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 : VB4-02356
Client ID no. / N° ID client : 5247-5183

Reasons and Decision – Motifs et décision

SPONSORSHIP

Appellant(s)	Rupinderpal Kaur BRAR	**Appelant(e)(s)**
and		
Respondent	The Minister of Citizenship and Immigration	**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	June 10, 2015	**Date de la décision**
Panel	George Pemberton	**Tribunal**
Counsel for the Appellant(s)	Massood Joomratty **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	Kevin Hatch	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] These are the reasons and decision in an appeal by Rupinderpal Kaur BRAR (the "appellant") against the refusal of the sponsored application for a permanent resident visa for her spouse, Sandeep Singh BRAR (the "applicant"), a citizen of India. This decision addresses whether the doctrines of *res judicata* or abuse of process apply to prevent hearing this appeal on its merits.

BACKGROUND

[2] The appellant and applicant were married in India on April 6, 2007. In July 2007 the appellant applied to sponsor the applicant. That application was refused on the grounds that the marriage fell within section 4 of the *Immigration and Refugee Protection Regulations* (the "*Regulations*")[1] as they existed at that time. The marriage was found to be not genuine and entered into primarily for the purpose of immigration. An appeal of that determination was dismissed by the Immigration Appeal Division (the "IAD") on November 24, 2009, following an in-person hearing[2] (the "2009 Decision"). Member Nest found that the marriage is not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the *Immigration and Refugee Protection Act* (the "*Act*").[3]

[3] In March 2010, the appellant applied to sponsor the applicant a second time. That application was refused on the same grounds. The appellant appealed to the IAD. On May 10, 2011, the appeal was dismissed. Member Kingma found that *res judicata* applied and that the circumstances did not support rehearing the case (the "2011 Decision").[4] The appellant applied for leave for judicial review. On February 23, 2012, the Federal Court dismissed the application for judicial review.[5]

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[1] *Immigration and Refugee Protection Regulations* (the "*Regulations*"), SOR/2010–208, s. 1.
[2] *Rupinderpal Kaur Brar v Canada (Minister of Citizenship and Immigration)*, November 24, 2009, Nest, VA8-02868.
[3] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
[4] *Rupinderpal Kaur Brar v Canada (Minister of Citizenship and Immigration)*, May 10, 2011, Kingma, VB0-02860.
[5] *Rupinderpal Kaur Brar v Canada (Minister of Citizenship and Immigration)*, February 23, 2012, Noel, 2012 FC 248.

[4] In November 2012, the appellant applied for a third time to sponsor the applicant (the "current application"). The appellant was interviewed by a visa officer on May 28, 2014. On June 18, 2014, the application was again refused on the grounds that the marriage is not genuine and was for the primary purpose of acquiring status in Canada. The appeal of that decision is now before me.

[5] On January 23, 2015, the IAD sent the appellant and counsel for the Minister of Citizenship and Immigration (the "respondent") a letter identifying that the doctrine of *res judicata* or abuse of process may apply to this appeal, and requesting the parties to provide evidence and submissions. On February 20, 2015, appellant's counsel provided a written submission. On March 12, 2015, the respondent provided a written submission. The appellant did not reply despite having the opportunity to do so.

[6] I find it is unnecessary to conduct an oral hearing into the issue before me. I have taken into consideration the contents of the Record, the parties' submissions and the 2009 and 2011 Decisions.

ISSUE

[7] The issue to be decided is whether the doctrines of *res judicata* or abuse of process apply to prevent the hearing of this appeal on its merits.

DECISION

[8] I find that the doctrine of *res judicata* applies. The appeal is dismissed.

ANALYSIS

[9] The doctrine of *res judicata* and its purpose, as well as its application to proceedings at the IAD, are well-established law. The purpose of the doctrine of *res judicata* was described by the Supreme Court of Canada in *Danyluk*:[6]

> 18. The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[10] The associated concept of *estoppel* is a doctrine of public policy intended to prevent injustice. In the words of the Supreme Court of Canada: "The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case".[7]

[11] The doctrine of *issue estoppel* applies when these three conditions are satisfied:

a) the parties in the previous proceeding are the same;

b) the previous decision was final, and

c) the issue is the same.

[12] In this case those conditions are met. The parties to the previous appeal are the same. The issue in both appeals is whether the marriage is genuine or was entered into primarily for the purpose of acquiring a status or privilege under the *Act*. The 2009 Decision was a final adjudication of the same matter.

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[6] *Danyluk* v. *Ainsworth Technologies Inc* [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46 (QL), para. 18.
[7] Ibid, para 67.

[13] It is therefore necessary to assess whether there are special circumstances that warrant making an exception, or is there fresh, new evidence, previously unavailable, that conclusively impeaches the original results.[8] Would failure to hear this appeal on its merits work an injustice?

[14] Appellant's counsel submits that there is new evidence not previously available, evidence he describes as "fresh and credible". He submits that the couple has "demonstrated a commitment over time, their marriage has matured and evolved significantly since the first appeal, and they have made more in-depth plans for the future". He relies, in part, on the decision of the Federal Court in *Sami*.[9]

[15] The respondent submits that the new evidence does not justify an exception to the doctrine of *res judicata*. In particular he submits that the finding that a marriage was for the primary purpose of acquiring status cannot be overcome by subsequent evidence. In essence, it is locked in time. He cites the Federal Court decision in *Ping*.[10]

[16] In *Ping* Madam Justice Kane succinctly described the standard required to overcome *res judicata*. It is not enough that the new evidence reinforces or bolsters the previous evidence. She found "the new evidence must be practically conclusive of the matter."[11]

[17] Turning to the respondent's submission that the finding of primary purpose is locked in time, it is true that the *Regulations* refer to the primary purpose of the marriage in the past tense. However, the purpose refers to a person's intention at the time, something that decision makers can only infer from the evidence before them. There may be circumstances where there is decisive new evidence that would cause a decision maker to come to a different conclusion about the primary purpose.

[18] Powerful evidence of genuineness can sometimes overcome evidence that a marriage was primarily for the purpose of gaining status. Conversely, evidence that a marriage was primarily for the purpose of acquiring status can undermine evidence that the marriage is genuine. What

[8] *Toronto (City)* v. *C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, para 52.
[9] *Sami v Canada (Minister of Citizenship and Immigration)*, 2012 FC 539.
[10] *Ping v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1121.
[11] *Ping*, para. 23.

new evidence that has been provided by the appellant primarily addresses the genuineness of the marriage. Appellant's counsel is essentially submitting that the new evidence of genuineness is also sufficient to prove that the primary purpose of the marriage was not to acquire status.

The Evidence

[19] The 2009 Decision relied, in part, on a finding that the appellant's testimony lacked credibility. Detailed reasons were provided for that finding. The member took into account evidence of return visits to India; the couple's stated desire to have children; letters and greeting cards between them; proof of telephone communication; and, photographs of the couple together.

[20] The applicant and appellant provided documents in support of the current application, including:

[a] 102 photocopy pages of greeting cards and letters.

[b] Affidavits and letters from friends and family attesting to the circumstances of the marriage and its genuineness.

[c] Proof of travel to India by the applicant.

[d] What appear to be money transfer receipts.

[e] Proof of medical examinations and tests related to efforts to conceive.

[f] 66 pages of phone records.

[g] 191 pages of photos.

[21] On May 14, 2010, the applicant and appellant were interviewed by a visa officer in respect to the second application. As new evidence since the 2009 Decision the appellant cited the fact that she had recently learned that she is unable to have children. She also cited her return visit in 2010, her first since 2008.

[22] On May 28, 2014, the applicant was interviewed by a visa officer in respect to the current application. As new evidence the appellant referred to the phone bills and photos provided, and

the fact that he and the appellant had together attended the appellant's sister's wedding and had participated in place of the appellant's deceased parents. He provided little other new evidence.

[23] I find that the documentary evidence provided is not "fresh, new evidence, previously unavailable, that conclusively impeaches the original results."

[a] Greeting cards and letters between the appellant and applicant were taken into account at the first hearing. Some of the cards and letters provided for the current application pre-date the 2009 Decision.

[b] The evidence provided in the affidavits and letters relates primarily to events surrounding the marriage. There is no explanation why that witness evidence could not, with due diligence, have been provided for the 2009 hearing.

[c] Evidence of return visits to India was taken into account in the 2009 Decision. The visits since then do little more than bolster the previous evidence.

[d] Many of the money transfer receipts pre-date the 2009 hearing. No explanation was provided why they could not have been provided for that hearing. No specific reference to financial support is made in the 2009 Decision. However, I find that this evidence is not decisive, and some of it is not new.

[e] The 2009 Decision took into account the couple's desire to have children. It commented negatively on the failure to provide evidence that the couple had sought medical assistance. That failing has now been rectified. However, I find it does little to change the overall evidence.

[f] Many of the phone records provided pre-date the 2009 Decision. Evidence of phone communication was taken into account in the 2009 Decision.

[g] Many of the photographs provided are of the appellant and applicant's marriage and honeymoon, in other words pre-dating the 2009 Decision. Photos of the couple together were taken into account in the 2009 Decision.

[24] There is little to differentiate the new evidence from that already taken into consideration in the 2009 Decision. The new evidence does little more than bolster the previous evidence. It does little to overcome the previous finding that the appellant lacks credibility. It falls far short of the standard of being practically conclusive.

[25] The pieces of new evidence do not individually amount to decisive new evidence. Even taken together with the passage of time they do not amount to decisive new evidence. There is

little evidence of any qualitative change in the nature of their relationship, or of the evidence, over that time. Time has passed; little else has changed.

[26] The appellant has provided limited new evidence. The new evidence that does exist is not qualitatively different than the evidence relied upon by the member who made the 2009 Decision. The evidence before that member was fully assessed, taking into account the findings on witness credibility. I find that, even woven together with the complete evidence and taking into account the passage of time, the new evidence adduced by the appellant does not amount to decisive new evidence that would warrant an exception to the application of *res judicata*.

CONCLUSION

[27] I find that the doctrine of *res judicata* applies. Examined as a whole and taking into account the passage of time, the new evidence adduced does not amount to decisive new evidence. There was no evidence or even allegation of fraud or dishonesty in the first proceeding, nor any other special circumstances that would warrant an exception to the application of *res judicata*.

NOTICE OF DECISION

The appeal is dismissed.

(signed) **"George Pemberton"**

June 10, 2015

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.