Federal Court  Cour fédérale

Date: 20110926

Docket: IMM-978-11

2011 FC 1097

Ottawa, Ontario, September 26, 2011

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

HARDIAL SINGH DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), of a decision by the Immigration Appeal Division ("IAD") of the Immigation and Refugee Board, dated January 21, 2011, whereby the IAD ordered that the sponsorship appeal of the Applicant for his spouse and her children be dismissed.

[2] Mr. Dhaliwal challenges the IAD decision on the grounds that his right to procedural fairness has been breached. More particularly, Mr. Dhaliwal argues that the interpretation at his

IAD appeal hearing was so poor that it constituted a breach of natural justice. He also argues that the IAD should not have relied on the visa officer's computer notes of their interview without an affidavit to support them. Finally, he submits that the IAD should have permitted his witness, who had provided an affidavit, to testify.

[3] Having carefully considered the record as well as the written and oral submissions of the parties, I have come to the conclusion that this application for judicial review ought to be dismissed. The following are my reasons.

BACKGROUND

[4] The Applicant, Hardial Singh Dhaliwal, is 54 years old and was landed in Canada on April 1, 1999. He was previously married in February 1972 and divorced on October 20, 2006. The Applicant has four children from that marriage, aged 29 to 37 years old; he has no contact with them, and claims that his former spouse "poisoned" the children's mind and alienated them from him. Alleging feelings of loneliness and helplessness, he sought to remarry.

[5] Mrs. Dhaliwal (formerly Karamjit Kaur) is a 45 year old citizen of India. Her first husband died in 1993. She has three children from that marriage, aged 27, 24 and 20. Her eldest son no longer resides with her, and is allegedly involved in terrorist activities.

[6] The Applicant testified that the marriage was arranged by Sant Dharam Das, a religious teacher who is well known and trusted by both Mr. and Mrs. Dhaliwal. Sant Dharam Das talked to

the Applicant about Mrs. Dhaliwal in 2007, and the Applicant flew to India, where he met her for the first time on February 2, 2008, in her village. They were married on February 14, 2008.

[7] On July 16, 2009, Mr. and Mrs. Dhaliwal were interviewed separately by Visa Officer Keshub in New Delhi, India. The officer refused Mrs. Dhaliwal's application for a permanent resident visa on the same day. In the refusal letter, the following reasons were provided:

- The officer noted that their wedding photos showed a large gathering which is not the norm in their community for second marriages with partners who have grown children. The marriage was held in a city away from the usual place of residence of both the families.
- Mrs. Dhaliwal could not name Mr. Dhaliwal's native village. Most of the post-marriage photos were taken on the same day; were posed, and appeared to have been created to support the application. The officer was not satisfied that they had spent any time together after their marriage.
- Mrs. Dhaliwal said that after the marriage she has been residing with Mr. Dhaliwal's aunt in Faridkot. However, Mrs. Dhaliwal gave her first husband's native village of Langiana as her mailing address.
- The officer was not satisfied that Mr. and Mrs. Dhaliwal kept in touch after the marriage. The telephone bills could reflect calls to Mr. Dhaliwal's relatives in Faridkot, rather than calls to Mrs. Dhaliwal.
- The officer did not find it credible that Mrs. Dhaliwal would be marrying, now that one son was married and her children were grown, rather than 16 years ago when she had young children.

[8] On September 8, 2009, Mr. Dhaliwal appealed the refusal to the IAD. At the hearing, the Applicant and his spouse required the services of an interpreter in giving their testimony.

THE IMPUGNED DECISION

[9] The member based its negative determination of the genuineness and the intent of the parties as to their marriage, on a finding that there are significant implausibilities, discrepancies and inconsistencies in the evidence, which further contribute to undermine the credibility of both the Applicant and his wife. The member considered the following factors in making his decision:

- The foundational documents of the sponsorship application and questionnaires: Those documents are attested as true by the parties. Yet the parties showed indifference and neglect as to the accuracy or truthfulness of the information provided to immigration officials. While the Applicant and his wife have little formal education, illiteracy cannot be used as an excuse since Mrs. Dhaliwal's children are educated and could have assisted her.
- The immigration officer's notes: Counsel for the Applicant put forth that a limited weight should be placed on Mrs. Dhaliwal's interview. As per s 175(1)(c) of the *IRPA*, members can consider all credible and trustworthy evidence as a basis for a decision. Interview notes are generally considered to be credible and trustworthy.
- The genesis of the relationship: The Applicant did not explain why he so eagerly married Mrs. Dhaliwal considering her son's involvement in terrorist activities. The Applicant did not conduct any sort of investigation as to Mrs. Dhaliwal's

past, prior to marrying her. Moreover, Mrs. Dhaliwal was also quick to agree to marry the Applicant, a man estranged from almost all of his close relatives.

