Date: 20080116

Docket: IMM-5910-06

Citation: 2008 FC 55

Ottawa, Ontario, January 16, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

AMANPREET KAUR GREWAL
YADVINDER SINGH GREWAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Yadvinder Singh Grewal (Mr. Grewal) and Amanpreet Kaur Grewal (Mrs. Grewal) are husband and wife married in India on April 27, 2001. They have a young daughter Ayra born on June 3, 2002 in India.

[2] Mr. Grewal resides in Canada; he obtained permanent residence in Canada on December 3, 2002 as a single person with no unaccompanying dependents.

[3] Mrs. Grewal still resides in India. Her application for permanent residence to Canada which was received by the Canadian High Commission in New Delhi (the "High Commission") in June 2002 sponsored by her husband in early 2002 was refused by a visa officer on October 26, 2006 because the visa officer found her to be inadmissible to Canada. She had supported her application for permanent residence with a false marriage certificate which stated she and her husband were married on December 30, 2002 i.e. after he had been landed in Canada earlier that month.

[4] During her interview at the High Commission in 2003, she initially maintained that falsehood but, when confronted by the fact that all the guests at the wedding were in summer clothes, admitted she was married in April 2002.

[5] The stated grounds of her inadmissibility are twofold:

- A violation of paragraph 40(1)(a) of the *Immigration and Refugee Protection Act* (IRPA) which states a foreign national is inadmissible 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*. Section 40(2)(a) of that same *Act* specifies the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside of Canada, a final determination of inadmissibility under subsection 1; and

- A violation of paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations* (the "Regulations") which provide a foreign national cannot be considered as a member of the family class if that person was a non-accompanying family member and was not examined.

[6] On May 23, 2006, the applicants were informed of the tentative conclusions reached by the High Commission and were given an opportunity to respond. The formal refusals on the stated grounds of inadmissibility are contained in two letters from the visa officer, Anita Puri, dated October 26, 2006.

[7] The visa officer also made another decision that same day and it is this decision which is the subject of this judicial review proceeding. The visa officer refused to exercise in favour of Mrs. Grewal the Minister's humanitarian and compassionate jurisdiction under section 25 of *IRPA* which authorizes the Minister to exempt breaches of *IRPA* or its regulations. Section 25 of *IRPA* reads, in both official languages:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public	25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

policy considerations.

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.	(2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

[8] It was the applicants' new solicitors, Waldman & Associates, who responded to the visa officer's fairness letters of May 23, 2006. In their submissions, the applicants' solicitors conceded the misrepresentation of when the applicants were actually married and the fact Mrs. Grewal was not examined.

[9] The applicants' solicitors specifically requested the visa officer to exempt Mrs. Grewal from compliance with section 117(9)(d) of the *Regulations* and also sought a waiver of the breach of section 40 of *IRPA* or, in the alternative, requested the issuance to Mrs. Grewal of a temporary residence permit.

[10] They also pointed out to the visa officer Mr. Grewal, who had also produced the false marriage certificate in support of his sponsorship of his wife had been declared inadmissible at an inadmissibility hearing held in Canada but was successful in his appeal to the Immigration Appeal Division (the "IAD") who on February 9, 2006 quashed the deportation issued against Mr. Grewal for equitable reasons.

[11] They also pointed out to the visa officer Ayra was eligible to be sponsored by her father to become a permanent resident of Canada because she was born after Mr. Grewal was landed in

Canada on December 3, 2002. They requested that if the visa officer refused Mrs. Grewal's application for permanent residence, the visa officer continue processing Ayra's application for permanent residence.

[12] The applicants' solicitors referred to their March 9, 2006 humanitarian and compassionate (H&C) submissions which focussed on the best interests of the family and on family reunification.

[13] I was told at the hearing of this judicial review application that Ayra has now become a permanent resident of Canada spending most of her time with her mother in India but has travelled a few times to Canada.

[14] This judicial review application raises two issues:

- First, did the visa officer fail to consider the best interests of Ayra by minimizing those interests; and

- Did the visa officer give overwhelming weight to Mrs. Grewal's misrepresentation leading the visa officer to ignore other relevant factors thus rendering the decision unreasonable.

[15] At the hearing of this application, the applicants' counsel abandoned an issue which had been raised in their written memorandum to the effect the visa officer erred in law by exceeding her jurisdiction because she did not have the necessary delegated authority to render the H&C decision.

