

Federal Court



Cour fédérale

Date: 20100205

Docket: IMM-5686-08

Citation: 2010 FC 122

Ottawa, Ontario, February 5, 2010

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

PARAMJIT KAUR GILL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by Paramjit Kaur Gill challenging a decision by the Immigration Appeal Division of the Immigration and Refugee Board (Board) which found her marriage to Baljit Singh Sandhu not to be genuine under s. 4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). What makes this case somewhat unusual is that Mr. Sandhu and Ms. Gill are the undisputed parents of a child born in Canada on August 12, 2006.

I. Background

[2] Ms. Gill entered Canada in 2002 after having been sponsored for landing by her first husband. That marriage broke down within a few months allegedly because of the husband's infidelity. Not long after the effective breakdown of Ms. Gill's first marriage, discussions ensued between Mr. Sandhu's Canadian relatives and Ms. Gill's Indian relatives with a view to arranging their marriage. Those discussions proved to be fruitful and Ms. Gill flew to India to marry Mr. Sandhu. They met for the first time on March 18, 2005 and they were married on March 25, 2005. They apparently cohabited for three weeks in India before Ms. Gill returned to Canada to go back to work. Ms. Gill returned to India in November 2005 and lived with Mr. Sandhu for a little over two weeks. It was during this time that Ms. Gill became pregnant by Mr. Sandhu. Once again, she returned to Canada to resume her employment. The parties claim to have maintained frequent contact by telephone and mail, but they have not lived together since.

[3] Ms. Gill applied to sponsor Mr. Sandhu in May 2005 and on November 14, 2005 they were examined in India by a Visa Officer (Officer). The Officer's notes to the file reflect a number of concerns about the *bona fides* of the marriage, including a suspicion that Ms. Gill's first marriage might have been one of convenience. The Officer also expressed reservations about whether the marriage conformed with Indian cultural norms and about the couple's incompatibility. On March 23, 2006 the Officer refused the sponsorship application on the basis that the marriage was not genuine and had been entered into for the purpose of obtaining immigration status for Mr. Sandhu. The Officer was not then aware of Ms. Gill's pregnancy. Ms. Gill appealed the refusal of her application to the Board and submitted DNA evidence confirming Mr. Sandhu as the

father of her child. The Board heard evidence from Ms. Gill, Mr. Sandhu and Ms. Jatinder Kaur Singh, Mr. Sandhu's paternal aunt.

[4] Notwithstanding the intervening birth of a child, the Board denied Ms. Gill's appeal. The Board found that Ms. Gill and Mr. Sandhu were not credible specifically with respect to their testimony about compatibility and the manner in which their relationship developed. The Board also expressed concerns about the infrequency of their visits since the wedding, an inconsistency about one telephone call, and the speed with which Ms. Gill entered into a second marriage. The decision contains other references to the Officer's concerns about the marriage not conforming to expected cultural norms and to some inconsistencies which arose during those initial interviews, but the Board failed to explicitly adopt those concerns as its own.

II. Issue

[5] Did the Board err in its treatment of the evidence concerning the genuineness of the Applicant's marriage?

III. Analysis

[6] When the Board is required to examine the genuineness of a marriage under ss. 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, it must proceed with great care because the consequences of a mistake will be catastrophic to the family. That is particularly obvious where the family includes a child born of the relationship. The Board's task is not an easy one because the genuineness of personal relationships can be difficult to assess from the outside. Behaviour that

may look suspicious at first glance may be open to simple explanation or interpretation. An example of this from this case involves the Officer's concern that the wedding photos looked staged and the parties appeared uncomfortable. The simple answer, of course, is that almost all wedding photos are staged and, in the context of an arranged marriage, some personal awkwardness might well be expected. The subsequent birth of a child would ordinarily be sufficient to dispel any lingering concern of this sort. Similarly, the Board's concern that Ms. Gill rushed into a second marriage can perhaps be explained by the fact that her divorce may have substantially reduced her prospects for remarriage.

[7] When assessing the genuineness of an arranged marriage, the Board must be careful not to apply expectations that are more in keeping with a western marriage. By its very nature, an arranged marriage, when viewed through a North American cultural lens, will appear non-genuine. When a relationship involves parties exposed to two cultures, Indian norms and traditions concerning marriage and divorce must also be applied with some caution.

[8] The Board was correct in acknowledging that, in the assessment of the legitimacy of a marriage, great weight must be attributed to the birth of a child. Where there is no question about paternity, it would not be unreasonable to apply an evidentiary presumption in favour of the genuineness of such a marriage. There are many reasons for affording great significance to such an event not the least of which is that the parties to a fraudulent marriage are unlikely to risk the lifetime responsibilities associated with raising a child. Such a concern is heightened in a situation like this where the parents are persons of very modest means.

[9] In its assessment of this marriage, the Board noted that “strong countervailing evidence” would be required to displace the significance of the birth of the child. The problem with the decision is that the Board’s assessment of that “strong countervailing evidence” largely concerned trivial, inconclusive or irrelevant matters and ignored considerable evidence which contradicted its conclusion.

[10] According to the parties this was an arranged marriage which had been negotiated by their extended families. The couple met for the first time only seven days before their wedding on March 25, 2005 in India and have only cohabited for about 40 days since that time. In this context the Board’s apparent concern that Mr. Sandhu knew very little about Ms. Gill’s life in Canada was misplaced. The same can be said for their disagreement about whether they had first spoken by telephone. In the situation of a marriage arranged by third-parties, this is a largely irrelevant point and, in any event, easily forgotten with the passage of time.

[11] The Board’s additional concern about the infrequency of Ms. Gill’s travel to India since the wedding is not adequately explained. Ms. Gill testified that she did not believe in birth control and was thus reluctant to return there and risk a second pregnancy. This was a completely rational fear in the face of a relationship that Citizenship and Immigration Canada had refused to recognize. Ms. Gill also testified that she had wanted to go to India in August 2008 after Mr. Sandhu’s mother passed away, but this possibility was stymied by an inability to obtain timely travel documents for her child. She also said that they frequently communicated by telephone and by mail and that she

wanted the family to be together. This evidence is noted by the Board, but never assessed. The decision simply sets out the conclusion that “[t]here does not appear to be any genuine desire on the part of the appellant to be with her husband”. This is the type of threadbare analysis that runs afoul of the requirement that reasons be intelligible and justified: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59. The Board’s failure to address the substantial body of evidence which contradicted its conclusion constitutes a reviewable error: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 at para. 17.

[12] The Board’s bare conclusion that Mr. Sandhu and Ms. Gill were not compatible also ignores their uncontradicted evidence that they were both Sikhs, they both spoke Punjabi, they both had grade-5 educations, they both held comparable levels of employment, and they both came from rural settings. The only potential contradiction to this was the Board’s observation that their respective ages and Ms. Gill’s status as a divorced person were inconsistent with prevailing cultural norms in India. The idea of a preferred age differential does not mean that marriages that fall slightly outside of the range do not occur. The same can be said for the Indian cultural view on divorce. Presumably marriages between previously unmarried persons and divorced persons do take place in India. The evidence also indicated that the Indian cultural stigma concerning divorce was diminished where no children were born of the first marriage and where the divorce was seen as the fault of the other party. In this case, Ms. Gill’s divorce was said to be the result of her first husband’s adultery and there were no children of that relationship. The Board failed to take any

note of these highly relevant considerations and thus failed to fulfill the obligation to consider all of the evidence and not just the evidence that confirmed its negative conclusion.

[13] Finally, the Board treated the two conjunctive elements of s. 4 of the Regulations as though they were the same. Evidence which bears on the issue of an immigration motive to obtain status in Canada may well be different from the evidence which is relevant to the genuineness of a marriage. In this case some consideration of Mr. Sandhu's situation in India before his introduction to Ms. Gill would have been useful in determining whether he had a desire to leave India for Canada for reasons other than marriage.

IV. Conclusion

[14] The cumulative deficiencies in the Board's analysis are sufficiently grave that this matter must be returned for reconsideration on the merits.

[15] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be returned for redetermination on the merits by a different decision-maker.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5686-08

STYLE OF CAUSE: Gill
v.
MCI

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

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