Immigration and Refugee Board of Canada
Immigration Appeal Division

Commission de l'immigration et du statut de réfugié du Canada
Section d'appel de l'immigration

IAD File No. / N° de dossier de la SAI : VB0-02646

Client ID no. / N° ID client : XXXXX XXXXX

Reasons and Decision – Motifs et décision

APPLICATION

Appellant	Manjit Singh SARAI	**Appelant(e)(s)**
Respondent	The Minister of Citizenship and Immigration	**Intimé(e)**
Date(s) of Hearing	N/A	**Date(s) de l'audience**
Place of Hearing	**In Chambers**	**Lieu de l'audience**
Date of Decision	23 November 2011	**Date de la décision**
Panel	**Maryanne Kingma**	**Tribunal**
Counsel for the Appellant	Narindar Kang Barrister and Solicitor	**Conseil(s) de l'appelant(e) / des appelant(e)(s)**
Designated Representative(s)	N/A	**Représentant(e)(s) Désigné(e)(s)**
Counsel for the Minister	Rick Lengert	**Conseil du ministre**

Canada

REASONS FOR DECISION

INTRODUCTION

[1] These are my reasons and decision in respect of the appeal of Manjit Singh SARAI (the "appellant"). The appeal is in respect of a third sponsorship application for the appellant's spouse Gurmeet Kaur SARAI, (the "applicant") made pursuant to provisions for such sponsorship as a member of the family class.[1] My decision addresses whether the doctrine of *res judicata* applies to this appeal to prevent a hearing on the merits.

BACKGROUND

[2] The appellant is a Canadian citizen who came from India in 1996 as a refugee on the grounds that he had been pursued by terrorists in India. He received permanent resident status in 1999 and then sponsored his first wife and two children. They arrived in May 1999 and the appellant and his wife divorced in 2001.

[3] The appellant married a second wife in India in March 2002 and sponsored her for immigration to Canada. Her application was refused and an appeal to the Immigration Appeal Division (the "IAD") was dismissed.

[4] The appellant married his current (third) wife on February 1, 2006 in India and applied to sponsor her for permanent residence in Canada. The application was refused by a visa officer on January 25, 2007 based on section 4 of the *Immigration and Refugee Protection Regulations* (the "*Regulations*").[2] The officer found that the marriage was not genuine and was entered into

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1 *Immigration and Refugee Protection Act* (the "*Act*"), S.C. 2001, c. 27, subsection 13(1),[1] which provides as follows:

> **13 (1) Right to sponsor family member** - A Canadian citizen or permanent resident may, subject to the Regulations, sponsor a foreign national who is a member of the family class.

2 *Immigration and Refugee Protection Regulations*, SOR/2002 – 227, which provides as follows:

> **4 Bad Faith** -For the purposes of these *Regulations*, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the *Act*.

primarily for the purpose of acquiring any status or privilege under the *Act*. An appeal to the IAD was dismissed on March 27, 2008.[3]

[5] A second application to sponsor the applicant was refused on February 5, 2009 on the same grounds. In addition, the visa officer concluded that there was insufficient decisive new evidence presented to overturn the prior refusal. An appeal to the IAD was dismissed on September 1, 2009[4] on finding that the appeal was caught by the doctrine of *res judicata*.

[6] This is the third sponsored application by the appellant for the applicant. It was refused by a visa officer on June 15, 2010[5] based on section 4 of the *Regulations*. The officer took into consideration the evidence presented as new, including that the applicant was pregnant, but found it was not sufficient to show genuineness. Upon appeal to the IAD, the parties were instructed to make submissions in respect of the application of the doctrine of *res judicata* in this case. Submissions were received from both parties.[6]

ISSUE

[7] The issue to be decided is whether the doctrine of *res judicata* applies to prevent the hearing of this appeal on its merits.

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3 *Manjit Singh Sarai* v.*The Minister of Citizenship and Immigration*, (IAD VA7-00639), Ostrowski, March 27, 2008.

4 *Manjit Singh Sarai* v.*The Minister of Citizenship and Immigration*, (IAD VA9-01538), Miller, September 1, 2009.

5 Record at pp. 140 – 141.

6 Appellant Counsel submissions Kang and Company under Fax Transmission Cover Sheet dated July 8, 2011 (28 pages, and Book of Documentary Evidence , 65 pages); Respondent submissions in letter dated July 12, 2011 with reference to earlier correspondence/submissions dated January 31, February 7, 2011 and May 13, 2011; Reply from the appellant Counsel Kang and Company under Fax Transmission Cover Sheet dated and received August 12, 2011.

ANALYSIS

[8] The doctrine of *res judicata* and its purpose,[7] as well as its application to proceedings at the IAD, are well-established law.[8] The doctrine applies when three conditions are satisfied: the parties in the previous proceeding are the same, the previous decision was final, and the issue is the same. In this case, all three of those questions are answered in the affirmative. Indeed, there are two previous IAD decisions that were final adjudications of the same matter; the parties to previous appeals were the same, i.e. the appellant and the Minister of Citizenship and Immigration; and the issue in both appeals was whether the marriage fell within the "bad faith" provision contained in the *Regulations*, i.e. whether the marriage was genuine or if it was entered into primarily for the purpose of gaining any status or privilege under the *Act*.

[9] I interpret the appellant's submissions to concede that the three requirements for *res judicata* exist in this case.

[10] The law requires application of the doctrine of *res judicata* to this appeal unless special circumstances warrant making an exception to the application of the doctrine. In determining whether such circumstances exist, I am guided by the Supreme Court of Canada[9] and the Federal

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7 *Angle v. Minister of National Revenue – M.N.R* [1975] 2 S.C.R. 248, at page 254; and *Danyluk v. Ainsworth Technologies Inc* [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46 (QL) at para. 25. The purpose of the doctrine of *res judicata* was described by the Supreme Court of Canada (SCC) in *Danyluk* as follows:
> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

8 *Danyluk v. Ainsworth Technologies Inc* [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46 (QL) at paragraph 21:
> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

9 *Ibid.*

Court of Appeal[10] to examine whether, taking into account all of the circumstances, application of the principle of *res judicata* would cause an injustice.

[11] The associated concept of *estoppel* is a doctrine of public policy that is designed to advance the interests of justice, as explained by the Supreme Court of Canada in *Danyluk*, at paragraph 25:

> Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, *estoppel* is a doctrine of public policy that is designed to advance the interests of justice. Where as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.

[12] Considerations amounting to an injustice have been identified in numerous cases that make reference to the principles set out in *Danyluk*. For example, in *Toronto (City) v. C.U.P.E., Local 79*, the court explained as follows:[11]

> 52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.
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> 53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by

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10 *Apotex Inc. v. Merck & Co.* (C.A.) [2003] 1 F.C. 242, [2002] F.C.J. No. 811 (QL) at para. 30.

11 *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77.

> permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision. (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

[13] I interpret and summarize the appellant's submissions for the non-application of the doctrine of *res judicata* in this case to be as follows:

- that there was a prior breach of natural justice due to interpretation issues, and
- that there exists decisive new evidence demonstrably capable of altering the previous decision.

[14] In support of the submission regarding interpretation issues in the original IAD proceeding, the appellant provided a July 8, 2011 affidavit of an experienced interpreter, Mr. Sarb Sandhu,[12] who reviewed the recording of the IAD appeal hearing proceeding of March 27, 2008. The interpreter's affidavit includes argument and conclusions about the effect of interpretation "errors" on the outcome of the proceeding, which I have disregarded.

[15] There are two reasons for rejecting the appellant's arguments about interpretation. Firstly, it is incumbent on a party to raise interpretation issues during the course of the hearing or as soon as the errors become apparent. In this case, that may have been when during the course of the hearing if counsel speaks the language being interpreted, or when the reasons were received if errors were not always evident in the course of hearing. From the materials before me, it is not evident that interpretation issues were identified at either of those earliest opportunities.

[16] Secondly, jurisprudence also confirms that there must be evidence of prejudice to the applicant as a result of the errors in question.[13] The general requirement for interpretation is that it must be "continuous, precise, competent, impartial and contemporaneous".[14] I interpret the jurisprudence to confirm that the interpreter, who is not graced with the luxury of time during a

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12 Attachment to the July 11, 2011 submission.
13 *Sukhvir Singh Boyal* v. *Minister of Citizenship and Immigration*, 2000 CanLII 14755 (FC).
14 *Mohammadian* v. *Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191.

hearing, is tasked with conveying the message, not providing perfect translation. In this case, the cited portions of the transcript of the original hearing as set out in the affidavit do not expose errors in the messages conveyed about material areas of testimony. The cited portions include review of testimony about the appellant's claim for asylum,[15] interaction with his children,[16] and some background of his marriage to the applicant and the sponsorship.[17] Even if there was scope to use different wording during those exchanges, it is not evident that the information from witnesses was not adequately conveyed. Furthermore, the referenced parts of the transcript do not disclose that there was prejudice to the appellant as a result of any alleged errors. The heart of Member Ostrowski's findings about credibility arose from such features as unexplained differences between the testimony of the appellant and applicant about his telephone contact with his children, and about background knowledge that was confusing, sometimes conflicting, and generally reflecting a lack of interest by the applicant, which was a material concern given his "baggage" of two divorces and children from a previous marriage. Those conclusions are not undermined by the re-interpretation offered in the affidavit. Consequently, I find that the appellant's arguments for breach of natural justice due to interpretation issues does not provide a basis for the non application of *res judicata* in this case.

[17] In support of the submission that there is decisive new evidence demonstrably capable of altering the previous decision, the appellant submitted the following evidence and argument:

1. Confirmation of the birth of a second daughter to Gurmeet Kaur Sarai (the applicant) on August 3, 2011 in India, with medical records pertaining to the pregnancy and a supporting affidavit from a legal assistant, Jaspreet 'Preeti' Bandesha;
2. Affidavit evidence from family members of the appellant:
    - Shangara Singh Sarai, older sister of the appellant;
    - Bhopinder Singh Sarai, nephew of the appellant;
    - Pardeep Kaur Gill, niece of the appellant.
3. Numerous petitions to immigration authorities from community members suggesting knowledge of the couple and their genuineness.
4. The appellant also submitted that the couple's willingness to undergo DNA testing constitutes decisive new evidence and referred to a decision issued by Member Cochran in support.[18]

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15 Record at pp.5-9.
16 Record at pp.10-11 & 16-21.
17 Record at pp 11-15.
18 *Sidhu* v. *Minister of Citizenship and Immigration*, VA9-05786, In Chambers, November 29, 2010.

[18] Items 2 and 3 do not constitute new evidence within the intended meaning of the phrase as used in *Danyluk* because it has not been shown that efforts were made to provide such evidence at the hearing. Furthermore, it is not evident that the testimony of family members is relevant to the merits of the case as determined by Member Ostrowski. The evidence referred to in item 3 is not relevant.

[19] Regarding item 4, respecting the DNA testing, and the case referred to, two important features distinguish that case from the present appeal: firstly, in the cited case there was a willingness by the couple to undergo DNA testing *in combination with* evidence regarding the effort of the couple to conceive, including *in vitro* fertilization treatments and a subsequent miscarriage that constituted decisive new evidence. Secondly, that evidence was found to be demonstrably capable of altering the result of the first proceeding because the couple's claim that they had been trying unsuccessfully to conceive a child was found by the member to be not credible. That case is, therefore, distinguishable from the case at hand.

[20] While I find that the willingness to undergo DNA testing does not constitute new evidence demonstrably capable of altering the previous proceeding, the evidence of two children allegedly of the marriage is material and relevant to my decision regarding *res judicata*. The circumstances as currently alleged do, in my view, present a situation of exceptional circumstances in which the doctrine of *res judicata* ought not to apply. There are now allegedly two children and a marriage of five years. Efforts to conduct DNA testing in respect of the first child could not be conducted because this was initiated during the applicant's pregnancy and considered unsafe. Further efforts to conduct DNA testing to establish paternity of both children have been discussed but not done. The fact of two children and a marriage that has lasted 5 years cannot be construed as fresh, new evidence demonstrably capable of altering the previous decision and impeaching the original results because the original decision was based on lack of credibility of the couple in material areas that are not directly addressed by the existence of two children and longevity of the marriage. However, a balanced consideration of the third principle set out in *Danyluk* tips in favour of permitting this matter to proceed to a hearing on the merits. The repercussions of the application of *res judicata* to this appeal are, for the applicant and her

two children in India, of substantial magnitude. Therefore, the merits of the case ought reasonably to be addressed in the interest of fairness. While every case in which there is a child or children allegedly of the marriage will not necessarily result in overcoming the application of *res judicata*, in the unique circumstances of incomplete DNA testing processes and the fact of a woman and two children in India whose interests are severely affected by this decision, relitigation will enhance, rather than impeach, the integrity of the system.

NOTICE OF DECISION

For reasons set out above, the doctrine of *res judicata* does not apply and the matter will proceed to a hearing on the merits. The matter will now be referred for further processing within the IAD.

(signed) **"Maryanne Lingma"**

Maryanne Kingma

23 November 2011

Date

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.