

Federal Court



Cour fédérale

**Date: 20091105**

**Docket: IMM-2620-09**

**Citation: 2009 FC 1131**

**Ottawa, Ontario, November 5, 2009**

**PRESENT: The Honourable Madam Justice Snider**

**BETWEEN:**

**SUNIL DUTT SHARMA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. INTRODUCTION**

[1] The Applicant, Mr. Sunil Dutt Sharma, is a citizen of India who came to Canada in 2000 on a work permit. His permit expired on December 31, 2001. A request for an extension was refused. In spite of this refusal, the Applicant remained in Canada illegally. During this time, it appears that the Applicant made no efforts to regularize his status in Canada. Seven years later, on November 22, 2008, the Applicant was reported for overstaying his visa. On November 25, 2008, the Applicant

was reported for working in Canada without a work permit. As a result, an exclusion order was issued against the Applicant on December 3, 2008.

[2] Meanwhile, the Applicant and Ms. Maliha Nawabi, who met in 2006, were engaged on October 19, 2008 and were married on November 25, 2008. On November 28, 2008, the Applicant applied for permanent resident status as a member of the Spouse or Common-law Partner in Canada class. In a decision dated May 4, 2009, an Immigration Officer refused the application on the basis that, on the balance of probabilities, the marriage was not genuine and was entered into primarily for the purpose of acquiring permanent residence in Canada.

[3] The Applicant seeks judicial review of that decision.

## **II. ISSUES**

[4] As clarified during the oral submissions, this Application raises two issues:

1. Did the Officer err in concluding that the marriage was not genuine by failing to have regard to the documentary evidence submitted by the Applicant?
2. Did the Officer err by failing to address whether the marriage had been entered into by the Applicant primarily for the purpose of acquiring permanent residence in Canada?

### III. STATUTORY FRAMEWORK AND LEGAL TEST

[5] Pursuant to provisions in the *Immigration and Refugee Protection Act* (IRPA) (in particular s. 12(1)) and the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations) and various policy documents of Citizenship and Immigration Canada (CIC), a spouse of a Canadian citizen may become eligible for permanent resident status in Canada as a member of the “spouse or common-law partner in Canada class”. However, under s. 4 of the Regulations, a foreign national shall not be considered to be a spouse if the marriage “is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under [IRPA]”.

[6] The interpretation of s. 4 of the Regulations has been the subject of considerable jurisprudence of this Court. As stated by Justice Mosley in *Donkor v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1089, 299 F.T.R. 262 at paragraph. 12:

... section 4 of the Regulations must be read conjunctively, that is the questioned relationship must be both not genuine and entered into primarily for the purpose of acquiring any status or privilege under the Act. That would seem to follow from a plain reading of the enactment and is supported by several decisions of this Court.

[emphasis in original]

[7] Further guidance was offered by Justice Hughes in *Khan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490, [2006] F.C.J. No. 1875 at paragraph 5:

Both branches of the test must be met before a person cannot be considered a spouse or partner. While the Applicant bears the onus of proof at this stage to demonstrate that a reviewable error has occurred, if the Applicant succeeds in that respect on only of these two branches of the test, then it is open to the Court to find that a reviewable error has occurred.

#### IV. ANALYSIS

[8] I begin by reviewing the decision.

[9] I note that the Officer makes an error in the cover letter dated May 4, 2009 by referring to Ms. Nawabi as the “common-law partner” of the Applicant. It is not disputed that the Applicant and Ms. Nawabi entered into a legal marriage and were not in a common-law relationship. It is obvious from the Decision and Reasons (contained in the Officer’s Notes to File, which constitute the reasons in this matter) that the Officer’s error in the cover letter was inadvertent and inconsequential. It does not constitute grounds to overturn the decision.

[10] In the Decision and Reasons, the Officer first reviews the Applicant’s immigration history, noting that the Applicant was married on the same day as he was reported for working in Canada without a permit. The Officer next sets out the test for meeting the requirements of s. 124(a) of the Regulations. Of particular relevance to the application before her, the Officer notes that s. 4 of the Regulations:

. . . clarifies that a foreign national will not be considered a spouse “if the marriage . . . is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the [IRPA]”.

[11] After correctly identifying the test, the Officer begins her consideration of the genuineness of the marriage. The Officer refers extensively to the interviews that she carried out with the Applicant and Ms. Nawabi and points to over 17 areas where the couple’s answers differed. While some of these responses may seem, to the reader, to be inconsequential, there is no doubt that many

of them were significant and that, cumulatively, they raise a serious doubt of the genuineness of the marriage.

[12] The Officer does not stop at that point. The Officer explicitly considers the evidence put forward by the Applicant in support of a "spousal relationship", as follows:

As evidence of their relationship, the applicant and sponsor provided their marriage certificate; a government cheque stub sent to the applicant at their shared address; limited photos (of their engagement, wedding, and a party they attended for a child's birthday); cellular phone invoices for two phone numbers, both under the sponsor's name; and a letter from their landlord attesting to their cohabitation. The applicant and sponsor also provided character reference letters for the applicant; the sponsor's bank statements for the past three months; and various bills/statements addressed to the sponsor, sent to their address. As the sponsor was already living at that address, I gave little [weight] to these documents as evidence of their spousal relationship. The applicant and sponsor both stated that they do not have any joint assets. I have considered their submissions and find them insufficient as evidence of a couple who was involved in an intimate relationship.

[13] What is apparent from reading the decision as a whole, on the question of the genuineness of the marriage, is that the Officer was considering the totality of all the evidence before her. Quite simply, the evidence proffered by the Applicant did not outweigh the evidence obtained through the personal interviews.

[14] The Applicant argues that the Officer erred by failing to explain why some of the information was rejected or not given weight. In my view, the Officer provided sufficient explanation. In short, even if every piece of documentary evidence had been accepted, the Officer was not persuaded that it established that the couple was in a loving intimate relationship – in other words, a genuine marriage. A review of the evidence before the Officer shows that this conclusion

was open to the Officer. For example, the letter from the landlord could have been written about two platonic roommates. The photos of the engagement may have been evidence that an “engagement” took place but say nothing about the genuineness of the relationship or marriage. The Officer considered and weighed all of the evidence.

[15] The second serious issue raised by the Applicant is that the Officer did not provide sufficient reasons as to why she found that the marriage was entered into primarily for the purpose of acquiring status under IRPA.

[16] As noted above, s. 4 of the Regulations requires the Officer to consider whether the marriage was entered into for the purpose of acquiring any status or privilege under the IRPA. The Applicant bears the burden of demonstrating that his marriage was not entered into primarily for the purpose of acquiring permanent resident status in Canada. I recognize that it is difficult for an Applicant to prove a negative; however, this is the evidentiary burden that must be met by the Applicant.

[17] What type of evidence could satisfy this burden? For one, a “genuine” marriage would weigh significantly in favour of a marriage that was not entered into for the purpose of gaining status in Canada. In this case (and, perhaps, in most situations), there is a strong link between the two prongs of the test. The timing of a marriage could also be relevant. For example, if the Applicant had been married while he still had legal status (a valid work permit or otherwise), this would be significant evidence in his favour. That was not the case before the Officer.

[18] The Officer – reasonably, in my view – had concluded that the marriage was not genuine. Much of the evidence and observations related to the genuineness of the Applicant’s marriage is also relevant to whether the marriage was entered into primarily for the purpose of acquiring permanent residence in Canada. The lack of genuineness presents strong evidence that the marriage was entered into for the purpose of gaining status. Moreover, the Officer had before her the evidence that the Applicant was married only after he was reported to immigration officials and that he has a seven-year history of not complying with immigration regulations. These were relevant considerations that were weighed by the Officer.

[19] Did the Officer fail to have regard to certain of the evidence – specifically that the Applicant and Ms Nawabi were engaged five months prior to his being questioned by the Inland Enforcement Officer? I do not think so. In the reasons, the Officer notes that she reviewed photos from their engagement. A review of the FOSS notes contained in the Certified Tribunal Record also shows that the Officer considered the photos from the engagement. However, offsetting the engagement photos was the fact that the Applicant could only produce photos from three occasions, even though he claims to have been in a relationship for three years.

[20] I am not persuaded that the evidence was ignored. Just as it was insufficient to persuade the Officer that the marriage was genuine, the evidence of the Applicant’s engagement was insufficient to demonstrate that the marriage itself was not entered into for the purposes of gaining status in Canada.

[21] In this case, it is evident that the Officer considered the evidence before her. The existence of all of the evidence, including the engagement photos, was weighed against the substantial evidence that this marriage was entered into primarily for immigration purposes.

## V. CONCLUSION

[22] Since I am satisfied that the Officer applied the correct test to the question before her, that she did not ignore evidence and that, overall, the decision falls within the range of possible, acceptable outcomes (See *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59), the Court will not intervene in the decision.

[23] Neither party proposed a question for certification.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. the application for judicial review is dismissed; and
2. no question of general importance is certified.

“Judith A. Snider”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-2620-09

**STYLE OF CAUSE:** SUNIL DUTT SHARMA v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** October 28, 2009

**REASONS FOR JUDGMENT  
AND JUDGMENT** Snider, J.

**DATED:** November 5, 2009

**APPEARANCES:**

Mr. Baldev Sandhu

FOR THE APPLICANT

Mr. Edward Burnet

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Sandhu Law Office  
Barrister and Solicitor  
Surrey, British Columbia

FOR THE APPLICANT

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Vancouver, British Columbia

FOR THE RESPONDENT