IMMIGRATION AND REFUGEE BOARD OF CANADA

IMMIGRATION APPEAL DIVISION

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

SECTION D'APPEL DE L'IMMIGRATION

2006 CanLII 59770 (CA IRB)

IAD File No. / N° de dossier de la SAI : VA5-01724
Client ID no. / N° ID client : 2885-0018

Reasons and Decision – Motifs et décision

Sponsorship

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

INDERJIT KAUR DHUNNA

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**

14 September 2006
Vancouver, BC

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

25 September 2006

Panel / **Tribunal**

Narindar S. Kang

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

Massood Joomratty
Barrister & Solicitor

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

Ron Coldham

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Reasons for Decision

[1] Inderjit Kaur DHUNNA (the "appellant") appeals the refusal to issue a permanent resident visa in Canada to Ranjit Singh DHUNNA (the "applicant"), from India.

[2] The *Immigration and Refugee Protection Act* (the "*IRPA*")[1] and *Immigration and Refugee Protection Regulations* (the "*Regulations*")[2] govern these proceedings.

[3] The application was refused[3] because, in the opinion of the visa officer as contained in the refusal letter dated June 22, 2005, the doctrine of *res judicata* applied, insofar that the applicant had not presented any new and relevant evidence on which the visa officer could conclude that his marriage to the appellant is genuine and not entered into primarily for the purpose of acquiring any status or privilege under *IRPA*. The visa officer further concluded that the applicant had submitted the new application to re-contest an issue on which the decision of the Appeal Division has already been given in an appeal by the appellant against the previous refusal of the applicant's application. The visa officer further referred to my colleague Member Workun's decision[4] and stated that the facts and matters upon which the second application before him were based are the same as those before Member Workun in her earlier decision.

[4] Moreover, the visa officer was of the opinion that the applicant is not considered a spouse of the appellant because their marriage is as described in section 4 of the *Regulations* (the "Bad Faith Regulation"), in that the marriage is not genuine and was entered into primarily for the purpose of acquiring the applicant's permanent residence in Canada. 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 *Regulations.*

[5] The Bad Faith Regulation provides as follows:

> 4. **Bad faith** – For the purposes of these Regulations, a foreign national shall not 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.

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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 Record, page 234.
4 *Verma* v. *Canada (Minister of Citizenship and Immigration)* (IAD VA3-04581, Workun, January 26, 2005.

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[6] On April 20, 2006, appellant's counsel provided submissions (with supporting materials) that there existed decisive new evidence (including the appellant's pregnancy as a result of conjugal relations with the applicant), so as to bring the appeal within the exception to the doctrine of *res judicata.* Respondent's then-counsel M. McPhalen, by way of letter of April 21, 2006, submitted that if the submissions of appellant's counsel were true, then decisive new evidence would be constituted, and it would be appropriate to hold a full hearing. On May 9, 2006, the Appeal Division made an interlocutory ruling that the appellant has provided evidence which constitutes decisive new evidence, not available at the time of the first appeal hearing. Thus, the Appeal Division ruled that the doctrine of *res judicata* ought not to apply.

[7] At issue in this case therefore, in a *de novo* hearing, is whether the applicant falls within the rubric of the Bad Faith Regulation. The two-pronged test to be used is a conjunctive one. 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 *IRPA.* 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.

[8] Genuineness of the marriage is to be determined as at the time of this *de novo* hearing. In relation to the second-prong of the two-prong test, the purpose of entering into the marriage is to be determined as at 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. As stated above, the onus is on an appellant to demonstrate that the applicant is not caught by the Bad Faith Regulation.

[9] The appellant testified first at hearing, with the assistance of a Punjabi language interpreter. Respondent's counsel also conducted a fulsome examination of the appellant, including regarding the antecedents of her first marriage. Thereafter, the applicant testified by teleconference from India, without a break in the proceedings. Respondent's counsel chose not to examine the applicant. Submissions were thereafter invited from both counsel. Respondent's counsel chose not to provide any closing submissions. Further, respondent's counsel, on query from the panel, submitted that the respondent had no position regarding the outcome of the appeal.

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[10] I have considered the witnesses' testimonies, along with additional material tendered at hearing by the appellant.[5] I have also considered the other materials contained in the Record and submissions of appellant's counsel. Respondent's counsel chose not to provide any submissions other than to state that the respondent, in the context of this adversarial hearing, had taken "no position" on its outcome. Counsel for the appellant submitted that the appellant was credibly responsive to the visa officer's concerns, and that the evidentiary focus was upon matters post January 26, 2005, the date of the prior Appeal Division decision.

DECISION AND ANALYSIS OF EVIDENCE

[11] Upon carefully considering all the evidence before me, including the testimonies of the appellant and applicant, as well as the documentary evidence and the submissions received, 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. Following are my reasons.

[12] In reviewing the evidence in this case, I find that the appellant testified in a generally straightforward manner and was a credible witness, including regarding matters referred to below. I have no difficulty finding that the marriage is genuine from the appellant's perspective. This is significant because although it is the applicant's intentions that are also of pivotal importance, the intentions of the appellant are very relevant in considering the genuineness of the marriage.

[13] The appellant provided cogent and credible evidence as to how, when, and where she and the applicant first met and then pursued their relationship, consistent with the materials in the Record and the materials in Exhibit A-1. The appellant also provided detailed testimony regarding the instrumental role in this genuine arrange marriage of the applicant's maternal uncle (mother's brother). The appellant also provided cogent and credible evidence as to the reasons why their marriage took place and ongoing interaction by her applicant spouse with herself and her relatives in India since marriage. In particular, the appellant provided credible evidence (and detailed testimony) regarding the lengthy return visitation by her (and cohabitation with the applicant) from about May 22, 2005 through to April 13, 2006. She also described in detail events in which she participated in a public setting on this return visitation, such as fasting in

[5] Exhibit A-1, Appellant's Disclosure of August 23, 2006 (including videotapes described by the appellant in

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honour of the applicant on the festival of *Karva Chauth.* I find that the appellant's participation in such post-marriage cultural ceremonies relating to their marital union, in a public setting, is indicative of genuineness of this marriage.

[14] I also find there is consistency in the appellant's testimony with that of the applicant in important areas, including regarding lengthy travels as a married couple within India in 2005 and 2006, and in the imminent birth of their first child, due on or about November 7, 2006. In sum, the applicant's testimony, unchallenged as it was by counsel for the respondent, remains credible.

[15] The marital antecedents of both the appellant and the applicant can be gleaned from the Record, and the witnesses testified in this regard as well. The 30-year-old appellant was landed in Canada on June 15, 1993 as a dependant child of her parents as sponsored by her eldest sister. The applicant was born February 8, 1980 and is 26 years of age. The appellant married the applicant on April 16, 2004 at Dhawan Palace, Moga, Punjab, India, after first meeting on March 25, 2003 in the company of respective family members. The appellant testified that marriage was first proposed on March 22, 2003 by the applicant's maternal uncle to her parents. The appellant testified in detail regarding her first marriage, which produced no children. While I have concerns regarding aspects of her testimony surrounding her first marriage (for example, her assertion that it was never consummated and that it was a love marriage), these aspects of her testimony, in my view, do not impugn her otherwise credible testimony in other material areas, including all aspects of her time spent together with the applicant in 2005 and 2006.

[16] As stated, the appellant testified that there was trust reposed in the applicant's maternal uncle in the initial marital discussions, and thus, in the context of a genuine arranged marriage, I do not consider it significant that the appellant and applicant married so soon after first meeting. The appellant credibly testified that they both talked directly to each other and family members also discussed both their personal and familial antecedents.

[17] The marriage, as the appellant testified, took place in India and various members of their social and religious communities attended. The Record contains photographs depicting the applicant with the appellant in various marriage and in marriage-related ceremonies, as well as in visitations to places of worship.

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her testimony).

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[18] Subsequent to marriage, as the appellant testified, the appellant cohabited with the applicant prior to her return to Canada. She testified that after she returned to Canada, she and the applicant maintained extensive phone contact. The appellant further testified that the videos provided reveal places of visitation both in and out of Punjab in 2005 and 2006. As referred to above, documentary evidence (namely videotape and phone bills) corroborates this testimony.[6] The appellant's credible testimony, coupled with materials submitted, constitutes 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 the applicant, including from 2004 to date of hearing.

[19] Both the appellant and applicant have compatible levels of education and social backgrounds. Both the appellant and applicant have similar religious backgrounds, being of Sikh faith. Furthermore, both come from similar socio-economic backgrounds, being from agrarian families originating in rural Punjab, India. I find that these commonalities 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 testimonies of the appellant and of the applicant, are present in this case.

[20] Further, even if I were to find that the applicant was motivated to acquire status under *IRPA* in Canada through marriage to the appellant, this does not negate in any way the substantial evidence before me of genuineness of this marriage. I find this couple's commonality has been built upon by diligence between the parties in pursuing their relationship to its marital fruition, and subsequently has been strengthened over time with frequent communication and lengthy personal visitation by the appellant to the applicant post-marriage. I also accept as credible both witnesses' testimonies regarding the timing of conception of their child-to-be during the appellant's lengthy cohabitation with the applicant in 2005 and 2006, a period of about 11 months, the resultant pregnancy, and their mutual expectations regarding their budding family life after the birth of their child in early November 2006. I find that their mutual desire to start a family, and their efforts in that regard through the course of this appeal, are indicative of genuineness of this marriage.

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6 Exhibit A-1.

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[21] I close by reiterating that respondent's counsel had no position regarding the outcome of this appeal. Given that this was a hearing *de novo*, the key concerns of the visa officer (and indeed of Member Workun) were alleviated at the appeal to my satisfaction.

CONCLUSION

[22] 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 a primary purpose of gaining any status or privilege for anyone under *IRPA*. Consequently, the decision of the visa officer is invalid in law.

[23] The appeal is allowed in law.

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

25 September 2006
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.

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