Federal Court  Cour fédérale

Date: 20130620

Docket: IMM-10810-12

Citation: 2013 FC 662

Ottawa, Ontario, this 20th day of June 2013

Present: The Honourable Mr. Justice Pinard

BETWEEN:

JASPREET SINGH SANDHAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a member of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board, brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "Act"). The IAD denied the applicant's appeal of an immigration officer's decision to refuse the sponsored application of the applicant's spouse, Harpreet Kaur Sandhar, as a member of the family class.

[2] The applicant was born in India and was sponsored to come to Canada by his first wife.

[3] The applicant landed in Canada on September 8, 2005. After less than a year of cohabitation with his first wife, they separated and eventually divorced on September 11, 2008.

[4] A relative of the applicant (the "Broker") proposed and arranged the marriage between the applicant and his second wife ("Mrs. Sandhar"), who is a citizen of India and eight years younger than the applicant. Initial talks between the Broker and Mrs. Sandhar's family took place in October and November 2010. On January 25, 2011, the applicant went to India with his family, where he met Mrs. Sandhar and her family at her residence on January 26, 2011. The couple agreed to marry and an engagement ceremony was held at a hotel on January 27, 2011. The marriage took place on February 6, 2011 and was followed by a honeymoon.

[5] The applicant remained in India until March 28, 2011. He returned to India from October 10, 2011 to November 15, 2011.

[6] The applicant submitted a sponsorship application for his spouse in June 2011 that was refused by the visa office on October 21, 2011. The immigration officer was satisfied that the marriage was not genuine and was entered into primarily for the purpose of acquiring permanent residence in Canada.

[7] The applicant appealed to the IAD. At the time of the appeal hearing, the applicant was 31 years old. The IAD came to the same conclusion as the immigration officer. The present application is a judicial review of that decision.

* * * * * * * *

[8] The IAD found it odd that Mrs. Sandhar's parents would agree to marry their only child to a divorcee without conducting an independent investigation into the cause of the breakdown of the applicant's first marriage, particularly given the circumstances of the applicant's first marriage and divorce and contradictory evidence in the statement of claim for this divorce regarding the length of time the applicant cohabitated with his first wife. The IAD also found a lack of explanation for the haste of the engagement ceremony and the wedding ceremony. Moreover, the explanation for why the couple agreed to marry, despite their incompatibilities, was not persuasive.

[9] The IAD found that mistakes on hotel and restaurant bills from the couple's honeymoon compounded its suspicion of the genuineness of the marriage.

[10] Furthermore, the IAD determined that the couple had conflicting testimony with respect to their discussions regarding birth control and having a family.

[11] The IAD also noted there was a lack of evidence regarding the couple's ongoing relationship since their wedding, given the distance between them.

[12] The IAD concluded that the marriage was not genuine and was entered into primarily for the purpose of gaining status or privilege under the Act.

* * * * * * * *

[13] The following provision of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") is relevant:

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	**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*) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	*a*) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;
(*b*) is not genuine.	*b*) n'est pas authentique.

* * * * * * * *

[14] The respondent submits as a preliminary issue that paragraph 7 and Exhibits "A" and "B" of the applicant's affidavit filed on March 11, 2013 should be struck or given no weight as they refer to evidence concerning Mr. Sandhar's wife's pregnancy which post-dates the IAD decision.

[15] It is a well-established principle that a judicial review of a decision must be based on the evidence before the decision-maker (*Sidhu v The Minister of Citizenship and Immigration*, 2008 FC 260 at para 22 and the cases cited therein). Therefore, I find that paragraph 7 and Exhibits "A" and "B" of the applicant's affidavit filed on March 11, 2013 is evidence that is inadmissible, as it was evidence that was not before the IAD.

* * * * * * * *

[16] The issue in this matter is whether the IAD erred in determining that the applicant's relationship was not genuine and was entered into for the purpose of acquiring any privilege or status under the Act.

