IMMIGRATION AND REFUGEE BOARD
(APPEAL DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE REFUGIE
(SECTION D'APPEL)

2001 CanLII 26792 (CA IRB)

VA0-01582

REASONS FOR DECISION AND ORDER

APPELLANT(S)/APPLICANTS — APPELANT(S)/REQUÉRANT(S)

HARDEEP KAUR BOPARAI

RESPONDENT — INTIMÉ

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

DATE(S) OF HEARING — DATE(S) DE L'AUDITION

November 23, 2000

PLACE OF HEARING — LIEU DE L'AUDITION

Vancouver, B.C.

DATE OF DECISION — DATE DE LA DÉCISION

June 27, 2001

CORAM — CORAM

Marilyn Baker

FOR THE APPELLANT(S)/APPLICANT(S)) — POUR L'APPELANT(S)/REQUÉRANT(S)

Massood Joomratty
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FOR THE RESPONDENT — POUR L'INTIMÉ

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Hardeep Kaur BOPARAI (the "appellant") appeals the refusal of the sponsored application for permanent residence of her spouse, Jasbir Singh BOPARAI (the "applicant") from India. The application was refused in a letter dated April 10, 2000[1] because, in the opinion of the visa officer, the applicant married the appellant primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing with her permanently. He is, therefore, inadmissible as a person described in section 4(3) of the *Immigration Regulations, 1978* (the "*Regulations*").

SUMMARY OF EVIDENCE AND ANALYSIS

The appellant, Hardeep Kaur Boparai, and the applicant, Jasbir Singh Boparai, testified at the hearing – the latter by teleconference from India.

The appellant is a 34-year-old woman who was landed in Canada in February 1998. She had married Balvir Singh Pada in India in August 1996 and he sponsored her to Canada. Within two months of her arrival she and her first husband separated. The appellant stated that he was a "bad man" who went out with other women. Evidence adduced is that the appellant's first husband was a divorcée at the time of their marriage.

The appellant's divorce petition indicates that her first husband committed adultery and that was the basis for the breakdown of the marriage.[2] Asked if his adulterous relationship was with his first wife, the appellant said that she did not know whom he was seeing. She moved out of his house and in with a roommate in April 1998 then filed for divorce in August 1998. The divorce became effective on November 19, 1998.[3]

Despite the fact that she has no relatives in Canada and was alone here, and despite the testimony that the reason she came to Canada – to reunite with her husband –

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1 Record, p. 148.
2 Record, pp. 8-12.
3 Record, p. 7.

was no longer relevant within two months of her landing, the appellant seemingly did not consider returning to India. Rather, several months later and prior to filing for a divorce, she was involved in serious discussions about a second marriage to someone in India whom she would sponsor to Canada. This match, with twenty-one year old Jasbir Singh Boparai, was suggested by a co-worker of the appellant, Surinder Kaur, who is the wife of Amarjit Singh Boparai, the applicant's older brother. The appellant was working alongside Surinder Kaur at a cannery and, when she told her the story of her marital breakdown, Surinder Kaur asked if she would be interested in marrying again. The appellant stated that these discussions commenced in June 1998. She said her parents were concerned about her being on her own in Canada.

When reviewing the history of the file, the visa officer noted that the appellant's first marriage appeared to be one of convenience to gain her admission to Canada. Considering the evidence in this regard, the Appeal Division concurs. That said, however, it is the circumstances in the case at hand which are to be assessed to determine if this marriage is genuine.

The appellant initially testified that she talked to her parents in India in June 1998 and they then visited the applicant's home and discussed the matter with them at the end of July 1998. A photograph of Jasbir Singh was sent and the appellant agreed to the match in early August 1998. On cross-examination, the appellant's testimony changed about the timing of events. She then stated that she contacted her parents about the match at the end of June 1998, and discussions were ongoing. They went to the applicant's home (which is in village Hussainpur) in November, met "the boy" and his parents, made inquiries, and found that all was "okay". It was then that they got a photograph of the applicant and gave them a photograph of her. The appellant saw the photograph in November and the match was agreed upon. There was no explanation for these inconsistencies in the appellant's testimony.

