Federal Court  Cour fédérale

Date: 20190704

Docket: IMM-5124-18

Citation: 2019 FC 889

Ottawa, Ontario, July 4, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

KANWALIJIT KAUR SANDHU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the July 31, 2018 decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dismissing an appeal from a decision of the Immigration Division [ID], which found the Applicant to be inadmissible to Canada for misrepresentation pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Applicant, Kanwaljit Kaur Sandhu, is a citizen of India. On February 19, 2006 she married Malkit Singh Sandhu, a permanent resident of Canada, in India. He then sponsored the Applicant, as his spouse, in her application to become a permanent resident of Canada. The Applicant was granted permanent residence status upon her arrival in Canada at Pearson International Airport on December 30, 2007. The Applicant and Malkit Sandhu divorced on June 26, 2011.

[3] On March 14, 2012, the Applicant married for a second time, to Mr. Gurpreet Sandhu [Husband]. The marriage took place in India, where her Husband still resides. They have two children together. The Applicant applied to sponsor her Husband to come to Canada. In her application, she lists her date of separation from Malkit Sandhu as December 30, 2007, the same date she obtained her permanent residence in Canada.

[4] Subsequently, a report on inadmissibility concerning the Applicant was prepared, dated July 17, 2014 [Section 44 Report]. The Section 44 Report was referred to the ID, which conducted an admissibility hearing. The Applicant, as well as her sister, Ms. Paramjit Brar, and her friend, Ms. Paramjit Benipal, gave oral evidence at the hearing. In its January 23, 2017 decision, the ID found the Applicant to be inadmissible for misrepresentation pursuant to s 41(1)(a) of the IRPA and issued an exclusion order against her.

ID's Decision

[5] In a lengthy decision, the ID found that the Applicant misrepresented herself as the marriage between herself and Malkit Sandhu was not genuine and was entered into primarily for

her acquisition of permanent resident status. It based its conclusion on a number factors, including the absence of safeguards typically effected to ensure the success of arranged marriages.

[6] The ID also analysed the incongruity between Malkit Sandhu's described behaviour before and after the Applicant arrived in Canada. The Applicant indicated that after the marriage she and Malkit Sandhu had lived together in India for one month. Malkit Sandhu then returned to Montreal where he resided. While the sponsorship application was being processed, they spoke two or three times a week and were happy. They also spoke when the Applicant received her visa, and the day before she left for Canada, when he told her to fly to Toronto as he would be moving there from Montreal and they would reside there, but not to tell her mother and sister, as this would be a surprise. However, he was not at the airport to meet her and, after a number of hours, she was forced to call her sister to pick her up at the airport. Over the following days, efforts to reach Malkit Sandhu by phone had limited success. The ID concluded that this behaviour, from a happy relationship one day to purported abandonment the next, was unexplained, and led it to the conclusion that the marriage had been entered into for an immigration benefit, which was obtained when the Applicant was granted permanent residence status.

[7] The ID also noted that Malkit Sandhu made no return trips to India while the sponsorship application was in process and the couple never lived together in Canada. The first and last time the Applicant saw Malkit Sandhu in Canada was during one visit to her sister's home in April 2008 when he arrived in the afternoon and left the following morning. The ID found that the purpose of the visit was unclear. Further, the Applicant claimed that during the visit Malkit

Sandhu allegedly demanded money from her and her family to bring his brother to Canada. The Applicant claimed that she did not understand the basis for the demand as there had been no pre-existing agreement for the payment of any money, and when the demand was refused, Malkit Sandhu became angry and left. The ID found that such demands of persons who had successfully arrived in Canada based on sponsorships were typically consistent with marriages entered into for immigration purposes. The ID concluded that there was no real cohabitation by the couple as spouses, and the evidence did not support the *bona fide* living arrangements between genuine partners.

[8] The ID found it noteworthy that the Applicant's Confirmation of Permanent Residence, completed at the port-of-entry on the day of arrival, showed a crossed out Montreal address, and the Applicant's sister's address written in by hand. Despite the fact that this address would have had to come from the Applicant herself, she maintained that she did not know the address she was going to in Toronto. The ID found that she could not credibly explain why the address was on her document and that she claimed that she could not remember notifying the immigration official about the address. The ID found this to be evidence that, prior to her arrival in Canada, the Applicant was aware that she was going to her sister's home.

[9] The ID also considered three documents which it viewed as supporting that the Applicant's marriage was not genuine and was entered into primarily to obtain status in Canada. In her sponsorship application of her Husband, in response to the question on the "Type of Relationship" that she had with Malkit Sandhu, she entered that the relationship was from February 19, 2006 (the date of the marriage) to December 20, 2007 (the date she arrived in Canada and obtained permanent resident status). The same separation date was repeated in the

Sponsorship Questionnaire in which the duration of the relationship was indicated as February 19, 2006 to March 19, 2006, with the separation date being December 30, 2007. Finally, in a document entitled "Date Conjugal Relationship Ended", which was required to be submitted in relation to her divorce and pension splitting, she again recorded December 30, 2007 as the date that cohabitation ended. The ID did not accept the Applicant's explanation that she had solicited the help of Ms. Benipal in filling out the forms and that she was not present when they were completed, that Ms. Benipal asked her no questions regarding the forms, that the Applicant did not provide any information and, that she did not know what she was signing. The ID noted that much of this testimony was inconsistent with or contradicted by that of Ms. Benipal and concluded that it was more probable than not that the Applicant was present when the forms were completed and, of necessity, she would have had to have provide specific answers to questions they contained. The ID found that the Applicant was responsible for the content of her application.

[10] The ID concluded that these documents provided clear and unassailable evidence that, even in her own eyes, the relationship between the Applicant and Malkit Sandhu had ended by the time she presented herself at the port-of-entry and obtained permanent resident status. If so, she was then no longer a member of the family class and, by continuing and getting processed as a permanent resident, she engaged in misrepresentation.

[11] The ID also observed that even if the Applicant was an innocent victim caught up in events caused by Malkit Sandhu, she would still be responsible for the misrepresentation or withholding of material facts. However, it was more likely that the misrepresentation occurred through the Applicant's own actions and motivations. She failed to disclose that the relationship

was fraudulent and was designed to obtain the benefit of immigration status. The misrepresentation was also material and relevant. By presenting herself as a *bona fide* member of the family class, by presenting her marriage as genuine, and in giving the false impression that the marriage was not entered into primarily to acquire status, the Applicant misrepresented herself as she put forward information that was incorrect or untruthful.

[12] The Applicant appealed the ID's decision to the IAD, which, on July 31, 2018, denied her appeal. That is the decision now under review.

Decision Under Review

[13] Two issues were raised on appeal before the IAD. These were whether the decision of the ID was legally valid, and if so, were there sufficient humanitarian and compassionate [H&C] considerations to warrant special relief to the Applicant. In a lengthy and detailed decision, the IAD found the decision of the ID to be legally valid and that there were insufficient H&C considerations to warrant special relief.

[14] At the hearing before the IAD, the Applicant argued that the ID exceeded its jurisdiction by going on a hunt for the *bona fides* of the marriage rather than focusing on whether or not there was a misrepresentation of a material fact. However, the IAD found that the ID had squarely addressed the issue of the misrepresentation outlined in the Section 44 Report when the ID concluded that the divorce and pension documents provided clear and unassailable evidence that the relationship between the Applicant and Malkit Sandhu had ended by the time she presented herself at the port-of-entry and obtained permanent residence. As such, she was not a member of

the family class and by continuing and being processed as a permanent resident she engaged in misrepresentation.

[15] The IAD stated that while the ID went further and conducted a detailed analysis of the evidence, it explained why it did so at the beginning of its reasons:

> [23] Because the alleged misrepresentation would have been occasioned through the benefit of permanent resident status that was received by Ms. Sandhu by way of her membership in the family class as a spouse with the right to be sponsored to Canada, the analysis must assess whether or not the marriage which conferred family class membership on her was genuine or was entered into primarily for the purpose of acquiring any status or privilege under the Act, pursuant to subsection 4(1) of the IRPR.
>
> [24] Beyond that, other considerations like motivations, actions, and dissolution and post dissolution events that supply alternative ways of viewing or explaining an otherwise unblemished marriage are not off limits. The pivotal test is whether the subject of the proceedings, Ms. Sandhu, made a material misrepresentation when applying for and obtaining permanent residence as Mr. Sandhu's spouse

[16] The IAD noted that the ID had relied upon *Ramkissoon v Canada (Citizenship and Immigration)*, 2000 CanLii 15534 (FC) [*Ramkissoon*] as authority for that approach and that counsel had not provided any evidence or submissions as to why this approach was incorrect. The IAD found that the ID did not exceed its jurisdiction.

[17] The IAD also stated that, following a careful review of the ID's decision, it found that decision to be persuasive and to contain findings about the evidence and the Applicant's credibility that were reasonable. The IAD summarized those findings and the ID's conclusions in its reasons and, in essence, adopted them as its own. The IAD also found that there was limited

new or credible evidence put before it to assail the reasoning of the ID, but that several new concerns were identified by its own analysis.

[18] It also found there to be grave credibility concerns with the evidence provided by the Applicant and her witnesses. These related to inconsistencies in the Applicant's testimony in regard to what she knew about Malkit Sandhu before the marriage; the Applicant's and Malkit Sandhu's conduct post-landing; the date the marriage ended, which the IAD concluded was by the date of landing; and the credibility of the Applicant's witnesses, including her sister and a friend who allegedly completed forms on behalf of the Applicant. The IAD found that, on a balance of probabilities, the Applicant misrepresented that her marriage was genuine for the purpose of obtaining status in Canada, that she knew and participated willingly in the fraudulent marriage, and it agreed with the ID that the Applicant engaged in a direct misrepresentation which induced an error in the administration of the IRPA.

[19] Before the IAD, the Applicant also argued that the ID's decision was not legally valid as it had failed to consider whether the Applicant could establish a rare exception to a finding of misrepresentation which arises where an applicant can show that they honestly and reasonably believed that they were not withholding material information (*Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345 (CA) [*Medel*]). The IAD concluded that the fact pattern before it did not met the criteria from *Medel* such that the "honest mistake" exception would apply. The IAD stated that the exception is narrow and, as it found the Applicant to be equally as culpable as Malkit Sandhu in perpetuating the fraud, it was not available to her. Accordingly, the IAD rejected the submission.

[20] The IAD then considered whether there were sufficient H&C considerations to allow the appeal, weighing the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, 1986 CarswellNat 1357 [*Ribic*], adapted for misrepresentation. As to the seriousness of her misrepresentation, the IAD noted that it had found that the Applicant knowingly entered into a marriage of convenience for the purpose of immigrating to Canada and that such conduct strikes at the very heart of Canada's immigration system which relies heavily on the candour and honesty of applicants. The IAD found the Applicant's conduct to be conscious, egregious and ongoing (*Li v Canada (Citizenship and Immigration)*, 2015 FC 998 at paras 36–39) and that she was only caught when she sought to sponsor her Husband. As a result, the Applicant required a significant amount of H&C considerations to overcome the seriousness of her direct misrepresentation. The Applicant's assertion that the marriage was genuine and her refusal to accept responsibility for the misrepresentation in the face of overwhelming evidence to the contrary suggested a lack of remorse. As to hardship upon return, the IAD noted that the Applicant previously lived and worked in India and speaks Punjabi. And although she stated that she would have difficultly living there as a divorced woman, she has remarried and her Husband is in India and could provide support upon her return. She has also made many trips to India, several lasting many months. The IAD found that while there would be hardship to the Applicant if she had to return, it would not be significant and that this was a negative H&C factor.

[21] The positive factors were the Applicant's family support in Canada and the impact on them if she were to return to India. The IAD noted that the Applicant has lived with her sister since her arrival in Canada in 2007 and contributes to rent and groceries. Her sister's family, the Applicant's family and the Applicant's mother are close knit and her mother cares for her minor daughters when the Applicant is working. However, the family devastation if the Applicant were

to be removed was mitigated somewhat by the fact that her mother returns to India every year, spending half of her time there. Community support in Canada and the Applicant's establishment were also positive factors, although the latter was somewhat discounted as it was gained on the basis of her misrepresentation.

[22] The IAD also considered the best interests of the minor children who are Canadian citizens, including their ages, four and five years, the availability of their grandmother and extended family in Canada, the Applicant's submission that the girls would not have the same activities, food and educational opportunities in India, the latter because education would be in Punjabi. The Applicant testified that the girls speak only a few word of Punjabi but the IAD rejected this as untrue. The IAD also considered availability of private schools in India, and that their grandmother travels there each year. It found that the best interests of the minor children did not weigh in favour of granting special relief to the Applicant.

[23] The IAD concluded that the positive factors were significantly outweighed by the seriousness of the Applicants misrepresentation, her lack of remorse and the lack of hardship upon return to India. Further, the best interests of the minor children did not favour the granting of special relief in this appeal. The appeal was dismissed.

Issues and Standard of Review

[24] Although the Applicant raises many issues, in my view they are captured as follows:

i) Was the IAD's decision reasonable?

ii) Did the IAD breach the duty of procedural fairness owed to the Applicant?

[25] The IAD's determination that the Applicant is inadmissible for misrepresentation and that there were insufficient grounds to justify H&C relief are reviewable on the reasonableness standard (*Jiang v Canada (Minister of Citizenship and Immigration)*, 2011 FC 942 at para 19; *Uddin v Canada (Minister or Citizenship and Immigration)*, 2016 FC 314 at para 19). Procedural fairness is reviewed on the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. The Federal Court of Appeal has recently held that certain procedural matters do not lend themselves to a standard of review analysis at all, such as when bias is alleged. Rather, the ultimate question is whether the applicant knew the case to meet and had a full and fair opportunity to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, paras 55–56).

Issue 1: Was the IAD's decision reasonable?

Jurisdiction - exceeding the scope of the Section 44 Report

[26] The Applicant submits that the IAD erred in determining that the ID had not exceeded its jurisdiction by going beyond the scope of the allegations in the Section 44 Report and analysing whether the marriage was genuine. According to the Applicant, while the IAD may have been able to assess the genuineness of the Applicant's relationship, the ID does not have the same jurisdiction. She submits that *Ramkissoon*, relied upon by the IAD and the Respondent, does not assist as it deals with the jurisdiction of the IAD without making reference to the parameters of the ID's jurisdiction.

[27] Conversely, the Respondent submits that it was open to the IAD to assess the *bona fides* of the marriage and whether the Applicant entered into it with the intention of residing with the

sponsor. While the question before the ID was whether the Applicant made a material misrepresentation, the nature of the misrepresentation in this case indirectly involved an assessment of the *bona fides* of the marriage. The misrepresentation and the *bona fides* of the marriage are intertwined. There was nothing unreasonable about the ID delving into the genuineness of the marriage and finding that the evidence of a lack of *bona fides* was related to the Applicant's misrepresentation about the marriage when she entered Canada in 2007 (*Ramkissoon* at para 8). Nor has the Applicant pointed to any jurisprudence or evidence that the ID exceeded its jurisdiction. In any event, it was open to the IAD to consider the case *de novo,* including the evidence on genuineness of the marriage, in determining whether the Applicant made a material misrepresentation when applying for and obtaining permanent resident status as the then spouse of her sponsor, Malkit Sandhu.

[28] I agree with the Respondent that, in this matter, the genuineness of the Applicant's first marriage and whether she was separated by her date of landing are interrelated issues. The ID explained this and it assessed them as such. Nor does the wording of ss 44(2) suggest that it was not open to the ID to analyse any misrepresentation arising out of the same factual pattern alleged in the Section 44 Report. While there may be the potential for procedural fairness issues to arise should the ID exceed the specific misrepresentation alleged, that is not the circumstance in this case. Here, the Section 44 Report sets out the information upon which it is based, which includes that the Applicant failed to inform immigration officials prior to or at the time she was seeking immigration status that she and her sponsor were separated and that the Applicant withheld a material fact, being that she was no longer in a relationship with her sponsor. Thus, in my view, the ID was in fact assessing the very concern raised by the Section 44 Report.

[29] As to *Ramkissoon*, there this Court considered a decision of the IAD which found that the applicant therein had obtained landing in Canada through misrepresentation of a material fact, specifically, having entered into a marriage for the purpose of gaining entry to Canada as a permanent resident and not with the intention of living together with him as a spouse. When discussing an allegation that the wrong test had been applied by the IAD in assessing conflicting evidence, the Court stated:

> [8] In addition, the test that the IAD applied, and was required to apply, was not the *Horbas* test. The IAD was not addressing the *bona fides* of a spousal sponsorship application. The question the IAD had to answer was whether the applicant made a material misrepresentation, when applying for landing as Mr. Pasad's spouse. This, indirectly, of course, requires an assessment of the *bona fides* of the marriage and whether it was entered into by the applicant with the intention of residing with Mr. Pasad, permanently as his spouse. At the same time, the analysis of the evidence is different and the IAD can take into account, as it must, events subsequent to those assessed by the visa officer in Port of Spain when the applicant's application for landing on the basis of Mr. Pasad's sponsorship was approved.

(Also see *Dhaliwal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 157 at paras 39-42)

[30] This was precisely the approach that was taken by the ID in this case. Nor am I persuaded that this approach was open only to the IAD and not the ID. In support of that position the Applicant points to s 67 of the IRPA, which states that to allow an appeal the IAD must be satisfied that the decision appealed from is wrong in law or fact or mixed law and fact (s 67(1)(a)) or, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all of the circumstances of the case (s 67(1)(c)). In essence, she argues that the wording "all of the circumstances" gives the IAD broader jurisdiction to look behind the Section 44 Report. However, even if that were so, and I am not persuaded that it is, s 67(1)(c) would only extend the

IAD's jurisdiction in the context of its H&C analysis. It would not extend its jurisdiction in the context of its misrepresentation findings. The Applicant points to nothing else in the IRPA which would support her view that the IAD has broader jurisdiction than the ID to assess intertwined circumstances underlying the Section 44 Report. Moreover, *Ramkissoon* upheld a misrepresentation finding, it did not find that it was made without jurisdiction (also see *Blanco v Canada (Minister of Citizenship and Immigration)*, 2010 FC 280 paras 26, 28 and *Julien v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 150, which support the jurisdiction of the ID to consider matters related to the content of a section 44 report).

[31] In any event, the ID clearly found that the Applicant believed the marriage had ended by the date she entered Canada. The IAD upheld this and drew the same conclusion, stating that the marriage, such as it was, was over before it ever began here in Canada. In my view, based on the evidence before it, this conclusion was reasonably open to the IAD. Accordingly, regardless of the jurisdiction issue, the IAD conducted a *de novo* hearing and reached a reasonable decision on the merits.

Credibility and factual findings

[32] The Applicant submits that the IAD's credibility findings were unreasonable and ties these to her submission that the IAD displayed a closed mind.

[33] I note that when reviewing credibility findings the role of this Court is limited. This is because the IAD has the advantage of hearing the witnesses testify and has an expertise in the subject matter that the Court lacks, the IAD is therefore better placed to make credibility findings (*Ma v Canada (Minister of Citizenship and Immigration)*, 2015 FC 838 at para 20; *Rahal v*

Canada (Minister of Citizenship and Immigration), 2012 FC 319; *Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315, [1993] FCJ No 732 at para 4 (QL) (CA). The IAD's credibility findings are also to be given significant deference (*Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052 at para 13, [2008] FCJ No 1329 (QL); *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857 at para 65; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7, 228 FTR 43) and a heavy burden lies on an applicant who seeks to rebut a finding that they lack credibility (*Jimenez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1098 at para 12 [*Jimenez*]). The decision-maker is also entitled to make reasonable findings based on implausibilities, common sense and rationality (*Jimenez* at para 12).

[34] In my view, the Applicant has not met her burden. The IAD's credibility findings were clear, multiple and based on the entirety of the evidence before it. The IAD found there to be grave credibility concerns with the evidence provided by the Applicant and her witnesses, which concerns it addressed in its reasons.

[35] However, the Applicant submits that despite not finding that the she testified in a vague, misleading or exaggerated manner, the IAD refused to consider that her testimony was true. I note that at various points in its reasons the IAD did find the Applicant's testimony to be vague, evasive and inconsistent. And, even if that were not the case, the IAD need not make an explicit finding in that regard in order to reject the credibility of the Applicant's narrative. Here the IAD set out and accepted the ID's credibility concerns and added its own concerns which arose out of the hearing before it including contradictions between the Applicant's evidence at the ID and at the IAD and implausibility findings. For example, before the ID the Applicant testified, when

asked where Malkit Sandhu lived, that a middleman had told the family that Malkit Sandhu lived in Quebec. Before the IAD the Applicant testified that she was unaware that he lived in Canada until after the marriage. Further, before the ID she testified that she knew before her marriage that Malkit Sandhu drove a truck for a living while before the IAD she testified that she was not aware of this until they were married and he had returned to Canada.

[36] The Applicant also submits that the IAD was overly microscopic in its analysis of her testimony. I disagree. Indeed, in reading the IAD's decision as a whole, it is very clear that the IAD's analysis was not based on a microscopic evaluation of issues peripheral or irrelevant to the case. While the Applicant highlights two findings in support of her position, even if I were to agree with her, which I do not, those findings were made in addition to a number of other significant negative credibility findings that demonstrate that the IAD considered the entirety of Applicant's narrative and the evidence before it.

[37] Additionally, the Applicant asserts that there was no thought anywhere in the decision of the cultural realities of the Applicant's situation, which is especially concerning in light of articles filed in evidence which discussed the stigma of divorce in Indian and Sikh communities and the level of abuse spouses will endure to avoid said stigma. Specifically, that the IAD failed to consider that the Applicant was an innocent victim following Malkit Sandhu's instructions. However, the IAD found that the Applicant was equally culpable as Malkit Sandhu in perpetrating the fraud. The decision to enter into a non-genuine marriage was therefore made prior to and regardless of the potential for future stigma arising due to divorce. There is also a presumption that the decision-maker has considered all the evidence (*Kumbanda v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1267 at para 50), it need not explicitly refer

to each piece of submitted documentary evidence. Further, in its H&C analysis the IAD noted the Applicant's testimony that she would have some difficulty living in India as a divorced woman but found that her status as a divorcee did not appear to have an impact on her ability to marry her Husband very shortly after her divorce from Malkit Sandhu. That is, the Applicant is now married and her Husband resides in India.

[38] The Applicant also submits that the IAD made several findings that were not based on the record. Having reviewed her submissions and the record, in my view, in all but one case the IAD had an appropriate evidentiary basis to make the findings it did, and in the one case where it did not, it was of no consequence to its decision.

[39] In sum, I am not persuaded that those of the IAD's credibility findings that were challenged by the Applicant were unreasonable. Nor that the IAD made findings of fact not based on the record that warrant this Court's intervention. Further, it is significant to note that the IAD based its decision on the totality of the evidence and the many and cumulative inconsistencies, discrepancies and implausibilities that it identified in that regard.

Ribic Factors – best interests of the child

[40] As stated in *Canada (Citizenship and Immigration) v. Li*, 2017 FC 805 [*Li*]:

> [22] The factors to be considered in misrepresentation cases are set out in *Wang v Canada (MPSEP)*, 2016 FC 705 at paragraph 8:
>
> > 8 First, the IAD, referring to this Court's decision in *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 [*Wang*], held that the factors to be considered in exercising discretion in cases involving misrepresentation included: (i) the seriousness of the misrepresentation leading to the removal order and the circumstances surrounding it; (ii) the remorsefulness of the appellant; (iii) the length of time spent in Canada and the degree to which the appellant is

> established in Canada; (iv) the appellant's family in Canada and the impact on the family that removal would cause, including the best interests of the child; and (v) the degree of hardship that would be caused to the appellant by removal from Canada, including the conditions in the likely country of removal.

[41] The IAD, in applying the *Ribic* factors under s. 67(1)(c) of the IRPA, must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient H&C considerations warrant special relief in light of all of the circumstances of the case. A misrepresentation that is serious and that may negate H&C relief must be balanced by equal or greater factors under the *Ribic* ruberic considered by the IAD in order for it to reasonably find that the remedy is justified (*Li* at paras 29, 31).

[42] As set out above, the IAD considered each of the *Ribic* factors. The Applicant has not challenged any of the IAD's findings or the weighing of any of these factors other than the best interests of the child factor.

[43] In relation to best interests of the two minor children, the IAD it acknowledged the analysis required by *Kanthasamy v Canada (Citizenship and Immigrations)*, 2015 SCC 61 [*Kanthasamy*]. The IAD noted that the children are Canadian citizens, their respective ages, their activities, and that they enjoyed living in a family situation where they were surrounded by extended family, including a grandmother who provided care for them. The IAD noted the Applicant's testimony that in India the children would be educated in Punjabi, that there are different kinds of activities there and, that the food is different. The IAD also noted that the evidence established that the Applicant had taken her children on numerous trips to India, for months at a time, to spend time with their father in a family situation.

[44] The IAD acknowledged the Applicant's testimony that her Husband is a farmer and that he has limited income. She stated that he has a small piece of land where he farms wheat and rice, his house is located on this piece of land and, she was unaware of the value of this property. The Applicant also testified that her children's relationship with their father is very good.

[45] The IAD stated that although the Applicant testified that her daughters speak only two or three words of Punjabi, this was established to be untrue on questioning by the Minister's counsel. Specifically, that when the children speak to their father in English, he responds that he does not understand them and they then switch to Punjabi. Further, the Applicant testified that her mother and sister both speak Punjabi at home and that her mother, who is the caregiver for the children, knows only a few words of English. The IAD found that the Applicant's assertion that the children do not speak Punjabi was untrue and intended to bolster her appeal and that it was more likely that the children have the benefit of being fluent in both languages.

[46] The IAD noted that although counsel filed some evidence regarding the educational situation in India, which indicated that the public school system in India is not strong, the Applicant had industriously saved and had a significant nest egg which she could use to enroll her daughters in private school in India if she chose to do so. Furthermore, it appeared that the children would have access to education in English.

[47] The IAD also considered that the children's grandmother, with whom they were very close, travelled to India every year and stated that if the relationship was as close as the Applicant would have the IAD believe, it seemed clear that the girls' grandmother would make concerted efforts to spend significant amounts of time with them in India. The IAD noted that

girls are Canadian citizens and if at any point in the five-year exclusion period it appeared that the system in India was failing them, the Applicant would have the option of having the girls return to Canada to resume their education while living in the family (the Applicant's sister's) home. Ultimately, however, it was always best for children, particularly when they are small, to have ready and physical access to both parents wherever possible.

[48] Having weighed all of the factors affecting the minor children in this appeal, the IAD found that the best interests of the minor children in this case did not weigh in favour of granting special relief to the Applicant.

[49] The Applicant submits that the IAD's analysis is insufficient and that it applied a hardship test. In that regard, its flawed analysis is similar to the decision which was under review in *Bautista v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1008 [*Bautista*]. Further, the IAD minimized the effects of relocating to India, and that it was unreasonable for the IAD to find that the Applicant's children speak Punjabi as this is contrary to the testimony provided by the Applicant and her witnesses. The Applicant also submits that the IAD failed to engage with the evidence such as the Applicant's testimony that her Husband's income is insufficient to support the family.

[50] The Respondent submits that the IAD conducted a proper weighing of all of the relevant factors in its assessment of the H&C grounds relied on in the circumstances. The IAD reasonably analyzed the best interests of the children. It did not apply an elevated test. All of the circumstances were considered – their age, their language abilities, their educational level, their close relationships with family in Canada and their relationship with their father. After weighing all of the factors, the IAD found that the seriousness of the misrepresentation and the lack of

remorse outweighed any factors which went in favour of the Applicant. It is not the role of judicial review to engage in a re-weighing of those factors.

[51] In *Kanthasamy*, the Supreme Court of Canada considered the requirement under s 25(1) of the IRPA to take into account the best interests of a child directly affected and stated that the best interests' principle is highly contextual because of the multitude of factors that may impinge on the child's best interests. It must therefore be applied in a manner responsive to each child's particular age, capacity, needs, and maturity. The decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive, and sensitive to them (*Kanthasamy* at para 38, referencing *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 74–75 [*Baker*]).

[52] A decision under s 25(1) will be unreasonable if the interests of children affected by the decision are not sufficiently considered. This means that decision-makers must do more than simply state that the interests of a child have been taken into account, those interests must be well identified and defined, and examined with a great deal of attention in light of all the evidence. Additionally, where the legislation specifically directs that the best interests of a child who is directly affected be considered, those interests are a singularly significant focus and perspective (*Kanthasamy* at paras 23–25, 35, 38 and 41).

[53] Accordingly, and while this decision was made pursuant to 67(1)(c) of the IRPA and not s. 25, the IAD was required to be alert, alive and sensitive to the best interests of the children, afford these interests significant consideration, examine them with care and attention in light of all of the evidence, and to take into account the children's personal circumstances.

[54] As to the Applicant's reliance on *Bautista*, I note that that case was decided before *Kanthasamy*. Subsequent jurisprudence has established that no specific formula or rigid test is prescribed or required for a best interests analysis, or to demonstrate that the IAD or an immigration officer has been alert, alive and sensitive to the best interests of the child (see, for example, *Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 [*Semana*]; *Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4).

[55] And, considering the IAD's reasons and the requirements of *Kanthasamy*, I do not agree that the IAD applied a hardship test or failed to adequately consider the best interests of the minor applicants.

[56] The Applicant also makes much of the IAD's conclusion that the minor applicants were likely fluent in both Punjabi and English and states that this finding was not based on her evidence. However, while the Applicant did assert that her children only speak two or three words of Punjabi, she also testified that her mother looks after the children and her mother knows only a few words of English. When asked what that language is spoken at home, she testified that her mother and sister speak Punjabi. Asked what the children speak, her response was unclear, but ultimately she stated that "Here her children speak English and that helps their parents to improve their English". She also testified that when the children speak to their father on the phone that they only know three words of Punjabi, "did you eat roti", and that her Husband does not know much English. However, her evidence was also that she and the children have visited India on numerous occasions, they have lived with her Husband as a family, and that her children have good relationship with their father. In my view, given her testimony and the IAD's prior finding that the Applicant is not credible, it was open to it to

disbelieve that the children spoke only theee words of Punjabi. Moreover, even if the IAD erred and the children are not bilingual, given their young age and that this was but one of the factors it considered, the error is not fatal.

[57] And while the Applicant testified that her Husband's income was low, I note that she had been able to afford to visit and live with him on numerous occasions for extended periods of time and gave no evidence of financial hardship to her and the children during those visits. The IAD also found her not to be credible. Further, the IAD did acknowledge the Applicant's evidence as to her Husband's income, however, a change in standard of living is not, alone, sufficient to warrant H&C relief on the basis of the best interests of the children.

[58] In conclusion, the IAD considered all of the *Ribic* factors, including the best interests of the children. I find no error in its analysis of that factor and it is not the role of the Court to reweigh the evidence.

Issue 2: Did the IAD breach the duty of procedural fairness owed to the Applicant?

[59] The Applicant submits that the IAD's alleged errors show that the IAD determined her appeal with a closed mind. As evidence of the IAD's closed mind, the Applicant also points to certain of her statements. For example, she points to statements such as "It makes no sense that that the Applicant would be pining away in Brampton waiting for Malkit to come and start their married life together when she had not seen him in person since April 2008." The Applicant also points to the IAD's conclusion that the *Medel* exception would not apply to the Applicant because she was a willing participant and was equally culpable as Malkit Sandhu in perpetration

of this fraud. She submits that this finding again evidences that the IAD member had a closed mind.

[60] The Respondent submits that the Applicant has provided no evidence to support the assertion that the IAD member exhibited a closed mind in making her determinations. The threshold for a finding of real or perceived closed mindedness is very high. The IAD was entitled to draw conclusions with respect to the Applicant's credibility based on the evidence. A negative credibility determination or an adverse outcome are not, without more, evidence of a closed mind. Further, the IAD did not refuse to consider the *Medal* exception. It simply found that it did not apply. Given the IAD's findings, it was reasonable to conclude that the Applicant could not claim an honest or reasonable belief that she had not withheld material information. This exception is a narrow one and was not appropriate in this case.

[61] While the Applicant frames this argument in terms of a "closed mind", this allegation actually hinges on an unstated assertion of bias. The test for a reasonable apprehension of bias is what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude? Would he think it is more likely than not that the decision-maker whether consciously or unconsciously would not decide fairly? (*Yukon Francophone School Board, Education Area No. 23 v Yukon Territory (Attorney General)*, 2015 SCC 25). There is also a presumption, in the absence of evidence to the contrary, that a member of a tribunal will act fairly and impartially (*Zundel v Citron*, [2000] 4 FC 225 at para 36 (CA) [*Zundal*]; *R v S(RD)*, [1997] 3 SCR 484). The threshold for a finding of real or perceived bias is high, a real likelihood or probability of bias must be demonstrated, and a mere suspicion is not

enough (*Zundal* at para 36). The onus of demonstrating bias lies with the person who is alleging its existence (*Zundal* at para 36).

[62] In considering the high standard for bias, I cannot conclude that the Applicant has discharged her burden of proof. As pointed out by the Respondent, many of the Applicant's submissions confuse a negative credibility finding against her and the dismissal of her arguments, with evidence of bias. And, even if the IAD made all the errors that the Applicant alleges, which I have found is not the case, it takes something more than an error, an unreasonable credibility finding, or an unreasonable decision to establish bias or a closed mind.

JUDGMENT in IMM-5124-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance for certification was proposed or arises.

3. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5124-18
STYLE OF CAUSE:	KANWALJIT KAUR SANDHU v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 15, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JULY 4, 2019

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