The Visa Officer's Decision

[16] As noted, it was on October 26, 2006 that the visa officer determined "it would not be justified by humanitarian and compassionate considerations to grant you permanent residence status or exempt you from any applicable criteria or obligation under the Act".

[17] In her formal letter sent to Mrs. Grewal, there is no mention of the young child and there were no reasons for her conclusion. The visa officer's CAIPS notes were produced. I reproduce those notes where the H&C exemption was discussed:

> "In his letter dated March 9, 2006, the sponsor's representative requested that Amanpreet Kaur Grewal's application be processed on humanitarian and compassionate grounds pursuant to section 25(1) of the *Immigration and Refugee Protection Act*. I have reviewed information on file to determine existence of H&C grounds.
>
> As per the information in our records, Amanpreet Kaur Grewal's parents and siblings are residing in India. The sponsor is the only one from his family residing in Canada. Amanpreet Kaur Grewal is residing with both her and her sponsor's families. She appears to have emotional support available in the country of her residence. The sponsor is financially supporting her and can continue to do so.
>
> The sponsor deliberately did not inform our office or the officer at the port of entry of the change is his marital status during the processing of his application. He decided not to declare the applicant as his dependent spouse and did not have her examined.
>
> Amanpreet Kaur Grewal is an educated person – she possesses master's degree and a diploma in fashion designing. She deliberately provided incorrect information as to the date of her marriage in order to establish that she is eligible for a permanent resident visa as a member of the family class.
>
> By my letter dated May 23, 2006, I informed Amanpreet Kaur Grewal that she is excluded as a member of the family class pursuant to section 117(9)(d) of the *Immigration and Refugee Protection Regulations*. Since her daughter, Arya, was born after the sponsor became a permanent resident of Canada, she is eligible for a visa as a dependent child. In his letter dated June 6, 2006, the sponsor's

> representative stated, "if you refuse the application for permanent residence of Mrs. Grewal, you continue processing the application for permanent residence of the child."
>
> In my opinion, there do not exist sufficient humanitarian and compassionate grounds to warrant an exemption from the applicable criteria.

[18] Anita Puri filed an affidavit in these proceedings upon which she was not cross-examined.

[19] In the first of part of her affidavit, she stated she had reviewed the visa file and the applicants' affidavits sworn on January 13, 2007 and January 17, 2007, as well as the applicants' Memorandum of Argument filed in this application for leave and judicial review of my decision. She also explained her duties in the processing of those applications for permanent residence and how the notes taken by her in relation to the processing of the applicants' H&C application were recorded in the Computer Assisted Immigration Processing System ("CAIPS"), an electronic file system in use at New Delhi for the processing of applications for admission to Canada.

[20] The material parts of her affidavit are contained in paragraphs 7, 8 and 9 of her affidavit which I reproduce:

> 7. In assessing the H&C Application, I considered the fact that the male Applicant's appeal was allowed by the Immigration Appeal Division.
>
> 8. The Applicants are educated and can read and understand English very well. The female Applicant has a master's degree and a diploma in fashion designing. The permanent resident visa was mailed to the male Applicant on October 25, 2001. The usual letter accompanying such a visa, that we used in our office since May 2000, informed the applicants that:

> "Should any of the following circumstances apply to you or any person included in your application, this office must be informed immediately and all visas returned for further action … change in marital status by reason of marriage, divorce, annulment, death or other." Attached hereto as Exhibit "B" to my affidavit is a copy of this letter.

9. In assessing the H&C Application, I took the best interests of the Applicants' child into consideration, although I inadvertently did not state this in my CAIPS Notes. I thoroughly read and considered all of the Applicants' counsel's submissions in support of their H&C Application before I made my decision. I took into consideration the facts that the male Applicant chose not to declare the female Applicant as his spouse before proceeding to Canada and that the female Applicant had provided false and misleading information in order to gain admission to Canada. I considered that the male Applicant's decision to live in Canada was a personal choice made by him. I considered that he would not suffer undue hardship if he returned to India as he had lived in India for almost 30 years before moving to Canada in 2001. Based on his qualifications and work experience, he would be able to easily re-establish in India. I considered that if the male Applicant returned to India, as he is able and free to do, his family would be together. I considered that any hardship that the family suffered would be the creation of the Applicant**s'** own choices. I therefore was not satisfied that the circumstances of this case warranted an exemption from the applicable criteria. [Emphasis mine.]

The IAD's February 9, 2006 decision

[21] In the context of this judicial review application, it is important to review the February 9, 2006 decision of the IAD which allowed Mr. Grewal's appeal and set aside his removal order on H&C grounds. As noted, Mr. Grewal did not challenge the legal validity of the deportation order and his appeal only went to relief on humanitarian and compassionate grounds under subsection 67(1) of *IRPA*. It is important to appreciate his deportation order was based in part on the fact of his inadmissibility to Canada for the same reason Mrs. Grewal was inadmissible: misrepresentation on the date of the marriage. The material part of the IAD's decision is contained at paragraphs 6 through 12 of the decision. After having outlined the fact the Minister was not opposed to humanitarian and compassionate relief [Emphasis mine.], provided that consideration has been given to the best interests of the child directly affected and after setting out the factors identified by

the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 the tribunal wrote:

> [6] Having considered them all, I find that the circumstances, and the fact that the respondent is not opposed to discretionary relief, persuade me that this appeal should be allowed on humanitarian and compassionate grounds.
>
> [7] The parties agree that the misrepresentation, while technically material to the administration of IRPA, is nevertheless not serious because it had and could have had no effect on the appellant's own eligibility to come to Canada because he applied and was admitted as an independent skilled worker and not as a family class member.
>
> [8] Based on submissions before me, which were not opposed by the respondent, I am persuaded that the appellant made the misrepresentation only because of improper advice by an unlicensed immigration consultant, that it would not have occurred but for that advice, and that the appellant sincerely regrets the mistake.
>
> [9] Based on the same, and the documents before me, I am further persuaded that the appellant is now established in Canada and not in India and that he would therefore suffer substantial hardship if removed because he has little or nothing to return to there.
>
> [10] The above-mentioned factors weigh positive in the humanitarian and compassionate balance.
>
> [11] The appellant has one young child in India, his daughter, Ayra Grewal. However, I am not persuaded that her best interests are directly affected in a negative way if I allow the appeal. Appellant's counsel submitted that he has been regularly financially supporting her and her mother, his wife, while in Canada, and that submission was not opposed by the respondent. Moreover, I have no reason to believe that his financial support from Canada will not continue in the future. Moreover, even if the final outcome with respect to her coming to Canada were that she could not, perhaps due to IRP Regulation 117(9)(d) applying to her mother, that final outcome has not yet occurred or been determined, and if that ever is the final outcome, I am not persuaded that the appellant would not return to India of his own volition pursuant to his own choices about his duties with respect to her best interests and to be with his wife.
>
> [12] I perceive no other factor or circumstance that would merit my consideration in deciding this appeal. [Emphasis mine.]

[22] As noted, on March 9, 2006, the applicants' solicitors made lengthy submissions to the High Commission in New Delhi. Specifically, in that letter, the IAD's decision of February 9, 2006 setting aside Mr. Grewal's removal order was enclosed along with voluminous other documentation.

Counsel's March 9, 2006 H&C submissions

[23] The applicants' solicitors made legal submissions based on applicable jurisprudence at that time pointing out when Mr. Grewal applied for permanent residence in Canada under the skilled worker class, he was not married and therefore did not have to declare his wife because at the time of that application she was not his spouse. Counsel argued that regulation 117(9)(d) does not apply to Mrs. Grewal's spouse and that a permanent residence visa should be issued to her. Counsel referred to decisions of my colleagues in *Beauvais v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 1713 and *dela Fuente v. Minister of Citizenship and Immigration*, [2005] F.C.J. No. 1219.

[24] Counsel also argued if Mr. Grewal's sponsorship application of his wife might be caught by the provisions of section 117(9)(d) in order to effect reunification of the family, counsel asked consideration be given to issuing a permanent resident visa to Mrs. Grewal based on humanitarian and compassionate considerations pursuant to section 25 of *IRPA*. It was pointed out while living in Canada, Mr. Grewal supports his wife financially and despite having made several visits to India the separation of the family is taking its emotional toll on the couple because being married almost five years, they have been unable to be together but for short periods of time and Ayra is being raised without her father's constant presence. Counsel pointed out the exercise of discretion under section

25 of *IRPA* is the only remedy that would allow reunification of the family in Canada where Mr. Grewal has been living since December 2, 2001 and where he is well established. Counsel provided examples of that establishment and also his involvement in the community.

[25] Counsel stressed family reunification and referred to and analyzed the Federal Court of Appeal's judgment in *De Guzman v. Minister of Citizenship and Immigration*, 2005 FCA 436 where Justice Evans stated at paragraph 49 that paragraph 117(9)(d) did not preclude other possible bases on which Ms. De Guzman's sons may be admitted to Canada referring, in particular, they could apply to the Minister under section 25 of *IRPA* for discretionary exemption from that paragraph or for permanent resident status emphasizing the discretion may be exercised positively when the Minister is of the opinion it is justified by humanitarian and compassionate circumstances relating to the applicant, taking into account the best interests of a directly affected child, or by public policy considerations. It was because of section 25 Justice Evans concluded paragraph 117(9)(d) did not make *IRPA* non compliant with an international human rights instruments to which Canada is a signatory. Counsel emphasized Mr. Grewal is well established in Canada and will be able to provide for his family here and emphasized family reunification is the ultimate goal for them. Counsel added marriage is a human right, living together is a human right, founding a family is a human right and family integrity is a human right. Counsel wrote: "While the right to marry and to family protection does not imply a right to choose the country in which the family will reside, Canada explicitly recognize that settlement in Canada of close family members of Canadians and permanent residents is a declared objective, rather than merely recognizing the family unit as important in generic sense."

[26] Finally, counsel for Mr. and Mrs. Grewal submitted it was in the best interests of Mr. Grewal's daughter to be reunited with her father and live in Canada together with both her parents. It was submitted the best interests of the child are served by allowing her mother to come to Canada on humanitarian and compassionate grounds. To deny this would cause severe emotional hardship and trauma to the child as she would be prevented from being raised by both of her parents.

Analysis

(a) Standard of review

[27] The standard of review of a decision of an immigration officer as to the existence of H&C factors under section 25 of *IRPA* is reasonableness *simpliciter* as determined by the Supreme Court of Canada in *Baker v. Minister of Citizenship and Immigration*, [1999] 2 S.C.R. 817, a case involving a review of the existence of H&C factors for the purpose of determining whether an immigration officer properly refused to exempt a foreign national from having to obtain a permanent resident visa outside the country.

[28] A decision is an unreasonable one if it is a decision, to use the words of Justice Iacobucci in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997], 1 S.C.R. 748: "that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."

(b) Discussion and conclusions

[29] Counsel for the applicants argued I should give little weight to the visa officer's February 21, 2007 affidavit in which she states, amongst other things, she took into account the best interests of Ayra.

[30] The case law of this Court discusses the circumstance where a visa officer's reasons for decision are contained in the CAIPS notes and where those reasons have been supplemented by the visa officer's subsequent affidavit which does not merely elaborate on cursory reasons for an assessment provided in the CAIPS notes but, as here, provide an entire line of reasoning that is not reflected anywhere in those notes.

[31] In those circumstances, the Court's jurisprudence, as reflected in *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, *Kalra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 941 and *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717 is to give such affidavit little weight because it was sworn several months after the decision was made thus impacting on a person's recollection and is an after the fact explanation.

[32] I agree with the rationale of giving a visa officer's affidavit little weight in such circumstances. Indeed, it has been expressed many times by my colleagues that the value of CAIPS notes is that they constitute a contemporary recording of the visa officer's thinking and questions asked and answers given.

[33] In any event, the visa officer's affidavit is not helpful in respect of the considerations she took into account as to the best interests of Ayra. All she says is that she took into account her best interests but provides no analysis and no reasoning. Her statement is a blanket statement which does not satisfy the well established jurisprudence that the best interests of the child be well identified

and defined (see *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paragraph 7).

[34] There is another reason for allowing this judicial review application. The visa officer stated, in her affidavit, she took into account the IAD's decision in respect of Mr. Grewal.

[35] Once again, on this point, the visa officer's statement is a blanket one without any consideration or analysis of the IAD's decision.

[36] In my view, the IAD's decision is material to a consideration of any H&C factor concerning Mrs. Grewal. The IAD made determinations on the circumstances which led Mr. Grewal to make false representations concerning when he married Mrs. Grewal, the depth of his establishment in Canada and the consequences of his returning to India. I also note that before the IAD the Minister's representative was not opposed to discretionary relief.

[37] In the circumstances, it is not appropriate to deal with the other issues raised by the parties.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the decision of the visa officer in respect of the application of section 25 of *IRPA* is set aside and the matter is remitted to a different visa officer for reconsideration in respect of the H&C issue.

"François Lemieux"

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Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5910-06
STYLE OF CAUSE:	Amanpreet Kaur Grewal et al v. the Minister of Citizenship and Immigration
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 8, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Lemieux J.
DATED:	January 16, 2008

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