Case Name:

Dhillon v. Canada (Minister of Citizenship and Immigration)

Charanjit Kaur Dhillon, appellant, and
Minister of Citizenship and Immigration, respondent

[2006] I.A.D.D. No. 837

[2006] D.S.A.I. no 837

No. VA5-02422

Immigration and Refugee Board of Canada
Immigration Appeal Division

Panel: Margaret Ostrowski
(In Chambers)

Heard: September 15, 2006.
Decision: September 15, 2006.

(15 paras.)

Appearances:

Appellant's Counsel: Brij Mohan, Barrister & Solicitor.

Minister's Counsel: Sharon Flynn.

Application

Reasons for Decision

INTRODUCTION

1 The appellant, Charanjit Kaur DHILLON (the "appellant"), appeals from a refusal to issue a permanent resident visa to Lakhvir Singh DHILLON ("the applicant") as her spouse pursuant to section 4 of the *Immigration and Refugee Protection Regulations* (the "*Regulations*").[1]

2 The Minister's counsel (the "Minister") has made an application pursuant to section 43 of the *Immigration Appeal Division Rules* stating that this panel is without jurisdiction to hear the matter of the appellant's appeal on the basis of the application of the doctrine of *res judicata* and that the subsection 63(1) appeal should be dismissed.

3 At issue in this case is the preliminary application regarding whether the principle of *res judicata* applies and if so, are there facts supporting an exception to the doctrine or a need to exercise discretion in its application. The Minister's application in this regard, was received on June 7, 2006, written submissions were received from the appellant's counsel on June 13, 2006 and a reply received from the Minister's counsel on June 28, 2006.

4 An application to sponsor the applicant was filed on August 4, 1999, and such was refused. On April 10, 2001, the Immigration and Appeal Division (the "IAD") determined that the applicant was not a member of the family class and dismissed the appeal. On August 27, 2001, a second application was filed to sponsor the applicant and such was refused. On July 9, 2003, a third application was filed to sponsor the applicant and such was refused on the basis that the sponsor was not residing in Canada. The sponsor, the appellant, withdrew her appeal to the IAD. On August 15, 2004, the appellant filed a fourth application to sponsor the applicant and it was refused. That decision was appealed to the IAD on October 28, 2005.

Issue of *Res Judicata*

5 Counsel for the appellant submitted that there is decisive new evidence that ought to be considered by the panel and that at the time of the first hearing in 2001, there are often sensitive personal issues among applicants and their sponsors that may have not been developed for various cultural and customary reasons.

6 Counsel for the appellant described various factors that should be considered in the category of decisive new evidence to support his position that a hearing on the merits should proceed:

> * That since the date of the marriage between the parties, the appellant has visited and cohabited with the applicant on several extended occasions in India and since November 2005 to June, 2006, they have been cohabiting.
>
> * There is documentary evidence from the appellant's doctor that she is in a depressed mental state due to her separation from her husband.

> * There is evidence of the appellant speaking almost daily with her husband prior to her departure to India.
>
> * There are letters and cards sent between the parties since the marriage.
>
> * There is medical documentation that the appellant has undergone tests for infertility.

7 Minister's counsel submitted that the doctrine of *res judicata* applies because the matter was previously decided on April 10, 2001 and that accordingly the Immigration Appeal Division (IAD) has no jurisdiction to hear the appeal as a result of the previous refusal. She states that the evidence tendered is not "fresh new evidence" unavailable due to special circumstances on February 28 and March 28, 2001 when the appeal was previously heard. Minister's counsel has also argued that the same question has been judicially decided notwithstanding the different immigration legislation used in the refusal letters.

8 The doctrine of *res judicata* promotes finality in decisions by preventing repeat hearings on the same issues. However if there are special circumstances that indicate that there were denial of natural justice in the previous hearing or if decisive new evidence is now available that could not have been discovered by the exercise of reasonable diligence, the doctrine need not be applied.[2] Furthermore, even where all the elements of *res judicata* are met, the application is still discretionary.[3]

9 I am in agreement with the position of the Minister's counsel that the question is the same notwithstanding the different wording in the section 4(3) of the former "*Immigration Regulations*" of 1978 and section 4 of the present legislation. I am bound by the decision of Mr. Justice Shore in *Mohammed*.[4] It states in that case:

> In the case at a bar, the only one of the three conditions set out above that is problematic is that of the identity of the issues. Clearly, the parties are the same and the previous decision was final.[5] So the issue here is whether the Appeal Division erred in finding that the issue it was preparing to determine had already been decided. To determine this, the Court must compare the meaning of subsection 4(3) of the *Immigration Regulations, 1978*[6] (the old Regulations) with that of section 4 of the *Immigration and Refugee Protection Regulations*[7] (the new Regulations). ...
>
> However, the Court subscribes to the interpretation provided by the Appeal Division in its decision of February 18, 2005, and supported by the decision of the Appeal Division in *Phuoc Vuong v. Minister of Citizenship and Immigration.*[8]

> Both subsection 4(3) of the old Regulations and section 4 of the new Regulations are intended to exclude spouses whose spousal status is not based on the creation of a *bona fide* marriage. The Court adopts the remarks of the Appeal Division in paragraph 16 of its decision:
>
> > ...Both provisions aim to exclude spouses whose status as a spouse is not based on the creation of a *bona fide* marital relationship - one that is intended to be of substances and lasting duration. Both aim to exclude spouses whose marriage was entered into primarily to achieve an immigration purpose. The pre-condition for the creation of issue estoppel is not whether the legislative provisions on which the disposition is based on are identical. Rather, the test is whether the same questions has in essence been decided. This is a broader test and the overriding criterion is one of substance rather than form. Courts have held that it is the substance of the matter actually decided which should control whether *res judicata* applies, not the form of the judgment (*AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada* (1993), 14 O.R. (3d) 161 (Gen. Div.) at 178. See also *McIntosh v. Parent* (1924), 55 O.L.R. 552 (C.A.) at 559).

I adopt the reasoning in this case and find that the test is whether the same question in essence has been decided and that it is a broader test and the overriding criterion is one of substance rather than form. I accordingly find that the issue decided in 2001 in this case and the case at bar is the same.

10 In proceeding with the next steps of the test, I have determined that the three preconditions for the operation of *res judicata*[9] are present: the parties are the same, the decision in that appeal was final, and the issue of whether section 4 of the *Regulations* applies, therefore excluding the applicant from consideration as the appellant's spouse, is the same.

11 However, decisive new evidence can bring the appeal within the exception to the principle. Decisive new evidence is, minimally, evidence which has significant probative value and is not merely additional. It should be "demonstrably capable of altering the result of the first proceeding."[10] It has been previously found that new evidence in the form of correspondence, trip records, etc. is not considered to be decisive new evidence in the context of the applicability of *res judicata*:

> More than further visits, letters, telephone calls, photographs or money transfer is required to establish a genuine spousal relationship not entered for immigration purposes is required, in my view, to constitute decisive fresh evidence of a genuine marital relationship.[11]

12 There are purportedly pieces of new evidence at the case at bar.

13 I have reviewed the items or factors submitted in the category of decisive new evidence. More of the same kind of evidence that was presented at the first hearing is not sufficient, and in particular, more evidence of contact. Though the appellant has argued that there has been several extended visits and cohabitation since the marriage, I also note that at Tab B in the appellant's submissions that it states on page 1 "going to India - father ill". Accordingly, I am not persuaded that the sole purpose of the appellant's trips were to cohabit with her spouse. However, there are also tendered copies of medical records from a Dr. T.N. Traff including tests regarding the fertility/infertility of the appellant which were not available at the previous IAD hearing in April 2001. I find that this is a significant piece of new evidence which could be capable of altering the result of the previous decision if supported by other credible circumstances and evidence. I am of the opinion that these tests are not particularly easy to undergo. In other cases by IAD panels, pregnancy or a birth has been deemed to be decisive new evidence. I am less than willing to give no weight to such results of tests to couples who have difficulty conceiving. That, together with the fact that the parties have been allegedly persisting for seven years as a marriage couple, I feel that it would be justified to order a full hearing of this matter.

14 Accordingly, I do not need to turn my mind to my discretion not to apply *res judicata* where there are special circumstances and where it would be an injustice to so do as I have found that there is some decisive new evidence that could alter the result of the previous decision. **DECISION**

15 Accordingly I found that on a balance of probabilities that circumstances exist which brings the appeal within the exception to *res judicata* and accordingly a hearing of the matter on its merits is ordered.

NOTICE OF DECISION

The Minister's application dated June 5, 2006 to dismiss the appeal on the basis of *res judicata*, is dismissed. Circumstances exist which would bring the appeal within the exception to *res judicata* and accordingly a hearing of the matter on its merits is ordered.

"Margaret Ostrowski"

15 September 2006

cp/e/qlplh

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

4: For the purposes of these Regulations, no foreign national shall be considered a spouse, a

common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

2 *Cobb v. Holding Lumber Co.* (1977) 79 DLR (3d) 332 BCSC, at 334.

3 *Danyluk* v. *Ainsworth Technologies Inc.* [2001] S.C.J. 46.

4 *Mohammed, Amina* v. *M.C.I.* (F.C., no. IMM-1436-05), Shore, October 27, 2005, 2005 FC 1442.

5 To determine which previous decision is final, *Saskatoon Credit Union Ltd*. v. *Central Park Enterprises Ltd.* (1988), 47D.L.R. (4th) 431, at page 438, provides the following guidance: "...no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participate din the previous proceedings unless some overriding question of fairness requires a rehearing." (Emphasis added)

6 SOR/78-172.

7 SOR/2002-227.

8 (IAD TA2-016835), Stein, December 22, 2003.

9 *Angle* v. *Minister of National Revenue,* (1975) 2 S.C.R. 248 at 254.

10 *Lundrigan Group Ltd.* v. *Pilgrim* (1989) 75 Nfld. And P.E.I.R. 217 (Nfld. C.A.) at 223.

11 *Litt* v. *Canada (Minister of Citizenship and Immigration)* [2004] I.A.D.D. No. 865 (TA3-15630), Néron, August 19, 2004, p. 3, para 13.