

Federal Court



Cour fédérale

Date: 20180717

Docket: IMM-56-18

Citation: 2018 FC 740

Ottawa, Ontario, July 17, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JANJEEVAN KUMAR BAINS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Janjeevan Kumar Bains, is a 43-year-old Canadian citizen who applied in November 2013 to sponsor his spouse, Pooja Bains, a 31-year-old citizen of India, for permanent residency in Canada. An officer at the visa post in New Delhi refused the sponsorship application on the grounds that the marriage was entered into primarily for Ms. Bains' immigration to Canada or is not genuine. The Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada received the Applicant's appeal in respect of the visa officer's decision

on December 3, 2014. The IAD dismissed the Applicant's appeal in a decision dated December 6, 2017. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the IAD's decision. He asks the Court to quash the IAD's decision and return the matter for redetermination by another member of the IAD.

I. Background

[2] The Applicant landed in Canada in December 2003, after being sponsored by his first wife. The Applicant and his first wife appear to have separated almost immediately after his landing in Canada or never lived together at all; the two were divorced in 2008. In January 2006, the Applicant pled guilty to sexual assault and sexual interference of a 13-year-old girl; he received a nine-month conditional sentence and 18 months of probation. The Canadian Border Services Agency wrote a report under section 44.1 of the *IRPA*, but no action was taken on that report. Due to his criminal conviction, the Applicant had to wait until five years after the end of his probation to sponsor Ms. Bains for permanent residency in Canada by virtue of paragraph 133(2) (b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*].

[3] The Applicant and his wife were introduced in December 2009 and married in January 2010. Ms. Bains has no prior marriages. She gave birth to a daughter, Aniya, on March 3, 2013; a DNA test indicates that the Applicant is Aniya's father. The Applicant applied to sponsor his wife for permanent residence in Canada on November 19, 2013. Subsequently, she was called to an interview at the New Delhi visa post. At the conclusion of the interview, the visa officer was

not satisfied that Ms. Bains plans on living with the Applicant in Canada as his spouse. The visa officer refused the sponsorship application on October 1, 2014, pursuant to subsection 4(1) of the *Regulations*, on the grounds that the marriage was entered into primarily for Ms. Bains' immigration to Canada or is not genuine. The visa officer identified the following concerns: (i) the marriage was performed in haste, within a few days of their first meeting; (ii) the ages, levels of education, and marital statuses of the Applicant and Ms. Bains are not compatible from the perspective of traditional arranged marriages; (iii) Ms. Bains erroneously stated at the interview that the Applicant had been cleared of criminal charges; (iv) she subsequently conceded that the Applicant had a criminal conviction, but could not explain why she and her family would agree to a marriage with a man who had been found guilty of a sexual offence with a child; and (v) she appeared to have little knowledge about the Applicant and his background.

II. The IAD's Decision

[4] In its decision dated December 6, 2017, the IAD noted that the onus was upon the Applicant to show that subsection 4(1) of the *Regulations* did not apply. The IAD found the Applicant was unable to meet his onus as neither he nor his wife was a credible witness. In particular, the IAD had concerns surrounding the Applicant's first marriage, his criminal record, and the compatibility of the Applicant and his wife.

[5] The IAD found the evidence before it supported a finding that the Applicant's first marriage was a non-genuine marriage of convenience for immigration purposes. While the material related to the Applicant's divorce suggested that he had cohabited in Canada with his first wife for approximately one month, other information suggested that his first wife

disappeared after his arrival and he had no contact with her whatsoever. Before the IAD, the Applicant testified he had initially stayed with his sister upon arrival in Canada and had seen his first wife a few times before she disappeared. When asked about the conflicting information, the Applicant stated he had lied to the criminal court judge and his probation officer because he thought they might contact his first wife and she would tell people in India about his criminal problems. The IAD also noted that Ms. Bains had indicated to the visa officer that the Applicant had lived with his first wife for a year. The IAD found that the Applicant's behaviour, including remaining in Canada and making no efforts to locate his allegedly missing wife, was consistent with a marriage of convenience. The IAD acknowledged that while evidence of a prior marriage for immigration purposes does not provide a sufficient evidentiary base for a finding that a subsequent marriage is not genuine, it was a relevant factor which, along with his conflicting evidence about his first marriage, significantly undermined his overall credibility.

