

Federal Court



Cour fédérale

Date: 20150917

Docket: IMM-6510-14

Citation: 2015 FC 1088

Ottawa, Ontario, September 17, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KAWALMIT KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], the applicant applies for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board [the Board] dated August 19, 2014, wherein the Board dismissed the applicant's appeal from an exclusion order issued against her on August 19, 2013.

[2] The applicant seeks an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The applicant is a citizen of Singapore.

[4] In March 2003, Dharamdas Raghani submitted a permanent residence application and listed the applicant as his common law spouse.

[5] On October 21, 2003, Mr. Raghani and the applicant were married. Citizenship and Immigration Canada [CIC] was informed of the marriage on or about November 4, 2003.

[6] On May 16, 2006, Mr. Raghani and the applicant were divorced by signed decree in Nevada, U.S.A. The stated ground for divorce was incompatibility. However, the applicant alleges they continued their relationship as common law spouses and the reason for them to get a legal divorce was inheritance. The divorce order indicated that Mr. Raghani resided in Nevada while the applicant resided in Singapore.

[7] The applicant originally stated to the Canada Border Services Agency [CBSA] that Mr. Raghani and she personally went to the High Commission in Singapore and informed the visa officer that they had obtained a divorce. However, during the hearing at the Board, she stated she relied on Mr. Raghani and did not personally inform CIC of the divorce.

[8] On December 14, 2006, Mr. Raghani's application for permanent residence was approved. He arrived in Canada alone in February 2007.

[9] On October 29, 2007, the applicant arrived in Canada with Mr. Raj Veer. She referred to Mr. Raghani as her husband upon arrival.

[10] On August 3, 2009, Mr. Raj Veer and the applicant were married.

[11] In 2011, the applicant applied to sponsor Mr. Raj Veer. The application stated that the applicant's relationship with Mr. Raghani ended on May 16, 2006 and her relationship with Mr. Raj Veer began on January 1, 2007.

[12] At the August 19, 2013 admissibility hearing, the Immigration Division issued the applicant an exclusion order under subsection 45(d) of the Act for misrepresentation pursuant to paragraph 40(1)(a) of the Act. The applicant appealed this decision to the Board.

II. Decision Under Review

[13] The appeal hearing took place on August 5, 2014. The Board dismissed the applicant's appeal and determined that she was inadmissible to Canada on the basis of misrepresentation. It found the exclusion order made on August 19, 2013 is legally valid and there were insufficient humanitarian and compassionate [H&C] considerations to warrant granting the appeal.

[14] The Board determined there are significant discrepancies and contradictions between the witnesses' stories and the information provided by the applicant at different times. It summarized the contradictions at paragraph 10 of its decision.

[15] The Board based its negative decision on the following: i) the applicant's divorce from Mr. Raghani was a material fact relating to a relevant matter that induced or could have induced an error in the administration of the Act; ii) neither the applicant nor Mr. Raghani disclosed the divorce to CIC; and iii) the applicant and Mr. Raghani did not remain in or resume a common law relationship after their divorce in May 2006.

[16] As for the H&C assessment, the Board found there are insufficient considerations to warrant special relief. It reasoned the following: i) the applicant's serious misrepresentation is a significant negative factor; ii) the applicant showed no remorse; iii) the applicant established herself in Canada to some degree and community support is in her favour; and iv) the applicant's alleged fear of return to Singapore due to threats from Mr. Raj Veer conflicts with a written police report.

III. Issues

[17] The applicant raises the following issues for my review:

1. Whether the Board erred in law by ignoring, confusing, mischaracterizing facts and/or misconstruing evidence?
2. Whether there was a reasonable apprehension of bias in the Board's decision to dismiss the appeal of the applicant?

3. Whether the Board breached the principles of procedural fairness and natural justice by making a negative finding on credibility and giving little weight to her testimony and the documentary evidence produced by her.

[18] The respondent raises two issues:

1. The Board's decision was reasonable; and
2. The applicant has not provided any evidence of reasonable apprehension of bias or a breach of procedural fairness.

[19] I would rephrase the issues as follows:

1. What is the standard of review?
2. Was the Board's decision reasonable?
3. Was there a breach of procedural fairness or a reasonable apprehension of bias?

IV. Applicant's Written Submissions

[20] First, the applicant submits the Board ignored her documentary and oral evidence. She argues the Board ignored the bank statements and insurance policies which were issued in Singapore. These documents substantiate her relationship with Mr. Raghani. She states the renewal date on the insurance document demonstrates that she was with Mr. Raghani until December 2008. Also at the hearing, the applicant provided the reasons for her divorce and getting into a common law relationship. She testified that due to inheritance matters, Mr. Raghani wanted to show his mother through a divorce that the applicant was not there for the

property. As for the contradictions in the applicant's former statements, she testified at the hearing that she was stressed and had no counsel for guidance at the previous interview.

[21] Second, the applicant submits that she met the requirements of a federal skilled worker on her own.

[22] Third, the applicant submits her evidence before the Board shows she felt very sorry for her omissions. She argues the Board erred in finding she had no remorse.

[23] Fourth, the applicant submits the Board misunderstood her oral testimony concerning her visit to Mr. Raj Veer's place and the police report. She argues there was no inconsistency.

V. Respondent's Written Submissions

[24] The respondent submits the standard of review regarding the Board's consideration of the evidence is the standard of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 46, 59, 61 and 63, [2009] 1 SCR 339 [*Khosa*]).

[25] The respondent submits the Board's decision was reasonable. Here, the Board based its credibility findings on numerous inconsistencies, omissions and improbabilities in the applicant's evidence.

[26] First, the respondent argues the only issue is whether the applicant disclosed the divorce. The respondent states even if Mr. Raghani and the applicant remained to be common law

spouses after their divorce, it would not be reason to overturn the Board's decision or the underlying exclusion order. It argues there was a valid exclusion order on the basis that a material fact was misrepresented or withheld pursuant to paragraph 40(1)(a) of the Act.

[27] The respondent argues paragraph 40(1)(a) of the Act is broadly worded to encompass misrepresentations even if made by another party without the knowledge of the applicant. For a misrepresentation to be material, it need not be decisive or determinative, but important enough to affect the process (*Masoud v Canada (Minister of Citizenship and Immigration)*, 2012 FC 422 at paragraphs 24 and 26, [2012] FCJ No 471). It argues the Board upheld the exclusion order on a valid basis: i) neither the applicant nor Mr. Raghani disclosed the divorce to CIC; and ii) the divorce was a material fact in the permanent residence application that induced or could have induced an error in the administration of the Act pursuant to paragraph 40(1)(a).

[28] Second, the respondent argues the Board considered the documentary evidence and the applicant's testimony. The Board found Mr. Raghani's affidavit evidence that he informed the CIC not to be credible. It was reasonable to find neither party informed CIC of the divorce. The respondent argues the Board was reasonable to find the applicant and Mr. Raghani did not remain a common law couple after their divorce in light of the evidence in front of it. Similarly, the Board reasonably found the applicant did not show remorse based on the evidence.

[29] The respondent relies on *RKL v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraphs 9 and 10, [2003] FCJ No 162 [*RKL*]. It submits assessing credibility lies within the heartland of the Board's functions. It argues the Board may rely on common sense and

rationality and is entitled to make negative credibility findings on the basis of inconsistencies, omissions and implausibilities. The onus is on a permanent resident facing removal to establish why she should be allowed to remain in Canada (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paragraph 57, [2002] 1 SCR 84).

[30] Third, the respondent submits whether the applicant was a skilled worker is irrelevant because she did not arrive in Canada based on an independent application as a skilled worker.

[31] Fourth, the respondent submits the applicant has not pleaded any material facts to show bias or breach of procedural fairness. The onus of demonstrating bias lies with the person who is alleging its existence (*R v RDS*, [1997] 3 SCR 484, at paragraphs 114 and 158, [1997] SCJ No 84 [RDS]).

VI. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[32] The Board's consideration of evidence is fact based and this generally attracts a reasonableness standard of review (*Khosa* at paragraphs 46, 59, 61 and 63). This means that I should not intervene if the decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

[33] An issue of procedural fairness and natural justice relates to the applicant's right to be heard or to respond to the Board's concerns. A review on procedural fairness typically triggers the standard of correctness. The Court must determine whether the process followed by the decision maker satisfied the level of fairness required in all of the circumstances (*Khosa* at paragraph 43).

B. *Issue 2 - Was the Board's decision reasonable?*

[34] I find the Board's decision was reasonable.

[35] The applicant is of the view that the Board ignored her documentary and oral evidence. The respondent submits the Board's decision was well founded and the Board did not ignore evidence in its assessment. Here, I agree with the respondent.

[36] This Court has consistently found credibility assessment is at the heartland of a Board's functions (*RKL* at paragraph 9):

Normally, the Board is entitled to conclude that an applicant is not credible because of implausibilities in his or her evidence as long as its inferences are not unreasonable and its reasons are set out in "clear and unmistakable terms": see *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 130 N.R. 236 (F.C.A.); *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.) ("*Aguebor*"); *Zhou v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1087 (QL) (C.A.); and *Kanyai, supra*, at para. 10.

[37] Here, the Board acknowledged the applicant's documentary and oral evidence. It found the applicant was not credible in light of the inconsistencies. I find its negative decision set out clear reasons in paragraph 10 of its decision (applicant's record at page 37).

[38] First, the Board found the applicant's divorce from Mr. Raghani was a material fact relating to a relevant matter that induced or could have induced an error in the administration of the Act. I agree with this finding. Paragraph 40(1)(a) of the Act is broadly worded to encompass indirect misrepresentations. Therefore, despite the inconsistent evidence, even if the applicant did not know Mr. Raghani did not report the divorce to CIC, the applicant still committed indirect misrepresentation. Paragraph 40(1)(a) states:

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation

40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :

(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

[39] Second, the Board found neither the applicant nor Mr. Raghani disclosed the divorce to CIC. I find this was a reasonable finding based on the evidence.

[40] Third, the Board found the applicant and Mr. Raghani did not remain in or resume a common law relationship after their divorce in May 2006. I find this was a reasonable finding in light of the inconsistencies in the evidence before the Board.

[41] The Board's decision stated that the applicant showed no remorse. However, a review of the hearing transcript shows that the applicant did show remorse. Even if the Board did err in its finding of no remorse, I do not believe that this error would be sufficiently material to render the whole decision unreasonable. The degree of remorse shown by the applicant is only one of several factors to be considered when assessing whether discretionary relief should be granted.

[42] Further, I agree with the respondent that in the present case, the applicant's qualification as a skilled worker was not a relevant consideration because she was an accompanying spouse and did not have an independent application.

[43] Therefore, I find the Board's decision was reasonable.

C. *Issue 3 - Was there a breach of procedural fairness or a reasonable apprehension of bias?*

[44] I find the Board did not breach procedural fairness and there was no reasonable apprehension of bias. In *RDS* at paragraph 114, the Supreme Court of Canada found the onus of demonstrating bias lies with the person who is alleging its existence. In the present case, although the applicant alleges that the Board was biased in dismissing her appeal and it breached

procedural fairness, she did not plead any material facts in support. Therefore, the applicant did not meet her onus.

[45] The application for judicial review by the applicant is therefore dismissed.

[46] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory ProvisionsImmigration and Refugee Protection Act, SC 2001, c 27

40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	40. (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
...	...
45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:	45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :
(a) recognize the right to enter Canada of a Canadian citizen within the meaning of the <i>Citizenship Act</i> , a person registered as an Indian under the <i>Indian Act</i> or a permanent resident;	a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la <i>Loi sur la citoyenneté</i> , à la personne inscrite comme Indien au sens de la <i>Loi sur les Indiens</i> et au résident permanent;
(b) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;	b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;
(c) authorize a permanent	c) autoriser le résident

resident or a foreign national, with or without conditions, to enter Canada for further examination; or

permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

...

...

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6510-14

STYLE OF CAUSE: KAWALMIT KAUR v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MARCH 19, 2015

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'KEEFE J.

DATED: SEPTEMBER 17, 2015

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