Date: 20080729

Docket: IMM-195-08

Citation: 2008 FC 924

Ottawa, Ontario, July 29, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MUSSARAT HABIB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a sponsorship appeal decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), dated December 19, 2007. The Board dismissed the appeal on the grounds that there were insufficient humanitarian and compassionate (H&C) grounds upon which an exemption from the requirements of the Act could be granted.

ISSUES

[2] Two issues are raised in the present application:

a) Did the Board apply the proper criteria in determining the existence of H&C considerations?

b) Did the Board err by failing to respect the appellant's right to family life and the right to marry whom she wishes?

[3] The application for judicial review shall be dismissed for the following reasons.

FACTUAL BACKGROUND

[4] The applicant is a Canadian citizen. She seeks to sponsor her husband in his application for permanent residence. The applicant arrived in Canada in 1994 from Pakistan, and became a permanent resident following a successful refugee claim. She was married to her first husband from December 9, 1985 until April 7, 2002. She has three daughters and a son from her first marriage, all of whom live in Canada.

[5] The applicant and her current husband were acquainted in Pakistan, prior to their respective arrivals in Canada. He arrived in Canada in November of 1994, approximately a week after the applicant; however, his asylum claim was refused. The applicant and her current husband got in touch with each other in Canada in 1995, but were not married until January 26, 2003, four years following his departure from Canada, when the applicant travelled to Pakistan.

[6] A departure order was issued against the applicant's husband on February 2, 1995, and his refugee claim was rejected on November 5, 1996. The applicant's husband did not leave Canada until January 20, 1999. While in Canada, he worked illegally and received social assistance, which the applicant has since repaid.

[7] The originating decision, which was appealed to the Board, was a refusal of the sponsored application for landing in Canada for the applicant's husband. A refusal letter, dated June 13, 2005, indicated that the application was denied because the appellant's husband was inadmissible to Canada, pursuant to subsection 52(1) of the Act, and subsection 226(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, (the Regulations).

No return without prescribed authorization	Interdiction de retour
52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.	**52.** (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.
Deportation order	Mesure d'expulsion
226. (1) For the purposes of subsection 52(1) of the Act, and subject to subsection (2), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.	**226.** (1) Pour l'application du paragraphe 52(1) de la Loi, mais sous réserve du paragraphe (2), la mesure d'expulsion oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

[8] The immigration program manager examined the applicant's husband's request for an authorization to return to Canada, and it was denied. The legality of this decision was never questioned by the applicant's husband pursuant to paragraph 67(1)(a) or (b) of the Act; rather the decision was only appealed on the basis of H&C grounds, pursuant to paragraph 67(1)(c) of the Act.

[9] The Board was seized of the appeal a first time, and rendered its decision on September 5, 2006. In this decision, the Board determined that the marriage between the applicant and her husband was not genuine, and therefore the Board considered that it did not have jurisdiction to examine the appeal on H&C grounds. A first application was made for judicial review. The application was allowed by Justice Harrington on May 16, 2007, and sent back for redetermination by another member of the Board.

[10] It is this second decision by the Board which is under review in the case at bar.

DECISION UNDER REVIEW

[11] The Board noted that in light of the reasons of the Court in *Habib v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 524, [2007] F.C.J. No. 702, the benefit of the doubt would be given to the applicant and her marriage would be considered genuine or not entered into primarily for the purpose of acquiring any status or privilege under the Act. The Board therefore concluded that the applicant's husband was a member of the family class, and consequently the Board had jurisdiction to consider the appeal on H&C grounds, pursuant to section 65 of the Act, as

was confirmed in *Canada (Minister of Citizenship and Immigration) v. Mathew*, 2007 FC 685, at paragraphs 25-27, [2007] F.C.J. No. 930.

[12] The Board noted a number of factors which may be considered in assessing an appeal on H&C grounds, including the relationship of the sponsor to the person being sponsored, the strength of that relationship, the reasons for that relationship, the overall situation of the sponsor and person being sponsored, family support, dependency, the best interests of the children and the objective of the Act. The Board considered the following factors:

a) The Board examined the strength of the relationship between the applicant and her husband and determined that it was not very great. The Board noted that the applicant travelled to Pakistan from January 22, 2003 until March 29, 2003. She married her husband on this trip. However, she has not since returned. She explained that traveling to Pakistan was expensive and she did not wish to leave her daughters in Canada. The Board did not accept this explanation in light of the fact that she sent two of her daughters to Pakistan from September 5, 2006 to August 22, 2007. The Board noted that she did not offer the fear of persecution as a reason for not travelling to Pakistan.

b) The Board considered the interdependence between the applicant, her children and her husband. The Board noted that the applicant did not bring her daughters to Pakistan when she got married in 2003. It was also noted that the applicant's husband sent money to the applicant for a period of two years, but that none was sent since the interview was held in September of 2004. The receipt of one money

transfer, dated June 13, 2003, from the husband to the applicant was submitted. The applicant testified that she spoke with her husband frequently by telephone; however, the only evidence of contact was four internet communications in February and March 2004. On these bases, the Board determined that the applicant did not demonstrate the existence of emotional or financial interdependence.

c) The Board considered the applicant's evidence that she had refunded her husband's debt to the social assistance office in Quebec. The Board considered the fact that the husband received social assistance and not working to be a negative factor in the assessment of H&C considerations.

d) The best interests of the children were considered. The Board found that there was insufficient evidence to demonstrate that the applicant's husband and her children were in a family relationship. The absence of financial support and letters were noted. The only evidence of a relationship was the fact that the applicant's daughters spent the last month of their trip in Pakistan with their stepfather, and he visited them while they were living with their mother's family. The Board was not satisfied that this amounted to dependence on the stepfather, and therefore determined that the applicant had not established that it would be in the best interests of the children to have her husband return to Canada. The fact that the daughters' father lives in Canada was also noted. The Board mentioned that the husband has two sons and one daughter from a previous marriage living in Pakistan. He claimed he did not know where they lived, when asked. The Board attributed little credibility to his

explanation, because a document in the file indicated an address where the children lived with their mother.

e) The Board considered the objectives of the Act, namely that of family reunification, and determined that the factor could not overcome the negative factors.

f) The Board assessed the reason for which the applicant's husband was refused re-entry into Canada. The Board noted that the applicant's husband left Canada without appearing before an officer at the point of entry, and without obtaining a certificate of departure. The Board concluded that he chose to stay in Canada illegally and did not report his departure, which was a significant breach of the Act, and therefore a negative factor.

[13] The Board therefore concluded that there were insufficient H&C reasons to warrant special relief.

RELEVANT LEGISLATION

[14] *Immigration and Refugee Protection Act*, 2001, c. 27.

Humanitarian and compassionate considerations	Motifs d'ordre humanitaires
65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the	**65.** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien

foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	partie de cette catégorie et que le répondant a bien la qualité réglementaire.
Appeal allowed	Fondement de l'appel
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

ANALYSIS

Standard of Review

[15] It was held in *Mathew*, above, at paragraphs 22 and 23, that applying the wrong test or ignoring a relevant factor in the exercise of discretion constitutes an error reviewable on the standard of correctness. However, determinations of fact or findings of credibility are reviewed according to the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9). For a

decision to be reasonable there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above at paragraph 47).

Did the Board apply the proper criteria in determining the existence of H&C considerations?

[16] The applicant argues that the Board did not properly assess the H&C factors. Specifically, she argues that the Board did not take into account the fact that the marriage is genuine. The applicant essentially submits that this Court made a determinative finding that the marriage between her and her current husband is genuine in the previous application for judicial review, and that the Board erred by examining factors such as the strength of the marriage and interdependence in the H&C analysis. She takes the position that once the marriage is determined to be genuine, the existence of interdependence is established.

[17] In making this argument, the applicant misreads the findings of the Court in *Habib*, above, and *Mathew*, above. First, it must be noted that the Board did not ignore the genuineness of the marriage; this was explicitly accepted at the outset of the decision. The Board accepted the genuine character of the marriage, and gave the applicant the benefit of the doubt in light of the decision in *Habib*, above. However, in this decision, Justice Harrington did not confirm the genuineness of the marriage, as the applicant alleges. The Court found that the Board erred in its assessment of the character of the marriage. Upon redetermination, it would have still been open to the Board to conclude that the marriage was not genuine, provided that the error identified by the Court was not

repeated. Instead, the Board chose to accept the genuineness of the marriage and conduct an analysis of the H&C factors.

[18] In doing so, the Board considered certain factors that overlap in part with factors that inform the characterization of the marriage. It is clear from the Court's decision in *Mathew*, above, at paragraph 27, that such an overlap is permitted:

> [27] In coming to this conclusion I do not say that elements of a genuine marriage cannot inform H&C factors; it is evident they can. On the other hand, factors leading to the genuineness of a marriage cannot be a complete substitute for relevant H&C factors justifying an override of an otherwise valid visa officer's decision which is a different purpose than the factors which test whether the marriage is genuine or not. Support for this conclusion is that, in the Departmental Guidelines, the factors for allowing an appeal on H&C considerations on a sponsorship appeal are different than those which are used to test a genuine marriage. Something more is required and that something more is not present here.

[19] This very paragraph is quoted by the applicant in her submissions. However, it is my opinion that the Board's consideration of factors such as interdependence and the strength of the relationship fall squarely within what is permitted by *Mathew*. It is noteworthy that the Board also considered the best interests of the children, the objectives of the Act, and the applicant's husband's past history of reliance on social assistance, and the reason for which his re-entry was refused. These considerations clearly constitute "something more" than the factors used to assess the genuineness of the marriage.

[20] The applicant alleges that cultural differences were not taken into account by the Board in its decision. However, the applicant makes no specific allegations, nor does she point to any evidence of differing cultural norms which might have an impact on the outcome of the decision. I agree with the respondent that the Board's findings with respect to the quality of the relationship between the applicant and her husband do not display a lack of cultural sensitivity. These findings were open to the Board and fall within an acceptable range of outcomes defensible in regard of the facts and law.

[21] The applicant asserts that the Board improperly assessed the best interests of the children. The applicant submits that no importance was given to the fact that the applicant's children spent time with their stepfather in Pakistan, or the testimony that they have a good relationship. The applicant essentially requests that the Court reweigh the evidence that was presented to the Board, and substitute the finding with one which she would prefer. It is not the role of the Court to reweigh the evidence. Deference to the Board's decision is required with regard to findings of fact, and the Board's finding with respect to the best interests of the children is reasonable. It was open to the Board to conclude that there was a lack of probative evidence demonstrating that the applicant's children would benefit from the physical presence of their stepfather.

Did the Board err by failing to respect the appellant's right to family life and the right to marry whom she wishes?

[22] The applicant submits that her right to family life and right to marry whom she wishes were not respected because the Board failed to give sufficient importance to these fundamental rights. The applicant cites Article 16 of the *Universal Declaration of Human Rights*, Article 23 of the

International Covenant on Civil and Political Rights and Article 6 of the *American Declaration of Rights and Duties of Man*.

[23] It is clear from the facts of this case that the Board has not interfered with the applicant's right to marry whom she wishes. It is a fundamental principle of the Canadian immigration system that there is no absolute right to immigrate. The Board is not bound to render a decision favourable to the applicant simply because a marriage is found to be genuine.

[24] The applicant submits that the Board did not give sufficient importance to her marriage and the object of family reunification. The applicant again asks the Court to interfere with the decision of the Board because of the weight attributed to the evidence. The Board clearly considered that the object of the Act was family reunification, but found that the negative H&C factors outweighed the positive ones. This conclusion was justified, intelligible and transparent based on the evidence.

[25] The applicant proposed the following question for certification:

> Is there a legal presumption that a valid marriage in good faith is generally sufficient to establish the existence of humanitarian reasons and that any decision on a marriage sponsorship must respect Canada's international obligations under the *International Covenant for Civil and Political Rights*.

[25] The respondent opposed such a question. The Court is of the opinion that this question is not determinative in the case at bar.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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