

Date: 20090501

Docket: IMM-4305-08

Citation: 2009 FC 445

Ottawa, Ontario, May 1, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

**HARBANS SINGH UPPAL
MANJIT KAUR
SANDEEP KAUR
BAIRAJ SINGH
IQBAL SINGH**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Harbans Singh Uppal, Manjit Kaur and three children seek judicial review of a decision refusing their applications for permanent residence through a family sponsorship. While acknowledging that Mr. Uppal and Ms. Kaur had initially misrepresented the nature of their familial relationships, the applicants submit that the misrepresentation was withdrawn prior to a decision being made in relation to their application.

[2] The applicants argue that in these circumstances, there was no material misrepresentation that induced or could induce an error in the administration of the *Immigration and Refugee Protection Act*. The immigration officer further erred, the applicants say, in failing to give any weight to documents provided by them to demonstrate the validity of the marriage between Mr. Uppal and Ms. Kaur.

[3] For the reasons that follow, I am not persuaded that the immigration officer erred as alleged. Consequently, the application for judicial review will be dismissed.

Background

[4] The applicants are citizens of India. They applied for permanent residence as members of the family class. The applicants were sponsored by Amandeep Singh Kaur, who was initially represented to be the biological child of both Mr. Uppal and Ms. Kaur.

[5] Mr. Uppal was the principal applicant in the family's application for permanent residence. He indicated on his application form that he had never been married prior to his marriage to Ms. Kaur.

[6] When the couple were interviewed in India, Ms. Kaur was asked to explain why there was such a substantial age difference between Amandeep and the three applicant children. Ms. Kaur explained that she had experienced medical problems after giving birth to Amandeep, and had been advised by her doctor not to have any more children. When she was asked why it was that she had

then had three more children, Ms. Kaur claimed that after taking medication, her medical problems resolved themselves, and she had then had her three younger children. Thus, Ms. Kaur clearly represented to the immigration authorities that she was the biological mother of all four children.

[7] The family's application for permanent residence was refused when the officer was not satisfied that the three applicant children were in fact the dependant children of Mr. Uppal and Ms. Kaur. An application for judicial review was commenced with respect to that decision, but was resolved when the family agreed to undergo DNA testing, in order to establish the familial relationship.

[8] It is not entirely clear from the CAIPS notes as to whether it was the applicants or CIC that had initially raised the possibility of DNA testing. However, Mr. Uppal's affidavit makes it clear that the request to carry out DNA testing came from the immigration officer.

[9] By letter dated August 30, 2007, Amandeep Singh Kaur wrote to CIC advising that his family members were prepared to undergo DNA testing. At the same time, he also advised that Mr. Uppal was his "real" father, and that Sandeep Kaur Uppal was his "real" sister. He further advised that Manjit Kaur was in fact his step-mother, and that Balraj Singh Uppal and Iqbal Singh Uppal were his step-brothers.

[10] DNA tests subsequently established that Mr. Uppal was the biological father of all four children, but that Ms. Kaur was only the mother of the two youngest children.

[11] Mr. Uppal then changed his story, and claimed that he had previously been married to another woman, and that he and his first wife had two children together prior to her death in 1987. He then married Ms. Kaur, and the couple had two more children, raising all four children together.

[12] The immigration officer then asked the applicants to provide the death certificate for Mr. Uppal's first wife, along with the marriage certificate for the marriage between Mr. Uppal and Ms. Kaur, and for Mr. Uppal's first marriage. The officer also asked for copies of photographs documenting each of Mr. Uppal's weddings.

[13] A death certificate for Mr. Uppal's first wife and a marriage certificate relating to the marriage between Mr. Uppal and Ms. Kaur were subsequently provided by the applicants. Both of these documents were issued after the date of CIC's request, notwithstanding that they purport to record events occurring more than 20 years ago. Mr. Uppal blames his lack of literacy for not having recorded the events in question at the time that they took place.

[14] The only explanation provided by the applicants for their initial misrepresentation of the family's situation was Mr. Uppal's claim in his affidavit that he did not mention the fact that his children had two different mothers in his application because he did not think that it was relevant, as he was the biological father of all of the children.

[15] No explanation has been provided by Mr. Uppal as to why he lied on his application for permanent residence when he said that he had never been married prior to marrying Ms. Kaur.

Similarly, no explanation has been provided by Ms. Kaur as to why she lied in her interview with respect to her alleged medical difficulties following the birth of Amandeep, and the effect that these problems had on the timing of the births of her three younger children.

The Immigration Officer's Decision

[16] The immigration officer found the applicants to be inadmissible pursuant to section 40(1)(a) of the *Immigration and Refugee Protection Act*, for having misrepresented or withheld material facts.

[17] The officer found the death and marriage certificates to be “self-servicing (*sic*)”, because they were produced after the CIC request was made, despite the fact that local officials maintain civil records throughout the Punjab and Rajasthan. Despite having been specifically requested by the officer, no photographs were ever provided with respect to either of Mr. Uppal's marriages. In this regard, the officer observed that weddings are highly festive events in India, and that photographs of celebratory events have been available for decades, even in rural Punjab and Rajasthan.

[18] The officer concluded that if the applicants' misrepresentations had not been discovered, the processing of their applications for permanent residence could have led to errors in the administration of the *Immigration and Refugee Protection Act* having been made. In particular, a visa could have been issued to Ms. Kaur, as the wife of Mr. Uppal, when he may not in fact have

been free to remarry, as it had not been satisfactorily established that his first wife was in fact deceased.

[19] As a result, the officer refused the applications for permanent residency for misrepresentation, with the result that the applicants are inadmissible to Canada for two years.

Standard of Review

[20] The applicants argue that the officer erred in finding that they had misrepresented a material fact relevant to their applications that could have induced an error in the administration of the Act, given that the situation was clarified prior to a decision having actually been made in relation to their applications for permanent residence.

[21] The applicants also argue that the officer erred in finding that there was insufficient evidence to establish the veracity and chronology of Mr. Uppal's relationships.

[22] Finally, the applicants say that the officer erred in failing to consider Ms. Kaur's eligibility for sponsorship as a common-law spouse, in the event that the officer was not satisfied as to the legality of her marriage to Mr. Uppal.

[23] These issues either involve the application of statutory provisions to the facts of this case, or the evaluation and weighing of the evidence. As such the immigration officer's decision should be reviewed against the standard of reasonableness: see *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[24] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir* at paragraph 47.

Was there a Misrepresentation within the Meaning of Section 40(1)(a) of IRPA?

[25] Section 16(1) of *IRPA* requires that a person making an application under the Act truthfully answer all questions that may be put to them. Section 40(1)(a) of the Act provides that a foreign national will be inadmissible to Canada for misrepresentation for “directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act”.

[26] It is clear that the applicants concealed the fact of Mr. Uppal’s first marriage, and misrepresented the true nature of the relationship between Ms. Kaur and the two older children. The family history and the nature of the familial relationships between the various parties to the applications for permanent residency are clearly both relevant and material in a family sponsorship application.

[27] Although counsel endeavored to portray the “clarification” letter sent by Amandeep as a voluntary correction of the record by the applicants, the reality is that they only acknowledged the true nature of the relationships between the various individuals once it was clear that their misrepresentation was about to be revealed through DNA testing.

[28] The applicants rely on the decision in *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 268, as authority for the proposition that a misrepresentation that has been withdrawn cannot form the basis of a finding under section 40 of the Act. However, a review of that decision discloses that the case is readily distinguishable from the present situation.

[29] In *Kaur*, the applicant had made misrepresentations in connection with her unsuccessful refugee claim. Her subsequent application for permanent residence accurately reflected the true state of affairs. In those circumstances, the Court quite properly found that the applicant's earlier misrepresentations could not have induced an error in relation to the application for permanent residence. That is not the situation here.

[30] The misrepresentations in this case were made in the context of the applications for permanent residence that were under consideration by the officer. In such circumstances, the fact that the misrepresentations were disclosed by the applicants prior to a final decision having actually been taken in relation to their applications does not assist them. Indeed, this Court specifically rejected this argument in *Khan v. Canada (M.C.I.)*, 2008 FC 512, at paras. 27-29.

[31] That is, the Court held in *Khan* that such an interpretation would lead to situations where individuals could knowingly misrepresent their circumstances, but nevertheless escape an inadmissibility finding, as long as they disclosed the misrepresentation right before a decision was made. Not only would such an interpretation encourage the abuse of the Act, it also ignores the requirement to provide truthful information in applications under the Act.

[32] The Court's concerns in *Khan* are amply illustrated by the facts of this case, where the applicants only came forward with their "clarification" once they knew that their lies were about to be uncovered through genetic testing.

[33] As a consequence, I am satisfied that the officer's conclusion that the applicants had misrepresented material facts relating to a relevant matter that could have induced an error in the administration of the Act was one that was reasonably open to him on the record before him.

The Officer's Evaluation of the Documentary Evidence

[34] The applicants submit that it was unreasonable for the officer to have rejected the death certificate for Mr. Uppal's first wife, and the marriage certificate for the marriage between Mr. Uppal and Ms. Kaur simply on the basis that they were both issued after the request from CIC, and were thus self-serving. Regardless of the timing of their issue, the applicants say that the documents were issued by public authorities, and should thus have been viewed as reliable.

[35] A review of the officer's reasons as a whole discloses that the officer actually had several reasons for discounting the reliability of these documents, quite apart from the fact that they were only issued in response to the request from CIC. The officer clearly had doubts as to the documents' authenticity, as well as with the applicants' explanation as to why the documents had not been issued at the time of the events in question. Relying on his local knowledge, the officer observed that civil records are routinely maintained throughout Rajasthan and Punjab.

[36] The officer was also clearly very troubled by the failure of the applicants to produce any photographs with respect to either wedding, despite having been specifically asked to do so. In the absence of any contemporaneous evidence whatsoever to document Mr. Uppal's first marriage, the death of his first wife, or his second marriage, the officer's concerns with respect to "the veracity and chronology" of Mr. Uppal's relationships were entirely reasonable.

The Failure to Consider Ms. Kaur's Eligibility as Mr. Uppal's Common-law Wife

[37] The applicants submit that even if the officer had concerns with respect to the legality of Mr. Uppal and Ms. Kaur's marriage, the officer was nevertheless obliged to consider her eligibility to be sponsored as Mr. Uppal's common-law wife.

[38] CIC's "OP 2 Processing Members of the Family Class" Manual makes it clear that applicants are required to indicate the category under which they are applying for immigration to Canada. Conjugal partners, common-law partners and spouses are all different categories, with different requirements. The Manual is quite clear that there is no obligation on an officer to re-assess an application by considering a relationship between the applicant and the sponsor that is different than the one specified in the application itself: see section 5.51.

[39] Furthermore, it is by no means clear that Ms. Kaur would even qualify as Mr. Uppal's common-law wife. Having children together and alleging that they lived together for 20 years is not sufficient to establish that they meet the definition of common-law spouses. It was impossible for the officer to know whether Mr. Uppal's first wife was indeed dead, or what the status actually was

of this first marriage. Moreover, any ongoing relationship between Mr. Uppal and his first wife could preclude a finding of a common-law relationship between Mr. Uppal and Ms. Kaur: see OP 2: Processing Members of the Family Class, section 5.38.

Conclusion

[40] For these reasons, I am satisfied that the officer's decision was reasonable, in that it falls within the range of possible acceptable outcomes which are defensible in light of the facts and the law. As a consequence, the application for judicial review is dismissed.

Certification

[41] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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