IMMIGRATION AND REFUGEE BOARD
IMMIGRATION APPEAL DIVISION

COMMISSION DE L'IMMIGRATION
ET DU STATUT DE RÉFUGIÉ
SECTION D'APPEL DE L'IMMIGRATION

IAD File No. / N° de dossier de la SAI : VA4-00784
Client ID no. / N° ID client : 2824-1813

Reasons and Decision – Motifs et décision

Sponsorship

Appellant(s) / **Appelant(s)**

JASBIR SINGH CHUNG

Respondent / **Intimé**

The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration

Date(s) and Place of Hearing / **Date(s) et Lieu de l'audience**

November 16, 2004
Vancouver, BC

Date of Decision / **Date de la Décision**

December 13, 2004

Panel / **Tribunal**

Kim Workun

Appellant's Counsel / **Conseil de l'appelant(s)**

Massood Joomratty
Barrister & Solicitor

Minister's Counsel / **Conseil de l'intimé**

Ron Coldham

Reasons for Decision

[1] Jasbir Singh CHUNG (the "appellant") appeals the refusal of the sponsored application for a permanent resident visa in Canada of Manjit Kaur CHOONG (the "applicant") from India. The application was refused because, in the opinion of the visa officer, the requirements of subsection 12(1) of the *Immigration and Refugee Protection Act, 2001* (the "*Act*")[1] were not met in that the applicant is a person caught by the exclusionary provision of section 4 of the *Immigration and Refugee Protection Regulations, 2002* (the "*Regulations*").[2] Section 4 of the *Regulations* provides as follows:

> 4. **Bad faith** – For the purposes of these Regulations, no foreign national shall be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[2] According to the English version of the *Regulations*, the "bad faith" provision imposes a disjunctive test. Notwithstanding that wording, the Division has consistently applied a conjunctive test in its assessment of alleged "bad faith" relationships as per the wording in the French version of the *Regulations*. Recent amendments[3] to the *Regulations* have reconciled the two versions and it is clear, at this point, that a conjunctive test is to be used in assessing sponsorships of foreign nationals. That is, in order for a foreign national to be caught by section 4 of the *Regulations*, the preponderance of reliable evidence must demonstrate that the marriage is not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the *Act*. In order to succeed on appeal, the appellant need only establish one of the prongs of the test has not been met. The onus is on an appellant to demonstrate that the applicant is not caught by the excluding section of the *Regulations*.

[3] At issue in this case is whether the applicant falls within the class of persons described in section 4 of the *Regulations*.

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
2 *Immigration and Refugee Protection Regulations*, SOR/2002 – 227.
3 *Ibid*., as amended by SOR 2004-167.

[4] The refusal letter[4] articulates the visa officer's concerns with respect to this application. The visa officer concluded the couple was incompatible in terms of age and marital history. The visa officer did not find the evidence of contact adequate and noted the applicant demonstrated little knowledge of her sponsor in several areas at interview. She also reviewed photographs tendered in support of the application, however, did not find these items to be compelling evidence in support of the relationship. The application was refused.

[5] The appellant and applicant testified at the hearing. I have considered their testimony, materials in the Record, additional material tendered at hearing[5] and submissions of counsel.

[6] The appellant has met the onus on him of establishing, on a preponderance of reliable evidence, the marriage is genuine. Moreover, I conclude reliable evidence establishes the marriage was not entered into primarily for the purpose of acquiring any status or privilege under the *Act*.

[7] As brief background, the appellant's family and applicant's family have known each other for many years in India. The appellant's brother is married to the applicant's sister and both continue to reside in India with their children. The appellant immigrated to Canada at the age of twelve and married, for the first time, in 1994. He sponsored his first wife to Canada and the couple remained together for nine years. They were divorced in February 2002. The appellant has a nine-year old daughter from his first marriage. He has little contact with his daughter from his first marriage. The appellant traveled to India in 2003. His family in India suggested that he re-marry and, to that end, he met with the applicant and the marriage was finalized. He remained in India after the marriage for a period and returned to India once to visit the applicant in the post-marriage period. The applicant is pregnant and expecting the couple's child in January 2005.

[8] Counsel for the respondent submits that the appeal ought to be dismissed. He submits that the match, itself, is problematic, noting the age, educational and marital history differences between the couple. He argues that the applicant's demonstration of knowledge at interview as to her sponsor's background remains unexplained. He asks that little weight be given to the

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4 Record, pp. 118-121.

