

Federal Court



Cour fédérale

Date: 20160215

Docket: IMM-2429-15

Citation: 2016 FC 193

Ottawa, Ontario, February 15, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**SURINDER KAUR GILL
JASKARAN SINGH GILL**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of an Immigration Officer at the High Commission of Canada in New Delhi, India, dated June 12, 2015, concluding that the Applicant was not a “dependent child” of the principal Applicant as defined in section 2 of the

Immigration and Refugee Protection Regulations, SOR/2002-227 [the Regulations], and was therefore not a member of the Family Class.

II. Background

[2] Surinder Kaur Gill [the principal Applicant] and her adopted son, Jaskaran, the second named Applicant in this judicial review (collectively, “the Applicants”) are citizens of India. The principal Applicant, with her late husband, Nirmal, has four daughters who currently reside in the United Kingdom, Canada, India and the United States.

[3] Jaskaran was born September 15, 1993, and was allegedly adopted into the Gill family around October 20, 1995. Jaskaran is the son of the principal Applicant’s sister, Manjeet, who died in 1995, shortly after the birth of her second son. Prior to her death, Manjeet and her husband Nishan agreed to give Jaskaran in adoption to the principal Applicant and her husband, since they had no sons of their own.

[4] The principal Applicant states that Jaskaran was two at the time of his adoption and grew up with the principal Applicant and her husband as his parents.

[5] The principal Applicant’s affidavit sets out that a small ceremony of adoption was held in the village where Manjeet and Nishan had been living in 1995, shortly following Manjeet’s death. At that time, the principal Applicant and her husband did not formalize the adoption legally with an Adoption Deed, as she claims they did not understand the necessity of doing so. Despite the lack of legal adoptive documents, Jaskaran was treated as a son and as a brother to

the principal Applicant's four daughters: he lived as part of the Gill family, was included on the family Ration Card, was known in the community to be their son, and lit the funeral pyre at his adoptive father's funeral.

[6] In November 2004, the principal Applicant and her husband obtained an Adoption Deed, upon learning from village elders that Jaskaran would not be eligible to inherit his adoptive father's property without a formal deed. Jaskaran's name change to Jaskaran Singh Gill was also published in a local newspaper at that time.

[7] Until the Adoption Deed was executed in 2004, Jaskaran's school documents listed his biological parents as his parents, which the principal Applicant explains is simply because they were indicated on his birth certificate. Post-2004, the principal Applicant and her husband were indicated as Jaskaran's parents.

[8] In May 2008, the principal Applicant's daughter filed an application to sponsor the principal Applicant, her husband, and Jaskaran for permanent residence in Canada as members of the Family Class.

[9] By letter dated January 6, 2015, the Applicants were asked to attend an interview on February 24, 2015, at the High Commission of Canada in New Delhi, India. The letter requested that the principal Applicant bring a number of documents, including evidence establishing a relationship to her dependents and power of attorney or guardianship documents for adoptive children. The principal Applicant brought the original Adoption Deed, the Ration Card,

Jaskaran's school documents, the newspaper article noting Jaskaran's name change, and many family photos showing the Gill family, Jaskaran included, over the years. According to the principal Applicant, the Officer did not look at any of these supporting documents in the interview.

[10] During the interview the principal Applicant was asked three times whether the "giving and taking ceremony" – as required under section 11 of the *Hindu Adoptions and Maintenance Act, 1956 [HAMA]* – had taken place, to which she replied "we didn't [have] any ceremony... no we never did a giving and taking ceremony", as there was no such tradition. The principal Applicant claims she did not understand the legal requirements of adoption in India, and thus to what the Officer was referring. The Adoption Deed conveys a small ceremony was held at the time of the adoption, and the principal Applicant claims everyone in her family and community knew that Jaskaran lived with them as their son since 1995. She does not recall details of the ceremony.

[11] Jaskaran was also separately interviewed by the Officer on February 24, 2015. Although the principal Applicant had claimed Jaskaran was adopted and had lived with her since 1995, Jaskaran informed the Officer he had only begun living with the principal Applicant in 2004.

[12] A decision letter from the Officer, dated April 25, 2015, and the Global Case Management System [GCMS] notes taken in relation to the interviews of the Applicants constitute the Officer's reasons for his decision.

A. *Decision Letter*

[13] In the decision letter, the Officer began by setting out the definition of “dependent child” in section 2 of the Regulations. The Officer indicated that *HAMA* governs Hindu adoptions in India and applied to Jaskaran’s adoption by virtue of subsection 2(1)(b) which brings Sikhs under its application. Subsection 5(2) stipulates that adoptions not made in accordance with *HAMA* are void and do not create rights in the adoptive family.

[14] Section 11 of *HAMA* sets out conditions for a valid adoption, stating that in every adoption “the child to be adopted must be actually given and taken in adoption by the parents ... with intent to transfer the child from the family of its birth ...to the family of its adoption” (subsection 11(vi)).

[15] The Officer noted that the Adoption Deed, executed November 22, 2004, indicated that the physical giving and taking for Jaskaran’s adoption had occurred October 20, 1995, which was inconsistent with the principal Applicant’s statements at the interview that no such ceremony had taken place and was also inconsistent with Jaskaran’s position during his interview.

[16] The Officer also referenced the Supreme Court of India’s decision in *Lakshman Singh v Rup Kanwar* (AIR 1961 SC 1378) [*Lakshman Singh*], wherein it found there cannot be a valid adoption without the giving and taking ceremony. Although it is essential to have a formal

ceremony, no particular form is prescribed and the nature of the ceremony may vary depending upon the circumstances of each case.

[17] The Officer was not satisfied a physical giving and taking for Jaskaran's adoption had taken place as required under *HAMA*, and thus the adoption was void. Furthermore, execution of the Adoption Deed did not, *per se*, validate the adoption. Accordingly, the Officer concluded that Jaskaran is not a dependent child according to the Regulations.

[18] The Officer also considered the application and surrounding circumstances according to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [Act], concluding that humanitarian and compassionate [H&C] considerations did not justify granting permanent residence or exemption from criteria under the Act.

B. *GCMS Notes*

[19] The Officer's GCMS notes detail the interview questions and Applicants' responses. Of particular importance are the principal Applicant's following answers:

Q: Do you have photos of the "giving and taking" ceremony? We didn't (sic) any such ceremony Q: Why not? We don't have any such tradition.

Q: On what basis did Jaskaran's biological parents give him up to you for adoption? They gave him to us because we had no sons. My sister died shortly after giving birth to her second son. They gave Jaskaran to us after Gurkeert was born. My sister had said that if she had another boy, they would have given Jaskaran to us

...

[20] In his separate interview with Jaskaran, the Officer's notes indicate that Jaskaran stated he had resided with the principal Applicant since 2004. Jaskaran had not severed ties with his biological siblings or father, although he does not see them on a regular basis.

[21] The Officer noted his concerns as follows:

Adoption is said to have occurred when Jaskaran Singh was one to two years of age, however adoption deed was created in 2004 when he would have been approximately 11 years of age. SPR [Sponsor – one of the principal Applicant's daughters] immigrated to Canada in 2005. It appears highly coincidental that adoption deed was made in 2004, shortly before SPR immigrated to Canada. – No official adoption "giving and taking" ceremony is said to have taken place. This seems highly unusual and is contrary to established traditions and norms. – There is very limited evidence to confirm that [the principal Applicant] took Jaskaran Singh in adoption at the age of one or two... I am satisfied that the adoption of Jaskaran Singh Gill is not genuine

[22] Regarding H&C considerations, the Officer noted that Jaskaran is now 21 years old and is actively pursuing studies. He appears to have good living arrangements in India and there is no reason why they cannot continue. His biological family resides near to him and they maintain some contact. Furthermore, the Officer noted Jaskaran has not indicated any apparent threat to his life.

III. Issues

[23] The issues are as follows:

- A. Was there a breach of procedural fairness?
- B. Was the Officer's decision reasonable?

IV. Standard of Review

[24] The parties agree that the standard of reasonableness governs discretionary decisions and questions of mixed fact and law, including an Officer's determination of whether someone is a "dependent child" pursuant to the Regulations and an Officer's assessment of a foreign adoption's validity in accordance with foreign law (*Boachie v Canada (Minister of Citizenship and Immigration)*, 2010 FC 672 at para 21; *Singh Dhadha v Canada (Minister of Citizenship and Immigration)*, 2011 FC 206 at para 4).

[25] The issues of natural justice and procedural fairness are reviewable on a correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

V. Analysis

A. *Was there a breach of procedural fairness?*

[26] The Applicants submit the Officer breached the duty of fairness by failing to properly inform them that the February 24, 2015 interview was exclusively related to Jaskaran's adoption. The letter inviting them to the interview was a form letter that requested they bring along numerous documents, some completely unrelated to their case. It in no way informed them of the nature of the interview or of the Officer's concerns with their application.

[27] As well, the Applicants were not given an opportunity to address the Officer's concerns that there was insufficient evidence demonstrating that Jaskaran was adopted at age two, as

outlined in the decision letter. The Applicants concede in their Reply Memorandum that the Officer alerted them to his concerns at the interview, however, they argue that the lack of advance warning was procedurally unfair because it denied them of the opportunity to adequately prepare, and once apprised of the Officer's concerns, to respond or provide further documentation, as his decision was final.

[28] The Applicants rely on Justice Richard Mosley's decision in *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284, to stand for the principle that visa officers may be required to alert applicants to their particular concerns in applications "so that an applicant may have a chance to "disabuse" an officer of such concerns, even where such concerns arise from evidence tendered by the applicant" in order to comply with the duty of fairness (para 22).

[29] Alternatively, the Applicants assert that the Officer breached the duty of fairness by concluding that they provided "limited evidence" that Jaskaran had been living with his adoptive parents since he was two. The Officer did not examine any of the original documents the principal Applicant had been specifically instructed to bring to the interview, which include the Gill family Ration Card listing Jaskaran as "son", and many family photographs evincing the parent-child relationship that had been ongoing for many years.

[30] Instead, the Officer simply determined that Jaskaran's adoption did not comply with *HAMA*, that there was a lack of evidence he was adopted at the time claimed, and that accordingly he was not a "dependent child".

[31] In my opinion, it was not a breach of procedural fairness that the letter scheduling the interview did not explicitly state Jaskaran's adoption was a central issue.

[32] While I disagree with the Respondent that the adoption was plainly at issue, as simply requesting in a standard form letter that various documents be brought and that adopted children accompany at the time of the interview does not convey that the validity of the adoption was of concern to the Officer, the purported lack of advance warning was not procedurally unfair. The Applicants were not denied any opportunity to adequately prepare: they were instructed to bring pertinent documents to the interview, including documents relating to adoption, which they did.

[33] Nor do I find merit in the Applicants' arguments that the Officer did not alert them to his concerns, as the GCMS notes clearly indicate that the Officer did convey his concerns surrounding the adoption, at least to the principal Applicant, during the interview.

[34] Whether the Officer considered the documentation the Applicants brought to the interview is difficult to discern. The principal Applicant states in her affidavit that at no point during the interview did the Officer look at any of the documents she had been requested to bring, and which evince the Applicants' parent-child relationship since before 2004. However, the GCMS notes indicate the Officer was at least aware that the principal Applicant had not provided any photos of the "giving and taking" ceremony, which he would not know without having reviewed the documents.

[35] A review of the evidence demonstrates there are several photographs of Jaskaran with the principal Applicant and her husband at ages younger than 11 years old. While these evince a relationship between the Applicants, the photos do not confirm the adoption occurred when Jaskaran was one or two, as the Officer stated. I do not find that his conclusion demonstrates documents were not reviewed, or that there was a breach of natural justice.

B. *Was the Officer's decision reasonable?*

(1) The Officer's decision on the validity of the Adoption

[36] The Applicants accept that *HAMA* governs adoptions in India, but they reference section 16 (not referenced in the decision letter), which indicates if there are registered legal documents relating to adoption, the adoption is presumed to have been made in compliance with *HAMA*, unless and until disproved.

[37] In the present case, the Adoption Deed states there was a "giving and taking" of Jaskaran in 1995. This is discounted by the Officer because it contradicted the principal Applicant's statements during the interview that no such ceremony took place. However, the Applicants point out that *HAMA* does not set out requirements for "giving and taking", and does not necessitate a formal ceremony. Instead, all that is required is that the "child to be adopted must actually be given and taken in adoption by the parents or guardian concerned" pursuant to subsection 11(vi). The Applicants submit there is evidence this requirement has been complied with; the principal Applicant specifically stated in the interview that her sister "gave him to us because we had no sons... They gave Jaskaran to us after Gurkeert was born".

[38] The Applicants argue that the Adoption Deed provides presumptive *prima facie* evidence of the validity of the adoption, and the Officer acted unreasonably by assigning this evidence little weight. Although execution of a deed is not a substitute for the act, the Applicants claim that section 16 of *HAMA* creates a presumption that the adoption was compliant, which has not been rebutted. The principal Applicant argues that her statement in the interview that no such ceremony had taken place is insufficient to rebut the presumption. This is particularly considering that the principal Applicant's affidavit conveys she did not understand what the Officer was referring to at the time.

[39] The Applicants submit that the evidence before the Officer established that Jaskaran's biological father had given him to the principal Applicant and her husband following her sister's death in 1995. This is confirmed in the Adoption Deed and by the principal Applicant in her interview. Indian Law does not proscribe what kind of ceremony must take place, simply that the child is given and taken in adoption – precisely what happened in this case. Thus, the adoption complied with *HAMA*, and it was unreasonable for the Officer to require a formal ceremony.

[40] The Respondent cites *Singh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1302, in support of his argument it was reasonable for the Officer to conclude the alleged adoption is not valid. At paragraphs 11 and 12 of that decision, Justice Russell Zinn states:

11 I further agree with the respondent that the facts at hand more closely parallel, in fact almost identically, those in *Dhadda v Canada (Minister of Citizenship & Immigration)*, 2011 FC 206 (FC), in which Justice Mactavish held that it was reasonable for the officer to conclude that no 'giving and taking' ceremony took place even though the Deed of Adoption stated otherwise and further that the Deed of Adoption was not a Court Order, and that it was inconsistent with the evidence of the adoptive father.

12 The Deed of Adoption is a contract drawn up by lawyers for the parties and executed by them. It is not evidence that a court of law turned its mind to whether the legal requirements for a valid adoption had been satisfied. It was then taken to a court for registration; however, there is no evidence that the registration process involved any independent decision-making. It appears to be merely an administrative process for which the court charges a nominal fee.

[41] Other cases of this Court have confirmed an adoption is not valid in accordance with the laws of India in the absence of the “giving and taking ceremony” (*Sahota v Canada (Minister of Citizenship and Immigration)*, 2015 FC 756 at paras 56 – 60 [*Sahota*]; *Dhindsa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1362 at para 21, 34; *Rai v Canada (Minister of Citizenship and Immigration)*, 2014 FC 77 at para 20).

[42] While I may disagree with the Officer’s weighing of the evidence, I agree with the Respondent that the Officer’s decision was reasonable.

[43] The Officer placed more weight on the Applicants’ answers in the interview than on the Adoption Deed, which he was entitled to do so long as it fell within the range of reasonableness.

[44] The Officer was aware of case law by the Supreme Court of India commenting on the validity of adoptions. It is the Officer’s role, not the Court’s upon judicial review, to assess and weigh the evidence. The Court is not to intervene unless the Officer’s decision falls outside the range of acceptable outcomes, defensible on the facts and law. There is evidence supporting the Officer’s conclusion, and the reasons provided in the refusal letter and GCMS notes are intelligible, justified and transparent.

[45] While I am sympathetic for Applicants, as it appears that an inadvertent legal technicality (giving and taking and proof thereof) effectively precludes Jaskaran's inclusion on the sponsorship application, the adoption was not considered by the Officer to be legally valid when it allegedly commenced (in 1995), and also was not properly carried out upon legally formalizing it with the Adoption Deed (no giving and taking in 2004). Applying the deferential standard of review, and in the face of some conflicting evidence, the Officer's decision is reasonable and open to him on the facts and evidence.

(2) The Officer's evaluation of relevant evidence

[46] The Regulations define "adoption" as creating a legal parent-child relationship and severing the pre-existing parent-child relationship.

[47] The Applicants submits that the Officer erred by ignoring relevant evidence that demonstrated the genuine nature of the relationship between the Applicants, including the Adoption Deed and Jaskaran's school records listing the principal Applicant and her husband as his parents. Although Jaskaran's school documents pre-dating the Adoption Deed (prior to November 2004) list his biological parents as his parents, this is simply because they had not legally formalized the adoption.

[48] The Applicants claim the Officer erred by failing to engage in a thorough analysis of the genuineness of the relationship between the Applicants. In assessing whether an adoption is genuine, the Applicants submits that the Officer should have considered the non-exhaustive factors set out by the Immigration Appeal Division in *Guzman v Canada (Minister of Citizenship*

and Immigration), [1995] IADD No 1248, to assist in assessing a relationship of parent and child.

[49] The Applicants also rely on *Jeerh v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 741 [*Jeerh*], wherein the Court confirmed the totality of the evidence must be considered when determining the relationship between the adopted parent and adopted child. In that case, Justice Karen Sharlow, as she then was, found the Officer's conclusion that a genuine parent-child relationship did not exist "difficult to reconcile" with the undisputed legal validity of the adoption.

[50] The Applicants also cites *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 822 [*Sinniah*], where Justice Eleanor Dawson, as she then was, stated:

15 The issue of the bona fides of an adoption is a question of fact. The Immigration Appeal Division has written that it is necessary to consider a number of factors when considering the bona fides of an adoption, including the motivation for the adoption, the extent to which adoptive parents have maintained care and control over the child since the adoption, the knowledge and understanding the adoptive parents have of the adopted child and vice versa, and the plans and arrangements made for the child's future.

[51] The Applicants' submit the Officer did not thoroughly analyze the genuineness of the Applicants' parent-child relationship, and erred by focussing solely on the issue of the adoption's legality under *HAMA*.

[52] While it is true that in assessing the presence of a genuine parent-child relationship, an Officer is required to thoroughly review the evidence and take into account a variety of factors,

the adoption must also be valid in the country in which he or she was adopted. The Officer in this case determined that Jaskaran's adoption did not comply with the laws of India governing adoptions, and thus, he was not required to consider whether a genuine parent-child relationship existed. As a legal parent-child relationship had not been established – this was not unreasonable, or in error.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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