Furthermore, the applicant's *viva voce* testimony contradicts the appellant's. He told the visa officer that the discussions about his marriage occurred a short time before

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the marriage.[4] At this hearing, he testified that discussions between his sister-in-law, Surinder Kaur, and the appellant did not commence until four months before the marriage. He talked to his brother, Amarjit Singh, on the telephone who said that they would find a girl in Canada for him to marry. His brother then sent the appellant's photograph about four months before the marriage. The applicant further testified that the first time he met the appellant's parents was a week before the February 1999 marriage when he went to their house (which is in village Bhagwanpur). He stated that he had never met them before, although her parents met his parents at his home several weeks earlier. There was no explanation for this significant contradiction in the testimony about when and how the arrangements for the marriage progressed.

The applicant, who is now 23 years old, was originally included as an accompanying dependent on a sponsorship application of his parents by his brother, Amarjit Singh Boparai. The application was in process at the time of the applicant's marriage to the appellant. There had been a delay in processing the application as the visa officer initially required DNA testing to prove the applicant's family relationship. That was done. Medicals were also completed. However, with the February 1999 marriage to the appellant, the applicant's inclusion in the family sponsorship was subsequently withdrawn. The applicant's parents were then issued visas and were landed in Canada in November 1999.

The appellant acknowledged that initially there were discussions about her marrying the applicant when he arrived in Canada, however, that decision was changed and the appellant returned to India and they were married on February 21, 1999. The applicant, however, denied that there were any plans for him to come to Canada and marry the appellant. The plan, he said, was for him to come to Canada as an accompanying dependent of his parents who were sponsored by his older brother. There was no discussion of then marrying the appellant. Evidence adduced is that the marriage

[4] Record, p. 152.

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was a large one attended by several hundred people from both sides, including family members from Canada, England and Australia.

The applicant admitted that being sponsored by a spouse in Canada was an attraction that would allow him to join his family here. That was a positive factor when agreeing to the match, as was the fact the appellant is "nice". In the view of the Appeal Division, the evidence indicates that, more likely than not, the basis of the applicant and the appellant's marriage was primarily for the purpose of gaining his admission to Canada as a member of the family class.

Pursuant to the Federal Court Trial Division decision in *Horbas*,[5] however, a two-prong test must be applied in order to disqualify a spouse under subsection 4(3) of the *Regulations*. First, the applicant must have entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and, second, on a balance of probabilities, there must be no intention on the part of the applicant to reside permanently with the appellant. Accordingly, the onus is on the appellant to show that at least one of the tests has not been met.

The appellant stayed in India for two months after the marriage and when she returned to Canada she was pregnant. A baby girl was born to her on December 6, 1999 and DNA evidence shows the applicant's paternity.[6] Appellant's counsel submits that the appeal should be allowed as that evidence is determinative of the case. Minister's counsel submits that such evidence is not determinative of the applicant's intentions at the time of his marriage or the *bona fides* of the marriage. The Appeal Division concurs. Counsel noted that the visa officer was aware of the child's birth when considering the application however, despite this information, concerns surrounding the baby's birth certificate and other inconsistencies in the evidence resulted in the refusal.

In particular, the visa officer expressed concern that the original birth certificate of the couple's daughter, issued February 4, 2000, did not include the name of the father or

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5 *Horbas* v. *Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 359 (T.D.).

6 Exhibit A2 – Taken in as evidence upon submission, as agreed, following the hearing.

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his place of birth.[7] The applicant told the visa officer that because he was not in Canada he was not shown on the certificate. A second birth certificate issued February 28, 2000[8] included the applicant's name and place of birth but there was no explanation to the visa officer of how this amended certificate was obtained. Furthermore, the visa officer stated his understanding is that most Canadian provinces insist on having the paternal information when registering births, "so that fathers can be held responsible for the maintenance of their offspring".[9] The visa officer continues:

> While I do not know how your sponsor was able to register the birth of her child without recording the father's name, I was of the view that the explanation seemingly given by her to you was not credible.

And further:

> While some of my concerns have been addressed, there remains the significant differences of age and marital status, and the suspicious nature of the way in which the child's birth was registered.