[6] The IAD then proceeded to address the Applicant's criminal record, asking itself two key questions: what he had told Ms. Bains and her family about his offence, and why they would agree to a marriage with a sexual offender? The IAD quoted from the Global Case Management System [GCMS] notes in which Ms. Bains provided the following conflicting information to the visa officer concerning the Applicant's conviction: (a) she initially stated that his criminal conviction was the result of "a fight"; when questioned as to why she would characterize sexual assault as a fight, she said that it just came out of her mouth; (b) she stated that he had told her he had been wrongly accused of sexual assault and could not sponsor her until he had been cleared of the charges, and indicated that he had been found not guilty; (c) after speaking with the Applicant for an hour at their first meeting, she concluded that he was not the type of person who

would commit sexual assault; (d) she indicated that she knew he had a criminal record, but did not know that criminal records only resulted from conviction; (e) she initially indicated that his criminal record was the reason for his delay in sponsoring her, but later stated that the delay also resulted from her seeking to complete an MBA; and (f) she had told her parents about the criminal record, but they did not object and said it was her decision.

[7] In her testimony before the IAD, Ms. Bains indicated that she had found out about the Applicant's conviction for sexual assault on the day she first met him, stating that the case was finished and dealt with and conceding that the Applicant had never told her that he was wrongly accused. When asked by the IAD about the discrepancy with her earlier statements at the interview, Ms. Bains said she did not express herself properly to the visa officer because she was nervous. In the IAD's view, Ms. Bains' statement that the conviction was something from the Applicant's past which was not important now suggested that the relationship was not important to her and also that she had entered into the marriage for immigration purposes. The IAD concluded its assessment of the Applicant's criminal record by stating that it did not find Ms. Bains' *viva voce* evidence to be "even remotely credible."

[8] The IAD began its assessment of the compatibility of the Applicant and his wife by noting the visa officer's concern that it is unusual in traditional Indian arranged marriages for there to be discrepancies in age, education and marital history between the couple. The IAD found it was unusual for a never-married young woman to marry an older divorced man with less education who had been convicted of a sexual offence against a child. While noting that cultural norms are usually not determinative of a marriage's genuineness, the IAD found the

discrepancies and criminal conviction in this case would normally have ended all marriage discussions, and noted that Ms. Bains could not provide a credible explanation for why she would agree to marry a sexual offender after speaking to him for approximately one hour.

[9] The IAD did not address the discrepancies between the sponsorship documents and the testimony regarding dates and the timing of the wedding activities because these were “sufficiently minor.” The IAD accepted the DNA evidence indicating that the Applicant was Aniya’s father, but noted that the birth of a child is not conclusive evidence of the genuineness of the marriage. The IAD concluded its reasons for dismissing the appeal by stating:

[34] I did not find the appellant or applicant to be credible. I am also satisfied that the applicant was purposely dishonest at her interview when discussing the appellant’s criminal history and that the appellant’s first marriage was likely a marriage of convenience for immigration purposes. The fact that they have had a child is insufficient to overcome the problematic aspects of this appeal; in particular, the clear mendacity of both the appellant and applicant.

[35] The evidence before me favours a finding that the applicant entered this marriage primarily for immigration purposes and the lack of credible testimony leaves me unable to determine that the marriage is now genuine.

III. Issues

[10] This application for judicial review raises three issues which can be broadly characterized as follows:

1. What is the appropriate standard of review?
2. Is the IAD’s decision unreasonable?
3. Was there a breach of procedural fairness?

IV. Analysis

A. *Standard of Review*

[11] The appropriate standard for judicial review of the IAD's decision is one of reasonableness (see *Le v Canada (Citizenship and Immigration)*, 2016 FC 330 at para 3, [2016] WDFL 2283). The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Those criteria are met if "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 para 16, [2011] 3 SCR 708). So long as "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence" (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*]).

[12] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of*

Citizenship and Immigration), 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. As the Federal Court of Appeal recently observed: “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, [2018] FCJ No 382). This is particularly true in cases where the alleged breach is an unintentional omission rather than a deliberate procedural choice. In other words, a procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct. Furthermore, a reviewing court will pay respectful attention to the procedures followed by a decision-maker and will not intervene except where they fall outside the bounds of natural justice (*Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3, [2018] FCJ No 403).

B. *Is the Member’s decision unreasonable?*

(1) The Parties’ Submissions

[13] The Applicant asserts that the IAD’s decision lacks transparency, intelligibility, and justification because it fails to explain how Ms. Bains’ statement that the Applicant’s criminal record is “not important now” supports the conclusion she only married the Applicant to get to Canada and that the relationship is not important to her. In the Applicant’s view, the IAD’s conclusion ignores evidence showing the veracity of his and Mrs. Bains’ relationship, including photographs of their wedding and post-marriage conduct as well as the fact they have a child

together. According to the Applicant, the IAD was acting as a “moral police” and its conclusion leads to the absurd result that any person who marries a sex offender must have an ulterior motive. The Applicant claims the IAD drew a negative credibility inference against Ms. Bains based on inaccurate information he had provided to her regarding his criminal charges and based on her lack of understanding of Canadian criminal law and, accordingly, since Ms. Bains had been given inadequate, or even wrong, information by the Applicant, it was unreasonable for the IAD to draw a negative credibility inference against her.

