Federal Court  Cour fédérale

Date: 20111128

Docket: IMM-2556-11

Citation: 2011 FC 1370

Toronto, Ontario, November 28, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

NACHHATTAR SINGH AND SAMARJEET KAUR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) dated 24 March, 2001, wherein it refused the Applicants' appeal from a Visa Officer's decision to refuse Nachhattar Singh's application to sponsor Samarjeet Kaur as his spouse for permanent residence in Canada. For the reasons that follow, I find that the application is dismissed.

[2] The Applicant Singh was born in India and has since become a Canadian citizen. He lives in Windsor, Ontario where he runs a garage mechanic business. He has been previously married twice. The first was a marriage to Rhonda Singh while he was living in the United States. They divorced and had no children. The second was a marriage to Shashi Singh in Canada. They divorced. They have a son who lives principally with his mother and visits with his father largely on weekends.

[3] The Applicant Singh returned to India in 2006, at which time, apparently at the request of his ailing father, he met a number of women offered as prospective new spouses. On November 4, 2007, Singh's father died. Singh was not in India at the time but returned to India to attend the funeral. At that time, he met the Applicant Kaur and married her eight days later. After the wedding Singh returned to Canada, but has been back to India six times during which he has visited with his wife Kaur.

[4] Singh sought a permanent resident visa for Kaur as his spouse. A Visa Officer in New Delhi, India interviewed each of them, together and separately. The Visa Officer expressed concerns as to the genuineness of the marriage and gave the Applicants an opportunity to respond. By letter dated October 17, 2008, the Visa Officer advised the Applicants that Kaur's application for a permanent resident visa was refused. The Applicants appealed to the IAD.

[5] The Applicants submitted a package of documents to the IAD. A hearing was held before a Board Member where Singh appeared in person and Kaur by teleconference. Each of the Applicants gave evidence and submissions were made on their behalf by their lawyer. That lawyer is not the same lawyer as the lawyer representing the Applicants at the hearing before me. The Board Member

took the matter under consideration and, on March 24, 2011, provided a lengthy written decision refusing the appeal. This is a judicial review of that decision.

ISSUES

[6] The following issues have emerged through the memoranda of the parties and argument of Counsel at the hearing before me:

a. *What is the standard of review?*

b. *Did the Board Member ignore relevant evidence before him?*

c. *Did the Board Member err in making adverse findings of credibility against the Applicants?*

STANDARD OF REVIEW

[7] The issues are essentially fact based. Both Counsel asserted, and I agree, that the standard of review is reasonableness. In considering the reasonableness of a decision at issue the Court must be mindful, as the Supreme Court of Canada has said in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47 and 48, that a reasonable conclusion is one that falls within a range of possible acceptable outcomes. That same Court has stated in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paragraphs 59 to 62, that a decision of the IAD is to be afforded a high level of deference when considering reasonableness since the IAD has had the advantage of conducting hearings and considering the evidence, including the evidence of the Applicants themselves.

THE REGULATORY PROVISIONS

[8] The decision at issue concerns section 4(1) of the *Immigration and Refugee Protection Regulations* (IRPR), SOR/2002-227, as amended:

4. *(1) For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership*	***4.*** *(1) Pour l'application du présent règlement, l'étranger n'est pas considéré comme étant l'époux, le conjoint de fait ou le partenaire conjugal d'une personne si le mariage ou la relation des conjoints de fait ou des partenaires conjugaux, selon le cas :*
(a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or	*a) visait principalement l'acquisition d'un statut ou d'un privilège sous le régime de la Loi;*
(b) is not genuine.	*b) n'est pas authentique.*

[9] These *Regulations* require that the Applicants bear the burden of demonstrating that the marriage was not entered into primarily for the purpose of permitting the non-Canadian spouse to acquire permanent resident status in Canada (*Sharma v Canada (Minster of Citizenship and Immigration),* 2009 FC 1131 at paragraph 16).

[10] This burden must be accepted seriously. A person is seeking to enter Canada as a spouse of a Canadian. That person's application is an important matter to be dealt with by the applicant and the applicant's professional advisors in a well prepared and competent manner. An applicant should not, at a later stage, endeavour to seek reversal of an unfavourable result on the basis of their own

naivety, or lack of preparation or the incompetence of a professional advisor. Where it is alleged that a professional advisor, such as an immigration consultant or lawyer, was incompetent, it is not sufficient merely to make such an allegation; there must be before the Court sufficient evidence to identify the problem, the scope of the problem, and steps taken to address the problem (see e.g. *Shakiban v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1177).

DID THE BOARD MEMBER ERR IN IGNORING THE EVIDENCE BEFORE HIM?

[11] Applicants' Counsel argued that the Board Member ignored two critical pieces of evidence, namely:

1. a medical report indicating that the Applicant Kaur had suffered a miscarriage after her marriage to the Applicant Singh; and

2. the Applicant Singh had travelled six times to India since his marriage to the Applicant Kaur and visited with her during those times.

[12] As to the medical report, the Board Member does not refer to this report anywhere in his Reasons. This is not surprising. Neither of the Applicants nor their Counsel at any time during the proceedings before the Board made any reference to this report whether in their evidence or in submissions to the Board Member. The transcript of the hearing shows that the Applicant Kaur was asked, *"Do you have any children from this marriage?"* to which she replied, *"I do not have any child as yet."* (Transcript, page 27). Even if one ignores the positive obligation upon the Applicants to lead evidence as to the genuineness of the marriage, this was a clear opportunity for evidence as

to the miscarriage to be led. A judicial review such as the present is not to be seen as simply a second chance or an opportunity for different Counsel to reshape the case.

[13] As to the six visits to India by the Applicant Singh, the Board Member did address this evidence. At paragraph 38 of his Reasons, he said:

> *[38] The appellant in many cases did not answer directly the questions put to him by counsel. He had difficult recalling exact dates or timeframes. The only exception occurred during the last day of the hearing when the appellant was able to recall without hesitation and accurately the dates and duration of his six post-marital visits to India.*

[14] It is clear that the Board Member was aware of these visits in arriving at his conclusions, which he stated at paragraph 47 of his Reasons:

> *[47] While there is corroborative evidence regarding the appellant's marriage and post-marital visits to India, these positive facts must be weighed against the totality of all of the evidence and the manner in which the evidence was given. With this in mind the panel finds that the appellant has not established on a balance of probabilities that he and the applicant have entered into a genuine marriage. Their marriage was also entered into primarily for the purpose of acquiring status or privilege under the Act.*

[15] It is not the function of this Court on judicial review to reweigh the evidence so long as the conclusions reached by the Board Member are within the range of possible acceptable outcomes(*Dunsmuir supra.* at para 47). The conclusions reached by the Board Member are reasonable and within such a range. There is no basis for setting aside these conclusions.

DID THE BOARD MEMBER ERR IN MAKING ADVERSE FINDINGS OF CREDIBILITY?

[16] Applicants' Counsel at the hearing before me reviewed several findings of the Board Member in which the Member criticized the evidence provided by the Applicants, the manner in which that evidence was given, and made a finding that doubt was cast on the credibility of the Applicant Kaur; and that a "lame excuse" was provided respecting at least one incident.

[17] Applicants' Counsel sought to support some of the apparently contradictory oral testimony given by the Applicants with reference to other parts of the transcript of the hearing and to some of the documentary evidence. However, this was simply an endeavour to re-argue submissions that should have been made at the close of the hearing before the Board Member. What Counsel at the Board hearing (not Counsel before me) for the Applicants said in submissions to the Board Member with reference to the Applicants' evidence was :

> *The evidence was given in a very tortuous manner. It was difficult to extract information, questions were asked many times over and over again in different way" (Transcript, page 28)*

[18] This Court must remember that the Board Member had the advantage of hearing the Applicants' evidence live, and at least in the case of Singh, in person. It is clear that the Board Member considered the totality of the evidence (see para 47 of his Reasons, supra). I am not persuaded that relevant evidence was ignored or misunderstood. As Justice Martineau wrote in *Singh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 347 at paragraph 18:

> *18 The standard of judicial deference that applies to findings of fact and to the weight given to the evidence by the Appeal Division is*

> *quite high. Unless the contrary is shown, the Appeal Division is assumed to have considered all the evidence presented to it. The Appeal Division's decision in this regard must be interpreted as a whole and it should not be subject to microscopic examination. Accordingly, the reviewing Court should refuse to interfere with decisions which assess credibility, provided that the explanations given are rational or reasonable, or that the evidence on the record permits the Appeal Division to reach, as the case may be, a negative inference as to the credibility of an applicant or a witness.*

CONCLUSION

[19] As a result, I do not find any basis upon which the decision of the Board Member should be set aside on judicial review. The application will be dismissed. Neither Counsel requested that a question be certified, and I find no basis for doing so. There are no special reasons to award costs.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified; and

3. No costs are awarded.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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