



IAD File No. / N° de dossier de la SAI : VA3-03853
Client ID no. / N° ID client : 4076-0479

Reasons and Decision – Motifs et décision

Sponsorship

Appellant(s)

FLORENCE MONICA THIND

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**

September 1, 2004
September 3, 2004
Vancouver, BC

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

Date of Decision

September 16, 2004

Date de la Décision

Panel

Kim Workun

Tribunal

Appellant's Counsel

Massood Joomratty
Barrister & Solicitor

Conseil de l'appelant(s)

Minister's Counsel

Randal Hyland

Conseil de l'intimé

La Direction des services de révision et de traduction de la CISR peut vous procurer les présents motifs de décision dans l'autre langue officielle. Vous n'avez qu'à en faire la demande par écrit à l'adresse suivante : 344, rue Slater, 14^e étage, Ottawa (Ontario) K1A 0K1, par courriel à translation.traduction@irb.gc.ca ou par télécopie au (613) 947-3213.

You can obtain the translation of these reasons for decision in the other official language by writing to the Editing and Translation Services Directorate of the IRB, 344 Slater Street, 14th Floor, Ottawa, Ontario, K1A 0K1, or by sending a request to the following e-mail address: translation.traduction@irb.gc.ca or to facsimile number (613) 947-3213.

Reasons for Decision

[1] Florence Monica THIND (the “appellant”) appeals the refusal of the sponsored application for a permanent resident visa in Canada of Ashraf MIAN (the “applicant”) from Pakistan. The application was refused because, in the opinion of the visa officer, the requirements of section 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 and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[2] The test is a two-pronged test, 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*.

[4] The refusal letter³ articulates the visa officer's concerns with respect to this application. The visa officer noted that most marriages in Pakistan are arranged ones and issues of compatibility routinely determine any given match. The visa officer went on to note the applicant's claim to refugee status in Canada failed in August 2000. Subsequently he married the appellant in a religious ceremony in December 2000. The legal marriage as between the couple

¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

² *Immigration and Refugee Protection Regulations*, SOR/2002 – 227, as amended by SOR 2004-167.

³ Record, pp. 40-41.

took place in June 2001, following the appellant's divorce from another partner. The visa officer noted the nineteen-year age difference between the couple and the fact that the appellant has two children by her former marriage. He paid particular attention to the timing of the marriage *vis à vis* the applicant's failed refugee claim and, taking all into consideration, concluded that the present marriage was simply an effort to obtain status in Canada. He concluded that the marriage was not a genuine one and refused the applicant's application.

[5] The appellant testified at the hearing. The applicant testified by telephone from Pakistan. The panel also heard from the appellant's 17 year-old son, Ron Mand. I have considered the testimony, contents of the Record, additional material tendered into evidence and submissions of counsel.

[6] The timing of the applicant's failed refugee claim and his involvement with the appellant, reasonably, raised concern with the visa post. Indeed, the significant age difference between the couple and timing of the religious marriage several months prior to her divorce from her former partner, as noted by the visa officer, simply raised further doubts with respect to the *bona fides* of the relationship. Counsel for the respondent tendered the decision and reasons with respect to the applicant's failed claim to refugee status.⁴ The presiding member in the refugee matter found the applicant to be lacking in credibility and the claim, itself, not to have a credible basis. In his reasons, the presiding member outlined several areas of contradiction and implausibility. It is not the role of this panel to re-assess the merits of the applicant's former claim to refugee status and, indeed, there is no evidence before me that would suggest that the applicant has a credible claim to asylum in Canada presently. Any difficulties he may or may not have presently in Pakistan appear to be with respect to his personal relationship with one of his siblings. For her part, the appellant had no notion of the appellant's alleged political difficulties in Pakistan. She was able, only, to speak to the personal issue he allegedly has with one of his siblings. The panel has no reason to look behind the findings of the member presiding in the refugee matter nor did counsel for the appellant urge the panel to do so. Rather, the focus of this appeal is on the merits of the applicant's relationship with the appellant. Thus, while noting the applicant's lack of credibility while under oath in a previous Board proceeding, the primary focus of this appeal

⁴ Exhibit R-1.

must, at all times, be on the nature of the relationship as between the appellant and applicant and whether there is sufficient evidence for me to conclude the marriage is a *bona fide* one.

[7] At the outset, I will note that I did not find the witnesses to be credible in their testimony as it relates to the adoption of the applicant's niece in Pakistan. The witnesses provided completely irreconcilable testimony with respect to the adoption discussions. For his part, the applicant testified the adoption was the appellant's idea and that she and he approached the natural parents for their consent. According to the applicant, the natural parents did not provide their immediate consent. In contrast to the applicant's testimony, the appellant testified the natural mother initiated adoption discussions and suggested that the appellant and applicant adopt the girl. The appellant testified that, after some thought, she and the applicant agreed to the plan. I note the applicant's nominal contact with the child over the years owing to his time in Canada and his transient lifestyle presently. I also note the significant discrepancy in the witness testimony surrounding adoption discussions. The evidence does not suggest that the adoption is anything other than immigration-motivated. While the *bona fides* of the adoption are not an issue before this panel, the inconsistency in the witness testimony with respect to the adoption discussions detract from the credibility of the witnesses to some degree even within the present application. I am in agreement with counsel for the respondent on this point.

[8] As was acknowledged by counsel for the appellant at hearing, there were inconsistencies in the evidence at hearing. Respondent counsel submits that the inconsistencies, when coupled with the applicant's history in Canada, including his failed refugee claim and its lack of a credible basis, ought to be sufficient to justify dismissal of the present appeal. Counsel for the appellant urges the panel to look at the history and quality of the relationship as between the applicant and appellant. He submits that the corroborative testimony of the appellant's son strongly suggests the present relationship is one of substance.

[9] In my view, the appellant testified in a credible manner. Her testimony as to her unhappy previous relationship, corroborated by her son, Ron, presented as sincere and truthful. She testified that she came to know the applicant in the period prior to his refugee hearing. She accompanied the applicant to his refugee hearing and assisted in various post-hearing matters, including further consultation with legal counsel. Both witnesses testified that, as at the time of

the refugee hearing, they had discussed the prospect of marriage. They later performed the religious component of the Muslim marriage. This allowed them to hold themselves out as a married couple and reside together. The appellant testified that she converted to Islam at the time the religious marriage was performed. She testified she remains a follower of Islam presently. The couple married in a legal ceremony in June 2001, shortly after the appellant's divorce from her former partner became final. The couple relocated to Edmonton with the appellant's child, Ron, in October 2001 and remained in Edmonton together until the applicant's removal from Canada in October 2002. After the applicant's removal from Canada, the appellant traveled to Pakistan and remained in that country for a six-month period. During that time, she met his family and resided at various locations in Pakistan with the applicant. I conclude that the appellant's intentions with respect to this relationship are *bona fide*. It does not appear that counsel for the respondent takes particular issue with the appellant's intentions.

[10] Counsel for the respondent, however, submits that the applicant has engineered a scheme whereby he has ingratiated himself into the appellant's life over a protracted period of time in a last-ditch attempt to gain status, by way of marriage, in Canada. The applicant's particular history does not necessarily preclude that finding. At the same time, the panel is able to make several findings of fact that, when considered together, tend to suggest, on balance, that the present relationship is a genuine one. These include:

- the applicant's involvement with the appellant over a protracted period beginning in early 2000;
- the applicant's daily and conjugal cohabitation with the appellant since December 2000 up to the applicant's removal from Canada in October 2002;
- the applicant's role within the appellant's family as step-father to the appellant's sons, including the applicant's attendance and consultation with high school officials on numerous occasions with respect to his step-son's performance and conduct at school;
- the appellant's travel to Pakistan for a six-month period and co-residency with the applicant during that period.

[11] As stated to both counsel at hearing, I am mindful of the discrepancy in the evidence in particular areas and common-sense dictates that I be cautious in assessing the veracity of the applicant's statements at hearing given his history in Canada, including his statements under oath in his refugee matter and comments of the presiding member in that matter. At the same time, the appellant has secured material, including statements from community members in Edmonton, corroborating the couple's joint activities in Edmonton throughout 2001-2002. The individuals providing the material confirm that they had occasion to see the applicant and appellant together and witness their day-to-day interactions. I have also considered the material from Ron's high school principal indicating that the applicant involved himself in Ron's life and undertook a parental role *vis à vis* Ron in that period. I have also considered Ron's testimony and find it to have been candid and sincere. In my view, the volitional nature of the applicant's involvement in the appellant's life over a protracted period, including lengthy periods of cohabitation, is telling and supportive of the conclusion the relationship is a genuine one.

[12] Counsel for the respondent made spirited and able submissions, however, the evidentiary burden is one of probabilities. On balance, I am satisfied that credible evidence supports the conclusion the relationship is a genuine one.

[13] The appeal is allowed.

Conclusion

[14] The applicant, Ashraf MIAN, is not caught by the exclusionary provision as articulated in section 4 of the *Regulations*. The appeal of Florence Monica THIND 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**

16 September 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.