[14] The Respondent maintains that the IAD’s conclusions on credibility were open to it given the Applicant’s immigration history and the couple’s testimony, and that the Applicant’s submissions amount to a request to reweigh *viva voce* evidence and reach a different conclusion on credibility. In particular, the Respondent says it was open to the IAD to question Ms. Bains as to why she agreed to marry a sexual offender one hour after meeting him and learning of his criminal history. In the Respondent’s view, the IAD’s conclusion on credibility was open to it given that Ms. Bains had told the visa officer the Applicant told her he had been wrongly accused when he had in fact not done so. According to the Respondent, the IAD’s inquiry was about the intent of the marriage and had nothing to do with the delay in making the sponsorship application or acting as “moral police.” In the absence of justification from Ms. Bains regarding her intent to marry the Applicant, the IAD’s conclusions were, the Respondent says, reasonable.

(2) Analysis

[15] Credibility findings based on *viva voce* evidence lie at the heartland of the IAD’s jurisdiction and it is entitled to considerable deference in assessing credibility and in determining

the weight of evidence (see: *Imran v Canada (Citizenship and Immigration)*, 2016 FC 916 at para 21, [2016] FCJ No 1075; also see *Bielecki v Canada (Citizenship and Immigration)*, 2008 FC 442 at para 32, 166 ACWS (3d) 305).

[16] In this case, “the clear mendacity” of both the Applicant and his wife were such that the IAD was unable to conclude, despite there being a child of the marriage, that it was genuine and not entered into for an immigration purpose. The Applicant’s arguments about the IAD’s credibility findings with respect to Ms. Bains essentially boil down to an assertion that she was sincerely conveying the lie he had told her about his criminal status; they are not persuasive, particularly given that she admitted in her testimony to the IAD that the Applicant never told her he was wrongly accused.

[17] I agree with the Respondent that the Applicant’s submissions amount to a request to reweigh evidence that was heard *viva voce* and reach a different conclusion on credibility. It is up to the IAD, not this Court, to assess credibility and decide the weight to be given to the evidence. Moreover, the IAD was not acting, as the Applicant contends, as “moral police” or insinuating that any marriage to a sex offender must not be genuine. It was not unreasonable (nor, for that matter, unfair) to question Ms. Bains about why she would agree to marry a person an hour after learning he had been convicted of a sexual offence against a minor.

C. *Was there a breach of procedural fairness?*

[18] The Applicant claims the IAD ignored evidence which showed the veracity of his marriage to Ms. Bains, including correspondence between him and Ms. Bains as well as

evidence of the wedding itself, which was acknowledged in the GCMS notes. According to the Applicant, it is a breach of procedural fairness for a tribunal decision-maker to fail to consider relevant evidence, and in this case the IAD showed bias based on a moral judgment of the Applicant as a sex offender. The Respondent does not address this issue directly beyond stating that all of the Applicant's submissions amount to disagreements with the weighing of evidence by the IAD.

[19] The Applicant's arguments on this issue are devoid of merit. His reliance upon *Hailu v Canada (Solicitor General)*, 2005 FC 229, 137 ACWS (3d) 373, is misplaced. That case dealt with a removal officer's duty to provide reasons and the discretion to consider submissions in the context of a pre-removal risk assessment. It does not say anything about ignored evidence being a breach of procedural fairness or natural justice.

[20] As to the Applicant's allegation that the IAD showed bias based on a moral judgment of him being a sex offender, this too is devoid of merit. The Applicant provided no legal argument as to how the test for a reasonable apprehension of bias is met in this case. Just because the IAD asked itself why Ms. Bains and her family would agree to her marriage with a sexual offender does not, in my view, show bias of any kind.

V. Conclusion

[21] In conclusion, I find the IAD's decision was reasonable. The IAD's reasons provide an intelligible and transparent explanation for its decision to dismiss the Applicant's appeal, and the outcome is defensible in respect of the facts and the law.

[22] Neither party proposed a question of general importance for certification; so, no such question is certified.

JUDGMENT in IMM-56-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed;
and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-56-18

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