[17] The reasonableness standard applies to the IAD's factual findings pursuant to section 4 of the Regulations (*Ma v The Minister of Citizenship and Immigration*, 2010 FC 509 at paras 26 and 30-31; *The Minister of Citizenship and Immigration v Oyema*, 2011 FC 454 at para 7).

[18] In order for a decision to be reasonable, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "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] 1 SCR 190 at para 47).

* * * * * * * *

[19] In the October 23, 2012 decision of *Achahue v The Minister of Citizenship and Immigration*, 2012 FC 1210, this Court provided the following guidance regarding the nature of an appeal of an IAD determination that a marriage was not genuine and was entered into for the purpose of acquiring a status under the Act:

> [16] It should be noted that the appeal to the IAD is a *de novo* appeal, in which the IAD must consider afresh whether the person sponsored as a spouse, common-law partner or conjugal partner is a

member of the family class (see *The Minister of Employment and Immigration v. Gill* (1991), 137 N.R. 373 (F.C.A.) and *Kahlon v. The Minister of Employment and Immigration* (1989), 97 N.R. 349 (F.C.A.)).

[17] As established by the case law, the onus was on the applicant to demonstrate to the IAD, on a balance of probabilities, that her spouse met the requirements of section 4 of the Regulations (see, *inter alia*, *Mohammed v. The Minister of Citizenship and Immigration*, 2005 FC 1442 and *Mohamed v. The Minister of Citizenship and Immigration*, 2006 FC 696, 296 F.T.R. 73 [*Mohamed*]).

[18] With respect to the relevant issue, namely, whether the marriage is genuine or whether it was entered into for the purpose of acquiring a status under the Act, it is well established in the case law that reasonableness is the applicable standard (see *Chen v. The Minister of Citizenship and Immigration*, 2011 FC 1268, *Singh v. The Minister of Citizenship and Immigration*, 2006 FC 565 [*Singh*] and *Mohamed*, above).

[19] This is a question of fact that boils down to the credibility of the spouses (*Sidhu v. The Minister of Citizenship and Immigration*, 2012 FC 515 [*Sidhu*]). This Court must therefore show considerable deference in determining whether the findings are justified, transparent and intelligible and fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47). It is not open to this Court to reassess the evidence that was before the panel (*Zrig v. Canada (The Minister of Citizenship and Immigration)*, 2003 FCA 178, [2003] 3 F.C. 761 at paragraph 42).

[20] This Court must consider the impugned decision as a whole (*Singh* and *Sidhu*, above) and not engage in a microscopic examination of the evidence; nor may this Court dissect the panel's decision (*Singh* citing *Carrillo v. The Minister of Citizenship and Immigration*, 2004 FC 548).

[21] I also adopt the following comments of my colleague, Justice Robert L. Barnes, in *Gan v. The Minister of Public Safety and Emergency Preparedness*, 2006 FC 1329, as my own:

> [16] It is not sufficient for an Applicant seeking judicial review to identify errors with respect to a few of the Board's

> findings of fact or some weaknesses in its analysis of the evidence. A decision will be maintained if it can be seen to be supported by other factual findings reasonably made.

[20] In my view, even though considerable deference is due to the IAD's determination, the present application ought to be allowed.

[21] I am persuaded by *Gill v The Minister of Citizenship and Immigration*, 2010 FC 122, 362 FTR 281 [*Gill*], that the IAD erred in its treatment of the arranged marriage and the compatibility of the couple. As Justice Robert Barnes stated at paragraph 7 of the decision:

> [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.

