Federal Court  Cour fédérale

Date: 20150216

Docket: IMM-5031-14

Citation: 2015 FC 193

Ottawa, Ontario, February 16, 2015

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

JATINDER SINGH DOSANJH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the decision of Tim Crowhurst of the Immigration Appeal Division [IAD], of the Immigration and Refugee Board, dated May 28, 2014, which dismissed the appeal by the Applicant, Jatinder Singh Dosanjh [the Applicant],

against the refusal of the family class sponsorship application for permanent residence of his wife from India, Jaspal Kaur Dosanju [Jaspal].

II. Facts

[2] The Applicant is a 41-year-old Canadian citizen. He arrived in Canada in 1998. He made a refugee claim, which was refused. He remained illegally in Canada until 2004, where he was admitted to Canada as a permanent resident after being sponsored by his first wife, Lakhwant Kaur Dosanjh [Lakhwant]. Lakhwant is Jaspal's sister.

[3] The marriage between the Applicant and Lakhwant was arranged by the Applicant's younger brother Harjit, in India. Lakhwant, who was living in Canada, agreed to marry the Applicant. The marriage between the Applicant and Lakhwant took place on September 4, 2004. At the time, Harjit was married to Jaspal.

[4] While in Canada, the Applicant was financially assisting his brother Harjit and Jaspal along with his parents in India. The Applicant's first wife, Lakhwant, told him not to send money to his family in India. The Applicant however continued to send money. Lakhwant therefore threw the Applicant out of the house on May 10, 2009.

[5] The Applicant traveled to India on May 31, 2009. His brother died that same evening.

[6] The Applicant and Lakhwant commenced divorce proceedings in November 2010 and a divorce was granted on March 17, 2011. The house that the Applicant and Lakhwant initially bought together was transferred into the name of Lakhwant in August 2012.

[7] The Applicant went to India on September 12, 2011 and married Jaspal on September 28, 2011. The Applicant submitted an application to sponsor her for permanent residence in Canada. Jaspal's three children, whom she had with Harjit, are included as dependents in her permanent resident application.

[8] The permanent residence application under the family class sponsorship was refused in a letter by a visa officer in New Delhi on January 11, 2013. The visa officer challenged the legality of the marriage. The Applicant appealed this decision to the IAD.

[9] The IAD dismissed the appeal on May 28, 2014. This is the decision under review.

III. Impugned Decision

[10] The Applicant appeals the refusal of the sponsor's application for permanent residence in Canada of Jaspal, from India. Jaspal's application was refused because the requirements of subsection 12(1) of IRPA were not met in that Jaspal is a person caught by the exclusionary provision of subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. Subsection 4(1) concerns marriage, common-law partnership or conjugal partnership entered in bad faith. To dismiss the appeal, the IAD must find that the marriage is not

genuine or that it was entered primarily for the purpose of acquiring a status or privilege under IRPA.

[11] After explaining the relationship between the Applicant, his ex-wife Lakhwant, his brother Harjit and his new wife Jaspal, along with the negative portrait provided of the Applicant's ex-wife Lakhwant, the IAD states that the testimonies of the Applicant and Jaspal lack credibility. The Applicant also breached the IAD's instruction not to speak to Jaspal during the lunch break, which impairs the weight that can be attributed to the Applicant and Jaspal's testimonies.

[12] The implausibility of the story behind the appeal, coupled with the history of immigration between the Applicant, Jaspal and their families is indicative of a primary purpose of immigration to Canada. The IAD therefore finds that the Applicant has not met his onus, on a balance of probabilities, to demonstrate that Jaspal is not caught by subsection 4(1) of the Regulations. This appeal is thus dismissed.

IV. Parties' Submissions

[13] The Applicant submits that the IAD is confused about the factual family network and that the IAD is substituting its own views, feelings and prejudice on the matter. The Applicant also states that he and Jaspal married for genuine and honourable reasons and not to gain Canadian immigration status. The Respondent retorts by stating that the IAD made no findings on whether or not the Applicant and Jaspal entered into a genuine marriage, but rather concluded that they married primarily for immigration purposes.

[14] The Applicant further argues that the IAD's judgment was clouded by its lack of understanding of the India sub-culture continent. Moreover, the Applicant's not so ideal immigration history to Canada has no bearing on the marriage between him and Jaspal. The Respondent replies that the Applicant does not prove the existence of the customs he raises, as no evidence of the alleged custom was put before the IAD.

[15] The Applicant finally submits that the IAD should not have concluded that the telephone call between the Applicant and Jaspal during the hearing's lunch break goes to the heart of their credibility. The Respondent, on the other hand, states that the Applicant simply disagrees with the IAD's view of the telephone call and is attempting to have this Court reweigh the evidence.

V. Applicant's Reply

[16] Contrary to the Respondent's argument that the IAD made no findings with regards to the genuineness of the marriage between the Applicant and Jaspal, the Applicant replies that the IAD's findings relate to both subsections (a) and (b) of subsection 4(1) of the Regulations. Furthermore, in reply to the Respondent's argument that the Applicant did not provide any evidence of the alleged customs before the IAD, the Applicant submits that the custom relating to the legality of the marriage was not an issue at the hearing since the legality of the marriage "was conceded by the Minister prior to the oral hearing and was not canvassed during the hearing" (Applicant's Reply at para 8). Moreover, evidence of customs was indeed submitted into evidence before the IAD. The Applicant also argues that the Respondent does not address the Applicant's assertion that the IAD was substituting its own Western culture views on the matter.

VI. Issue

[17] After reviewing the parties' records and respective submissions, I frame the issue as follows:

1. Did the IAD err in concluding that the marriage was entered primarily for immigration purposes?

VII. Standard of review

[18] The question of whether or not the IAD erred in concluding that the marriage was entered primarily for immigration purposes attracts the reasonableness standard as it raises questions of mixed fact and law (*Huynh v Canada (Minister of Citizenship and Immigration)*, 2013 FC 748 at para 6 [*Huynh*]; *Zheng v Canada (Minister of Citizenship and Immigration)*, 2011 FC 432 at para 18 [*Zheng*]). The Court shall only intervene if it concludes that the decision is unreasonable, and falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

VIII. Analysis

[19] Subsection 12(1) of IRPA explains that a foreign national may be selected as a member of the family class on the basis of their relationship as the spouse of a Canadian citizen or permanent resident. Subsection 4(1) of the Regulations however highlights the conditions under which a foreign national will not be considered a spouse. To make a determination under

subsection 4(1), the IAD must determine whether the marriage was either entered primarily for acquiring status or privilege under IRPA, or is not genuine (*Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1077 at para 5 [*Singh*]). Either finding precludes the spouse from obtaining the necessary visa to live with her husband in Canada (*Ibid*). In order for the Applicant's marriage to Jaspal to fall outside the scope of the subsection 4(1) exclusion, he is required to demonstrate that both conditions set out in subsection 4(1) are not satisfied (*Ouk v Canada (Minister of Citizenship and Immigration)*, 2007 FC 891 at para 12 [*Ouk*]; *Zheng, supra* at para 21). After reviewing the parties' records and their respective submissions, I find the IAD decision reasonable.

[20] The IAD first addresses the timeline of events leading up to the marriage between the Applicant and Jaspal. To that effect, the jurisprudence of this Court explains that the timing of a relationship can be a relevant consideration when making a determination as to the applicability of subsection 4(1) of the *Regulations* (*Zheng, supra* at para 25). In the case at bar, the Applicant arrived in Canada in 1998 and made a refugee claim, which was refused. He remained in Canada illegally and only obtained permanent residence status in 2004 after being sponsored by his first wife, Lakhwant. Lakhwant allegedly kicked the Applicant out of the house on May 10, 2009. After his brother's death on May 31, 2009, the Applicant commenced divorce proceedings with Lakhwant in November 2010, which was granted in March 2011. Six months later, in September 2011, the Applicant married his ex-wife's sister, also his brother's widow. The house the Applicant and Lakhwant bought together was only transferred into the Lakhwant's name in August 2012, almost a year and a half after the divorce was granted. Based on this chain of events, the timing of the divorce between the Applicant and Lakhwant and the Applicant's

subsequent marriage to Jaspal, along with the Applicant's immigration history, it was reasonable for the IAD to conclude that the marriage was entered for the purpose of facilitating Jaspal and her children's immigration to Canada.

[21] Second, the IAD made several negative credibility findings. The IAD's credibility findings are findings of fact and are to be afforded significant deference, as the IAD had the opportunity to hear and observe the Applicant and hear Jaspal give their oral evidence and is thus in the best position to assess their credibility (*Granata v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1203 at para 28 [*Granata*]). Here, the IAD questioned the credibility of the Applicant and Jaspal's testimony at the hearing regarding the explanation given as to Lakhwant's difficult character, the money issues of the Applicant and Jaspal's family in India, along with the telephone call the Applicant made to Jaspal during the hearing's lunch break after being instructed by the IAD not to get in touch with any of the parties involved in the matter. More will be said on this in the following paragraphs. The date of separation between the Applicant and Lakhwant shortly prior to the Applicant's brother's death and the matrimonial home being transferred to Lakhwant more than a year after the end of the divorce proceeding also impacted the credibility of the Applicant and Jaspal. Moreover, contrary to the Applicant's argument, the IAD did not substitute its own views, feelings and prejudice on the matter, it instead relied on the facts of the case to make its determination. Again, the IAD's finding that the marriage was entered for the purpose of facilitating Jaspal and her children's immigration to Canada is reasonable.

[22] As for the Applicant's argument regarding the error the IAD made in paragraph 13 of its decision with regards to the family network, it is a minor and immaterial error, and it is not determinative of the issue (*Nsabimana v Canada (Minister of Citizenship and Immigration)*, 2007 FC 645 at para 4 [*Nsabimana*]). It does not affect the outcome of the decision. Indeed, the relationships between all the parties involved are clearly explained in the rest of the decision.

