *bona fides* before then deciding whether that lack of *bona fides* was withheld from officials.

[82] The Respondent also argues that the *Khera* factors do not need to be assessed with a fine-tooth comb. In its view, in *Khera* Mr. Justice Luc Martineau was merely saying that the factors he listed were relevant in that case, and he never intended them to be exclusive or exhaustive.

[83] The Respondent also defends the IAD's factual conclusions, saying that it was reasonable for the IAD to prefer the testimony of Mr. Dhaliwal over that of the Applicant. The date that he reported the sham marriage to CIC was immaterial to the IAD's decision, and the Respondent argues that Mr. Dhaliwal's credibility cannot be undermined by the fact that he sponsored the Applicant since he had been duped into the marriage of convenience. Further, the police report does not contradict her ex-husband's story, since he had never denied that he was at the house when the police came; he only said that he arrived afterwards.

[84] Finally, the Respondent states that it was reasonable for the IAD to find that the Applicant's claim she did not know about the divorce implausible, and that the Applicant's arguments to the contrary were just bare assertions.

(3) Analysis

(a) *Alleged failure to consider independent evidence*

[85] In *Sellan*, the Court of Appeal said (at paragraph 3) that "where the Board makes a general finding that the claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible documentary evidence in the record capable of supporting a positive disposition of the claim." The Respondent argues that cases decided about refugee protection claims should not be equated "willy-nilly" to the present situation.

[86] The Respondent's attempt to distinguish *Sellan* is misguided. *Sellan* does not create some special legal rule for refugee claims. Rather, it is simple logic; unreliable evidence for a claim does not negate independent evidence for the same claim, and a proposition is not proven false merely because some of the evidence advanced to support that claim could not alone prove that it is true. Put less formally, distrusting the panicked yelps of the boy who cried wolf does not let one ignore security camera footage of a wolf chasing him. This principle is not derived from any special considerations for refugee protection; it applies to any truth-seeking process.

[87] However, the Applicant is wrong to assert that the IAD ignored the "letters, photographs, telephone bills, affidavits, post stamps, wedding invitation cards, and personal letters" submitted to support the IAD appeal in 2002. On the contrary, all of that evidence is perfectly consistent with the IAD's finding that the Applicant tricked Mr. Dhaliwal into marrying her so that she could come to Canada and keep up the charade until she was landed.

[88] As for the Applicant's insistence that the "earliest date of separation can only be July 23, 2003," that impliedly asserts that spouses cannot be legally separated until one lets the other know that he or she wants a divorce. The Applicant does not cite any authority for that belief, and it is contrary to paragraph 8(3)(a) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp), which says that "spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other" (emphasis added). When the BCSC considered this issue in 2013, that court confirmed that if the Applicant had been deceiving Mr. Dhaliwal from the start, then "grounds for divorce existed in 2003" since the Applicant had formed the intention to separate more than a year before the divorce was granted (*Dhaliwal* (BCSC) at paragraph 19).

(b) *Separate inquiries*

[89] The Applicant argues that the IAD was obligated to assess the genuineness of her marriage separately from whether she misrepresented that it was genuine. For this, she relies on *Ouk*, where Mr. Justice Richard Mosley said that it is "open to the appeal panel to find that the sponsoree is inadmissible for misrepresentation pursuant to s. 40 of the Act *or* that the marriage is not genuine, but the distinction between these two avenues of inquiry must be kept clearly separate" (*Ouk* at paragraph 17 (emphasis in original)).

[90] The Applicant claims that one of the introductory passages of the IAD's decision makes this error. At paragraph 14, the IAD briefly summarized its findings as follows:

> The evidence before me favours a finding that when [the Applicant] came to Canada in 2003 she did not intend to live with her sponsor as husband and wife. As that information was not

> disclosed to the visa post or the immigration officer at the port-of-entry, I find that section 40(1)(a) of the [the *Act*] is applicable.

