

Date: 20080304

Docket: IMM-2330-07

Citation: 2008 FC 296

Ottawa, Ontario, March 4, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JASWANT SINGH DHALIWAL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Immigration Appeal Division (the IAD) dated May 29, 2007, which dismissed the appeal of the removal order against the applicant.

[2] The applicant requests that the decision be set aside and the matter be remitted to a newly constituted panel of the IAD for re-determination.

Background

[3] Jaswant Singh Dhaliwal (the applicant) is a citizen of India. The applicant first applied to Canada as a dependent to his mother, who was being sponsored by the applicant's sister as a member of the family class. On January 13, 1994, an application for permanent residence was submitted for the applicant. He was issued an immigration visa on May 25, 1994 and permanent residence was granted on June 26, 1994. On August 8, 1995, the applicant submitted a sponsorship application on behalf of his then fiancée, Ravinder Kaur Danoa. On February 2, 1996, the applicant travelled to India and married her at a temple in Parsrampur. The applicant alleged that this was the first meeting between the two as the marriage had been arranged by a relative in Canada. On February 11, 1996, a marriage certificate was obtained in Jalandhar. The applicant returned alone to Canada in February 1996. On March 6, 1996, an application for permanent residence was submitted for Ravinder Kaur Danoa; it was refused on June 24, 1997.

[4] On December 3, 1998, Ravinder Kaur Danoa was apprehended at Indira Ghandi Airport in New Delhi attempting to board a flight to Canada with a fraudulent visa. The applicant alleged that his wife's father obtained the visa for his daughter and that he had no prior knowledge of this. On December 11, 1998, an appeal against the sponsorship refusal was allowed and on April 1, 1999, a second application for permanent residence was submitted for Ravinder Kaur Danoa.

[5] It appears that some time prior to September 4, 2000, immigration officials received a poison pen letter questioning the applicant's identity and therefore prompting two field investigations. The letter appears to have claimed that the applicant was already married and had a daughter when his immigration application to Canada was processed. Moreover, the letter alleged that the applicant had assumed the identity of his younger unmarried brother to qualify as a single dependent of his mother to gain entry into Canada, and that the applicant had since "remarried" his wife.

[6] On September 4, 2000, Larry Carroll and Philip Lupul, immigration officials from the Canada High Commission in New Delhi, conducted the first of two field investigations in the village of Madhopur where the applicant's extended family was believed to have resided (the first investigation). On October 12, 2000, a statutory declaration regarding the findings of the first investigation was made (the first declaration). On March 11, 2002, a second field investigation of Madhopur was conducted (the second investigation) by Gaynor Rent, then Third Secretary at the Canadian High Commission in New Delhi. Both investigations turned up the same results. Namely, that the individual living in Canada was Narinder Singh Dhaliwal, whereas Jaswant Singh Dhaliwal resided in India and that Narinder had assumed the identity of his younger brother Jaswant, in order to pose as a never-married accompanying dependent of his mother.

[7] Between the two field investigations, the applicant's wife's application for permanent residence was refused on February 5, 2001 on grounds of inadmissibility pursuant to section 19 of the Former Act.

[8] On September 5, 2002, the applicant was reported inadmissible under section 40(1)(a) of IRPA. On September 19, 2002, the admissibility report was referred for an admissibility hearing to the Immigration Division (ID). The ID found that based on a balance of probabilities, the applicant who claimed to be Jaswant Singh Dhaliwal, was really Narinder Singh Dhaliwal and that when he was sponsored to come to Canada in 1991, he was already married to Ravinder Kaur Danoa. As such, the ID determined that the applicant had misrepresented a material fact in his application by assuming the identity of his younger unmarried brother in order to be eligible for sponsorship under the family class as a dependent of his mother. In conclusion, the ID found the applicant to be inadmissible as per paragraph 40(1)(a) of IRPA. Consequently, an exclusion order was issued on May 27, 2004.

