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 : VA8-01575

Client ID no. / N° ID client : 3844-8892

Reasons and Decision – Motifs et décision

APPLICATION

Appellant(s)	Kuldeep Kaur DHALIWAL	**Appelant(e)(s)**
Respondent	The Minister of Public Safety and Emergency Preparedness	**Intimé(e)**
Date(s) of Hearing	N/A	**Date(s) de l'audience**
Place of Hearing	In Chambers	**Lieu de l'audience**
Date of Decision	13 May 2011	**Date de la décision**
Panel	**Douglas Cochran**	**Tribunal**
Counsel for the Appellant(s)	Narindar Kang **Barrister and Solicitor**	**Conseil(s) de l'appelant(e) / des appelant(e)(s)**
Designated Representative(s)	N/A	**Représentant(e)(s) Désigné(e)(s)**
Counsel for the Minister	Rick Lengert	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] Kuldeep Kaur DHALIWAL (the "applicant") applies to reopen her appeal, pursuant to section 71 of the *Immigration and Refugee Protection Act* (the "*Act*").[1] This section provides:

> **71 Reopening appeal -** The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.

[2] An exclusion order was made against the applicant on April 22, 2008 and the applicant was ordered removed from Canada pursuant to paragraph 40(1)(a) of the *Act*.

> **40(1) Misrepresentation** - A permanent resident or a foreign national is inadmissible for misrepresentation
>
> (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

[3] The applicant appealed the removal order to the Immigration Appeal Division (the "IAD") pursuant to its humanitarian and compassionate discretion and on October 2, 2009 the presiding member, in a twenty page decision, dismissed the appeal. This decision dealt with five appellants: the applicant; her parents; brother; and sister. All appellants relied on the panel's discretion, pursuant to subsection 67(1) of the *Act*, taking into account the best interests of a child directly affected by the decision, to determine whether there were sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case. The presiding member determined that the applicant did not meet this test.

[4] At the hearing of this appeal, the applicant did not challenge the legal validity of the removal order and conceded the facts alleged by the Minister regarding the misrepresentation. These facts, as quoted in the presiding member's decision, from the statutory declaration of the visa officer, include:

> Kuldeep Kaur Brar was born on January 1, 1971, and was not less than 19 years of age on the date (April 23, 1999) on which the sponsorship was made for her

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

> father as a member of the family class. She also was not continuously enrolled and in attendance since before attaining the age of 19 years. Further, she stated in her Application for Permanent Residence in Canada as the dependent daughter of her father that she did not have any serious disease or physical of mental disorder. She was, therefore, not eligible for permanent residence in Canada as the accompanying daughter of her father with the meaning of "dependent daughter" in section 2(1) of the Immigration Regulations, 1978, then in force.

[5] New counsel for the applicant applies to reopen her appeal. Her application is based on the allegation that there were significant errors in the interpretation provided at the December 8, 2009 hearing, which resulted in a denial of natural justice. In support of these allegations, the applicant has provided an affidavit from an interpreter (the "auditor"), who audited the tapes of the oral hearing. The auditor provides various opinions about the quality of the interpretation and its consequences to the fairness of the hearing. In addition, the applicant notes that when a DARS recording was requested of the hearing, the disk provided did not contain the evidence of the applicant's brother and thus, given the IAD's inability to provide an auditable recording, a breach of natural justice has occurred. After additional searching, a copy of the DARS recording of the testimony of the applicant's brother was provided to counsel and at the request of applicant's counsel I directed an audit of the interpretation at that hearing. The audit found that the intyerpreter was "accurate and complete in both languages" and found no discrepancies in the seven segments anlaysed. Counsel for the applicant responded to this audit by asking the IAD to respond to a number of questions. Firstly, counsel for the applicant requested "an explanation" as to why only a partial audit was obtained of the hearing involving the applicant's brother when a full audit was requested. I have reviewed the relevant correspondence and the preceding statement is inaccurate. Counsel for the applicant only sought "an audit" and not a "full audit". Counsel, being a former member and having dealt with audits in numerous other applications to reopen, is familiar with the process of auditing in the IAD. Regardless, the applicant did not request a full audit of the related proceeding where her brother testistified. Secondly, the applicant sought "an explanation for why there has been no disclosure of any other previous audits of the same interpreter". The applicant did not request this and if she did it would likely be denied. Such information would have limited relevance, place an enormous administrative burden on the IAD and smacks of a different objective by counsel which is well beyond the parameters of this reopening application. Thirdly, the applicant seeks the identity of the interpreter conducting the audit. Provision of this information is not part of the audit

process in the IAD. The applicant can seek such information as part of an access to information request.

[6] Finally, the applicant seeks the qualifications of the auditor, disclosure of which is not part of the audit process in the IAD. The applicant can seek such information as part of an access to information request.

[7] Counsel for the applicant further seeks an opportunity to "conduct her own fulsome audit and juxtapose those independent findings with those of the IAD". The implication in this statement being that the IAD audit is not independent whereas an audit, likely by the same auditor who conducts a substantial number of audits on behalf of this law firm, would somehow be more independent. The reopening applicantion has been outstanding for a considerable period of time. Numerous extensions of time have been granted to accommodate counsel's presentation of submissions. There have been multiple submissions from counsel and submissions on the issue of abuse of process at the behest of the panel. There has been a substantial amount of correspondence from counsel for the applicant pursuant to this reopening application. The panel has two audits to consider, the one relating to the parallel application of the applicant's brother, demonstrates that the interpretation at that hearing was "accurate and complete in both languages". The decision to order an audit of the applicant's brother's testimony was in response to a request by applicant's counsel. In all these circumstances this matter ought to be decided with the available information and without additional delay. I deny the applicant's request for further time to conduct her own audit.

[8] The respondent opposes the application to reopen. He argues that the applicant had an onus of raising concerns about the quality of interpretation at the two-day oral hearing in September 2009 and cannot now seek relief based on an issue that ought to have been put before the presiding member. In addition, the Minister argues that the applicant has not shown how the alleged interpretation errors "were so serious as to affect the outcome of the hearing".

[9] I have reviewed the affidavit of the auditor in relation to the applicant's testimony, in detail. In a previous application to reopen, utilizing this same auditor and counsel from the same law firm, I commented that it does not assist in consideration of a reopening application,

where the auditor makes sweeping statements expressing opinions about whether errors in interpretation rendered "the hearing procedurally unfair" as that is the very issue before the member hearing the application to reopen. What is most helpful is where the auditor can provide details of the alleged misinterpretations in context and in sufficient detail that the member considering the motion can come to an informed decision regarding the impact of the alleged misinterpretation. The auditor and counsel have not amended their standard submissions despite my previous comments regarding the inclusion of inappropriate statements.

[10] The specific references to alleged errors in interpretation do not support the applicant's claim that errors in interpretation caused her to be confused, that questions being asked of her appeared nonsensical and the combined effect was to render the process unfair. In hearing appeals in the IAD where there is interpretation, there are often instances of confusion. Sometimes confusion arises because questions put by counsel are rambling and imprecise. Where a witness asks for a clarification in a question, this is largely welcomed by presiding members as appropriate to ensure evidence is clearly stated, unless it appears that the witness is being evasive or attempting to "buy time" in order to manufacture an answer. Members in the IAD are experienced in dealing with evidence provided through interpretation and well aware that a specific phrase or concept may be described a number of different ways and in different ways by different interpreters. This variation in interpreter styles does not imply a breach of natural justice provided the essential meaning is conveyed. It is a rare instance where an appeal would be decided by a word, a phrase or even a series of words or phrases. Where a precise word or phrase is key to the outcome of an appeal, counsel should be alive to the importance of the evidence being provided and must attempt to clarify, even rehabilitate the evidence, as opposed to standing mute at the appeal hearing and later raising concerns in an application to reopen.

[11] It is, however not necessary for me to review the specific instances of alleged errors in interpretation because this application must fail on other grounds. The alleged interpretation errors do not address a more fundamental issue; that the decision of the member in this matter came after a joint recommendation from all counsel, with the applicant seeking the very order she now wishes to overturn. At the conclusion of the applicant's testimony, counsel sought an adjournment of the proceedings in order to consult with their clients and "the family" with the

prospect of returning the next day with a joint recommendation. The member was presented with a joint recommendation the following day. Despite the fact that there was a joint recommendation, the member conducted an extensive analysis of the circumstances involving the applicant prior to exercising his discretionatry jurisdication. From the decision in this matter, member Nest states:

> [25] Kuldip Kaur Dhaliwal was 28 years old at the time Gurcharn Singh Brar sponsored her to come to Canada as a dependent child of his father, Baljit Singh Brar. Her application for permanent status in Canada was processed without examination based on the information provided to the immigration authorities, where she was described as an18 year old who is illiterate.
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> [26] She admitted that she was aware of the Canadian immigration requirements for sponsorship of family members and she realized that she would qualify to come to Canada only if she was found to be a dependent daughter of her father. She confirmed that she knew that her father and Gurcharan Singh Brar conspired to bring her to Canada by procuring falsified information pertaining to her age and education.
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> [27] Based on the evidence before and on the balance of probabilities, I find that Kuldeep Kaur Dhaliwal was an active participant in her family's scheme to deceive immigration authorities. I conclude that her misrepresentation with respect to her age and education to the Canadian immigration authorities was advertent and she was granted permanent residence status by being sponsored as a member of the family class.
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> [28] Kuldeep Kaur Dhaliwal's claim that at the time her application for permanent status was processed she disagreed with the decision to misrepresent the facts regarding her age and education by her father and brother in Canada, but the decision was out of her control.
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> [29] Given that Kuldeep Kaur Dhaliwal was aware of the deliberate misrepresentations to the Canadian immigration authorities before and during the processing of her application for permanent residence, she continued with the misrepresentation after she immigrated to Canada by never changing the information pertaining to her age and education in all relevant documents pertaining to her identity in Canada.
>
> [30] After she sponsored her husband in 2003, she continued to misrepresent her age and education during the processing of the application for permanent residence status, as well as during the appeal hearing. It is clear that a duty of candour exists and the surrounding circumstances are important for deciding what that duty entails in any particular instance. In this particular instance, there was an obligation on the part of Kuldeep Kaur Dhaliwal to disclose her real age when applying to sponsor her husband to Canada; instead she conspired with him to continue to mislead the immigration authorities with respect to her age and education. While Kuldeep Kaur Dhaliwal claimed that at the time of the processing of the application for permanent residence, she

considered what her father and brother did by making misrepresentations was wrong. Based on the totality of evidence before me and on the balance of probabilities, I find that her expression of remorse is lacking in credibility. I find this to be a factor to the detriment of Kuldeep Kaur Dhaliwal.

[31] Kuldeep Kaur Dhaliwal knew that making misrepresentations to the Canadian immigration authorities was wrong from the outset but she continued to make misrepresentations after coming to Canada as long as she was able to. The actions were not simply remaining silent about her circumstances, but taking deliberate actions to continue to misrepresent materials facts to the immigration authorities. I find the absence of factors mitigating her misrepresentations to be a negative factor in this appeal. I note the depth of investigation that the Minister underwent to prove the falsified documents through two field trips in 2005 and 2007. These investigations, if replicated for all documents provided by prospective immigrants, would cause the process of immigration to grind to a halt.

[32] In looking to what extent Kuldeep Kaur Dhaliwal is established in Canada, I find that she has been continuously employed since 2007, and she is viewed as a valuable employee as evidenced by the letter from her employer.[2] She has a bank account and she makes financial contribution to the joint household expenditures. There is no evidence that Kuldeep Kaur Dhaliwal has studied in Canada, that she acquired employment qualifications which tie her to one place or that she has future employment prospects, and plans including the existence of employment contacts in Canada. Taking into consideration her length of residence and employment in Canada, her good relationship with her family members she is residing with, I find that Kuldeep Kaur Dhaliwal has achieved a degree of establishment in Canada. I find this to be a positive factor in this appeal.

[33] I have considered hardship to Kuldeep Kaur Dhaliwal if removed form Canada. I note that she has a number of family members in India, including her aunt and the paternal uncle and their respective families with whom she maintains a positive relationship. She testified that since her marriage in 2003 she spent approximately a year during her visits with her husband and his family. She confirmed that she stays with her in-laws while visiting in India. She enjoys a loving relationship with her husband and she receives ongoing support from his parents. No credible evidence was adduced to conclude that during her prolong stays in India after 2003 she experienced any threats to her personal safety. Based on the evidence before I find that Kuldeep Kaur Dhaliwal has a supporter and resources of family members in her home country, including accommodation available to her if returned. While I accept that she has emotional bonds to family members in Canada, Kuldeep Kaur Dhaliwal is married and has a family of her own. I find no evidence of significant hardship to Kuldeep Kaur Dhaliwal if removed from Canada that can outweigh other very negative factors in all the circumstances of her case.