5 Exhibit A-1.

letters tendered into evidence given the appellant's illiteracy. Finally, he suggests that the panel should only give weight to the pregnancy if there are other factors supporting the conclusion the evidence, overall, is credible.

[9] Counsel for the appellant asks the panel to review the evidence carefully given the lack of sophistication of both witnesses. Although he admits the differences between the couple in terms of age and marital history, he notes the other compatibilities of the couple, including social background. He suggests that the appellant presented as sincere and truthful at hearing, notes the well-publicized nature of the marriage, post-marriage visitation and the applicant's pregnancy. He asks that the appeal be allowed.

[10] I agree with counsel for the respondent that issues of compatibility are properly raised in the refusal. The marriage is an arranged one and, in my view, the applicant's family's ready agreement to permit their young never-married daughter to marry an older divorced man with a child by his former wife is curious. Given the marked discrepancy between the couple in terms of age and the fact that the appellant had an older child by his first wife, I have little hesitation in concluding that the fact of the applicant's potential immigration to Canada was an important consideration to the applicant's family in their deliberations as to whether to permit the marriage. Having said this, I am unable to conclude that the family did not address their minds to other relevant considerations as well. In this regard, I note the families' history in India with one another including the long-standing and successful marriage of the applicant's sister to the applicant's brother. I note the straightforward manner in which marriage discussions arose. I note the witnesses' consistent testimony with respect to their initial meetings and the families' involvement in the marriage discussions. The appellant and applicant share a similar social background. There is no suggestion that the appellant's former marriage was one of convenience. The appellant presented as a sincere witness and I find his testimony to be credible. I note the appellant's apparent ability to support the applicant in Canada. I note the publicity of the marriage within the applicant's community. For all these reasons, it is not apparent to me that the marriage was entered into primarily for the purpose of the applicant's acquisition of status under the *Act*.

[11] In looking to the genuineness of the relationship, I am satisfied the relationship is a genuine spousal one and that there has been a reasonable development in the relationship over time. The appellant remained with the appellant for a period following the marriage. The applicant continues to reside with the appellant's brother and her sister in the appellant's family home in India in the period following the marriage and during the appellant's absences from India. The appellant has returned to visit the applicant. The applicant is pregnant and I accept that the child is the appellant's child. In this regard, there is nothing in the timing of the applicant's pregnancy or evidence tending to support the conclusion that she has another ongoing relationship such as would suggest that she is pregnant by someone other than the appellant.

[12] The case was not without its difficulties. The applicant's knowledge of her sponsor in specific areas, as demonstrated at interview, was deficient. Counsel for the appellant submitted that the applicant was confused. This explanation is not particularly helpful to the appellant's case. The panel, however, would be remiss not to assess the applicant's performance at interview and at hearing in the context of her educational level and apparent level of sophistication. She attended school for nine years. I have looked to her academic performance as reflected in her educational certificate[6] and note that she did not obtain passing marks in any of her school subjects when she left school in 1996. The "result" on her report indicates that she failed. Since leaving school in 1996, she has been occupied with household duties in the family home. When all of this is taken together, I do not consider the applicant's deficient responses at interview in specific areas to be determinative of the disposition of this appeal.

[13] There were also discrepancies arising in the evidence at hearing, however, I do not view these discrepancies as sufficient to draw an overall negative conclusion with respect to the credibility of either witness. For example, the appellant's contact with his daughter in Canada is not regular and, when it occurs, it is brief in nature. I do not find the applicant's lack of knowledge about his most recent brief and unplanned contact with his daughter to be particularly probative of the couple's level of contact overall. The applicant resides with the appellant's family members in India. The telephone bills reflect contact between the appellant's home in Canada and his family member's home in India.

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6 Record, p. 38.

[14] In considering the evidence in its entirety, I am satisfied that the marriage is a genuine one. The applicant's sister is married to the appellant's brother in India. They have been married for some time and have three children. These relatives appear to have suggested the match. The marriage between the applicant and appellant was well-publicized and the applicant became pregnant during the appellant's most recent travel back to India. On balance, the evidence is supportive of this appeal's success.

Conclusion

[15] The applicant, Manjit Kaur CHOONG, is not caught by the exclusionary provision as articulated in section 4 of the *Regulations*. The appeal of Jasbir Singh CHUNG is allowed.

NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

"Kim Workun"
Kim Workun

13 December 2004
Date (day/month/year)

Judicial review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.