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Reasons and Decision – Motifs et décision

Sponsorship

Appellant(s)

KULJEET KAUR KAILEY

Appelant(s)

Respondent

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

Intimé

**Date(s) and Place
of Hearing**

November 2, 2004
Vancouver, BC

**Date(s) et Lieu de
l'audience**

Date of Decision

November 2, 2004

Date de la Décision

Panel

Narindar S. Kang

Tribunal

Appellant's Counsel

Massood Joomratty
Barrister & Solicitor

Conseil de l'appelant(s)

Minister's Counsel

Steve Bulmer

Conseil de l'intimé

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Oral Reasons for Decision

[1] Kuljeet Kaur Kailey (the “appellant”), appeals the refusal to issue a permanent resident visa to Navjit Singh Kailey (the “applicant”), from India. The application was refused¹ because, in the opinion of the visa officer,² the applicant is not considered a spouse of the appellant because their marriage is as described in section 4 of the *Immigration and Refugee Protection Regulations* (the “*IRP Regulations*”),³ otherwise referred to as the Bad Faith Regulation, in that the marriage is not genuine as it was entered into primarily for the purpose of acquiring the applicant’s permanent residence in Canada.

[2] Consequently the visa officer determined that the applicant is not a member of the family class whose application as the appellant’s spouse may be sponsored pursuant to paragraph 117(1)(a) of the *IRP Regulations*.

[3] The Bad Faith Regulation provides as follows:

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.

[4] There was no challenge by the respondent with respect to the legal validity of the marriage. At issue in this case in a *de novo* hearing is whether the applicant falls within the rubric of the Bad Faith Regulation.

[5] In order for a foreign national to be caught by the Bad Faith Regulation, 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 *Immigration and Refugee Protection Act* (“*IRPA*”).⁴ Genuineness of the marriage is to be determined as at the time of the *de novo* hearing. The purpose of entering into the marriage is to be determined as at

¹ Record, page 144.

² Refusal letter dated December 8th, 2003.

³ *Immigration and Refugee Protection Regulations*, SOR/2002

⁴ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

the time of the wedding. 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 Bad Faith Regulation.

[6] Insofar that the appellant, who bears the requisite onus, is to know the case to be met, and given that the refusal letter summarizes the visa officer's concerns, that is determined from information that is set out in the record, including the CAIPS notes. It is reasonable for the appellant to conclude that no additional grounds for refusal exist other than those set out in the CAIPS notes or otherwise specifically stated in the Record, either by way of any statutory declaration of the visa officer or by plain statement with reference to other information in the Record. Any paucity thereto is to the benefit of the appellant.

[7] The appellant was examined at length and in detail by both counsel and in areas regarding marital antecedents, intimacy post-marriage, and circumstances post-refusal. Thereafter, the applicant testified by telephone from India immediately after the appellant's cross-examination and her further examination by the panel was completed, without a break in the proceedings. The applicant also completed his testimony at the subsequent sitting of this appeal. The applicant was examined in some detail and in areas regarding marital antecedents, intimacy post-marriage, and circumstances post-refusal by both counsel, and on matters that were revealed during the appellant's cross-examination. The panel also posed some questions to the applicant. Present as an observer was the appellant's paternal cousin, Kulvinder Singh Sandhu. Mr. Sandhu is further commented upon below.

[8] I have considered the witness' testimonies along with the additional materials tendered at hearing, namely Exhibit A-1, the appellant's documents submitted September 3rd, 2004 (including a video). I have also considered the materials contained in the Record, as well as the comprehensive and salient submissions made by both counsel, both of an interlocutory nature at hearing, and upon completion of the *viva voce* evidentiary portion of the hearing.

[9] Counsel for the appellant submitted, after a reiteration of some of the testimony, that both witness' testimony was credible. Counsel for the respondent submitted that the appellant failed to meet her burden of proof insofar that there were inconsistencies in the two witness'

testimonies, and in part that the applicant did not consider it important to have his wife accompany him to Greece post-marriage in 2003. This is further commented upon below.

Decision And Analysis Of The Evidence

[10] Upon carefully considering all the evidence before me, including the testimony of the aforementioned witnesses as well as the documentary evidence and the submissions of both counsel, I find on a balance of probabilities that the applicant is not a person described in the Bad Faith Regulation. Consequently the decision of the visa officer is invalid in law and the appeal is allowed. The following are my reasons.

[11] In reviewing the evidence in this case, it is clear that the appellant testified in a generally cautious yet trustworthy manner and was a credible witness, including regarding matters referred to below. I find she was genuinely emotional at times, including during closing submissions and during the testimony of the applicant. The appellant provided cogent and credible evidence as to how, when and where she and the applicant first met and the extended role of the intermediary to their ultimate union, her older paternal uncle Parshan Singh Sandhu (the father of the observer Kulvinder Singh Sandhu) of the village of Bashesharpur who was also a friend and business acquaintance of the applicant's father. Although the applicant's intentions are also of pivotal importance, the intentions of the appellant are also very relevant in considering the genuineness of this marriage.

[12] I also find there was consistency in the applicant's testimony with that of the appellant in important areas and such consistency in major areas outweighs any apparent inconsistencies. I find that the applicant studied exclusively in rural Punjab and is a person of limited experiences. Thus I do not attach any significance to minor discrepancies in recollections of dates and events with the passage of time.

[13] I find that the applicant testified in a credible, albeit simplistic manner. From his testimony, I find the applicant also possessed sufficient, although not comprehensive, knowledge of the appellant's antecedents. He also provided cogent and credible evidence regarding the role of the intermediary to their ultimate marital union as he saw him, namely Parshan Singh Sandhu, who used to attend at his village and meet with his father. He also corroborated very personal

matters that the appellant testified to, including the timing of their first intimacy and the absence of use of birth control at that time. The applicant also provided cogent and credible evidence as to the reasons why their marriage took place, their participation in culturally specific activities and ongoing interaction by the appellant and members of his extended family upon her return visitation in 2003, including a visit to numerous spiritual places, relatives and the city of Simla.

[14] The appellant was born August 6th, 1979 and was 25 years of age at hearing. The applicant was born January 14th, 1980 and was 24 years of age at hearing. The appellant married the applicant on February 13th, 2003 in the *gurdwara* in the applicant's village in Punjab, India. While the visa officer was of the view that this age discrepancy was an incompatibility indicative of non-genuineness, I do not concur. I find that an age gap of less than a year in favour of the female appellant is not significant, given that both parties entered into this arranged marriage under the auspices of the elders of their families. I note that the *gurdwara* marriage was followed by a reception at the Gupta Palace, about five or ten minutes' distance from the applicant's home.

[15] The witnesses first personally met on February 9th, 2003. Religious functions were arranged and conducted thereafter in the interim, with an *Akhand Path* completing on February 12th, 2003, and they were married on February 13th, 2003. The appellant credibly testified that the first meeting occurred in Nakodar and she was accompanied there by her paternal uncle Parshan Singh Sandhu (the intermediary), his wife, his son Kulvinder Singh Sandhu, and her parents. Despite the lack of an extended passage of time wherein the appellant reflected upon the possible arranged match with the applicant and vice versa, the appellant testified that the personal observations of the respective families and her elders were considered, and this undermines counsel for the respondent's assertion regarding non-genuineness. The appellant and applicant both presented as mature, reflective and responsive witnesses, and I find that they entered this arranged marriage volitionally and fully cognisant of the interests of their respective families and themselves in securing this genuine match.

[16] The video contained in Exhibit A-1, which I have reviewed, corroborates the appellant's testimony regarding the pomp and circumstance of the marriage and marriage-related ceremonies. Numerous relatives and members of the witness' religious and social communities

are seen to be in attendance on the video.

[17] I do not accept counsel for the respondent's contention that this marriage is solely for the purpose of the applicant acquiring landed status in Canada insofar that its genuineness is bolstered by the participation in elaborate marital processes and ceremonies by so many of the parties' family members and members of their social and religious communities. I find that the publicity resultant from the well-attended marriage is indicative of the genuineness of this marriage.

[18] The appellant also described in detail their visit to the Golden Temple, *Anandpur Sahib*, and other historical Sikh places of worship in 2003, visits I find indicative of genuineness of this marriage insofar that they sought blessings under their mutual Sikh faith practises. I find this compatibility in religious background and religious practise post-marriage is also indicative of the genuineness of this marriage.

[19] Both witnesses also testified regarding their social enmeshment in 2003, both with each other and their respective extended families. I find this type of post-marriage social enmeshment to be a significant indicia of a genuine arranged marriage.

[20] The appellant testified that during her time in Canada post-marriage, including after her return from her trip to see the applicant from November 6th of 2003 through to April 27th of 2004, she and the applicant maintained extensive phone contact. The witness' credible testimonies, coupled with materials submitted in Exhibit A-1, constitute sufficient evidence of numerous phone calls of lengthy duration between the appellant and the applicant since marriage. I find there is sufficient trustworthy evidence of numerous telephone calls and personal contact between the appellant and applicant.

[21] Documentary evidence, namely photographs proffered by the appellant, corroborates her testimony regarding social enmeshment by her with the applicant's family, and vice versa, in India. These photographs provided by the appellant also establish a degree of tenderness between the appellant and applicant in various venues. I find that the high degree of ongoing social enmeshment by the applicant in his spouse's extended family to be indicative of genuineness of this marriage.

[22] I find there is sufficient documentary and photographic evidence of an ongoing marital relationship, much of it corroborative of the *viva voce* evidence of the appellant and the applicant. I find this couple's commonality has been built upon by diligence between the parties, including the respective families in this arranged marriage, in pursuing their relationship to its marital fruition, and subsequently has been strengthened over time with frequent communication.

[23] As stated above, while there is an age gap of about one year in favour of the applicant (she being 25 and the applicant being 24), I find that this is not significant and that both have compatible levels of social background. I also find that both have similar educational background, each having completed some secondary schooling in India, with the applicant completing ten years of schooling and the appellant 12 years. I find no material incompatibility in their educational backgrounds. I find that the appellant has been diligent in Canada in establishing herself in ways other than furthering her education. I find her partnering in an arranged marriage with a man with an education slightly lower than hers is reasonable and does not impugn her credibility in any fashion.

[24] As stated above, both have similar religious backgrounds, being originally of the Sikh faith and jointly participating in paying homage to various principal Sikh religious institutions, including the Golden Temple, post-marriage in 2003. Photographs provided by the appellant corroborate the occurrence of this visit. Furthermore, both come from a similar socio-economic background. I find that these commonalties, coupled with the trust reposed in Parshan Singh Sandhu by his niece, the appellant, and by the applicant's family, form a sufficient impetus to consider an arranged marriage in all the appellant and applicant's circumstances. I find that the hallmarks of a genuine arranged marriage, as borne out by the credible testimony of both witnesses, are present in this case.

[25] Counsel for the respondent submitted that the genuineness of this marriage is undermined insofar that the appellant did not accompany the applicant post-marriage to Greece, in part to be introduced to his friends there in 2003, and that there was no consideration of such. I do not concur. While the applicant spent approximately three-and-a-half years in Greece, he went there in about 1999, and had spent almost two decades of his life in India previously. I find he had an established and unrequited social circle in his home country. I find that the length of time the

appellant spent with the applicant in India in 2003 post-marriage (over three-and-a-half months, approximately), coupled with their extensive travel and visitation to the Golden Temple and to numerous relatives, amongst other activities, constitutes a sufficient degree of interpersonal dealings post-refusal that bolsters the appellant's assertions regarding genuineness of this marriage, notwithstanding the applicant's other activities in Greece while apart from his spouse.

[26] Both witnesses provided consistent testimonies that no birth control was used during the consummation of this marriage. First and foremost, I consider this consistency to be material in bolstering the assertions of genuineness insofar that this testimony arose during cross-examination of the appellant, and was immediately corroborated by the applicant. The evidence establishes the applicant has a support structure from both her original family and her in-laws and that the couple's intimacy is a natural progression in a genuine arranged marriage.

[27] In the context of this arranged marriage, where there is one return visitation by the appellant, it is to be reasonably expected that there will be some paucities in knowledge between the parties. For example, the appellant testified that the applicant entered Greece legally when he went there for the first time, whereas the applicant testified he later acquired temporary work permits allowing him to legally work in Greece. In the context of this arranged marriage, I find the appellant's credible testimony regarding forward-looking aspects of their lives is more significant than forgetfulness, if it can be characterized as such, or lack of knowledge regarding such past events.

[28] Exactitude in the testimonies of witnesses is not required in my assessment in order for an appellant to establish that the applicant does not fall within the rubric of the Bad Faith Regulation. Discrepancies in testimony can be rooted in a myriad of factors, including cultural unfamiliarity, language difficulties and the passage of time, amongst other legitimate reasons. The inconsistencies in this case as noted in the respondent's submissions are, in my view, minor and do not impugn the credibility of the witnesses in other important areas at this *de novo* hearing regarding their arranged marriage and the ongoing relationship supportive of the genuineness of their marriage. Given that this was a hearing *de novo*, the key concerns of the visa officer were alleviated at the appeal to my satisfaction.

Conclusion

[29] There was sufficient reliable evidence of the nature of a genuine marriage, including but not limited to that enumerated above, that I am of the view that the appellant has shown on a balance of probabilities that the applicant is not a person described in the Bad Faith Regulation. In reviewing the evidence in this case on the whole, I conclude on a balance of probabilities that the appellant has established that her marriage to the applicant is genuine and that it was not entered into for the primary purpose of gaining any status or privilege for anyone under *IRPA*. Consequently the decision of the visa officer is invalid in law and the appeal is allowed in law.

[Edited for clarity, spelling, grammar and syntax.]

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.

"Narindar S. Kang"

Narindar S. Kang

6 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.