

Federal Court



Cour fédérale

Date: 20120228

Docket: IMM-4004-11

Citation: 2012 FC 273

Vancouver, British Columbia, February 28, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

INDERJIT KAUR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated March 11, 2011, in which an Immigration Program Manager [the manager] at the Canadian High Commission in New Delhi determined that the applicant was inadmissible to Canada as a result of misrepresenting her marital status, pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Background

[2] Ms. Inderjit Kaur [the applicant], an Indian citizen, first applied for a permanent resident visa under the skilled worker class in May of 2009, but subsequently withdrew her application.

[3] Ms. Kaur then married on August 14, 2009, re-applied for permanent residence under the skilled worker class on January 4, 2010, and included her husband as an accompanying spouse.

[4] On January 10, 2011, Ms. Kaur's application was reviewed by a visa officer [the officer], who assigned the applicant a score of 69 points, just above the 67 required under the IRPA. Of the 69 points, five were tentatively given for the applicant's husband's Master's degree, pending a review of the spousal questionnaire and interview. The officer determined that an interview was required to fully assess the application because of the following concerns, as described in the Computer Assisted Immigration Processing System [CAIPS] notes (Trial Record [TR] at 11):

[Applicant] is 7 years older than her husband, this is not common in local culture. Spouse is a master's degree holder but has been unemployed since he graduated in April 2007. [Applicant] and spouse married in August 2009, one month before she applied for permanent residence file number B055333456. [Applicant's] new passport issued in February 2010 does not indicate she was married. [Applicant's] PCC from India issued in May 2010 does not indicate she is married.

[The reference to the file number B055333456 is to the first application. Therefore, this is not factual. She abandoned the first application in September 2009.]

[5] A letter was sent to the applicant informing her that in order to continue processing her application, she was requested to complete a spousal questionnaire, to provide proof of her continued relationship pre and post-marriage – including telephone bills indicating constant contact

or bank statements – and to bring wedding photos from her ceremony and reception to an interview that would be held with her and her husband (Applicant’s Record [AR] at 25).

II. Impugned Decision

[6] On March 10, 2011, the officer interviewed the applicant and her husband, first individually, then together. They were both questioned for details of their relationship history, marriage, and ongoing relationship. The applicant provided photos from the wedding ceremony and honeymoon, which according to the officer’s notes, were limited and appeared contrived and taken in haste. After completing both individual interviews, the officer informed the applicant and her husband that she had concerns regarding the *bona fides* of their marriage and that she believed it was entered into primarily for the purpose of acquiring permanent residence in Canada. She told them she would list her concerns and provide them a chance to satisfy her that the marriage was real and genuine.

According to the officer’s CAIPS notes, the following exchange took place (TR at 15):

[Officer:] You have a large age difference, your wedding was not well attended, you submit that you have sexual relations prior to marriage, all of these are contrary to local customs. Your sister in law Sukhdeep is older than your husband, she is 29 years of age, not 24 as you said. The photos you have shown me from your wedding and honeymoon look contrived and taken in haste. You don’t look happy or festive. The telephone bill you brought me does not appear to be issued from a phone company. What would you like to say to me now?

[Response:] As you like.

[Officer:] Do you have anything you would like to tell me before I make my decision?

[Response:] No, we are already married and living together for two years, what is there to say.

The officer informed the applicant that she would refer the case to a senior officer who would determine whether he agreed that the applicant had misrepresented her marriage.

[7] The same day, the officer summarized her position in the CAIPS notes (TR at 15-16):

[Applicant] first applied for permanent residence to Canada in May 2009, she later withdrew this application and reapplied in February 2010. [Applicant] makes 64 points on her own and requires 5 points from spouse's education to pass selection. [Applicant] and Spouse offered contradictory responses at interview regarding the sister in law that is supposed to be residing with the couple. They insist that there was no wedding reception, which is contrary to local customs. The number of guests who attended the wedding is 150 but there is a lack of photographic evidence to show it. The wedding and honeymoon photos appear contrived and awkward, unlike a festive ceremony as per local customs and norms. [Applicant] is over 6 years older than her husband, which is unusual in an Indian marriage. The couple admitted to having physical relations 2 months after meeting each other and before marriage, which is also unusual in an Indian marriage, even if it is a love marriage. When asked about their bedroom, both applicants described their bedroom the same way as if it was rehearsed. All these factors makes it hard to believe that this is a genuine relationship.

The marriage ceremony seemed to be a hasty affair. Couple does not appear to be happy, guests are not well dressed, there was no wedding reception. No credible explanation was offered other than [applicant's] and Spouse had no interest in a wedding reception. This is uncommon in Hindu Weddings.

I expressed my concerns to the [applicant] and her spouse and they did not provide a satisfactory answer to address my concerns. [Applicant] also did not provide me with evidence/documents in support of an on-going spousal relationship other than their honeymoon photos which did not satisfy me of a genuine relationship and telephone records without a header and did not appear to be issued from a cellphone company [...]

[Applicant misrepresented her marital status in order to bring [her husband] to Canada and to pass selection with enough points gained from spouse's education.

[8] The manager reviewed the application the following day and determined that, on a balance of probabilities, it was more probable that the applicant had misrepresented the facts. As a result, he deemed the applicant to be inadmissible for misrepresentation under section 40 of the IRPA and sent her a letter informing her of his decision that same day.

III. Parties' Positions

[9] The applicant argues the manager did not have jurisdiction to assess the *bona fides* of her marriage under section 4 of the *Immigration and Refugee Protection Regulations*, SOR 2002/227 [IRPR], that there was a breach of procedural fairness because she was not given notice of the concerns relating to her marriage and inadmissibility for misrepresentation, and that the totality of the evidence supporting the *bona fides* of her marriage was not considered.

[10] The respondent contends that there was no determination made pursuant to section 4 of the IRPR, but that instead her inadmissibility was determined pursuant to section 40 of the IRPA. The respondent submits that the genuineness of the marriage was relevant and material to the processing of the application and that there was a valid basis for a finding of inadmissibility due to misrepresentation. The applicant's concerns regarding procedural fairness are disputed as she was given notice by letter and during the interview of the concerns relating to misrepresentation. Finally, the respondent is of the view that the finding of inadmissibility was based on all of the evidence presented.

IV. Issues and Standard of Review

[11] The following issues will be reviewed by this Court:

1. Was the applicant denied procedural fairness?
2. Did the manager err in determining that the applicant had misrepresented her marital status?

[12] Procedural fairness is a question of law and this Court will not show deference if an error has been committed (*Ha v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49 at para 45, [2004] FCJ 174). By contrast, deference must be shown when reviewing a finding of misrepresentation under section 40 of the IRPA as reasonableness is the appropriate standard of review (*Koo v Canada (Minister of Citizenship and Immigration)*, 2008 FC 931 at para 20, [2008] FCJ 1152; *Uppal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 445 at paras 23-24 [2009] FCJ 557; *Nazim v Canada (Minister of Citizenship and Immigration)*, 2009 FC 471 at para 19, [2009] FCJ 564). Accordingly, it will suffice that this Court confirm the existence of justification, transparency, and intelligibility within the decision-making process and that the manager's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR [Dunsmuir]).

V. Analysis

A. *Was the applicant denied procedural fairness?*

[13] The applicant is of the view she had no reason to believe a skilled worker application would involve a process whereby the *bona fides* of her relationship with her spouse would become the primary focus of inquiry at the interview. In light of the fact there is a higher standard of procedural fairness when either section 40 of the IRPA or section 4 of the IRPR are applied (*Chen v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1227 at para 33, [2008] FCJ 1539 [Chen] and *Menon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1273 at para 15, [2005] FCJ 1548), she believes not receiving notice that her marriage was vital to her application or that there were concerns as to its genuineness constitutes a breach of procedural fairness.

[14] Considering the letter sent to her, I cannot accept that the applicant was unaware her marriage would be scrutinized at the interview. The letter dated January 11, 2011 informed the applicant that in order to continue processing her application, she was requested to complete a spousal questionnaire, to provide proof of her continued relationship pre and post-marriage, and to bring wedding photos from her ceremony and reception to an interview that would be held with her and her husband (AR at 25). At the end of the interview, the officer expressed her concerns explicitly and provided the applicant with a chance to respond. The applicant chose not to avail herself of the opportunity and did not further pursue the matter. The subject of the officer's concerns – the marriage – was evident and there was no requirement to make it more obvious.

B. Did the manager err in determining that the applicant had misrepresented her marital status?

[15] During the interview, the officer made the following comments found in the CAIPS notes (TR at 15):

Based on information available on file and what you have told me during this interview, I have concerns regarding the bona fides of your marriage. In my opinion, this marriage was entered into primarily for the purpose of acquiring permanent residence in Canada [...] I am going to refer your case to a senior officer now, if he or she agrees with my concerns and find that you have misrepresented yourselves and this is not a genuine marriage, your husband will be dropped from your application and you will be found inadmissible to Canada for 2 years [emphasis added].

The officer's language is almost word for word the one employed in section 4 of the IRPR. There is no doubt she had misgivings about the *bona fides* of the marriage and concluded it had been entered into in bad faith. Instead of making a determination based on section 4 however, the officer concluded that the applicant had misrepresented her marital status under section 40 of the IRPA.

[16] As noted above, the file was then referred to the manager, who concluded that on a balance of probabilities, “it was indeed more probable that the applicant has misrepresented facts that are material to a determination under the IRPA” (TR at 16). He concluded that this misrepresentation would have led to an error in the administration of the IRPA potentially resulting in issuance of a visa. As result, he found the applicant was described by section 40. Again in his affidavit the manager confirms that the officer’s CAIPS notes and decision under section 40 were forwarded to him for review. He notes that in his assessment, “cumulative evidence indicated that the Applicant had misrepresented her relationship” (Manager’s affidavit at para 13) and confirms that he consequently found the applicant inadmissible under section 40. Nowhere in his affidavit does he mention section 4 of the IRPR.

[17] The respondent’s counsel confirmed at the hearing that the manager’s decision was taken under section 40 of the IRPA and that no determination was made under section 4 of the IRPR. Based on the manager’s CAIPS notes entry and affidavit, I fully agree. As a result, I conclude the manager was not guided by the proper legal considerations and committed a reviewable error (*Chertyuk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 870 at para 29, [2008] FCJ 1086). The officer and manager made their findings based strictly on concerns about the *bona fides* of the marriage. Such a determination should have been made under section 4 of the IRPR. It would then have been open to them to also conclude there was misrepresentation based on section 40 of the IRPA. Without first determining under section 4 of the IRPR that the marriage was entered into in bad faith however, the officer and manager could not simply conclude misrepresentation had occurred based on an unconfirmed doubt as to the *bona fides* of the marriage.

[18] The parties did not propose any question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and no question is certified.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4004-11

STYLE OF CAUSE: INDERJIT KAUR v MCI

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: February 22, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL, J.

DATED: February 28, 2012

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