

Federal Court



Cour fédérale

**Date: 20180625**

**Docket: IMM-5005-17**

**Citation: 2018 FC 659**

**Ottawa, Ontario, June 25, 2018**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**AMRITPAL SINGH BAINS**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for judicial review of the decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, dated November 3, 2017, in which the IAD upheld the earlier finding of the Immigration Division [ID] that the Applicant is inadmissible to Canada for misrepresentation and found that there were insufficient humanitarian and compassionate [H&C] grounds to grant discretionary relief. The grounds for the

inadmissibility finding were that the Applicant's first marriage, to the woman who sponsored him for Canadian permanent residence, was not genuine and was entered into primarily for immigration purposes.

[2] As explained in greater detail below, this application is allowed, because I have found that the IAD, in analysing the competing versions of events with which it was presented in this appeal, failed to consider evidence which is sufficiently relevant to that analysis that such failure undermines the intelligibility and reasonableness of its decision.

## II. **Background**

[3] The Applicant, Amritpal Singh Bains, is a 34-year old citizen of India. The grounds for his inadmissibility surround his first marriage, to another Indian citizen who emigrated from India to Canada in 2004 and became a Canadian permanent resident in 2005. This was a marriage arranged by the couples' families. Discussions between the families started in 2001 and were then conducted more formally and concluded in 2006. The couple married in December 2006, and Mr. Bains' wife submitted a spousal sponsorship application for him in May 2007. He was granted a visa and landed in Canada as a permanent resident on January 13, 2008. Once he joined his wife in Canada, the couple resided with Mr. Bains' elder uncle.

[4] Less than a week after Mr. Bains arrived in Canada, his wife was hospitalized for having taken too many sleeping pills. Mr. Bains' evidence is that his wife told him that the overdose was because of stress due to her studies, while her evidence is that she was depressed due to his treatment of her since he arrived in Canada. Mr. Bains subsequently returned to India in March

2008 to complete his studies. His wife's evidence is that Mr. Bains went to India without informing her of his plans and that she received the news of his departure from his family in Canada. He disputes this, saying that his wife was aware of his departure and in fact drove him to the airport. Mr. Bains says that he originally intended to return to Canada in June 2008 but ended up extending his stay so that he could support his mother, who had been diagnosed with breast cancer.

[5] In August 2008, Mr. Bains' wife swore a Statutory Declaration, setting out her version of events as described above. This includes her statement that, when Mr. Bains arrived in Canada in January 2008, he asked her to live separately as he was not ready for married life and claimed that he was forced to marry her by his parents. She also stated that she believed that Mr. Bains had married her in order to come to Canada. She provided this Statutory Declaration to the Canada Border Services Agency [CBSA], although it appears from CBSA's notes that this may not have been until November 2008.

[6] Mr. Bains returned to Canada in September 2008 but says that he then discovered that his wife wanted nothing more to do with him and that she had filed a criminal complaint in India alleging that his family had illegally requested a dowry in connection with the marriage. This complaint was later dismissed by the Indian authorities. His elder uncle severed ties with him, the explanation for which is also in dispute in this matter.

[7] The evidence of Mr. Bains' wife is that she attended marriage counselling sessions in September and October 2008. She says that she made efforts to contact Mr. Bains through his

uncle so that he could attend these sessions. Mr. Bains says that these efforts did not come to his attention. Based on CBSA's notes, it appears that Mr. Bains' wife contacted CBSA in September 2008 regarding the alleged marriage of convenience [MOC]. She also subsequently filed for divorce. Mr. Bains says he only became aware of the divorce when filing his taxes in 2011 and that he had remained in Canada in the hopes that the couple could reconcile.

[8] Mr. Bains applied for Canadian citizenship in 2012, which led to an investigation of the alleged MOC. Mr. Bains has also remarried. His current wife lives in Dubai, and Mr. Bains has sponsored her to come to Canada.

[9] Mr. Bains was given notice of the allegation of misrepresentation in May 2014, his then ex-wife having provided CBSA in April 2014 with an affidavit materially the same as her 2008 Statutory Declaration. In December 2015, the ID found him inadmissible for misrepresentation and an exclusion order was issued against him. Mr. Bains appealed the exclusion order to the IAD, challenging its legal validity and submitting that sufficient H&C considerations existed that he should be granted special relief from the inadmissibility. Mr. Bains, his parents, and his younger uncle testified at his appeal on August 1, 2017. The IAD rejected his appeal on November 3, 2017, in the decision that is the subject of this application for judicial review.

### III. **The IAD Decision**

[10] In considering the validity of the exclusion order, which surrounded the question of whether Mr. Bains' marriage to his ex-wife was genuine on his part, the IAD concluded that Mr. Bains was not a credible witness and listed its most significant credibility concerns.

[11] The IAD found that Mr. Bains failed to provide a credible account as to why the marriage with his ex-wife broke down. It concluded that, in contrast to his version of events, she had provided a clear reason for why the relationship ended and that her overdose and Mr. Bains' estrangement from his eldest uncle were consistent with her explanation.

[12] Mr. Bains testified that he and his family put effort into communicating with his ex-wife and her family in order to save the marriage. However, the IAD found that this evidence was inconsistent with the documented evidence that his ex-wife had attended marriage counselling and made efforts, unsuccessfully, to have Mr. Bains join her at those counselling sessions. It did not find credible his assertion that he had no knowledge of those efforts. The IAD concluded that it was Mr. Bains who wished to end the marriage, not his ex-wife. The IAD also questioned why Mr. Bains stayed in Canada after the relationship had broken down, finding that there was little credible evidence supporting his explanation that he stayed because he hoped for a reconciliation.

[13] The IAD therefore concluded that Mr. Bains had married his ex-wife so that he could immigrate to Canada, that he was guilty of misrepresenting an MOC as a genuine marriage, and that the exclusion order was legally valid.

[14] In considering Mr. Bains' request for H&C relief, the IAD found that his misrepresentation was serious and, as he consistently maintained that his marriage was genuine, he had demonstrated no remorse. It found that Mr. Bains was well established in Canada, although that establishment had been gained due to his misrepresentation. The IAD treated this

as a moderately supportive factor in favour of his appeal. It found that his departure from Canada would have a minimal impact on his family and considered that factor to be neutral. While the IAD acknowledged that Mr. Bains would face challenges in returning to India and restarting his life there, it identified family and financial considerations that would assist him in that regard. The IAD therefore considered the impact of such a return upon Mr. Bains to be a moderately positive factor. Finally, there were no best interests of the child to consider as there was no evidence that a child would be directly affected by the decision.

[15] The IAD concluded, on a balance of probabilities, that Mr. Bains had not satisfied his onus of proving that sufficient H&C considerations existed to warrant the exercise of its discretion. It therefore dismissed the appeal.

#### IV. **Issues and Standard of Review**

[16] The Applicant raises the following issues for the Court's consideration:

- A. Did the IAD err by ignoring relevant evidence?
- B. Are the IAD's credibility findings unreasonable?
- C. Is the IAD's H&C analysis unreasonable?

[17] The parties agree, and I concur, that the standard of review applicable to these issues is reasonableness (see *Sidhu v Canada*, 2012 FC 515 at para 39, and *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 705 at para 16).

V. Analysis

[18] My decision to allow this application for judicial review turns on the Applicant's argument that the IAD ignored relevant evidence. In reaching this conclusion, I am conscious of the difficult task with which the IAD was confronted, as it was obliged to choose between two irreconcilable versions of events. As such, I disagree with Mr. Bain's submission that the IAD erred by disregarding the principle that an applicant's sworn testimony is presumed to be true unless there is reason to doubt its truthfulness. While this principle is trite law (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 at para 5 (FCA)), it is of little assistance to Mr. Bains. While he testified before the IAD, his ex-wife also provided sworn written testimony which contradicts his evidence in significant respects. The IAD was therefore required, in considering Mr. Bains' appeal, to determine which of the two versions of events was more credible.

[19] The IAD found the evidence of Mr. Bains' ex-wife to be more credible. Both parties characterize the IAD's credibility analysis, resulting in its preference for the ex-wife's evidence, as turning on conclusions as to plausibility, i.e. a finding that the ex-wife's version of events was more plausible than that of Mr. Bains. Mr. Bains acknowledges that the IAD is entitled to make plausibility findings but argues that the findings of the IAD in the present case are not based on clear evidence or accepted facts as the jurisprudence requires (see, e.g. *Ansar v Canada (Citizenship and Immigration)*, 2011 FC 1152 at para 17; *K.K. v Canada (Citizenship and Immigration)*, 2014 FC 78 at para 60)).

[20] I concur with the parties' characterization of the IAD's credibility analysis as plausibility-based and with the acknowledgement that such an analysis is a tool available to the IAD. Indeed, in considering two conflicting versions of events, an analysis of the extent to which each version is consistent with common sense, taking into account the available evidence and uncontested facts, may in some circumstances be the only means available to an administrative decision-maker to choose between the two competing versions. However, regard should also be given to whether either version of events is inconsistent with other evidence, so as to provide a reason to doubt the credibility of one and prefer the other. My difficulty with the decision in the present case is the IAD's failure to consider evidence of this latter sort which, on its face, appears to directly contradict an aspect of the evidence of Mr. Bains' ex-wife.

[21] The IAD's conclusion that Mr. Bains has committed a misrepresentation by entering into an MOC is based on his ex-wife's evidence surrounding the events of 2008. She says that, after arriving in Canada in January 2008, he refused to spend any time with her and asked that they live separately as he was not ready for married life and had been forced to marry her by his parents. She also says that he left Canada for India in March 2008, without informing her, and returned to Canada again in September 2008, again without informing her, to live separately from her. She describes this mistreatment as the reason for the breakdown of the marriage, an explanation that the IAD found to be plausible.

[22] Mr. Bains contests these assertions and, in considering most of them, there is little to assist the IAD in choosing between the two versions of events other than by conducting a plausibility assessment. However, as emphasized by Mr. Bains in his counsel's submissions to



the IAD, there is a piece of third-party evidence that he submits directly contradicts part of the ex-wife's story – her statement that Mr. Bains left Canada for India in March 2008 without informing her. Mr. Bains testified that she was aware of his intention to return to India in March 2008 to complete his studies and that, in fact, she drove him to the airport. What is significant is that this aspect of his testimony is corroborated by his younger uncle, who testified that he was present in the car when Mr. Bains' then wife drove him to the airport for his return to India.

[23] The Respondent's counsel noted at the hearing of this judicial review application that the Respondent addressed this issue before the IAD, arguing that Mr. Bains and his uncle had almost two years since the decision in the admissibility hearing to collude in their testimony. The Respondent submits that just because Mr. Bains and his family say that his wife drove him to the airport does not mean that it is true.

[24] This argument questions the impartiality and credibility of the uncle's evidence. However for purposes of this judicial review, the point is that the IAD's decision does not demonstrate any consideration of this evidence, conclusion as to its credibility or impartiality, or discussion of its effect upon the competing versions of events. The Respondent describes the evidence surrounding Mr. Bains' departure for India as *minutia* and submits that the absence of an analysis of this particular piece of evidence does not undermine the reasonableness of the IAD's overall analysis of the competing versions. With respect, I do not agree. While it is trite law that an administrative decision-maker is presumed to have considered all the evidence before it, the more important the evidence that is not mentioned and analysed, the more willing a court may be to infer that an erroneous decision was made without regard to the evidence (see *Cepeda-*

*Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35 [*Cepeda-Gutierrez*] at paras 15-17). Given that the evidence of Mr. Bains' uncle appears to corroborate his testimony and contradict the evidence of his ex-wife, and as this piece of evidence was the subject of submissions on this point by both parties during the appeal, I find that it meets the threshold set by *Cepeda-Gutierrez*.

[25] I emphasize that I express no conclusion as to the significance of the evidence of Mr. Bains' uncle, and its apparent corroboration/contradiction of the competing versions of events, other than that this evidence raises a point which required consideration by the IAD in order for the decision to be considered intelligible and therefore reasonable. I will allow this application for judicial review and set aside the IAD's decision, with Mr. Bain's appeal to be returned to a differently constituted panel of the IAD for redetermination. As such redetermination may affect the IAD's consideration of the plausibility of the competing versions of events, I decline to express conclusions on the Applicants' arguments surrounding the plausibility findings in the decision that is being set aside.

[26] Neither party proposed any question for certification for appeal, and none is stated.

**JUDGMENT IN IMM-5005-17**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed and the matter is returned to a differently constituted panel of the Immigration Appeal Division for redetermination.

“Richard F. Southcott”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5005-17

**STYLE OF CAUSE:** AMRITPAL SINGH BIANs v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 7, 2018

**JUDGMENT AND REASONS:** SOUTHCOTT J.

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