[91] The Respondent rightly points out that the analysis is more clearly separated in the body of the decision, but even the above summary does not disclose any error. Having found that the Applicant did not intend to live with Mr. Dhaliwal as his wife when she came to Canada, it was reasonable for the IAD to find that the Applicant was therefore "withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act" (*Act*, s 40(1)(a)). It was also reasonable for the IAD to conclude at paragraph 41 of its decision that, "but for her misrepresentation, she would not have been granted status in Canada as the spouse of her sponsor."

[92] *Ouk* does not assist the Applicant and has no material bearing on the present situation. In that case, the IAD decided that the marriage was not genuine because the applicant and her sponsor did not disclose that they lived with the sponsor's half-sister. In *Ouk*, Justice Mosley set aside the decision because, although that might have been a misrepresentation, it was a misrepresentation that did not impugn the genuineness of the marriage and the IAD never actually found that the applicant was inadmissible for misrepresentation.

[93] A far more pertinent case is *Peirovdinnabi*, where the Federal Court of Appeal said (at paragraph 26) that "a person who applies for a benefit under the Act as a spouse makes a misrepresentation if his or her marriage is not *bona fide* in the sense that it was entered into for the purpose of obtaining an advantage under the Act." The same should apply to a finding that the Applicant never intended to live with her sponsor in Canada as his wife. When a proposition

so central to the application turns out to be false, a finding of inadmissibility for misrepresentation is almost automatic. There is very little to be gained from conducting separate inquiries.

(c) *Alleged failure to assess the genuineness of the marriage*

[94] The Applicant says that the IAD erred by finding that her marriage was not genuine without assessing the factors set out in *Khera*. However, that is not a requirement in every case. In *Stuart v Canada (Citizenship and Immigration)*, 2012 FC 1139 at paragraph 24, Justice Noël summarized the law as follows:

> [T]his Court has already noted that there is no specific test to establish whether a marriage is genuine (*Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432, at para 23, 388 FTR 61). In *Khera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 632, at para 10, [2007] WDFL 3916, this Court validated the IAD's approach in which factors such as the length of the spouses' relationship, their age difference, their respective financial situation and employment, their knowledge of one another's histories, their language, their interests and the fact that some members of the wife's family live in Canada are relevant in determining whether a marriage is genuine. Therefore, the criterion that must guide the IAD in its analysis of the facts and evidence is therefore relevance and it is open to it to take into consideration all the factors it considers relevant.
>
> [Emphasis added]

[95] The misrepresentation identified by the IAD was that the Applicant failed to disclose to CIC that she did not intend to live with Mr. Dhaliwal in a spousal relationship once she arrived in Canada. That conclusion and the factual findings underlying it were amply supported by the testimony of Mr. Dhaliwal, who testified as follows:

> **[APPLICANT'S] COUNSEL:** And when did … see you stated that Harpreet told you that she had a boyfriend in India and that she was not going to live with you, she had no intention to (Inaudible); when did she tell you sir?
>
> **MR. DHALIWAL:** Right at the airport.
>
> …
>
> **[APPLICANT'S] COUNSEL:** So tell me exactly what did she … what she told you?
>
> **MR. DHALIWAL:** She told me that she do not want to live with me, she has a boyfriend in India that is it. (Inaudible) get her divorce she will make my life hell, she will destroy my family name in (Inaudible).

[96] If Mr. Dhaliwal is credible, then the conclusion that the Applicant never intended to reside with him as his wife inevitably follows from his testimony, and could not possibly be disturbed by assessing factors such as the age difference between the Applicant and Mr. Dhaliwal or their respective financial situations. It was therefore reasonable for the IAD not to consider those factors to be relevant.

(d) *Alleged factual errors*

[97] The Applicant said that one of the "most incorrect" findings that the IAD made was its statement that "[a]t some point after [the Applicant] returned to India in January 2004, Mr. Dhaliwal notified Citizenship and Immigration Canada that he believed that the appellant had only married him to obtain status in Canada." She contends that it was actually before she went to India and the undated FOSS notes do provide some ambiguous support for that. However, this detail was immaterial. While the IAD mentioned it when summarizing Mr. Dhaliwal's version of

events, any mistake in the date does not impugn his credibility since he said that he did not remember when he made the report.

[98] The only other alleged contradiction was that Mr. Dhaliwal said he was not at his parents' home when his sister got into a fight with the Applicant and the police were called. He testified that he only arrived in the evening, while the police officer's note said that Mr. Dhaliwal was there by the time he had left the home at 2:23 p.m. At best, that shows that Mr. Dhaliwal was mistaken about the time of day that he arrived at his parents' house after an event that happened about a decade earlier. It is not fatal to his credibility.

[99] The Applicant also claimed that it was unreasonable for the IAD to believe a man who was actively involved in bringing the Applicant to Canada up until at least July, 2003, and yet claimed a separation date in February, 2001, when applying for a divorce. However, as noted above, the BCSC determined that there was nothing wrong with claiming that separation date if Mr. Dhaliwal's version of events is true (*Dhaliwal* (BCSC) at paragraph 19). Furthermore, as the IAD decided that the Applicant had deceived Mr. Dhaliwal up until she came to Canada in July, 2003, his actions in trying to get her here cannot be held against him. As such, it was reasonable for the IAD not to draw any adverse inferences.

[100] The remainder of the Applicant's arguments attack the IAD's plausibility findings, but rest entirely on assertions that the Applicant is a "traditional shy, unsophisticated Indian wife," and Mr. Dhaliwal a domineering husband. That is circular reasoning; the Applicant is adopting as her premise the conclusion for which she argues. The IAD was entitled to assess the

plausibility of the Applicant's and Mr. Dhaliwal's testimony in light of its own perceptions of them as witnesses. In a few key passages, the IAD's reasons cogently explain why it favoured the testimony of Mr. Dhaliwal:

> [17] …I did not find the appellant to be a credible witness. Her evidence with respect to some matters was contradictory and her testimony regarding the breakdown of her relationship with Mr. Dhaliwal was, in my view, completely implausible.
>
> [18] In contrast, I found Mr. Dhaliwal's testimony to be believable. He presented as a forthright and reliable witness and his credibility was not undermined in any substantive way. …
>
> …
>
> [31] I find that the appellant's testimony in respect of these issues [i.e. when she learned about the divorce] was not even remotely believable. It is implausible in the extreme that a woman who believed she was in a genuine and subsisting marital relationship would lose all contact with her husband and not take any concrete steps to find him, other than attempting to phone him a couple of times. Her actions are more consistent with someone who was aware that divorce proceeding [*sic*] were commenced in August 2003. Indeed, I am satisfied that, more likely than not, she was properly served with those documents and was able to understand their contents. The fact that she contacted counsel in the fall of 2006 to do a divorce registry search is, in the circumstances of this case, more likely the result of her trying to get a copy of her divorce order so that she could remarry, which she did just a few months later.
>
> [32] Mr. Dhaliwal's testimony, on the other hand, was not internally inconsistent or implausible. He claimed that the appellant expressed her desire to end their marriage as soon as she arrived in Canada. Because he was responsible for her, not only in the eyes of their community but as a result of his undertaking with Citizenship and Immigration Canada, he agreed to have her reside with his parents while he moved into his business premises. He filed for a divorce at her request one month after she was landed and the divorce documents clearly indicate that he was not living at the same address as the appellant. At some point after she returned to India in January 2004, Mr. Dhaliwal notified Citizenship and Immigration Canada that he believed that the appellant had only married him to obtain status in Canada. Mr. Dhaliwal's evidence that they had no contact after the appellant returned to India makes

> more sense than the appellant's claim that he continued to maintain contact with her as if their marriage was subsisting and everything was copasetic.
>
> [footnotes omitted]

[101] It is understandable why the IAD made these findings and they are defensible in respect of the facts and the law (*Newfoundland Nurses* at paragraph 16). As such, they deserve deference and there is no basis for intervention under paragraph 18.1(d) of the *Federal Courts Act*, RSC 1985, c F-7.

E. *Did the IAD unlawfully refuse to grant humanitarian and compassionate relief?*

(1) The Applicant's Arguments

[102] The Applicant submits that the IAD unreasonably refused to grant humanitarian and compassionate relief. The Applicant says that the IAD failed to assess each factor independently of the others (citing *Jiang v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 413 at paragraph 10, 17 Imm LR (4th) 219 [*Jiang*]), and based its analysis of the best interests of the children on the unfounded assumption that they would have significant family support in India.

(2) The Respondent's Arguments

[103] The Respondent states that the IAD's finding that the Applicant did not deserve special relief was clearly within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Respondent argues that the Applicant's misrepresentation was planned right from the beginning and was the only reason she obtained status under the *Act*.

Furthermore, her establishment was only mildly positive, any family dislocation upon removal would be minimal, and the evidence supported the IAD's finding that the Applicant's children would have the support of their parents and extended family in India. Moreover, the Applicant showed no remorse with respect to her misrepresentation. The Respondent submits that the IAD did nothing wrong here, since a serious misrepresentation can mitigate any positive weight to be given to hardship or establishment factors when assessing humanitarian and compassionate grounds for special relief.

(3) Analysis

[104] When it considered whether to grant humanitarian and compassionate relief, the IAD set out the six *Ribic* factors but adjusted them slightly since criminality was not in issue. The IAD therefore assessed the factors under the following headings: (a) the misrepresentations and remorse; (b) establishment; (c) dislocation to family; (d) support for the appellant; and (e) hardship.

[105] The Applicant complains that the IAD counted her misrepresentation against her twice. First, the IAD said that the misrepresentation was a negative factor, and then it reduced the positive weight of the hardship factor, partially because selling her house and quitting her job "would not constitute undue or disproportionate hardship, particularly when one considers that the acquisition of her home and employment was only possible because she obtained permanent resident status through a misrepresentation." The Applicant says that this kind of double-counting was prohibited in *Jiang* at paragraph 11.

[106] However, weighing the *Ribic* factors is not a quantitative or mensurative exercise; it is not simply about adding up the positive factors and subtracting the negative ones. Rather, it is qualitative or relative assessment, and the IAD is "free to weigh each factor, and is consequently free to give no weight to any given factor depending on the circumstances" (*Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at paragraph 32, 386 FTR 85).

[107] This naturally involves comparing the factors against each other, and the Applicant has not seriously impeached the IAD's reasoning for deciding that the misrepresentation outweighed the hardship. As Justice Mosley has said about an application under subsection 25(1) of the *Act*, "misrepresentations engage public policy considerations involving the integrity of the immigration system," and "the regulation would be rendered meaningless if all such applications were given special dispensation and approved because of family separation and hardship" (*Kisana v Canada (Citizenship and Immigration)*, 2008 FC 307 at paragraph 32, aff'd 2009 FCA 189 at paragraph 27, [2010] 1 FCR 360). The fact that the Applicant might lose some of the profits that she gained from defrauding her ex-husband and deceiving the immigration authorities of this country does not exactly cry or call out for humanitarian and compassionate relief.

[108] Thus, the Applicant's argument reduces to merely one that the IAD conducted the weighing process too early in its reasoning. However, to set aside the decision merely because the IAD conducted part of its weighing analysis under the wrong heading seems like the type of "line-by-line treasure hunt for error" criticized by the Supreme Court in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34

at paragraph 54, [2013] 2 SCR 458). To the extent that *Jiang* cannot be distinguished from this case, I decline to follow it.

[109] The Applicant also takes issue with one element of the IAD's analysis of the best interests of the children. Specifically, she argues that it was speculative to say that the children would benefit from "significant family support" in India. As the Respondent points out, the children would likely be accompanied by both their parents. It is reasonable to characterize the support from two loving parents as significant. As well, the Applicant supplied no evidence to suggest that her or her new husband's extended family in India would be unsupportive.

V. Conclusion

[110] I dismiss the applications in Court Files No. IMM-1478-14, IMM-3931-13, and IMM-3932-13. The parties have not proposed any questions for certification, so none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications for judicial review in Court files IMM-1478-14, IMM-3931-13 and IMM-3932-13 are each dismissed.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1478-14, IMM-3931-13 and IMM-3932-13
STYLE OF CAUSE:	HARPREET KAUR DHALIWAL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 15, 2014
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	FEBRUARY 6, 2015

APPEARANCES:

J.S. Mangat	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mangat Law Professional Corporation Mississauga, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT