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

IAD File No. / N° de dossier de la SAI : VA6-02303

Client ID no. / N° ID client : 2388-4720

Reasons and Decision – Motifs et décision

SPONSORSHIP

Appellant(s)	KULDIP SINGH DHANDA	Appelant(s)
and		et
Respondent	The Minister of Citizenship and Immigration Le ministre de la Citoyenneté et de l'Immigration	Intimé(e)
Date(s) and Place of Hearing	17 October 2007 Vancouver, BC	Date(s) et lieu de l'audience
Date of Decision	11 December 2007	Date de la décision
Panel	Erwin Nest	Tribunal
Counsel for the Appellant(s)	Massood Joomratty Barrister & Solicitor	Conseil(s) de l'appelant(e) / des appellant(e)(s)
Counsel for the Minister	Carla Medley	Conseil du ministre

Canada

Reasons for Decision

[1] Kuldip Singh DHANDA (the "appellant") appeals from the refusal to approve the permanent resident visa application for his spouse Gurmit Kaur DHANDA (the "applicant") from India. The visa officer found that the appellant is a person caught by the exclusionary provision of subparagraph 133(1)(d)(k) of the *Immigration and Refugee Protection Regulations,* 2002 (the "*Regulations*").[1]

[2] Subparagraph 133(1)(d) and (k) provide:

> 133.(1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor
> (d) is not detained in any penitentiary, jail, reformatory or prison;
> (k) is not in receipt of social assistance for a reason other than disability.

[3] Appellant's counsel indicated that the appellant was not challenging the legal validity of the refusal. The basis for the appeal is paragraph 67(1)(c) which reads as follows:

> 67(1) To allow an appeal the Immigration Appeal Division must be satisfied that at the time the appeal is disposed of,
> (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

BACKGROUND

[4] The appellant is a 30-year-old permanent resident of Canada, originally from India. In 1987 the appellant immigrated to Canada sponsored by his sister Rashpal as a dependant child. According to the appellant he began a relationship with Carrie Andrews in 1998 and there were two daughters born out of this union, now ages 4 and 2 respectively. According to the appellant he traveled to India in January 2002, and married on January 28, 2002. There was one son born out of this union, now age 5.[2] The appellant testified that for the last 3-4 months he has been

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1 *Immigration and Refugee Protection Regulations*, SOR/2002 – 227.

2 A-1, page 4

living with his sister Harjinder in Surrey.[3] The applicant is a 33 years old citizen of India. She lives with the couple's son and her parents in her ancestral home in the village Dhandwar. The appellant has not returned to India to visit the applicant and according to her he stays in touch through telephone calls.

DECISION

[5] In looking to the circumstances in their entirety, the appellant has not made out a case for discretionary relief. The appeal is dismissed.

ANALYSIS

[6] I have considered all the testimony adduced at the *de novo* hearing, the contents of the Record, the appellants' disclosure and written submissions from the appellant and the Minister's counsel.

[7] The appellant was represented by counsel. The appellant testified in person at the hearing and the applicant testified by phone from India. The appellant's two sisters, nephew, sister-in-law and sister's mother-in-law were present at the hearing in support of the appeal.

[8] I regard the following factors to be the appropriate considerations in the exercise of discretionary jurisdiction in the context of an appeal based on the appellant's failure to meet the *Immigration and Refugee Protection Act* (the "*Act*")[4] requirements. The factors to be considered by the Division when exercising its discretionary jurisdiction are those as set out in *Ribic*.[5] These factors include the seriousness of the offence, the possibility of rehabilitation, the likelihood of the appellant re-offending, the length of time he has spent in Canada and the degree to which he is established here, the family and community support available to him. These factors are not exhaustive, however do provide a general guideline to the Division in terms of its exercise of discretion.

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3 A-3, page 2.
4 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
5 *Ribic, Marida* v. *M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

[9] In this regard, I note the continuing reference to humanitarian and compassionate considerations, which warrant relief in any given case. Humanitarian or compassionate considerations under the former *Act* were, generally, "…taken as those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another…".[6]

[10] In looking at the seriousness of the offence I have considered the degree of criminality, dates of the first conviction and most recent convictions, number of convictions, time in Canada before first conviction, type and pattern of offenses, description of sentences and evidence of the rehabilitation –lower risk of recidivism as well as community support.

[11] The appellant has 20 convictions. He said that most of them were thefts under $5000.00 to support his drug habit. Some of the convictions are as follows:

1. February 2, 1998 – Theft under $5000 - (1-2) 1 day on each charge, probation for a year;
2. May 26, 1998 – Theft under $5000.00-14 days;
3. September 6, 1998 — Theft under $5000.00. $300.00;
4. October 1, 1998 – Theft under $5000.00. Failure to comply with probation order. – 14 days, 1 day;
5. October 2, 1998 – Theft under $5000.00. Failure to comply with probation order. (1-2) 28 days on each charge, probation for 12;
6. June 22, 1999- Theft under $5000.00-45 days;
7. August 23, 1999 – Theft under $5000.00-30 days and 1 year probation;
8. September 2, 1999- Theft under $5000.00, failure to comply with recognizance - (1-2) 60 days on each charge conc.;
9. December 2, 2001 – Theft under $5000.00, Uttering threats- (1-2) 60 days on each charge;

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6 *Chirwa v. Canada (Minister of Manpower and Immigration*) (1970), 4 I.A.C. 338 (I.A.B.).

10. May 24, 2005, – Assault of another person–3 months in jail.[7]

[12] The appellant could not recall how many convictions he had. He claimed that he has never been convicted of violence against another person. Pressed by the Minister's counsel he admitted to assault conviction in 2005.

[13] The appellant testified that:

- He started using drugs (smoking pot) and drink alcohol in 1998, following the death of his brother-in-law, sister's Rashpal's husband, who played a father role in his life after his parents passed away.
- He started to use hard drugs, namely cocaine in 2003.
- He supported his drug habit by stealing.
- He lived on the street and maintained infrequent contact with his sisters and brother.
- He attempted to stop taking drugs in 2004, by going to the detox centre but walked away from it after 3 weeks.
- He participated in a Court ordered counselling program in August 2006.
- Since October 9, 2007 he voluntarily started counselling in the Methadone Maintenance Program, paid by his sister.
- He has not engaged in any criminal activity since serving time in jail in August 2006 after theft of alcohol.
- The last time that he used cocaine was about months ago.
- He met the applicant for the first time on January 17, 2002 during his travel to get married in India.
- He is has a good relationship with his wife and his son and hopes to re-unite with them in Canada, so the applicant can help him to overcome his drug addiction and he can straighten his life by finding employment and support his family.

[7] Record, pages 43-45.

- Between 1998 and 1999 he was employed by a lumber mill where his late brother-in-law used to work.
- He was recipient of social assistance in 2006 and in 2007 for two and-half-months.

[14] I disagree with the appellant's counsel that the appellant testified in a credible and lucid fashion and that the appellant was sincere about his determination to get better so he can give his son "what he never received". I find the appellant's testimony not credible for the following reasons:

- The appellant's and the applicant's testimony confirms that the appellant was using cocaine in India in January 2002 during the post marital period while living with the applicant for 5 months.
- The appellant's sponsorship evaluation states that he was employed as a cleaning worker at Hyatt Building Maintenance since March 2005.[8]
- Despite his denial, based on the evidence before me I find that the appellant was in receipt of social assistance for a reason other than disability from April 2001 until November 2005.[9]
- The applicant contradicted the appellant's testimony about the couple's first contact confirming that she met the appellant in 2000 when his brother and sisters celebrated marriage arrangement between the appellant and the applicant through Shagun and engagement ceremonies.
- The appellant was unable to explain what steps he has taken to stop his 9 year addiction to drugs.
- No credible and trustworthy evidence was submitted to corroborate the appellant's claim of his participation in counselling programs in the past and he did not know the name of the program he currently attends.

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[8] Record, page 9.
[9] Record, page 16.

- The appellant started Methadone Maintenance Program 8 days before the date of the hearing, contradicting his claim that he has been participating in the program for the last two months.
- There was no trustworthy evidence adduced at the hearing of the appellant's expression of remorse or his articulation of a genuine understanding as to the nature and consequences of his criminal behavior.
- There was no evidence of any reports by psychologists and psychiatrists to help the Panel with assessment of the seriousness of the appellant's criminal conduct, a degree to which he demonstrated the rehabilitation and the support system available to him.
- No evidence was presented at the hearing to demonstrate the appellant's efforts to address the factors that gave rise to his criminal behavior and his understanding of the effects that his actions had on the victims of assault.
- There is a Warrant for Arrest issued against the appellant on September 18, 2007[10] for the failure to comply with Probation Order contrary to section 733.1(1) of the *Criminal Code of Canada.*[11]

[15] Given that the onus is on the appellant to prove his rehabilitation on the balance of probabilities, I find that the appellant's pattern of offences indicates his continued problems with the law as a result of his drug addiction. When asked when the last time he used drugs was, the appellant struggled to remember. He confirmed that he stopped using drugs two months prior to the hearing date after a long pause. In looking at the nature, gravity and pattern of offences and possibility of rehabilitation the evidence in all the circumstances of this case supports the conclusion that the appellant has been in trouble with the law since he was 22 years old and his offences formed a pattern of criminal behaviour posing the risk of the appellant's re-offending.

[16] Given the appellant's counsel's statement in his letter of December 15, 2006[12] that "the appellant is in the process of finding out the amount he has to repay the Provincial government.

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10 Exhibit R-2.
11 *Criminal Code of Canada*, RSC 1985.
12 A-2, page 2.

He intends to pay the debt as soon as possible." I find no evidence to support the appellant's claim with respect to his efforts to repay the debt. Based on the totality of evidence and a balance of probabilities I find that the appellant has not shown his ability to support himself, he has no employment at the present time and no history of regular employment since coming to Canada. Given the appellant's testimony that his drug addiction is related to a stress brought by loss of his brother-in-law and his concern about his sister's Rashpal and her children's situation I note that his sister Rashpal is successfully re-married but the appellant despite his marriage and a birth of three of his children has shown no sign of attempting to remove himself from a pattern of offences, which include theft and assault.

[17] Given the appellant's lack of memory of the details of his criminal convictions I find no credible evidence that the appellant has learned from his mistakes. The evidence of the appellant's lack of remorse, his failure to accept full responsibility and culpability for his criminal and unacceptable behaviour, his failure to take meaningful and timely corrective steps toward becoming rehabilitated outweighs his evidence to support his claim of determination to change his lifestyle. I find the appellant's history of drug use, combined with lack of credible and trustworthy evidence to establish that the appellant is on a path to rehabilitation and presents a low risk of re-offending as well as the absence of evidence to support his claim of intention to repay his debt to the Provincial government are very negative factors in this appeal.

[18] Counsel for the appellant referenced the *Sulhdev Singh Pander* case.[13] I do not find the referenced case helpful as it is distinguished on facts.

[19] In exercising its discretionary jurisdiction, the IAD has regard to the objectives 3(1)(e)(h) and (i) of the *Act* which are "to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society" "to protect the health and safety of Canadians and to maintain the security of Canadian society", and "to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or

[13] Workun VA4-03078.

security risks" respectively. These objectives and their emphasis on security were noted by the Supreme Court of Canada in *Medovarski,*[14] which was a unanimous decision of the Court.

[20] In looking at the appellant's establishment in Canada; property, assets, work history, schooling, family life, the time in Canada I note the following:

- The appellant did not finish high school.
- Since 1998 until 3-4 months ago the appellant has been living on the street.
- The appellant did not maintain regular employment and was a recipient of social benefits for 4 years.
- The appellant has no asset, property, investments or savings.
- Despite the fact that he has two children in Canada he has not paid child support for them, and his sister Harjinder provides financial support to the applicant and the couple's son.
- The appellant was vague about the length of his relationship with the mother of his two children in Canada.
- No evidence of the appellant's participation in a voluntary community based organizations or in the organized religion.
- No evidence was adduced at the hearing to support the conclusion that the appellant has friends in Canada, except associates he wants to avoid because of their negative influence on his drug addiction.

[21] Based on the evidence before me I find the appellant's degree of establishment in Canada, despite 20 years of residence, not meaningful, I find this to be a negative factor in this appeal. I have taken into consideration the appellant's young age when granted permanent status and his background and circumstances in India before immigration to Canada.

[14] *Medovarski v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 51, June 7, 2005 (judgment rendered), September 30, 2005, (reasons delivered).

[22] I have considered the support available for the appellant within his family. While I accept the evidence that the appellant's siblings and his relatives, including his maternal uncle, who is married to the applicant's paternal aunt attempted to help the appellant to overcome his drug addiction by arranging his marriage to the applicant [15] and the appellant continues to rely on his immediate family for support as evidenced by their attendance at the hearing, there was no evidence adduced at the hearing to suggest that because of the support from his family the appellant was able to stay out of trouble with the law and I find that their efforts to help the appellant to stay off drugs and straighten his life were unsuccessful. The appellant was using cocaine during his marriage to the applicant, he fathered two children with Carrie Andrews after his marriage, he lived on the street until 3-4 months ago, his family had difficulty to contact him during this time and he continued his pattern of offenses until August 2005. The appellant's family were not able to dissuade him from committing offences. The appellant currently faces Warrant for his arrest. Given the length of the appellant's residency in Canada and the evidence of support from the family I am not satisfied that his family is able to prevent the appellant from re-offending I find this to be negative factor in this appeal.

[23] I note the appellant's testimony that he spends time with his nephews and nieces, there are left in his care despite his condition with no harm done to them. I disagree with appellant's counsel's submission that the appellant's interaction with his nephews and nieces is evidence of degree of rehabilitation. While I accept that there is an emotional attachment to his immediate family in Canada I find no evidence of significant dislocation to the appellant's immediate family in Canada as a result of the appellant's inability to re-unite with the applicant and his son as a result of his non compliance with the *Regulations*.

[24] I have considered the appellant's relationship with the applicant and the degree of hardship that would be caused to her by the negative determination of this appeal I note the discrepancy in the witnesses testimonies with respect to the origin of their relationship, circumstances and a time line of their first contact, motivation for the marriage and a puzzling lack of efforts on the part of the applicant's family to investigate details of the appellant's education, employment history, personal circumstances and background, as customary in the

[15] A-3, page 2.

arranged marriages for two years prior to the marriage despite the fact that in addition to the applicant's relative, who arranged the marriage there were former residents of the applicant's village residing in Canada. The applicant's testimony regarding her first contact with appellant and his family and the details of marriage arrangements contradict the information she provided in the sponsored spouse questionnaire. There was no explanation for this discrepancy. . Based on the evidence before me I find the applicant not a credible witness. No trustworthy evidence was adduced at the hearing to support the conclusion of the hardship to the applicant if this appeal is dismissed.

[25] I have considered the spousal relationship between the appellant and the applicant and in a normal course of events the husband and wife should be together. In this case, reliable evidence fails to establish that the appellant's and the applicant's share relationship and that their marriage is genuine. In the absence of evidence that the appellant's family was forthcoming with their knowledge of the appellant's situation in Canada, including being unemployed, living on the street, a drug addict who had a number of criminal convictions, fathered children with another women after the marriage, I find on the balance of probabilities that the evidence in all circumstances of this case is consistent with the conclusion that the applicant entered into the marriage for immigration purpose.

[26] Given the appellant's testimony of his living arrangements since 1998 and the applicant's statements of the frequency of contact between her and the appellant since his return to Canada after marriage I find the evidence of the phone cards, copies of phone bills, phone cards,[16] money transfers [17]and the photographs[18] tendered in support of the contact between the couple are not meaningful and not indicative of subsisting relationship. I note that the appellant's phone bills are in the name of the appellant's sister and given the applicant's admission that she communicates frequently with her sister-in-law I give little weight to the appellant's phone records submitted as evidence of communication between him and the applicant.

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16 Record, pages 113-118, A-1, pages 1-84.
17 A-1, pages 87-90.
18 Record, pages 89-112.

[27] In looking at the best interest of a child directly affected by this decision, I find that the appellant's son was cared by the applicant since his birth. He lives with his mother, his maternal grandparents and his 2 uncles.[19] While the appellant's sister Harjinder continues to provide monthly financial assistance to the applicant there is no evidence that the applicant is financially dependent on the appellant. There is no evidence of a regular contact between the appellant and his son in India or any meaningful role in the life of his child. While it is always preferable that the child will be cared by both parents, in light of all the circumstances of this case I find no evidence on a balance of probabilities that the in the best interest of the appellant's son in India and his two children born in Canada that this appeal should be allowed

[28] I have examined with care the best interests of the children weighed with other factors, in light of all circumstances of this case I find insufficient positive factors in the appellant's appeal to offset the negative factors against him.

CONCLUSION

[29] It is therefore my decision that the refusal is valid in law and that, taking into account the best interests of a child directly affected by this decision, there are insufficient humanitarian and compassionate considerations warranting special relief in light of all the circumstances of the case. This appeal is dismissed.

[19] Record, page 70.

NOTICE OF DECISION

The appeal is dismissed.

(signed) "Erwin Nest"

Erwin Nest

11 December 2007

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.