While this *de novo* hearing[10] is not a judicial review of the visa officer's refusal, the issues of concern to the visa officer are addressed. In this regard, the Appeal Division takes official notice that in British Columbia, the inclusion of the name of the father is not mandatory when registering a birth. In order to include the name of the father, he must sign the application for the registration. *Viva voce* testimony at this hearing is that the birth was initially registered without the applicant's signature and later amended through a second registration form once a second application had been sent to the applicant for his signature.

On reviewing the visa officer's notes[11] and refusal letter, the Appeal Division finds that he seemingly had doubts that the applicant is the father of the appellant's child and, therefore, gave less weight to that factor in assessing the *bona fides* of the relationship.

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7 Record, p. 157.
8 Record, p. 158.
9 Record, p. 149.
10 *Kahlon, Darshan Singh* v. *M.E.I.* (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: *Kahlon* v. *Canada (Minister of Employment and Immigration)* (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).
11 CAIPS notes, Record, pp. 152-154.

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Considering the correct information with respect to the birth registration requirements, and considering the new DNA evidence showing the applicant's paternity, the Appeal Division finds the evidence shows that the child, Harleen Kaur Boparai, was born from the union of the appellant and the applicant following their marriage. While not determinative, this fact reflects positively in assessing the tenure of the couple's relationship.

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There is no question that the circumstances surrounding the arrangement of the marriage and the contradictory testimony in this regard raise serious questions about the intentions and purpose of the parties in this marriage. As noted by the visa officer in the letter of refusal:[12]

> But for the fact that the relationship had produced a child, it would be difficult to give any credit to the claim that it is genuine.
>
> However, even the birth in Canada of a child to your sponsor leaves its own unanswered, or inadequately answered, questions.

The Appeal Division recognizes the basis of this assessment but notes that there *is* a child and at this hearing the questions surrounding the child have been addressed conclusively and removed any doubt that the child is that of the couple in this case.

Further evidence adduced indicates that the appellant and applicant are in contact with each other regularly. The appellant and their daughter are living with the applicant's family in Canada and receiving support from them. The applicant's mother cares for Harleen Kaur when the appellant is working. Telephone bills of contact between the couple, and letters, were submitted in documentary evidence.[13] The applicant references their daughter and talks of caring for her and looking forward to seeing her. He also references the appellant's educated status and his expectations of her and indicates that he has followed some advice she has given. Further, he chides her for what he considers poor actions on her part. There is a candour to the letters. Both witnesses spoke of having a second child together. At the time of the hearing, the appellant had not returned

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12 Record, p. 148.
13 Exhibit A1.

to India to visit the applicant due to her pregnancy and then the care of a newborn child. Plans were, however, for her to return to visit the applicant following this hearing and to celebrate both her birthday and their daughter's first birthday.

The applicable test in determining the disposition of an appeal is not proof beyond a reasonable doubt – rather, it is making a finding on a balance of probabilities. The Appeal Division's findings on the first prong of the two-prong *Horbas*[14] test are that on a balance of probabilities, the applicant entered into the marriage primarily for the purpose of gaining admission to Canada. However, with respect to the second prong – the intention to reside together permanently – the Appeal Division finds, on balance, that the evidence is persuasive that the applicant's intentions are to reside permanently with the appellant. Considering the evidence as a whole, more likely than not, the marriage is *bona fide*.

DECISION

The Appeal Division finds that while, on a balance of probabilities, the applicant, Jasbir Singh Boparai, entered into the marriage with the appellant, Hardeep Kaur Boparai, primarily for the purpose of gaining admission to Canada as a member of the family class, he has, on balance, the intention of residing with her permanently. The appeal is, therefore, allowed, as the refusal is not valid in law.

ORDER

The Appeal Division orders that the appeal be allowed because the refusal to approve the application for landing made by Jasbir Singh BOPARAI is not in accordance with the law.

"Marilyn Baker"
Marilyn Baker

Dated at Vancouver, B.C. this 27th day of June, 2001.

You have the right under ss. 82.1(1) of the *Immigration Act* to apply for a judicial review of this decision, with leave of a judge of the Federal Court - Trial Division. You may wish to consult with counsel immediately as your time for applying for leave is limited under that section.

14 *Supra*.

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APPEAL DIVISION - SPONSORSHIP - FAMILY CLASS - SPOUSE - MARRIAGE OF CONVENIENCE - EVIDENCE - INTENTION - ALLOWED - INDIA

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