[22] In *Gill*, Justice Barnes proceeded to analyze the IAD's treatment of the arranged marriage by stating the following:

> [10] <u>According to the parties this was an arranged marriage which had been negotiated by their extended families</u>. 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.
>
> […]

> [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.
>
> [Emphasis added]

[23] Similarly, the present case involves an arranged marriage negotiated by the couple's extended families. The couple met for the first time only eleven days before their wedding on February 6, 2011 and in the record before the IAD, the couple had only been physically in the same country for about 65 days since their marriage. Given the circumstances of this marriage arranged by third parties, I believe the IAD's concern over the fact that the couple agreed to marry after speaking to each other for only 15 to 20 minutes is misplaced.

[24] The IAD repeatedly mentioned its concern that Mrs. Sandhar's family had not undertaken background checks related to the applicant's previous marriage and divorce, given that the applicant's first marriage only lasted a few months and that this should have incited concern on the

part of Mrs. Sandhar's family. However, the respondent has not pointed to any evidence in the record that supported the IAD's concern that it was odd the family had not looked into this. On the contrary, the applicant refers to testimony before the Board by Mr. Bains, who is Mrs. Sandhar's brother-in-law and was the only person tasked by Mrs. Sandhar's family to do a background check of the applicant. Mr. Bains testified that Mrs. Sandhar's family knew about the divorce but only asked him to look into the applicant's character, as found at pages 446 and 447 of the tribunal record:

> CROSS-EXAMINATION OF MR. BAINS BY MR. MacDONALD
>
> Q …How many times has Jaspreet Singh been married?
>
> A Just two times. Like his (indiscernible) divorce and now with my wife's niece.
>
> Q And is divorce common in the Punjab?
>
> A At this time, yes. I'd say. It is but when I got married -- let me tell you what my -- I got married 20 years ago. I didn't see my wife since my first night. We are living since 20 years together but now everything's changed so different opinions and different lot of modernization and everything's coming up.
>
> Q When did you first learn that Jaspreet Singh had previously been married?
>
> A It's when this – Kurwant [Mrs. Sandhar's mother] called me then she – we discussed briefly because she was told by the person interviewed that he (indiscernible), I think. Then I told her "Okay. I can check the background but people get divorced. Some good people can get divorced as well. It's not like somebody got divorced and he's a bad person."
>
> Q So what did you learn about Jaspreet Singh's divorce?
>
> A All [Mrs. Sandhar's mother] told me he's been divorced once in Canada and now he's living by himself some – in

> Kelowna. This is his name. Can you find out his character now?
>
> Q So when you contacted your friend, I believe it was Karwinder Singh --
>
> A Karwinder Singh.
>
> Q Yeah, what did Karwinder Singh tell you about the divorce?
>
> A He didn't tell me anything, I didn't ask him about it.

[25] Moreover, while the IAD was concerned with the issue of the applicant's divorce, the IAD also repeatedly found that there were incompatibilities between the applicant and his wife (see paragraphs 9 and 13 of the decision). Similar to what was found in *Gill*, at paragraph 12, in my view, the IAD's finding that the couple had many incompatibilities ignored the uncontradicted evidence before the IAD that they are both Sikhs, both speak Punjabi, both originate from small villages near one another in India, both want a family and are only eight years apart in age.

[26] I disagree with the respondent that *Gill* is distinct from the case at hand. Although in *Gill*, at paragraph 8, this Court recognized the significance of a child when assessing the legitimacy of a marriage, in no way did the Court indicate that the fact the couple had a child was determinative of the decision.

[27] In my view, the above errors are significant and important enough to render the impugned decision unreasonable and to warrant the intervention of the Court.

* * * * * * * *

[28] For the above reasons, the application for judicial review is allowed and the matter is remitted to a differently constituted panel of the IAD for redetermination.

[29] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review is allowed. The decision of a member of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board of Canada, dated September 27, 2012, is quashed and the matter is remitted to a differently constituted panel of the IAD for redetermination.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10810-12
STYLE OF CAUSE:	JASPREET SINGH SANDHAR v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	June 20, 2013

APPEARANCES:

Me Ross Depner	FOR THE APPLICANT
Me Aman Sanghear	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ross M. Depner Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT