

Federal Court



Cour fédérale

**Date: 20120719**

**Docket: IMM-238-12**

**Citation: 2012 FC 903**

**Ottawa, Ontario, July 19, 2012**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**HARKAMALJIT KAM NIJJAR**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Harkamaljit Kam Nijar [the Applicant] applies for judicial review of a decision of the Immigration Appeal Division [the IAD] of the Immigration and Refugee Board dated December 15, 2011, wherein the IAD denied the Applicant's appeal from a visa officer's refusal of her application to sponsor her husband for a permanent resident visa because the Applicant's marriage was determined (i) not to be genuine and (ii) entered into primarily for the purpose of acquiring a status or privilege under the Act [the Decision]. This application is made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The Applicant is 43 years old and is a Canadian resident and citizen. In India she completed primary school and five years of high school but she did not graduate. She was married to her first husband on March 23, 2003 and came to Canada from India on October 9, 2004 as a spouse. The Applicant and her husband divorced on November 3, 2008. According to the Applicant's affidavit evidence, their marriage broke down because he did not want to have children.

[3] The Applicant met her current husband, Harpal Singh Nijjar [the Husband], in India on February 24, 2010.

[4] Their meeting was arranged by a matchmaker who is a distant relative directly and by marriage of both parties.

[5] The Husband is 31 year old citizen of India. At their initial meeting in India the Applicant and her Husband [the Couple] spoke alone for approximately one half-hour [the First Meeting]. The Couple met again the next day, along with members of the Husband's family, and decided to marry [the Second Meeting].

[6] The Husband has two years of high school education and works as a farm labourer. The Applicant is currently employed at McDonalds.

[7] The Couple's marriage took place in India on March 7, 2010 and they went on a brief honeymoon to Kulu Manali. Thereafter, they returned to the Husband's home and then made a

number of short trips. During this time they also made arrangements concerning the Husband's paperwork for immigration to Canada. The Applicant returned to Canada on April 21, 2010.

[8] The Applicant discovered that she was pregnant on May 28, 2010 but had a miscarriage on June 7, 2010.

[9] The Husband was interviewed by a visa officer [the Visa Officer] on January 11, 2011 and his sponsorship application was refused on January 12, 2011 [the Sponsorship Decision].

[10] On March 8, 2011, the Applicant travelled back to India to visit her Husband. She states that during this time the Couple spent time together at home, visited relatives and friends, and travelled to visit religious and tourist sites. During the visit, the Applicant also met with a lawyer to complete the Husband's immigration papers. She returned to Canada after staying in India for two months.

[11] On October 3, 2011, the Couple attended a hearing before the IAD [the Hearing] to appeal the Sponsorship Decision. The Applicant states in her affidavit that, prior to the Hearing, she met briefly with the immigration consultant the Couple hired to represent them [the Consultant]. The Husband met the Consultant for the first time on the day of the Hearing.

[12] The IAD dismissed the Applicant's appeal on December 15, 2011.

## THE DECISION

[13] The IAD observed that there are two separate tests for determining who is and who is not a spouse pursuant to subsection 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations]. It reads:

4. (1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership

(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or

(b) is not genuine.

4. (1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :

a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;

b) n'est pas authentique.

### *The marriage is not genuine*

[14] The IAD began with this issue and noted that the existence of a genuine marriage is a question of fact and “includes a mix of the past, current and future state of affairs in the relationship.” It stated that the onus of proof is on the Applicant to show, on a balance of probabilities, that the sponsored individual is not disqualified as a spouse.

[15] The IAD concluded that the evidence did not indicate a genuine spousal relationship between the Applicant and the Husband, based on “significant gaps, discrepancies and inconsistencies” in the evidence. The IAD provided the following examples:

- (i) The Couple provided no satisfactory explanation about why the Husband and his family considered the marriage to be an acceptable match given the age difference between the two and the fact that the Applicant had previously been married;
- (ii) The IAD found that it was not credible that the Couple and their families would enter into the marriage so quickly given these “incompatibilities”;
- (iii) The Husband was not able to explain why this was a good match;
- (iv) The Husband could not say what the Couple discussed at the First Meeting;
- (v) The Husband could not say whether the Couple had private discussions at the Second Meeting;
- (vi) The Husband could not say why the Applicant had divorced and wanted to remarry;
- (vii) The Husband could not describe the relationship between the Applicant and the couple who took the role of her parents at the wedding;
- (viii) The Husband could not provide details of the Applicant’s miscarriage;
- (ix) The Husband could not provide details of the Applicant’s living accommodations;
- (x) The Husband did not know how often the Applicant attends the *gurdwara*.

[16] The IAD concluded that the Husband had not bothered to learn or remember personal information about the Applicant because he did not intend the marriage to be a lasting relationship.

[17] As discussed below, the Applicant says that seven of these conclusions are erroneous because the Board ignored relevant evidence.

*The marriage was entered into primarily for the purpose of acquiring a status or privilege under the Act*

[18] The IAD also concluded that the marriage was arranged primarily to allow the Husband to acquire permanent resident status in Canada. In addition to the evidence described above, the IAD also cited the following evidence on which it based this conclusion:

- The Husband did not tell the Applicant that he had travelled abroad to Thailand since the marriage;
- There were contradictions in the Couple's evidence regarding:
  - i. Where the Couple will live in the future;
  - ii. Whether the Couple have discussed sponsoring the Husband's parents to come to Canada; and
  - iii. Whether the Applicant ever asked her Husband if he intended to marry her in order to come to Canada.

[19] The IAD found that the Couple failed to demonstrate that they have developed or are developing a genuine spousal relationship.

## **THE ISSUES**

[20] The Applicant raises the following issues:

1. Did the IAD ignore and/or misconstrue relevant evidence?
2. Was there a breach of procedural fairness either because the IAD displayed bias or because the Couple's immigration consultant was incompetent?

## **THE STANDARD OF REVIEW**

[21] Counsel for the parties agreed at the hearing and I accept that "reasonableness" is the applicable standard of review.

### **Issue 1**

(i) *The Husband's knowledge about the breakdown of the Applicant's first marriage*

[22] The IAD concluded that it was not credible that the Husband did not have more knowledge about the breakdown of the Applicant's first marriage. The Applicant says, and I agree, that the IAD ignored the Husband's testimony on this point, in which he demonstrated knowledge of the marriage breakdown. He said:

Board: Do you know what the reason was that her first marriage broke up?

Husband: Well, from whatever little she told me, I understand that she wanted a baby but however I did not dwell too much on this subject because she kind of gets tense, so I have not touched these issues much.

[23] The Applicant also says that the Husband told the Visa Officer that the Applicant divorced because she wanted children and her first husband already had children.

(ii) *The suitability of the match between the Applicant and her Husband*

[24] The IAD found that it was not credible that the Couple and their families would enter into a spousal relationship so quickly given their 12 year age difference and the Applicant's prior divorce.

[25] The Applicant says, and I agree, that the IAD ignored the Husband's testimony that his parents were initially reluctant about the marriage. The Husband testified that he convinced his parents that the Couple shared similar views and that she was a nice person, after which they agreed that the marriage should proceed. The Applicant argues that this is evidence that the marriage was well thought out and not hasty.

(iii) *The Husband's inability to explain why the match was a good one*

[26] The IAD found it was not credible that the Husband was unable to explain why his match with the Applicant was a good one. However, I have determined that the following evidence was ignored by the Board:

- In his testimony before the IAD, the Husband described two previous marriage prospects. One he found to be too highly educated and he rejected the other because of her appearance;
- The Husband explained during his interview with the Visa Officer that although the Applicant was 12 years older she did not look her age. He also explained that she was from a good family and was a nice girl;



- The Husband testified before the IAD that he and the Applicant shared similar views and that she was not too well educated.

[27] In my view, this evidence shows that the Husband had in his mind a particular type of person that he wanted to marry, and that the Applicant fit his criteria. This provided an explanation for why the match was a good one.

(iv) *The Husband's knowledge of personal details about the Applicant*

[28] The IAD concluded that the Husband had insufficient knowledge of the Applicant's personal details and circumstances. However, I accept the Applicant's submissions that the IAD ignored the following evidence:

- *The Miscarriage* – although the Husband did not know the precise month in which he was advised of the pregnancy or the miscarriage, he knew the correct days (i.e. the pregnancy occurred on the 28<sup>th</sup> or 29<sup>th</sup>, and the miscarriage occurred on the 7<sup>th</sup>). As well phone records showed that they spoke on both dates.
- *Living accommodations* – the Husband testified that the Applicant owned a two-level house in partnership with another person; the Applicant lived in the upstairs part of the house; the basement was empty and belonged to the partner; and the Applicant paid \$800/month toward the mortgage.

- *Applicant's employment* – the Husband testified that the Applicant works at McDonalds and has been doing so for the past 4-5 years. He also testified that the Applicant walked to work, which was about 15 minutes from her home.

(v) *Evidence regarding the development of a genuine spousal relationship*

[29] The IAD found that the evidence did not demonstrate that the Couple had developed or are developing a genuine spousal relationship. However, the Applicant points to several pieces of evidence which she says contradict the IAD's finding:

- The Applicant and her Husband both testified that they went on a honeymoon to Kulu Manali and stayed at two hotels while there. However, there was some question based on the receipts and the Husband's statements to the Visa Officer about whether they stayed for three or four nights;
- The Applicant testified about the various places the Couple visited together during her trips to India in 2010 and 2011;
- The Applicant and her Husband both testified that the Husband would have to find a job once he came to Canada;
- "Extensive" phone records from both the Applicant and her Husband were part of the record before the IAD. They showed frequent communication between the two (a total of 660 calls) and, in particular, showed calls on the date the Applicant learned she was pregnant and on the day of her miscarriage. It is

noteworthy that the IAD seemed to disparage the documentary evidence about the regular phone communication between the Applicant and her Husband. For some reason it spoke of the “alleged” communication since the marriage. This language is unreasonable given that there was no suggestion that the records were false and given that, in the preceding paragraph of the Decision, the IAD had described them as part of “favourable evidence”.

- The Applicant provided evidence from her doctor in Canada confirming her pregnancy and subsequent miscarriage.
- Wedding photographs showing a reception and pre- and post-wedding ceremonies and the honeymoon were provided as part of the record before the IAD;
- The Applicant testified that her pregnancy was planned.

[30] However, there were also discrepancies in the evidence which suggest that the Couple is not in a genuine spousal relationship. They included:

- The fact that the Husband visited Thailand after the marriage. Before the IAD, he testified that he had told the Applicant about the trip but she testified that she was not aware that he had travelled outside India after their wedding;
- The fact that the Applicant testified that she and her Husband had discussed sponsoring his parents to come to Canada and had agreed with his parents that they would come to Canada only after the marriage of another of their sons who lived in Spain. However, the Husband denied that the subject had been given any thought and denies having discussed it with his parents;

- The fact that the Applicant and her Husband could not accurately describe each others' religious observance. The Applicant said her Husband attended the *gurdwara* twice a day yet he said he attended once or twice a week. The Applicant said she attends once or twice a month but the Husband said she never attended.

### **Conclusion on the First Issue**

[31] There is no question that the IAD ignored significant evidence on material issues and therefore overstated the gaps and inconsistencies in the evidence. This failure means that it cannot be said that the IAD considered the “totality” of the evidence. However, in my view, this was only part of the problem with the Decision. It also fails to squarely address the fact that the Couple conceived a child and, but for the miscarriage, would now share responsibility for a sixteen month old toddler. The birth of a child, as Mr. Justice Barnes of this Court said in *Gill v Canada (Citizenship and Immigration)*, 2010 FC 122 at para 8 should be accorded great weight by the Board in assessing the genuineness of the marriage. The fact that the Decision did not focus on this aspect of the evidence also makes it unreasonable.

[32] In view of this conclusion, it is not necessary to consider the second issue.

### **CERTIFIED QUESTION**

[33] No question was posed for certification under section 74 of the Act.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that** the application is allowed. The appeal of the Visa Officer’s disqualification of the Husband’s as a spouse under subsection 4(1) of the Regulations and the resulting negative sponsorship Decision of January 12, 2012 is to be reconsidered by another member of the IAD. Fresh evidence may be filed by both parties on the reconsideration.

“Sandra J. Simpson”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-238-12  
**STYLE OF CAUSE:** NIJJAR v MCI  
**PLACE OF HEARING:** Vancouver, British Columbia  
**DATE OF HEARING:** June 27, 2012  
**REASONS FOR JUDGMENT:** SIMPSON J.  
**DATED:** July 19, 2012

**APPEARANCES:**

Kamaljit Kaur Lehal

FOR THE APPLICANT

Hilla Aharon

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lehal & Company  
Delta, British Columbia

FOR THE APPLICANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT