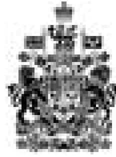
Immigration and Refugee Board of Canada
Immigration Appeal Division



Commission de l'immigration et du statut de réfugié du Canada
Section d'appel de l'immigration

2007 CanLII 70960 (CA IRB)

IAD File No. / N° de dossier de la SAI : VA6-02691

Client ID no. / N° ID client : 2682-9082

Reasons and Decision – Motifs et décision

SPONSORSHIP

Appellant(s)	AMRIK SINGH NAHAL	**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	21 September 2007 **Vancouver, BC**	**Date(s) et lieu de l'audience**
Date of Decision	10 December 2007	**Date de la décision**
Panel	**Kim Workun**	**Tribunal**
Counsel for the Appellant(s)	Massood Joomratty Barrister & Solicitor	**Conseil(s) de l'appelant(e) / des appellant(e)(s)**
Counsel for the Minister	Kevin Boothroyd	**Conseil du ministre**

Reasons for Decision

[1] Amrik Singh NAHAL (the "appellant") appeals the refusal of the sponsored application for permanent residence in Canada of Sandeep Kaur NAHAL (the "applicant") from India. The applicant's application was refused because, in the opinion of the visa officer, the requirements of section 12(1) of the *Immigration and Refugee Protection Act, 2001* (the "*Act*")[1] were not met in that the applicant is a person caught by the exclusionary provision of section 4 of the *Immigration and Refugee Protection Regulations, 2002* (the "*Regulations*").[2] Section 4 of the *Regulations* provides as follows:

> 4. **Bad faith** – For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

[2] In order for a foreign national to be caught by section 4 of the *Regulations*, the preponderance of reliable evidence must demonstrate that the marriage is not genuine and was entered into primarily for the purpose of acquiring a status or privilege under the *Act*. In order to succeed on appeal, the appellant need only establish one of the prongs of the test has not been met. The onus is on an appellant to demonstrate that the applicant is not caught by the excluding section of the *Regulations*.

[3] The refusal letter[3] articulates the visa officer's concerns with respect to this application. The visa officer concluded that the couple was incompatible in terms of age, marital background and educational background. In this regard, it was noted that the male sponsor is ten years older than the female applicant, was married previously, has a child from his former marriage, and that the applicant is better-educated than her spouse, the appellant. The visa officer concluded that the marriage was organized hastily and that no satisfactory explanation was provided for the

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
2 *Immigration and Refugee Protection Regulations*, SOR/2002 – 227.
3 Record, p.p.128-132.

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apparent haste of the marriage. The visa officer was not satisfied with evidence of contact between the couple, noting the applicant's deficient knowledge-base with respect to the appellant and his circumstances. Finally, the visa officer did not find the applicant to be credible at interview. The applicant's application was refused.

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[4] The appellant and applicant testified at the hearing. I have considered their testimony, materials in the Record and additional material tendered at hearing.[4] I have also considered the submissions of counsel in the case.

[5] The appellant has not met the onus on him of establishing, on a preponderance of reliable evidence, that the marriage is genuine. Moreover, I conclude reliable evidence does not establish that the marriage was not entered into primarily for the purpose of acquiring status or privilege under the *Act*. The appeal is dismissed.

[6] As brief background, the appellant is 37 years old[5] and has been married previously. He was separated from his first wife June 2003[6] and was divorced in October 2004.[7] He has a son, Manny, age 15, from the first marriage. Manny's primary residence is with the appellant.[8] The appellant's first wife passed away in 2006.[9] The applicant is 26 years old. This is her first marriage. She resides with her parents in India. The couple testified that an individual known to both families[10] suggested the match to the respective families at the time the appellant was visiting India in or around December 2004. The couple met on the 4 December 2004 and the match was finalized 6 December 2005. The couple married 2 January 2005 and the appellant testified that he remained in India until his return to Canada 26-27 days later. The appellant returned for a visit in April 2007 and testified that he remained for one month at that time. The appellant's first sponsorship of the applicant was refused in 2005[11] on the grounds that the

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4 Exhibits A-1; R-1.
5 Record, p.2.
6 *Ibid*. p. 8, Q. 11.
7 *Ibid*. p. 6.
8 *Ibid*., at p. 8, 14(c).
9 Appellant testimony in cross-examination.
10 Described as the applicant's "cousin" (as per interview notes/ Record, p. 1, Q. 3: "maternal aunt's daughter" or "Manjit Kaur"); apparently, also the "neighbor" of the appellant's mother, according to the appellant at hearing.
11 *Ibid*. p. 134: CAIPS notes indicating file history.

appellant was not eligible to sponsor in that he had been convicted of an assault involving his first wife. The appeal was allowed because it was determined, on appeal, that the police report from the court file did not establish that the first wife suffered "bodily harm", a necessary component in a refusal under paragraph 133(1)(e) of the *Regulations*. The matter was remitted back to the visa post for continued processing and this refusal followed. At this time, the couple wishes to be reunited in Canada and asks that their appeal be allowed. During their periods apart, the couple maintains contact primarily by telephone.

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[7] I did not find either witness to be credible at hearing in a critical area. While the appellant testified that his earlier conviction for assault against his former wife was known to the applicant and her family in advance of the agreement to marry, I note the applicant's statements at her interview[12] held 31 August 2006:

- Do you know why your application was refused previously?
- I think somebody complained against it.
- What do you mean?
- I don't know the details.
- Didn't you receive the refusal letter previously?
- Somebody told us that the marriage was not genuine.
- Weren't you aware that your case was previously refused because your sponsor was ineligible to sponsor?
- I did know this.
- But I have just asked you the same?
- It was not clear.
- So, why your sponsor was ineligible to sponsor?
- He and his wife were fighting and he got a charge against.
- What charge are we talking about?
- My husband divorced her wife because they were not happy together.
- Are you aware that he was convicted of a criminal offence?
- I just know about the fact that they were fighting, that is all.
- How is it possible that you married someone who has committed a criminal offence and not know about such an important fact?
- I don't know anything about that, just the fact that they were fighting together.

These statements, coupled with her testimony at hearing that the appellant did not "specifically tell me about the charge", that she does not know if he went to court, and her belief that the

[12] *Ibid*. at p.p. 135-136.

"charge" has been "cleared", are irreconcilable with the appellant's testimony at hearing in this same area.

[8] In looking to the applicant's interview statements, I conclude that she was unaware of the appellant's conviction. Curiously, she appears not to have questioned the appellant about his conviction in the period following the first refusal and prior to her interview. Quite aside from her deficient knowledge as to his prior criminal history, the applicant's failure to follow-up with the appellant upon notice of the first refusal is not reasonable in the context of alleged regular spousal communications. In this regard, I note that the relevant criminality provisions of the *Act* were reproduced in the refusal letter delivered to the applicant, that she has some ability in English,[13] and, importantly, that there would have been opportunity for discussion between the couple in this area in the period following the first refusal and up to interview. While the couple testified that they speak regularly of their activities and routines over the telephone and speak of Manny and his activities, it is conspicuous that the applicant would not have asked the appellant to provide reasonable detail about his "ineligibility" to sponsor as a result of his criminality, all of which resulted in the initial visa denial. Moreover, the conviction was raised during the applicant's interview after the initial refusal. One would think this topic would be a matter deserving of some discussion as between the couple given its importance to immigration officials in the context of the current application and, consequently, its importance to the couple's combined future.

[9] Not only do I find the applicant's lack of enquiry to be unreasonable, I note the internal inconsistencies in the appellant's testimony at hearing in this area and, moreover, the lack of harmony as between the witnesses' testimony in this area.

[10] For his part, the appellant testified, under cross-examination, that during the couple's first encounter 4 December 2004, he told the applicant that he and his first wife fought, the police had been called, and that he had been charged and convicted of assault. He confirmed this information later in the hearing in response to questions from the panel. When confronted with

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[13] *Ibid.* at p. 15, Q. 11.

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the applicant's interview statements,[14] however, he contradicted his earlier testimony and advised that the applicant did not know of the conviction but that he had told the "middle-person everything". I conclude the appellant misled the panel at hearing in his earlier testimony. I do not find him to be a reliable witness in this area. For her part, the applicant testified, in direct examination, that the appellant advised her that there had been charges but that they had "cleared". She also indicated that the middle-person also provided this same information to her. When pressed by appellant's counsel to address the nature of the "charges" the applicant indicated that she did "not pay too much attention", that is, that the appellant "did not say and I did not ask". She did not even know if or why the appellant had attended court.

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[11] Aside from the irreconcilable statements as between the witnesses on this point, the panel also notes the applicant's response to counsel when pressed to explain why she was not interested in knowing the substance of the criminal charges. Her response that she "did not feel it necessary…because I got a good family and good husband" do little to satisfy the panel that meaningful investigations were performed by the applicant's family or reasonable questions were put to the appellant by the applicant in the pre-marriage period. Moreover, the applicant's failure to meaningfully address this area with the appellant after the first refusal and to date are not consistent with the quality of communications to be expected as between married parties in the context of a genuine relationship.

[12] The visa officer also noted incompatibility as between the couple. With respect to the visa officer's observation that the couple's educational background was dissimilar, I am not concerned with the two-year difference. However, other issues with respect to the couple's degree of compatibility were not adequately addressed at hearing. In this regard, it is noted that there is a 10-year age difference between the couple and the appellant is divorced with a teen-age son while the applicant has never been married.

[13] At interview, the applicant agreed that an arranged marriage to someone older "never happens usually."[15] She went on, however, to indicate that the middle-person had referred the

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[14] *Ibid.*
[15] *Ibid*. p. 136, at lines 24-32.

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family to the appellant and her parents "agreed to the match". At hearing and in response to the panel's question as to whether her family had any concerns prior to meeting the proposed suitor, the applicant advised "no, nothing". In re-direct, she indicated that the middle-person had "told us everything and we liked everything". She advised her counsel that, though there were initial concerns, after meeting the appellant, the family found him to be a "nice person". Neither the interview responses, noting the following specific interview responses:

> -Why did you agree to marry a divorcee not accordingly to India tradition?
> - For the same reason that he told everything to me.
> - Is it not an unusual situation in any arranged marriage setting?
> - My cousin explained everything and my parents said ok. His nature is good.

nor the several hearing responses in this area, persuade the panel that any particular effort was made to investigate the appellant's personal background (even upon being apprised of his prior marital history and past criminality), other than to discuss the matter with the middle-person, to "check with my husband's mother"[16], and address the matter directly with the appellant at the time of the couple's meeting. Though the middle-person is alleged to have had an ongoing friendship with the appellant's mother, there is no evidence that she had any regular or direct contact with the appellant during his absence from India for "15-years"[17] after his emigration in 1992. Even were the panel to accept that the middle-person was kept apprised, to some degree, of the appellant's doings in Canada over the 15-year period through conversation with the appellant's mother, the appellant's testimony that the middle-person was aware of his criminal conviction does not reconcile with the applicant's testimony that the middle-person indicated that the charge was "cleared" nor with her own statements at interview that she did not know of any "conviction" or details in that regard. Finally, the evidence does not support the conclusion that the appellant's mother informed the applicant or her family about the conviction. In this regard, I simply note the applicant's responses at interview and her continuing belief that the "charges" had cleared. The evidence in this area is confusing and unreliable. There is no evidence indicating that any *independent* efforts (beyond basic enquiries with the middle-person and mother of the appellant) were made by the applicant or her family to enquire about the

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16 Record, p. 137.

17 Appellant's testimony in direct examination.

appellant's criminal background notwithstanding that there was disclosure to the family that there was "fighting" in his previous marriage and, depending on whose testimony is to be preferred, the appellant had disclosed that police were called, charges laid, and a subsequent conviction sustained.

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[14] In summary, the witnesses' vague and general responses that their dispositions/natures were similar and that everything was agreeable and "okay" to the applicant and her family does little to address the incompatibility issues reasonably raised in the refusal letter, especially when according to the applicant, marriages between individuals with a 10-year age difference do not usually occur and, secondly, when criminality issues arise in the context of a suitor's prior marital history. While it may well be that the middle-person was trusted, the applicant's lack of knowledge as to the appellant's criminal history at interview and her continuing deficient knowledge as to relevant details as demonstrated at hearing, strongly suggest to the panel that the appellant's personal suitability as a mate for the applicant was not a particularly important feature in the context of this arranged marriage either in the pre-marriage stage or, even, at a later point. The applicant's family's ready agreement to the marriage of their young, never-married daughter to a partner with a criminal history and a failed first marriage, where the daughter's emigration from India is anticipated and to a place where she has no extended family to look to for support should the marriage not succeed, is curious. Reliable evidence with respect to the appellant's disclosure of relevant background facts addressing the circumstances surrounding his first marriage and its demise, including his conviction for an assault on his first wife, and reasonable independent efforts on the part of the applicant's family to investigate the proposed suitor may have adequately addressed the concerns in this area. As it is, however, the evidence is deficient.

[15] The panel also notes the inconsistency in the evidence with respect to the parties' plans with respect to their living arrangements in the future should the applicant not be issued a visa by authorities. For his part, the appellant testified that he and his son, Manny, will relocate to India. For her part, the applicant testified that the appellant will simply visit her in India periodically because Manny cannot and does not wish to reside in India. The testimony in this area does not suggest that the couple have addressed this issue, an issue of some importance given that the

applicant's application has been refused on two occasions. As well, one would expect that discussion of plans in this area would reasonably arise in the context of genuine spousal communication allegedly occurring over time.

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[16] The panel notes that the witnesses' testimony in their respective direct examinations was generally consistent in areas regarding the appellant's activities and routines in Canada, knowledge of extended family, and the like. Other areas covered with the witnesses with respect to Manny's activities, including the recent theft of his computer, were also generally consistent. Telling for the panel, however, was the testimony with respect the appellant's disclosures to the applicant over time regarding his criminal history. Both he and the applicant were shown to be unreliable witnesses. Moreover, the panel concludes that, what ought to have been an obvious and important area of discussion as between the couple, noting the appellant's testimony that his criminal history was disclosed in the pre-marriage period and given its relevance to the initial visa refusal in 2005, remains vague, unclear and unexplored by the applicant or her family to date. While counsel for the appellant, in submissions, noted that the applicant appeared to know that there was a "charge" during her interview, her subsequent responses to the interviewing officer reflect her remarkably deficient knowledge in the area. As at the time of hearing, her knowledge remained deficient, tellingly so, in my view, in the context of spousal relationship where regular and meaningful spousal communication is alleged.

[17] I have considered the witnesses' testimony in several other areas, for example, the testimony that the appellant sends money to the applicant periodically, that the couple maintain contact by telephone and letters (primarily cards),[18] and that the appellant returned for a one-month period in the post-refusal period.[19] When all is taken together, however, I conclude that the marriage is not a genuine one. The evidence was unreliable in a significant area and I found the appellant to be a particularly unreliable witness. Several issues noted in the refusal letter, including the couple's incompatibility and the applicant's lack of knowledge in an obvious and relevant area (an area known to both parties since, at least, the applicant's interview in August

18 Also see, documentary material in Record and Exhibit A-1.
19 *Ibid.*: Exhibit A-1, Tabs 5 & 6.

2006), remain outstanding. The appellant has not met the onus on him of establishing, on a preponderance of reliable credible evidence, that the marriage is a genuine one.

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[18] With respect to the motivation for the marriage, again, the applicant's lack of knowledge at interview as to the appellant's assault of his first wife do not suggest that this area was reasonably canvassed in the pre-marriage period, as alleged by the appellant at hearing. In noting that the marriage is an arranged one, I conclude that reasonable investigation or enquiries were not undertaken by the applicant or her family to assure themselves that the appellant was a suitable match in light of the information allegedly provided them that there was "fighting" in the appellant's first marriage and that "charges" followed. Given the appellant's personal history, as allegedly disclosed to the appellant's family in the pre-marriage period, the visa officer's observation that the agreement to marry two days later and the subsequent marriage within a one-month period was a "hasty" one is not without merit. The visa officer's concerns and the additional concerns arising at hearing have not been adequately addressed by reliable evidence. The panel also questions the quality of the dialogue between the couple in light of the applicant's apparent disinterest in the appellant's criminal history even though his history has had a direct bearing on the initial visa rejection and was raised in the context of the applicant's recent interview at the visa post. In the context of a relationship entered into with a genuine spousal purpose, one would expect to see a reasonable exchange of information over time in this area. I note that the appellant has English skills[20] and a moderate education.[21] In my view, this applicant has skills which lend themselves to settlement independent of the appellant. When the evidence is considered in its entirety, I conclude that reliable evidence does not establish, on a balance of probabilities, that the marriage was not entered into for the purpose of acquiring a status or privilege under the *Act*. The appeal fails.

[19] The applicant, Sandeep Kaur NAHAL, is caught by the exclusionary provision as articulated in section 4 of the *Regulations*. The appeal of Amrik Singh NAHAL is dismissed.

[20] *Supra*. at footnote 12.
[21] *Ibid.* p. 21, at Section "A".

NOTICE OF DECISION

The appeal is dismissed.

"Kim Workun"

(signed) ______________________________

Kim Workun

10 December 2007

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Date (day/month/year)

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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.