[9] The Immigration Appeal Division (IAD) heard the appeal of the removal order on August 9, 2006 and January 10, 2007. On May 29, 2007, the IAD found that the ID decision was valid in law and that the applicant had misrepresented himself as his younger brother in order to be added as a dependent to his mother's application for permanent residence and subsequently to obtain permanent residence status in Canada. This is the judicial review of the IAD's decision.

Officer's Decision

[10] In the decision dated May 29, 2007, the IAD rejected the applicant's appeal of the removal order made against him on May 27, 2004. The IAD identified the determinative issue as whether the

applicant had assumed the identity of his younger brother in order to immigrate to Canada as a never-married dependent son of his mother.

[11] The IAD stated that an evaluation of the evidence pertaining to the investigations was pivotal to the ultimate determination. The IAD considered the applicant's submission that the evidence emerging from the investigations was erroneous, but concluded that there was a slim likelihood that both field investigations would yield similar results if the information was erroneous. The IAD noted that in both investigations, several villagers spontaneously identified a photo of the applicant as being Narinder Singh. Moreover, the villagers exhibited familiarity with the details of the applicant's family life such as the location of his home, the fact that he was married, the fact that he had gone abroad about six to seven years prior to 2000, and the fact that at that time he had a daughter.

[12] The IAD considered the applicant's submission that Arun Kumar, the interpreter used during the investigations, was not fluent in Punjabi, and rejected it. The IAD found that it did not accord with common sense that both investigative parties would take as their interpreter someone who did not speak the language of the village. Moreover, in the applicant's brother's testimony, he referred to the interpreter as "the Punjabi person". The IAD found that this patently undermined any claim that the interpreter was not able to speak Punjabi. The IAD found on a balance of probabilities that Arun Kumar was fluent in Punjabi and able to communicate during both investigations.

[13] With regards to the statutory declarations of villagers recounting their earlier answers to the investigators questions, the IAD found valid reasons for preferring the villagers' earlier statements. The IAD reasoned that villagers' explanations for their "errors" were not very convincing.

[14] The IAD noted that when originally asked of his identity, the applicant's brother insisted that he was Jaswant Singh, but when he realized that the officials questioning him were from the Canadian High Commission, he subsequently insisted that his name was Narinder Singh. The IAD rejected the applicant's explanation that his brother did not understand the question being asked. The IAD did not find that the applicant's brother had provided a satisfactory explanation for his apparent confusion about his own identity.

[15] With regards to the applicant's marriage, the IAD found on a balance of probabilities that the February 2, 1996 wedding between the applicant and Ravinder Kaur Danoa was not their first and that at the time he immigrated to Canada, they were already married. The IAD reached this conclusion based on consideration of the following evidence:

- Statements made by villagers, namely Amarjeet Singh and Gurmeet Kaur who had not recanted their statements
- An affidavit from the applicant's wife's brother sworn March 24, 1993 stating that his sister was married at the time.
- An affidavit from the applicant's father-in-law sworn March 13, 1995 stating that his daughter, Ravinder Kaur, was married at the time.

- Testimony from the applicant's brother stating that as his brother and his wives have the same name, Ravinder Kaur, his father had nicknamed his wife "Simroo". This was not possible unless the applicant was married to Ravinder Kaur before his father died which pre-dates the alleged February 2, 1996 wedding date.

[16] With regards to the applicant's alleged older daughter, the IAD did not accept the medical reports submitted by the applicant stating that the applicant's wife's pregnancy in 2001 was her first. The IAD noted that the medical reports gave conflicting birthdates for the applicant's wife's date of birth and that the applicant's wife had simply stated to the doctor that it was her first pregnancy.

[17] In conclusion, having considered all the evidence, the IAD found that the applicant had assumed his brother's identity in order to immigrate to Canada. The IAD found that the applicant's actions were deliberate and intended to induce and did induce an error in the administration of the Former Act. As such, the IAD found the applicant to be in breach of paragraph 40(1)(a) of IRPA and consequently inadmissible for misrepresentation.

[18] The IAD then proceeded to turn its attention to the question of humanitarian and compassionate (H&C) considerations. The IAD was not of the view that the applicant merited his appeal being allowed on H&C grounds. The IAD acknowledged that the applicant had been a resident in Canada since 1994 and that he was now fairly well established. However, the IAD found that but for the deliberate misrepresentation, he would not be so placed. In conclusion, the IAD

found that there were insufficient H&C factors warranting the exercise of special consideration being extended to the applicant.

[19] On this analysis, the IAD dismissed the applicant's appeal of the exclusion order made against him on May 27, 2004.

Issues

[20] The applicant submitted the following issue for consideration:

1. Did the Board err in law by ignoring and misconstruing evidence and drawing inferences unsupported by the evidence?

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the IAD err in failing to assess the applicant's brother's marriage in relation to the theory that the applicant had assumed his brother's identity in order to immigrate to Canada as a dependent?
3. Did the IAD err in finding that the translator was able to translate in Punjabi?
4. Did the IAD err in determining that the applicant had assumed his brother's identity in order to gain access to Canada?
5. Did the IAD err in its consideration of the H&C factors in this case?

Applicant's Submissions

[22] The applicant submitted that the IAD's conclusion that the applicant misrepresented his identity and marital status was made without regard to the totality of the evidence. It was submitted that the IAD's decision ignores that the Minister's theory is fatally undermined by the evidence presented by the applicant. The applicant argued that the IAD's decision salvages part of the Minister's allegations, without analysis of the evidence undermining the remaining allegations. The evidence referred to by the applicant in making this argument included:

- Testimony from the applicant and his brother to the fact that they had both married women named Ravinder Kaur, but that these were two different women. The applicant's wife's name is Ravinder Kaur Danoa and she has a daughter with the applicant named Gurvir Kaur. The applicant's brother's wife's is Ravinder Kaur Hotti and she has a daughter with the applicant's brother named Jasdeep Kaur.
- DNA evidence attesting to the paternity and maternity of both Guivir Kaur and Jasdeep Kaur.
- A medical report from Ravinder Kaur Danoa's doctor stating that while she was pregnant, she was examined and it was determined that the pregnancy was her first.

[23] The applicant argued that two of the Minister's major findings are absurd given the evidence. Firstly, given that the applicant's brother was already married and had a child when the applicant immigrated to Canada, it is absurd to accept that he assumed his brother's identity to gain access to Canada as a non-married dependent. The applicant submitted that the IAD's failure to

assess the applicant's brother's marriage and how it conflicted with immigration officials' theory was an error. The applicant submitted that there was affidavit evidence before the IAD attesting to the fact that the applicant's brother was married in 1988. This information undermines the central allegation of immigration officials' theory and should therefore have been addressed by the IAD.

[24] Secondly, the Minister's original theory was that the applicant had a child with Ravinder Kaur prior to immigrating to Canada. The Minister first alleged that that child was a daughter named Jasdeep Kaur. The applicant submitted that when DNA evidence was produced to prove that the applicant was not Jasdeep Kaur's biological father, immigration officials adapted their theory stating that they did not claim that the daughter in question was necessarily Jasdeep Kaur. The applicant submitted that it was unreasonable for the IAD to accept the Minister's adaptation of the original theory. The applicant noted that no other name has been specified for the alleged older daughter of the applicant.

[25] The applicant also took issue with alleged flaws made during the immigration investigations. The applicant submitted that the following factual errors and deficiencies were made in relation to the investigations:

- The picture included as Annex "E" to the statutory declaration of Larry Carroll (immigration official) shows a girl who is identified as the niece of the applicant. However, the applicant testified that he is not related to this girl.

- The picture included as Annex “G” to the statutory declaration of Larry Caroll (immigration official) shows a girl who is identified as Harvinder Kaur. However, the applicant testified during cross-examination that this was in fact Satinder Kaur.
- The officer conducting the first investigation never testified.
- The officer conducting the second investigation (Ms. Rent) testified that the investigation was rather short, only about half an hour. She also testified that she had no background information on the file, had no specific recollections of the field investigation and that during the process of the investigation, immigration officials already had a hypothesis they were trying to establish.

[26] The applicant submitted that as he once lived in the village and knows the villagers, his testimony should have been preferred over that of immigration officials. Moreover, there is no evidence as to which identity documents of the villagers were checked, if any were checked at all. The applicant submitted that these matters raise serious doubts regarding the credibility and trustworthiness of the manner in which the investigations were conducted.

[27] The applicant further submitted that the IAD erred in finding that Arun Kumar, the translator used by immigration officials in their investigations, was fluent in the Punjabi language. The applicant submitted that the affidavit of villagers and the applicant illustrate that there were significant language barriers during the immigration investigations. The applicant noted that there was no objective evidence establishing that the translator was fluent in Punjabi. The applicant also

stated that his brother's reference to the translator as "Punjabi person" was made in the context of the translator's race and not his language ability.

[28] And lastly, the applicant submitted that the IAD erred in concluding that there were insufficient H&C factors to warrant the exercise of special consideration given the extent of the applicant's misrepresentation. It was submitted that the IAD failed to consider the impact of the applicant's removal on his elderly mother.

Respondent's Submissions

[29] The respondent submitted that the applicant has failed to demonstrate that the IAD's decision is patently unreasonable. It was submitted that the two separate investigations resulted in the same conclusions. The IAD clearly identified the evidence upon which those conclusions were based:

- Several villagers spontaneously identified a photograph of the applicant as Narinder, not as Jaswant;
- Villagers located the applicant's family home, knew that he was married, knew that he had been abroad for six or seven years prior to the 2000 investigation, and that at that time he had a daughter;
- Three neighbours positively identified the applicant's brother as Jaswant when they took the investigators to the Dhaliwal home;

- Notarized statements in support of the applicant from residents of the village attesting that they were confused about the two brothers' nicknames when they made the identifications were not convincing;
- When Larry Carroll (immigration official) met the applicant's brother, he identified himself as Jaswant. He later stated that he was Narinder when he was questioned about his passport and whether he had travelled to Canada;
- The applicant's niece identified the applicant's photograph as her uncle Narinder who lived abroad;
- The applicant did not know what test was performed on his wife to prove that her first pregnancy was in 2001;
- The medical reports regarding the applicant's wife give different dates of birth for her;
- The applicant's father-in-law swore in an affidavit that his daughter was married in 1995, whereas the applicant stated that he married his wife in 1998; and
- The applicant denied knowledge of his wife's plan to come to Canada with a stolen visa document.

[30] With regards to the applicant's argument that Arun Kumar, the translator, was not qualified to translate in Punjabi, the respondent submitted that the IAD did not accept this argument as it would have been unreasonable for the investigators to take someone who did not speak Punjabi as their interpreter. Furthermore, the respondent noted that even the applicant's brother identified the translator as the "Punjabi person".

[31] The respondent submitted that the applicant is essentially requesting that the Court reweigh the evidence and render a new decision. This is not the role of this Court.

[32] And lastly, the respondent submitted that the IAD did not err in failing to consider the effect of his deportation on his mother, as this was not argued before the IAD. The onus is on the applicant to provide all evidence in support of any H&C claim. The IAD rightly concluded that there were insufficient factors to outweigh the applicant's misrepresentation and disregard for Canadian law.

Applicant's Reply

[33] The applicant submitted that the appropriate standard of review in relation to the decision of the IAD involving removal order appeals is reasonableness "essentially because the decision is not protected by a full privative clause, is not a polycentric one, relates to human interests and does not, insofar as the possibility of rehabilitation factor is concerned, engage the Board's expertise (*Khosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24).

[34] In response to the respondent's submissions, the applicant argued that simply listing the findings of the investigation does not address the issues raised by the applicant. The applicant also made the following clarifications. With regards to the translator, the applicant submitted that several villagers presented affidavit evidence attesting to translation problems. Moreover, the applicant's brother's labelling of the translator as "Punjabi" is not determinative. With regards to the little girl alleging to be the applicant's niece, the applicant submitted that the girl stated that the photo was of

her maternal uncle and therefore, the little girl could not have been Jasdeep Kaur. The applicant also submitted that the fact that the applicant did not know the type of medical procedure performed on his wife is not determinative.

Analysis and Decision

[35] **Issue 1**

What is the appropriate standard of review?

The applicant submitted that the appropriate standard of review is reasonableness based on the authority of *Khosa* above. The respondent appears to be arguing that the appropriate standard of review is patently unreasonable, although they did not rely on any case in particular in making this submission.

[36] I agree with the applicant that as per *Khosa* above, the IAD's exercise of discretion under paragraph 67(1)(c) of IRPA is to be reviewed on the standard of reasonableness.

[37] With regards to whether the IAD considered the relevant factors when exercising its discretion, this is reviewable on the standard of correctness (*Canada (Minister of Public Safety and Emergency Preparedness) v. Philip*, 2007 FC 908 at paragraph 4).

[38] **Issue 2**

Did the IAD err in failing to assess the applicant's brother's marriage in relation to the theory that the applicant had assumed his brother's identity in order to immigrate to Canada as a dependent?

The applicant submitted that the IAD's failure to assess evidence of his brother's marriage in 1988 was a reviewable error as this evidence undermined the Minister's theory and contradicted the IAD's finding that the applicant had assumed his brother's identity in order to qualify as a single dependent of his mother in order to gain entry into Canada.

[39] Having reviewed the IAD's decision, I find that there is no assessment of this evidence. The IAD failed to consider how or even if this evidence undermined the Minister's theory that the applicant had assumed his brother's identity in order to immigrate to Canada as a never-married dependent. The IAD's ultimate finding was that in 1994, when the applicant applied to immigrate to Canada, he was already married and as such, assumed the identity of his brother in order to qualify as a single dependent. Implicit in this conclusion is the finding that the applicant's brother was not married in 1994; otherwise, as the applicant submitted, it would not have been to the applicant's advantage to assume his brother's identity.

[40] The Minister also alleged that the applicant was already the father of a daughter when he immigrated to Canada. There was DNA evidence before the Board that the girl named Jasdeep Kaur was the daughter of the applicant's brother and his wife, and not the applicant's daughter as initially alleged. This evidence could also suggest that the applicant was not married with a child when he

applied to come to Canada. Again, this evidence was not discussed or analyzed by the Board. It was merely mentioned.

[41] In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J.

No. 1425, this Court stated at paragraph 17:

[...] the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts.

[42] In my opinion, the above articulated principle applies to the present case. While the IAD mentioned the applicant's brother's marriage and the DNA tests, it did not assess this evidence in light of its ultimate finding that the applicant had assumed his brother's identity in order to immigrate to Canada as a never-married dependent. It was the job of the IAD to analyze this evidence in light of the Minister's theory and come to a decision. It did not do this, causing it to make a reviewable error.

[43] Because of my finding on this issue, I need not deal with the remaining issues.

[44] The application for judicial review is therefore allowed and the matter is referred back to a different panel of the IAD for re-determination.

[45] Neither party wished to submit a proposed serious question of general importance for certification for my consideration.

JUDGMENT

[46] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred back to a different panel of the IAD for re-determination.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

40(1) A permanent resident or a foreign national is inadmissible for misrepresentation	40(1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) 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;	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	b) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or	c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;
(d) on ceasing to be a citizen under paragraph 10(1)(a) of the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.	d) la perte de la citoyenneté au titre de l'alinéa 10(1)a) de la Loi sur la citoyenneté dans le cas visé au paragraphe 10(2) de cette loi.
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 :
...	...
(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.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2330-07

STYLE OF CAUSE: JASWANT SINGH DHALIWAL
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT OF:** O'KEEFE J.

DATED: March 4, 2008

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