[34] I have taken into consideration hardship to family of Kuldeep Kaur Dhaliwal.

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[2] Exhibit A-3.

> [35] I accept she has strong emotional support from her family in Canada. She interacts with Gurcharan Singh Brar's three children and contributes to the joint family household expenditures. There is no evidence before me to indicate that there will be negative impact on financial support being provided by Kuldeep Kaur Dhaliwal to family members in Canada.
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> [36] Based on the preponderance of reliable evidence I find that best interest of Gurcharan Singh Brar's three children will not be directly affected by the decision in this appeal.
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> [37] The circumstances of this case are not compelling. There is no evidence that there is unique or special circumstances present such as would warrant relief in the circumstances of this case. I agree with the Minister's position that the serious nature of the intentional misrepresentations in this case are not outweighed by the humanitarian and compassionate considerations, including best interest of the child.
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> [38] I conclude the appellant has not met the onus on her of demonstrating that, taking into account the best interests of a child or children directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of this case.

[12] When the appeal hearing was reconvened, after allowing an opportunity for the applicant and her family to discuss the proposed resolution, counsel outlined in detail a joint recommendation which involved allowing the appeals of a number of family members based on humanitarian and compassionate grounds and dismissing the applicant's appeal. That is what the member did:

> MR. LARLEE: Mr. Williamson, Mr. Joomratty and I have had discussions regarding a possible resolution acceptable to the Board of these further appeals. We have reached a point where we're prepared to make a joint recommendation and I'll just very quickly summarize it and then delve into a little background.
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> We're all three counsel, Minister's counsel and counsel on this side, are mindful that this is a case in equity. **We're mindful that Kuldeep Kaur Dhaliwal was included in the family's application when she should not have been because of her age.** We are all mindful that otherwise Baljit and his wife Kartar would have been normally sponsorable as parents, as well as Mr. Joomratty's client, Veerpal. They had an entitlement and, on this basis, we are prepared to make a joint recommendation that their appeals be allowed.
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> PRESIDING MEMBER: Again, could you – the names –
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> MR. LARLEE: The appeals of Baljit, Veerpal and Kartar.
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> PRESIDING MEMBER: Okay.

> MR. LARLEE: **Conversely, we're of the view that the appeal of** Veerpal be dismissed and, as I'm sure you can appreciate, this concession – sorry, Kuldeep **– that Kuldeep's appeal be dismissed**. This joint recommendation, of course, had to gain the approval of the family and this has been a very difficult, to say the last, (sic) decision for the family to reach to concede that Kuldeep should have her appeal dismissed and ultimately return to India.
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> I would like to note, by way of background, that after the section 44 reports were filed and action was taken against this family, **a without prejudice letter was written to the investigating officer at CBSA dated 16th of January, 2007. In that letter it was proposed that action be dropped against Baljit, Kartar, Veerpal and Gurshran (phonetic) and, in return, action could be proceeded against Kuldeep**.
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> A year and a half – more than a year and – two and a half years has transpired since that letter and the family's hopes were rekindled that Kuldeep could possibly remain. That has been revisited yesterday and today and **the family now sees that it's appropriate and right that Kuldeep, not having legitimate status in Canada, should return to India.**

[13] Having determined that the appeal that the applicant sought to reopen was resolved after a joint recommendation, I sought submissions from counsel regarding whether the doctrine of abuse of process ought to apply. I have received those submissions and as this issue is determinative of this appeal I will not address the other concerns raised by the applicant. I have carefully considered submissions from the applicant and the Minister and conclude that the doctrine of abuse of process does apply in this matter.

Doctrine of Abuse of Process

[14] The doctrine of abuse of process has been dealt with extensively by the Supreme Court of Canada. It is clearly reviewed in the *Toronto (City) v. C.U.P.E.*[3] case.

> (3) Abuse of Process
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> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

[3] *Toronto (City) v. C.U.P.E.*, Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63.

> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

In addition, the Supreme Court stated:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to **prevent the misuse of its procedure**, in a way that would . . . **bring the administration of justice into disrepute**" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
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> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an **attempt to relitigate a claim** which the court has already determined. [Emphasis added.]
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> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless **violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.** (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25). [bolded emphasis added]

[15] It is thus clear that the principle of abuse of process incorporates unfairness to a particular litigant but is applied beyond the interests of individual litigants, as it seeks to control a process that would impact on societal interests such "as judicial economy, consistency, finality and the integrity of the administration of justice". Counsel for the applicant has made lengthy submissions which are not organized under specific point headings and I will attempt to sort through the submissions to identify the discrete points raised.

Joint recommendation ought not to have been accepted by the IAD

[16] The applicant argues that the joint recommendation proffered by her counsel ought not to have been accepted by the panel. Counsel stirs issues of interpretation and divided loyalty of counsel into the mix. The arguments of applicant's counsel with regard to the lack of interpretation when the joint recommendation was presented to the panel are unconvincing. The applicant was represented by a barrister and solicitor who practices extensively before the IAD. The proposed joint recommendation is, in substance, the same as what was proposed by this same counsel in January of 2007, over two and a half years earlier. The presiding member granted an adjournment overnight to afford the opportunity for the proposed joint recommendation to be fully canvassed by the applicant and her family. It strains credulity beyond the breaking point for the applicant to now allege that she did not comprehend what she agreed to. She is in her late thirties and has been in Canada since November of 2001. She has substantial familiarity with the immigration process including the operation of the IAD as a result of her sponsorship of her husband, refusal of that application and her successful appeal to the IAD of the denial of that sponsorship.

[17] This joint recommendation was presented by applicant's counsel. The applicant argues now that the joint recommendation ought not to have been accepted by the panel since she no longer had "effective counsel" and there was a conflict between her interests and those of her other family members who were represented by this same counsel. The outcome of the joint recommendation was for the applicant's appeal to be dismissed and that of her parents and siblings to be allowed. This, in itself, does not establish that the joint recommendation was against her interests. As pointed out by applicant's counsel to the presiding member, the applicant was in the unique position of not being a member of the family class at the time of her sponsorship to Canada, since she was overage. She was admitted to Canada on the lie that she was born in 1980 rather than 1971, which is when she likely was born. The lie about her age was a primary basis for the misrepresentation finding that is the basis of this appeal. Minister's counsel, in his submissions to the presiding member, indicated that this fact places her in a completely different category from the other appellants.

> Kuldeep should never have been included because she was above the age of dependency and she was a full-time student nor did she have a disability that precluded her from being self-supporting and would have resulted in inclusion as a dependent daughter on the basis of some disability.

[18] In addition, Minister's counsel noted that the applicant had married since being landed in Canada and had spent considerable time in India with her husband. In the course of her application to sponsor her husband the applicant again lied to Canadian immigration authorities.

> The other reasons that persuade us that Kuldeep's appeal is less meritorious than her other family members include that in Kuldeep's case there was the initial misrepresentation on her written application for a Canadian immigrant visa, and just to remind the Board, there were misrepresentations not only in respect of her age, when she claimed to be nine years younger than she was and that as important to make her a dependent daughter, but also there was the misrepresentation made about her schooling. She claimed to be illiterate and to have never attended school. Those misrepresentations were necessary in order to cover up the first misrepresentation, which was her age.
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> Now, Kuldeep maintained the misrepresentation for years following her landing in Canada. No doubt she felt there was no alternative but to maintain the misrepresentations because she married her husband in India, who was himself born in 1980, and she sponsored him and it was necessary, I suppose, she might say to you in the course of her undertaking to sponsor her husband that she maintain the fiction that she was of the same age as him, but it compounds the original bad conduct that she did so.
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> Not only did she sponsor her husband Maninder claiming her original date of birth as it showed on her landing documents, but she has told you that she had to get her husband's agreement that he would go along with the fictional age, that he would be dishonest himself when interviewed by the Canadian visa officer. Kuldeep was dishonest herself when the time came when Maninder's application was refused and Kuldeep appealed the refusal of his application to the Board and she appeared her in an appeal hearing and provided perjured testimony about what her own age was and what her birth date was.[4]

[19] Thus, there are distinctions between the applicant and her family members, whose appeals were allowed pursuant to the joint recommendation that she agreed to. She had no entitlement to be sponsored as a member of the family class, whereas they did. She not only lied originally but her application to sponsor her husband was based on this lie and the applicant conspired with her husband to lie and gave perjured testimony before the very Board she seeks

[4] Page 13, line 11, transcript of September 10, 2009 proceedings.

humanitarian and compassionate relief from. In these circumstances it might be considered a remarkable feat to obtain the support of the Minister to this joint recommendation. A prime feature of the agreement between the parties was the applicant's agreement that her appeal be dismissed. In doing so, the applicant obtained a considerable advantage for herself by ensuring the Minister's support for a joint recommendation, a substantial benefit to her immediate family. By taking this step she also gained a strategic advantage for her close family members by avoiding them being tarred with the brush of her deceitful behaviour before the same Board that was being asked to grant humanitarian and compassionate relief. To suggest that the applicant derived no benefit from this agreement is a denial of the very "social enmeshment" that it has often been argued exists within the applicant's culture.

Effective Counsel

[20] Applicant's counsel argues that the applicant did not have "effective counsel" in this appeal. Counsel for the applicant at the hearing was experienced counsel and a member of the Bar and it is reasonable to conclude that if there had been a conflict between his duty to one client and another he would have dealt with this in the manner he did earlier when Mr. Joomratty became counsel for two of the appellants. In his submissions,[5] counsel for the applicant cites a passage from a letter written by applicant's then counsel which states; "[i]t is unlikely that I would continue to represent all members of the family as their interests are divergent". Thus, it is clear that, as early as January 16, 2007, applicant's counsel was alive to potential for conflict and as a result, some of the family members obtained new counsel. I conclude that neither the applicant nor experienced counsel saw any conflict in Mr. Larlee's representation of more than one client at the time of the hearing. The applicant has experience in dealing with the IAD and was previously successful in appealing the denial of her sponsorship of her husband. She is in her late thirties and has been in Canada since 2001. She has a responsibility to communicate with her counsel, most particularly if she is in disagreement with a proposed resolution of her appeal. It is significant that this proposal had been "on the table" since January of 2007 and the presiding member afforded a postponement overnight, prior to the applicant committing to the joint recommendation.

[5] Applicant's submissions, October 15, 2010, paragraph 13.

[21] What could be more indicative of whether counsel was effective than securing the support of the Minister for a proposed resolution of the appeal that had been in substance the same, since January 2007? I do not accept that simply because the applicant's appeal was dismissed she did not effectively have counsel. As outlined above, the applicant, who by no means had a likelihood of success in her appeal, achieved a substantial benefit from the joint recommendation in the form of her family maintaining their permanent resident status. The abuse of process in this matter is underscored by the applicant, having achieved the benefit of acquiring support from Minister's counsel for the joint recommendation, attempting to resile from the joint recommendation, only so far as it applies to her.

[22] Counsel for the applicant's argument that "there was no submission provided to the Presiding Member that the Appellant, an individual litigant in these proceedings, ever *individually acquiesced* to this proposed compromise as proffered to the Appeal Division" is untenable. Where an appellant is represented by experienced counsel, in this case a member of the Bar, who informs the IAD that counsel have a joint recommendation for the resolution of the appeal, that statement ought to be accepted. It is untenable for the panel to challenge counsel about such an assertion, to question an appellant about their agreement to the proposed resolution, or to otherwise impede counsel's efforts to resolve an appeal in the manner that an appellant sees as favourable. Were the presiding member to have intervened and should the agreement amongst the parties fall apart as a result, the applicant quite rightly could complain that the effectiveness of her representation had been impaired by the presiding member. The applicant has provided an affidavit dated September 29, 2010 which confirms that her former counsel believed that she had consented to the joint recommendation although he did not obtain written consent from her. It is perfectly understandable that the applicant would suffer from a form of "buyer's regret" after agreeding to this joint recommendation, particularly where her family members have retained their permanent resident status as a result of this process and she had not. Notably there is no offer to rescind the outcome of the appeals for her family members so the applicant takes the benefit and rejects the loss, being her permanent resident status which had initially been fraudulently obtained.

Waiver of Interpretation

[23] The applicant argues that the proceedings where the joint recommendation was outlined to the panel ought to have been interpreted notwithstanding her counsel's waiver of interpretation, on her behalf. The panel must be able to rely on counsel who waives interpretation on behalf of an appellant. The transcript of the hearing on September 9, 2010, where the joint recommendation is outlined to the panel, confirms that the panel specifically sought confirmation that the applicant waived her right to interpretation. To require interpretation where an appellant seeks to proceed without interpretation would be to interfere with the appellant's presentation of her case. Counsel often waive interpretation of submissions to the panel and not just for expediency but additionally because interpretation breaks the flow of submissions and likely makes it harder for counsel to maintain the flow of their thinking and arguments. If an appellant were to strategically waive interpretation and then apply to reopen an unsuccessful appeal due to lack of interpretation, this would amount to an attempt to obtain "two kicks at the can", an abuse of process. The appellant was represented by experienced counsel. The proposition that she did not fully understand the substance of the joint recommendation, given that she had the same counsel since at least January 2007, when the initial proposed resolution with the same effective outcome was made, cannot be maintained.

[24] Not only is the applicant seeking to relitigate her appeal but she is doing so in circumstances where she consented to the outcome she now complains of. It is particularly unseemly for the applicant to obtain a benefit from the course of action proposed by her counsel and agreed to by her, being allowing the appeals of her parents and siblings, and then almost in the next breath attempt to reneg on her agreement by requesting a reopening of her appeal. Such a course of action would violate the principle of judicial economy because it would result in a second hearing where the applicant had previously been afforded the opportunity to present her case to the IAD on two separate days and joined with the other appellants in a submission to the panel about the outcome of that appeal. It would violate the principle of consistency in that there would be no point in a new hearing unless the applicant was seeking a result inconsistent with the outcome of the earlier proceeding. It would violate the principle of finality in that it involves relitigation of a matter that was finally resolved and it would undermine the integrity

of the administration of justice because the applicant seeks to keep the benefit derived from the earlier proceeding and re-litigate only the part she finds disagreeable.

[25] Further, an additional policy reason for not permitting the applicant to reopen her appeal is the potential negative impact that this would have on the operation of the IAD. If the IAD were to allow an applicant to reopen, where she had obtained a benefit which would be retained notwithstanding a renewed appeal on her part (her parents and siblings retaining their permanent resident status) then the Minister would likely be less willing to consider such a joint recommendation in the future. "Once burnt, twice shy" is the expression that comes to mind. Where Minister's counsel is prepared to entertain joint recommendations there is a significant benefit to other appellants and to the IAD, in relation to efficient management of its process. Where appellants, in particular appellants represented by experienced counsel, commit to an agreement in the form of a joint recommendation they should not be surprised to be bound by the doctrine of abuse of process.

[26] The panel acceded to the request from the applicant's then counsel for an opportunity for the family to have discussions. In these circumstances, there would not be a need for interpretation for these discussions and there cannot be any question as to the adequacy of interpretation of the proposal advanced by the applicant's counsel and ultimately agreed to by the Minister. In the applicant's circumstances, the proposal was not complex and remained unchanged over about two and a half years. Four of the applicant's family would retain their permanent resident status and she would not.

[27] In accepting the joint recommendation the member notes that the applicant's four family members, whose appeals were allowed, "would have been eligible to be sponsored as a member of the family class". This is not the case with the applicant, who was not sponsorable as a dependant due to her age and circumstances. In essence, she seeks to be put in a better position than she was pre-misrepresentation. No suggestion has been made by the applicant that the appeals of her four family members should be reopened. Surely, if the applicant were to be successful in arguing that the alleged errors of interpretation were sufficient to reopen her appeal, the Minister would be entitled to a reopening of the appeals in relation to her family members.

[28] Notwithstanding the joint recommendation, the member conducted a thorough analysis of humanitarian and compassionate factors which relate to the applicant. In making this reopening application the applicant, having changed her mind, is attempting to relitigate a claim which the tribunal has already determined.

CONCLUSION

[29] I deny the application to reopen the appeal as it amounts to an abuse of process.

NOTICE OF DECISION

The applicant's application to reopen the appeal is dismissed.

(signed) **"Douglas Cochran"**

Douglas Cochran

13 May 2011

date

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.