- Other implausibilities and discrepancies:
    - There are various discrepancies in their testimonies, namely the date of their first meeting, what family members of Mr. Dhaliwal his spouse met prior to the wedding, where Mrs. Dhaliwal's eldest son and family has been residing, the extent of financial support provided by Mr. Dhaliwal to his wife, details regarding Mr. Dhaliwal's work in 2009 and his current work, etc.
    - The parties did not demonstrate the depth and extent of knowledge of each other and their circumstances, as would be expected in a genuine spousal relationship, given the extent of the alleged contact and communication.
    - Several documents applied for and acquired after the marriage demonstrate an intention contrary to that of a long-lasting relationship. For example, the name of her late husband appeared on Mrs. Dhaliwal's passport, telephone bill, police clearance certificate and affidavit of birth.

[10] On the basis of the evidence, the officer concluded that the marriage was entered into primarily for Mrs. Dhaliwal and two of her children to acquire permanent resident status in Canada.

ISSUES

[11] The following issues arise in this application for judicial review:

a) Did the IAD breach the principle of natural justice in failing to provide adequate interpretation at the hearing?

b) Did the IAD err in relying on the visa officer's CAIPS notes because they were not supported by an affidavit?

c) Did the IAD breach the principle of natural justice in refusing to hear an additional witness?

ANALYSIS

[12] It is well established that issues of procedural fairness are to be reviewed on a standard of correctness. In other words, a decision must usually be set aside when a breach of natural justice has occurred (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] FCR 392 (FCA); *Canadian Union of Public Employees v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539).

[13] On the other hand, the weight to be given to the Computer Assisted Immigration Processing System ("CAIPS") notes is a question of law falling within the expertise of the member. As such, it attracts a standard of reasonableness. Accordingly, the decision must be upheld if it falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

a) Did the IAD breach the principle of natural justice in failing to provide adequate interpretation at the hearing?

[14] Counsel for the Applicant submitted that the Applicant was denied a fair hearing due to the failure of the IAD to ensure that the interpretation provided was competent. Relying on two affidavits by Mr. Sarb Sandhu, an interpreter who is regularly retained by the Tribunal, the

Applicant maintains that there were material errors in the interpretation both from English to Punjabi and from Punjabi to English. These errors allegedly resulted in omissions, additions and misinterpretations during the testimony, and they could not be detected by the Applicant and his wife as they do not understand English.

[15] I agree with counsel for the Respondent that Mr. Dhaliwal waived his right to object to the quality of interpretation at his hearing. It is well established that complaints about the quality of interpretation must be made at the earliest opportunity (*Mohammadian v Canada (MCI)*, [2000] 3 FC 371 at para 27, [2000] FCJ no 309 (QL) [*Mohammadian*]). Failure to do so results in a waiver of the right to object to the interpretation on judicial review (*Bal v Canada (MCI)*, 2008 FC 1178 at para 31, [2008] FCJ no 1460 (QL)) .

[16] It is true that neither Mr. Dhaliwal nor his spouse speaks English, thus making it difficult for them to raise concerns with the adequacy of the interpretation. But the Applicant was represented by a Punjabi speaking counsel, who took no issue with the calibre of interpretation at the IAD hearing. During Mr. Dhaliwal's five hour IAD hearing, counsel raised concerns six times about possible misinterpretations or words that may not have been clear or heard. Each concern was addressed by the interpreter or the IAD member, who asked the Applicant on multiple occasions to slow down, to repeat inaudible answers and to answer in segments to allow for accurate and complete interpretation. The member took every step to ensure that the interpretation was accurate, and counsel appeared to be satisfied that her concerns had been addressed. Never did she complain about the quality of interpretation at the hearing, in her lengthy written submissions to the IAD after the hearing or in her reply.

[17] Having carefully reviewed the transcript of the hearing, I therefore come to the conclusion that the Applicant (through his counsel) must be taken to have waived his right to object to the quality of the interpretation. As Justice Pelletier said in *Mohammadian*, above, at para 25:

> There is a powerful argument in favour of such a requirement arising from judicial economy. If applicants are permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems of interpretation, they will remain silent. This will result in a duplication of hearings. It seems a better policy to provide an incentive to make the original hearing as fair as possible and to avoid repetitious proceedings. Applicants should be required to complain at the first opportunity when it is reasonable to expect them to do so.

[18] In any event, I find that the interpretation was adequate and that the alleged errors were immaterial. As the Supreme Court stated in *R v Tran*, [1994] 2 SCR 951, [1994] SCJ no 16 (QL) [*Tran*] although the standard of interpretation is high, it is not one of perfection. An interpreter auditing a hearing recording can always find instances of interpretation that are not perfect, as recognized by this Court in *Boyal v Canada (MCI)*, [2000] FCJ no 72, 95 ACWS (3d) 139 (FC). In order to meet the standard of continuous, precise, impartial and contemporaneous interpretation set out in *Tran*, above, however, the interpretation does not have to be perfect. What matters is that persons who do not speak and understand one of the official languages, be able to tell their story and that the interpretation be of such quality that they are not impeached in their ability to make their case (see *Lawal v Canada (MCI)*, 2008 FC 861, at para 26, [2008] FCJ no 1082 (FC)).

[19] In the case at bar, counsel for the Applicant relied on the affidavits of Mr. Sarb Sandhu. These affidavits, essentially to the same effect, are replete with arguments and conclusions on legal issues such as materiality, procedural fairness and credibility assessment. Since an affidavit should

be limited to facts, pursuant to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106, these portions of the affidavits ought not to be considered by the Court.

[20] Mr. Dhaliwal relied on the affidavits of Mr. Sandhu to show that the interpretation at his hearing was so inadequate that it constituted a breach of natural justice. Counsel for the Applicant made much of the fact that the Respondent did not tender any evidence to challenge or rebut the findings of Mr. Sandhu and did not cross-examine him. While this is certainly a factor that can be taken into consideration in assessing the evidence, it is always up to the trier of fact to assess the probative value of expert evidence, even where that evidence is uncontradicted (*R v Molodowic*, 2000 SCC 16 at paras 7-10, [2000] 1 SCR 420).

[21] Having read the affidavits and the transcript, I see no proof of material errors justifying the Federal Court's intervention. If anything, the excerpts presented by Mr. Sandhu demonstrate that the interpreter was extremely cautious as she asked the spouse to repeat herself if she was not certain she had heard her correctly, and to slow down in order that the interpretation could be more accurate. Mr. Dhaliwal has not demonstrated that the interpretation negatively impacted the hearing. The Applicant and Mr. Sandhu may not have liked the interpreter's choice of words, but the interpretation conveyed the same message as Mr. Sandhu's own interpretation. As a result, I find that the interpretation was adequate and met the standard set by the Supreme Court in *Tran*, above.

> b) Did the IAD err in relying on the visa officer's CAIPS notes because they were not supported by an affidavit?

[22] Counsel for the Applicant further submitted that the IAD erred in relying on the visa officer's CAIPS notes, because they were not supported by an affidavit. Relying on *Tharmavarathan v Canada (MCI)*, 2010 FC 985, [2010] FCJ no 1226 (QL) and *Tajgardoon v Canada (MCI)*, [2001] FC 591, [2000] FCJ no 1450 (QL) counsel argued that CAIPS notes are no more than allegations of fact, and not evidence, when unsupported by an affidavit. Furthermore, it was contended that CAIPS notes are inherently unreliable as they are not a transcription of the interview, but rather notes of the immigration officer with regard to the interview.

[23] This argument can be easily disposed of. First of all, the IAD is an administrative tribunal and, as such, is not bound by the rules of evidence governing this Court. Indeed, ss 175(a) and (b) of the *IRPA* explicitly states that the IAD "is not bound by any legal or technical rules of evidence", and allows it to base its decision on all evidence that "it considers credible or trustworthy in the circumstances". The cases relied upon by the Applicant must therefore be distinguished, as they dealt with the use of CAIPS notes before this Court and not before the IAD.

[24] The assessment of whether the CAIPS notes are credible or trustworthy is a matter to be determined by the IAD member, based on the evidence in each particular case. Mr. Dhaliwal's reliance on two IAD decisions does not assist his argument, as it is clear in both of those cases that weight was not given to the CAIPS notes for reasons that had nothing to do with their admissibility. In both of these cases, the IAD favoured the oral testimonies at the hearing over the CAIPS notes for a number of reasons that had more to do with the credibility of the appellant and his spouse than with technical formalities. In particular, the testimonies of the appellant and his wife were

consistent and there was documentary evidence establishing the genuineness of the marriage. The IAD found that the visa officer's concerns had been adequately dealt with at the *de novo* hearing.

[25] In the present case, the member found that there were contradictions between Mr. Dhaliwal's oral testimony and that of his wife, as well as with the documentary evidence. As already mentioned, the member noted the following: the lack of accuracy and truthfulness in the documentary evidence; discrepancies as to when and how the Applicant learned about the involvement of his spouse's son in terrorist activities; the lack of satisfactory explanation as to why the Applicant did not further investigate the circumstances of his spouse before the marriage; the lack of satisfactory explanation as to why the Applicant's spouse consented to marry someone who is estranged from most of his relatives; where his spouse's eldest son has been residing; where his spouse's family has been residing; the date of the Applicant and his spouse's first meeting; where the Applicant's spouse resided after the marriage; when the Applicant returned to Canada; and the extent of financial support provided by the Applicant to his spouse. Further, I note that Mr. Dhaliwal and his wife did not deny the statements contained in the visa officer's CAIPS notes of their interviews, or testify that the record of the interview was inaccurate. On that basis, the IAD member could reasonably conclude that the concerns of the visa officer were not dispelled before the IAD and that the CAIPS notes could be considered as credible and trustworthy.

c) Did the IAD breach the principle of natural justice in refusing to hear an additional witness?

[26] Finally, counsel for the Applicant argued that the IAD erred in refusing to hear the testimony of Mr. Hardev Singh Dhaliwal, the Applicant's long-time friend and distant relative of his wife. Mr. Hardev Singh Dhaliwal had disclosed a summary of his intended *viva voce* evidence in

an affidavit, and his intended evidence included personal knowledge of the relationship between the Applicant and his wife, of the genesis of the relationship and the on-going nature of it. In doing so, counsel submits that the IAD disallowed the Applicant from fairly prosecuting his appeal and sacrificed his appeal at the altar of administrative efficiency.

[27] Once again, this argument must be rejected. The member was not required to hear all *viva voce* evidence. The IAD is to be shown much deference in its choice of procedure, provided that the Applicant is given adequate opportunity to be heard. The Applicant relied on *Kamtasingh v Canada (MCI)*, 2010 FC 45, [2010] FCJ no 45 (QL) [*Kamtasingh*] in support of his claim that close family members and friends must be heard without any reservation when credibility is at issue. However, *Kamtasingh*, above, must be distinguished from the case at bar because it involved an unrepresented litigant, which imposes a higher degree of procedural fairness on the member. In the present case, the Applicant was fully represented by counsel. It was left to counsel for the Applicant to devise an efficient way to present his client's case given the allotted time for the hearing.

[28] Both counsel were informed of the allotted time for the hearing almost two months before the hearing. At the outset of the hearing, the member noted that the hearing, as agreed, had been set for half a day, which meant that each party were to have an hour and a half to present their case. The member even mentioned that the Applicant could have requested more time in advance. Counsel for the Applicant answered that she did not require more time. In fact, Mr. Dhaliwal's hearing extended well over half a day, as it started at 9:00 a.m. and ended at 2:00 p.m. Moreover, the IAD member reminded counsel for the Applicant of the time and her responsibility to manage

her witnesses during the hearing, assisted in focusing the questioning on relevant matters, and restricted the time for cross-examination by the Respondent's counsel. Accordingly, it cannot be said that the member was not open to hear all the testimonies, or that she sacrificed the fairness of the procedure on the altar of administrative expediency.

[29] Be that as it may, it is not entirely clear what Mr. Hardev Singh Dhaliwal could have added in oral testimony to his affidavit. No further affidavit was filed in this Court as to what he could possibly have said. Moreover, the testimony of that witness would most probably have been immaterial, as the decision itself was based on contradictions between Mr. Dahliwal and his wife, and internal inconsistencies in the documents. Accordingly, I am unable to find that the IAD breached its duty of procedural fairness in refusing to allow Mr. Hardev Singh Dhaliwal to testify.

[30] For all of the foregoing reasons, I have come to the conclusion that this application for judicial review must be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

The parties have not proposed a question of general importance, and none will be certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Narindar Kang Jasdeep Mattoo	FOR THE APPLICANT
Caroline Christiaens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kang & Company Surrey, BC	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT