Date: 20080515

Docket: IMM-458-07

Citation: 2008 FC 613

Vancouver, British Columbia, May 15, 2008

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

GURPREET SINGH GILL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Gurpreet Singh Gill (the Applicant), an 8-year-old citizen of India, applied for admission to Canada on humanitarian and compassionate (H&C) grounds, so that he could be reunited with his family. The present Application challenges the decision of the Second Secretary, Immigration (the Officer), dated December 7, 2006 in which he found that there are insufficient H&C considerations to approve Gurpreet's request. The issue for determination is whether, in reaching this conclusion, the Officer made a reviewable error. For the reasons that follow I find that he did.

[2] Gurpreet's father, Amarjit Gill, submitted an application to immigrate to Canada as a skilled worker prior to his son's birth. Although he declared his two daughters on his application as unaccompanying dependents, he failed to amend his application to include his son. Amarjit Gill was landed in Canada on July 1, 2000, and has since sponsored his wife and two daughters. Their applications also did not list Gurpreet as a family member. They are all now Canadian citizens.

[3] In May of 2005 a family class sponsorship was submitted for Gurpreet, however it was denied under s.117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*), which prohibits undeclared dependents from later being sponsored as members of the family class. Instead of appealing this decision, an H&C application was submitted under s.25 (1) of the *Immigration and Refugee Protection Act* R.S.C. 2001, c. 27 *(IRPA).*

[4] Counsel for the Applicant sent a letter to Citizenship and Immigration Canada (CIC) accompanying Gurpreet's application. The letter explained the circumstances surrounding the primary negative factor in Gurpreet's application, being that his family failed to declare him, but submitted reasons why this should not result in his application being rejected. The letter then went on to outline the H&C considerations in Gurpreet's case. In addition to noting that it was a goal in the *IRPA* to reunite families, the letter stated:

> The Applicant…is financially dependent on his parents and requires emotional support from his parents. The Child finds himself alone in India as all immediate family members are in Canada. In India although the Child has grandfather who is elderly and unable to provide financial and emotional support [*sic*].
> (Tribunal Record, p. 33)

[5] The Officer interviewed Gurpreet at the consulate in New Delhi on December 7, 2006. The interview, which was conducted through a glass security partition, lasted 1 hour and 20 minutes. Gurpreet's grandfather also attended and was allowed to remain in the room, but was told by the Officer not to interrupt or participate unless asked to do so. The Officer asked Gurpreet a series of questions through an interpreter and recorded his questions and Gurpreet's answers in the CAIPS notes. The Officer then conducted an interview with Gurpreet's grandfather. It is agreed that the notes of these interviews, along with others made by the Officer in the CAIPS system, constitute the reasons for the decision. These reasons indicate that a determining factor in the decision under review is that the Officer concluded that it is in the best interests of Gurpreet to remain in India.

I. The Issues

[6] The primary issue in the present Application is the sufficiency of the Officer's best interests of the child analysis. However, the Applicant also raises procedural fairness with respect to the Officer's interview with Gurpreet. As discussed below, although there are procedural concerns resulting from this interview, I do not find that these concerns constitute a breach of due process.

[7] The statutory basis for H&C applications is provided in s.25(1) of the *IRPA*:

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	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

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 policy considerations.	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.

[8] *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 [*Baker*] establishes that the standard of review applicable for H&C applications is reasonableness (para. 62). *Baker* further establishes that a decision will be unreasonable if the best interests of the child analysis is deficient (see e.g. *Ek v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 526; *Reis v. Canada (Minister of Citizenship and Immigration)* [2002] F.C.J. No. 431).

[9] In order to assess whether the Officer's analysis is deficient, it is first necessary to determine what constitutes a sufficient analysis of the best interests of the child and to decide how it fits into the scheme set out in s.25(1) of the *IRPA.* Therefore, the following issues must be addressed:

1. What is the approach to be adopted for determining the best interests of the child in overseas s.25(1) applications?
2. What is the process for determining the best interests of the child in overseas s.25(1) applications?
3. Is the Officer's best interests of the child determination for Gurpreet deficient?

II. What is the Approach to be Adopted for Determining the Best Interests of the Child in Overseas s.25(1) Applications?

A. *The relevant guidelines*

[10] As the wording of s.25(1) confers a broad discretion on visa officers to exempt applicants on H&C grounds, the Supreme Court of Canada recognizes that the guidelines that are issued by CIC "are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section" (*Baker* at para. 72). Therefore, for H&C applications made within Canada, the test is that set out in the Inland Processing Manual 5: *Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds* (IP5), which states at s.5.3:

> Applicants bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside of Canada would be
>
> (i) unusual and undeserved or
> (ii) disproportionate.
>
> Applicants may present whatever facts they believe are relevant.
>
> [Emphasis added]

However, in the present Application, the facts are different from those considered in IP5. Rather than someone obtaining an exemption in order to make an application for landing from within Canada, the Applicant is applying for an H&C exemption from the application of s.117(9)d of the *IRPR* from outside Canada. Visa officers have a policy manual specifically designed for assessing H&C applications made outside of Canada, being the Overseas Processing Manual 4: *Processing of Applications under Section 25 of the IRPA* (OP4).

[11] OP4 makes no mention of the “unusual, underserved or disproportionate hardship” test, which is specified in IP5. By contrast, OP4, at s.5.5, instructs an officer to assess an H&C application as follows:

> First, the decision-maker assesses the eligibility of the applicant under one of the existing three immigration classes. If the applicant does not meet the requirements of the class in which the application was made, the decision-maker can proceed to review the case under H&C.
>
> The decision-maker then assesses H&C grounds and decides whether the applicant should be exempted from these sections of the Regulations. The applicant bears the onus of satisfying the decision-maker that the H&C factors present in their individual circumstances are sufficient to warrant an exemption.
> The decision-maker considers the applicant's submissions in light of all the information known to the Department.
>
> After a positive H&C decision is made, the applicant must still satisfy the remaining requirements for a permanent resident visa and must not be inadmissible.
>
> [Emphasis added]

Nevertheless, the Respondent argues that since OP4 makes reference to IP5 to say that “[f]or information regarding the processing of applications under section 25 of the Act (IRPA) at inland offices of Citizenship and Immigration Canada, see IP 5.” and “[f]or more detailed guidelines on the best interests of the child in an inland H&C context, see chapter IP 5, section 5.19”, the undue hardship test should be applied under OP4. However, in my opinion, these references do not have the effect of importing the IP5 test into OP4 evaluations, because the driving factor behind an applicant’s inland H&C application is to avoid having to leave Canada to apply for permanent

residence from outside. It does not make sense to import the undue hardship test in overseas applications because the hardship of having to leave Canada is not a factor in play.

B. ***The relevance of the decision in Hawthorne v. Canada [2003] 2 F.C. 555 (C.A)***

[12] The Court of Appeal's decision in *Hawthorne* is an authority often referred to with respect to the application of the best interests of the child test in inland applications. Since inland applications relate specifically to the removal of a person from Canada and the impact of this removal on a child, a realistic approach is acknowledged in the majority decision of *Hawthorne* which was decided under s.114(2) being the H&C section of the former *Immigration Act*. The certified question posed and the answer given in *Hawthorne* is as follows:

> Q.: Is the requirement that the best interests of children be considered when disposing of an application for an exemption pursuant to subsection 114(2), as set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, satisfied by considering whether the removal of the parent will subject the child to unusual, undeserved or disproportionate hardship?
>
> A.: The requirement that the best interests of the child be considered may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.
>
> [Emphasis added] (*Hawthorne*, at para 11)

Thus, *Hawthorne* stands for the proposition that the best interests of a child must always be determined in H&C applications, but, specifically for inland applications, the reality of the situation might focus the analysis on the suffering that a child will experience as a result of the removal of a person from Canada (*Kolosovs v. Canada (Minister of Citizenship and Immigration)* 2008 FC 165).

Obviously the reasoning in *Hawthorne* does not apply to overseas applications because such applications do not involve the removal of a person from Canada. Therefore, I do not agree with the decisions in *Yue v. Canada (Minister of Citizenship and Immigration)* 2006 FC 717 and *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 156 which are advanced by the Respondent as relevant because they apply the *Hawthorne* analysis to overseas H&C applications.

C. *The relevance of family law principles*

[13] In the family law context, it is well established that the best interests of the child analysis should not focus on harm, although the presence or absence of harm may be an important factor to consider. Rather, the best interests of the child is a child-centric analysis, as the best interests of the child "is the positive right to the best possible arrangements in the circumstances of the parties" (*Young v. Young* [1993] S.C.J. No. 112 (Q.L.) at para. 102 per Justice L'Heureux-Dubé [*Young*]).

[14] Family law values have often been reflected in immigration jurisprudence. *Baker* notes that an officer assessing an H&C application must be "alert, alive and sensitive" to the child's best interests (*Baker*, above, at para. 75). Similarly, in *Canada (MCI) v. Legault*, 2002 FCA 125 [*Legault*] the Federal Court of Appeal says that, in order for the best interests of the child analysis to be complete, these interests must be "well identified and defined". CIC itself recognizes in its policy manual that the best interests of the child analysis requires a contextual approach by reference to family law:

> The outcome of a decision under A25(1) that directly affects a child will always depend on the facts of the case. Officers must consider all evidence submitted by an applicant in relation to their A25(1) request. Thus, the following guidelines are not an exhaustive list of

> factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide to officers and illustrate the types of factors that are often present in A25(1) cases involving the best interests of the child. As stated by Madame Justice McLachlin of the Supreme Court of Canada, ". . . The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty. . . ." (*Gordon v. Goertz*, [1996] 2 S.C.R. 27).
>
> [Emphasis added] (IP 5 at s.5.19, referenced in OP4 at s. 8.3)

[15] All of these statements reflect the fact that the best interests of the child analysis is necessarily context specific and requires an officer to identify the factors in play in order to assess how they will impact the child. The critical points in conducting the best interests of the child analysis are found in *Young* in Justice L'Heureux-Dubé's decision at para. 71:

> A determination of the best interests of the child encompasses a myriad of considerations, as child custody and access decisions have been described as "ones of human relations in their most intense and complex form". In contrast to most issues that come before the courts, such decisions are "person-oriented" rather than "act-oriented" and require an evaluation of "the whole person viewed as a social being" (L. LaFave, "Origins and Evolution of the `Best Interests of the Child' Standard" (1989), 34 *S.D.L. Rev.* 459; R. H. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 *Law & Contemp. Probs.* 226). Courts are required to predict the happening of future events rather than to assess the legal import of past acts and judge the effect of various relationships on the best interests of the child, all the while weighing innumerable variables without the benefit of a simple formula.
>
> [Emphasis added]

Therefore, in my opinion, the best interests of the child analysis must be highly contextual and focused on the future.

III. What is the Process for Determining Best Interests of the Child in Overseas s.25(1) Applications?

[16] Flowing from the need for a contextual assessment of a child's circumstances, it is possible to outline two steps that must be taken by an officer in order to adequately assess a child's best interests.

A. *Identify the factors impacting a child's best interests*

[17] The first step in an analysis requires the identification of the evidentiary factors which affect a child's best interests. The immigration manuals suggest some common factors that, when present, impact a child's best interests:

> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:
>
> • the age of the child;
> • the level of dependency between the child and the H&C applicant;
> • the degree of the child's establishment in Canada;
> • the child's links to the country in relation to which the H&C decision is being considered;
> • medical issues or special needs the child may have;
> • the impact to the child's education;
> • matters related to the child's gender.
>
> (IP 5 at s. 5.19, referenced by OP4 at s. 8.3)

[18] More complete lists of possible factors are available from family law legislation where courts are tasked on a regular basis with assessing the best interests of children. The following list is stated in s.24(2) of the Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C-12., which states that, when establishing what is in a child's best interests:

> 24 (2) The court shall consider all the child's needs and circumstances, including,
> (a) the love, affection and emotional ties between the child and,
> (i) each person entitled to or claiming custody of or access to the child,
> (ii) other members of the child's family who reside with the child, and
> (iii) persons involved in the child's care and upbringing;
> (b) the child's views and preferences, if they can reasonably be ascertained;
> (c) the length of time the child has lived in a stable home environment;
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
> (e) any plans proposed for the child's care and upbringing;
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and
> (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Similar sections are contained in family law legislation in other jurisdictions in Canada (see e.g. British Columbia *Family Relations Act*, R.S.B.C. 1979, c. 121 at s. 24 and the New Brunswick *Family Services Act*, S.N.B. 1980, c. F-2.2, s.1).

[19] Therefore, if an officer fails to identify the factors which impact a child's best interests, his or her analysis of the best interests of the child is defective.

B. ***Make a well reasoned choice between available options***

[20] Once the factors that impact on a child's best interests have been identified and analyzed, a decision-maker must apply this knowledge to make a choice between the options available for the future of the child. The child is entitled to careful reasons to explain the choice made.

C. ***Weigh best interests against other relevant factors***

[21] In my opinion, in the determination of an overseas H&C application, it is only after the best interests of the child analysis is completed that an officer can proceed to apply the analysis to the immigration issue at hand in reaching an s.25(1) determination. *Legault* establishes that the best interests of the child does not dictate a specific result under s.25(1) and it is for the officer to determine the degree of weight to be placed on the best interests conclusion. Clear reasons must be provided with respect to the outcome of this balancing process.

IV. Was the Officer's Best Interests of the Child Determination for Gurpreet Deficient?

A. ***Procedural fairness concerns***

[22] The Applicant argues that, because the circumstances of the interview were intimidating, and the questions asked of Gurpreet were not age appropriate, it was unfair to rely on the evidence of an 8-year-old child. As a child's opinion on his or her future may provide relevant information in concluding a child's best interests analysis, conducting an interview might very well be appropriate. In the present case, in my opinion, it was appropriate. While the interview was conducted under security requirements, I do not find either the process adopted or the questions placed constitute a breach of due process. However, I find the use of Gurpreet's statements to the Officer to be troubling.

B. ***Were the factors impacting Gurpreet's best interests identified?***

[23] The entire best interests of the child analysis of the Officer is as follows:

> Gurpreet Singh Gill is already separated from his family since a long time and his financial needs are in part assured by his parents living abroad and the extended family living with him in India. The family configuration at home has been able to cope with the emotional needs required in the absence of support and assistance of the close family unit, as they provided basic necessities (food, shelter) and provided support to pursue further studies. The best interest of the child is to be with his grandfather and the person he is considering to be his mother, his aunt.
>
> [Emphasis added] (Tribunal Record, p. 7)

In my opinion, this analysis shows that the Officer failed to identify the factors impacting Gurpreet's best interests. Although the analysis includes passing reference to important issues, such as financial and emotional needs, the Officer's analysis is misdirected. The Officer focuses on Gurpreet's ability to cope in his current living situation instead of determining which living option would serve his future best interests.

[24] Several factors were mentioned in Gurpreet's paper application and interview which impact on his best interests: he is an eight-year-old separated from his parents and his sisters; he misses his mother, father, and his sisters; he talks to his parents on the phone several times a week; his family sends him presents; he is financially dependent on his parents; his grandfather caregiver is growing old and might not be able to care for him in the future; he wants to go to Canada to be with his family; he is having trouble in school; and he feels neglected by his aunt and uncle because they pay more attention to their own children.

[25] In the decision rendered, the Officer does not clearly identify the factors in play. Indeed, the Officer seizes on one response given by Gurpreet at the interview and bases the best interests of the child conclusion on a misunderstanding that Gurpreet considers his aunt to be his mother.

The question and answer evidence with respect to the misunderstanding is as follows:

> Do you have your own room?
> My uncle and aunt are with me.
>
> Are there any other children in the house?
> My cousin brother and cousin sister, they are younger than me.
>
> […]
>
> How many persons live in your house?
> Grandfather, uncle, aunt, cousin sister and cousin brother.
>
> Who is cooking food?
> Mommy my aunt.
>
> […]
>
> Do you know where is [sic] your mother and father?
> In Canada, In Vancouver.
>
> […]
>
> Do you have any brother and sisters?
> I have two sisters in Canada.
>
> Are you missing anything?
> My mother, father and two sisters.
>
> Do you know why your family never came to visit you?
> I don't know.
>
> Do you think they miss you?
> Yes.
>
> Why do you say that?
> They always telling [sic] me this on the phone.

> What is the difference between what your grandfather can give you and your father?
> I don't know.
>
> How do you called [sic] your aunt in your house?
> Mamma.
>
> What does this mean?
> I don't know.
>
> How do you called [sic] your uncle?
> Chacha (uncle).
>
> [Emphasis added]
>
> (Tribunal Record, pp 5-6)

In order to clarify why Gurpreet calls his aunt "Mamma" the Officer specifically sought information about this from Gurpreet's grandfather:

> What can you say about the fact that he seems to consider his aunt as his mother?
> Earlier he used to call her chachi (aunt) but when their own kids called her mommy, he started the same [sic].
>
> What is the difference with his own mother he practically never saw?
> They gave more attention to their own kids now. It is all normal.
>
> Could you tell me why his parents never came back to India to visit Gurpreet?
> When they left for the first time, he used to cry a lot because he missed them. I told them, either you come and live here permanently or arrange for a visa for him.
>
> [Emphasis added] (Tribunal Record, p. 6)

It is clear that, in reaching the decision under review, the Officer relied upon an erroneous finding of fact being that Gurpreet considers his aunt to be his mother.

C. ***Did the Officer make a well reasoned choice between available options?***

[26] The obvious answer is “no”. Since the Officer failed to identify many of the factors that impact on Gurpreet’s future best interests, it was impossible for him to make a well reasoned choice.

D. ***Did the Officer weigh best interests against other relevant factors?***

[27] Since the decision-making in reaching this conclusion was fundamentally flawed, in fact, no weighing could take place.

V. Conclusion

[28] Since the Officer’s best interests of the child analysis is made in fundamental error, I find that the decision under review is unreasonable and, thus, is made in reviewable error.

JUDGMENT

Accordingly, I set aside the decision under review, and refer the matter back for redetermination by a different officer.

CERTIFIED QUESTION

Counsel for the Respondent proposes the following question for certification:

> When considering the best interests of a child in the context of a humanitarian and compassionate (H&C) request received overseas, following a finding that the child is not a member of the family class based on subsection 117(9)(d) of the *Immigration and Refugee Protection Regulations*, is it sufficient for an immigration officer to consider whether the refusal to grant the H&C request made overseas would cause the child unusual, undeserved or disproportional hardship?
>
> (Respondent's Certification Argument dated April 24, 2008)

Counsel for the Respondent argues that "[t]his question transcends the interests of the parties, contemplates issues of broad significance and general application and is dispositive of the case at hand" and, therefore, meets the test for certification under s. 74(d) of the *IRPA*.

There is no dispute that Counsel for the Respondent cites the correct test for certification (*Liyanagamage v. Canada (MCI)*, [1994] F.C.J. No. 1637 (C.A.)). However, Counsel for the Applicant objects to certification on the basis of the following argument:

> The draft reasons of the court dated 17 April 2008 rely heavily on the unique facts of the case and in particular, relies on a finding that the

> Visa Officer misconstrued the evidence by stating in his refusal that the applicant considers his mother his aunt. This was found to be an erroneous finding of fact. Moreover, it has been found that the officer did not clearly identify the factors necessary for a proper best interest of the child assessment. This is a factual determination, unique to the situation evident in this application.
>
> (Applicant's Certification Argument dated May 1, 2008)

I agree with Counsel for the Applicant. Because the primary errors in the decision under review in the present Application are factual in nature, and because the result is driven by these errors, I find that the answer to the proposed question cannot be determinative on appeal. Therefore, I find that the proposed question does not meet the test for certification.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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