[23] On the phone call issue, a reading of the transcript is telling. At lunch break, the IAD tells the Applicant that he should not speak to his wife or anyone else with regards to his testimony. At the beginning of the cross-examination of Jaspal, who testified by phone, counsel for the Minister inquires about when was the last time she spoke to her husband:

> Q What time is it where you are right now?
>
> A It's close to two o'clock in the morning; quarter to two.
>
> Q Have you been awake waiting for the phone call today or did you go to sleep for a while?
>
> A I was waiting for the phone call.
>
> Q When's the last time you spoke with your husband?
>
> A I spoke to him yesterday.
>
> Q How do you think that he did on his questioning today?
>
> A What?
>
> Q How do you think that he did on his questioning before we called you?
>
> A [Foreign language spoken.]
>
> Q Who are you talking to right now?
>
> A I am talking with you.

Q Okay. What was your answer? We didn't hear it.

A Ask me again. I did not understand.

Q How do you think that your husband did on his questioning today?

A He gave good answers.

Q How do you know?

A He told me that I have answered my questions now they will be calling you.

Q When did he tell you that?

A He called me that make sure you haven't gone to sleep. He phoned me.

Q So he called you after he answered the questions today.

A He said "My interview has been done. Don't go to sleep. They will be calling you."

From this exchange, it is notable that at first Jaspal lies when she says that she spoke to her husband "yesterday" when in reality later on she admits to have spoken to him during the lunch break. She even says that "he gave good answers" and justifies the conversation by saying that he called to make sure that she would not go to sleep.

[24] Counsel for the Applicant at the IAD decided not to clarify the matter and not ask any questions after the cross-examination of counsel for the Minister. During his submissions, counsel for the Applicant did not address the phone call issue except for a brief comment in reply to counsel for the Minister's submissions which dealt with the issue square on.

[25] As seen earlier, counsel for the Applicant in this judicial review argued that it was an error on the part of the IAD not to have asked questions to the Applicant or his wife to obtain further information on this phone call and that therefore it was wrong to draw a negative credibility finding because of this. Counsel did not rely on any jurisprudence and limited himself to a general comment.

[26] This argument can be refuted on the facts as they are presented. Clear instructions not to have a discussion with his wife dealing with the testimony of the Applicant were given by the IAD. These instructions were not respected. In addition, it is counsel for the Minister that addressed the issue, and from the transcript it appears that Jaspal at first lies when saying they spoke "yesterday", then hesitates even though the questions asked were clear and understandable and then informs that they had spoken at noon. Furthermore, counsel for the Applicant decides not to clarify the matter by not asking further questions nor in his initial, oral submissions. It is only in reply that he deals with the matter and limits his comment to submit that Jaspal did not say that they had discussed his testimony.

[27] Why would the IAD have the obligation to ask further questions on this when counsel for the Applicant did not choose to clarify the telephone conversation? It was up to counsel for the Applicant to do so and not the IAD. The IAD has the obligation to deal with the evidence as it was presented at the hearing and to draw any conclusions it may have arrived at. The IAD reviewed the evidence on this matter and made a negative credibility finding as it was open to do so. Counsel for the Applicant was not able to submit any jurisprudence to support his argument on this matter. Therefore, the undersigned, relying on the facts of this case, finds that the IAD

did not have an obligation to conduct an enquiry into the reasons for the phone call or the nature and substance of the telephone conversation, and had the evidence to make a negative credibility finding.

[28] Counsel for the Applicant submitted a question for certification:

> Where an Appellant telephones his wife (the Applicant), in contravention of the Board's instructions not to communicate with her during break in the hearing, is the Board justified, without more, to proceed to make negative findings on the credibility of the testimonies of the Appellant and Applicant, or should the Board, before reaching such an adverse conclusion, conduct an enquiry into the reason for the phone call and the nature and substance of the telephone conversation?

[29] Counsel for the Respondent objected to the certification of the question because it does not meet the test for certification. The Applicant made no submissions regarding the certification of his question.

[30] The principles governing the certification of a question pursuant to subsection 74(d) of IRPA were set out by the Federal Court of Appeal. The question "must be one that transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ 1637, 176 NR 4 at paras 4-6). The question must be serious and of general importance and dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12; *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras 22-29).

[31] In the case at bar, the proposed question does not meet the test for certification. The question is specific to the facts of the case, it is neither a question of general importance nor does it contemplate issues of broad significance and it is not dispositive of the appeal. The question will therefore not be certified.

IX. Conclusion

[32] The decision of the IAD, when read as a whole, is reasonable. It properly concluded that the Applicant has not met his onus of proof that, on a balance of probabilities, their relationship is not caught by subsection 4(1) of the Regulations. The intervention of this Court is not warranted. As seen above, no question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is dismissed.

2. No question of general importance will be certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5031-14
STYLE OF CAUSE:	JATINDER SINGH DOSANJH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 5, 2015
JUDGMENT AND REASONS:	NOËL S. J.
DATED:	FEBRUARY 16, 2015

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