

Federal Court



Cour fédérale

**Date: 20120503**

**Docket: IMM-5521-11**

**Citation: 2012 FC 512**

**Ottawa, Ontario, May 3, 2012**

**PRESENT: The Honourable Mr. Justice Barnes**

**BETWEEN:**

**SURINDER SINGH JHAJJ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (Board) which refused the Applicant's application to sponsor his adopted daughter as a permanent resident.

**Background**

[2] On July 3, 2001 the Applicant Surinder Singh Jhajj and his wife adopted their 13-year-old niece, Rajwinder Kaur Jhajj, in India. Shortly after, they applied to sponsor Rajwinder for landing

in Canada as their adopted daughter. It is not entirely clear from the certified tribunal record what became of the sponsorship application but the visa office did not convene an interview of Rajwinder and her natural father until April 18, 2006. At that point, Rajwinder was 17 years of age. It appears from the CAIPS notes that on April 27, 2006 the visa officer in New Delhi sent a fax to Alberta Children's Services requesting a home study. This was followed up on June 5, 2006 and November 23, 2006 with letters from the visa officer to Mr. Jhajj asking that arrangements for an Alberta home study be completed. When the visa officer received no response, he sent further letters to Mr. Jhajj in February and April 2007.

[3] On June 8, 2007, Mr. Jhajj's legal counsel, Dalwinder Hayer, advised the visa post that a home study request had been submitted through Alberta Children's Services. The record includes an authorization for a home study issued by Alberta Children's Services on May 11, 2007, but it contains nothing further until March 22, 2008 when Mr. Hayer advised the visa post that a home study could not be completed because Rajwinder was over the age of 18 – that being the age of majority in Alberta.

[4] In the absence of a home study, the Program Manager for International Adoptions at Alberta Children's Services, Anne Scully, wrote to the visa post on March 16, 2009 by way of a "Letter of No Involvement". That letter stated:

Alberta Children and Youth Services has been asked to provide a Letter of No Involvement on behalf of the above-named child. Alberta Children and Youth Services has agreed to provide this letter upon receipt of an adoption order granted in the child's country of origin.

For all purposes, when an adoption order is made in Alberta, the adopted child is the child of the adopting parent and the adopting

parent is the parent and guardian of the adopted child as if the child had been born to that parent in lawful wedlock. Section 73 of the Alberta Child, Youth and Family Enhancement Act states “*An adoption effected according to the law of any jurisdiction outside Alberta has the effect in Alberta of an adoption made under this Act, if the effect of the adoption order in the other jurisdiction is to create a permanent parent-child relationship*”.

The attached Deed of Adoption was obtained with respect to Rajwinder Kaur, by Mr. and Mrs. Jhaji. An adoption ceremony was performed on July 2, 2001 in the presence of friends and relatives according to the adoption custom of India. The Adoption Deed was registered in the District Registrar Office, in Newanshahr, Punjab, India on August 21, 2001.

Alberta Children and Youth Services had no role in arranging this adoptive placement. A home assessment report was not completed on Mr. and Mrs. Jhaji in Alberta.

The decision concerning the granting of Canadian citizenship to Rajwinder Kaur, rests with Citizenship and Immigration Canada.<sup>1</sup>

[5] The visa officer then rejected the sponsorship application on the following basis:

Copy of request for home study on file, received by Alberta Children Services on 09MAY2007.

As per information provided on file, the applicant was adopted in India prior to the age of 18. As per R117(3), the adoption is considered to be in the best interests of a child if it took place under the following circumstances:

- a) a competent authority has conducted or approved a home study of the adoptive parents.

This was not complied with at the time of the adoption. Although the sponsors have explained that no home study [can] be provided as the applicant is over 18, I note that they had 5 years to ensure that the appropriate requirements for this adoption were met. I further note

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<sup>1</sup> An earlier version of this letter had been sent by Ms. Scully to the visa post on April 28, 2004 requesting confirmation that the Indian Deed of Adoption of July 3, 2001 constituted confirmation of a lawful Indian adoption carrying the same effect as an Alberta adoption. The visa officer responded two years later by confirming that the adoption “meets the requirements of the Hindu Adoption and Maintenance Act, 1956 and is a valid adoption”. The visa officer also requested the completion of an Alberta home study.

that at the time of our last request, the applicant was under 18 years of age and that no request for a home study was made until such time as the applicant had already turned 18 years old. As a result, I am not satisfied by the explanation provided for the lack of home study. The fact that the sponsors did not go through the appropriate steps to effect the adoption of their relative at the time of the adoption (and in the 5 years after the adoption) undermines the bona fides of the case, in addition to ensuring that the application does not meet the requirements of R117(3).

Application refused.

[6] Mr. Jhaji appealed from this decision and argued the matter before the Board on June 8, 2011. This was almost 10 years after the Indian adoption and Rajwinder was then 22 years old. The Respondent again raised the absence of an Alberta home study before the Board. The Board held that the failure to obtain a home study was fatal to the sponsorship application and it rejected Alberta's Letter of No Involvement on the basis that it was not a Letter of No Objection as stipulated in subsection 117(7) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRP Regulations]. The Board's analysis of this issue is set out below:

[6] At the beginning of the hearing, the Minister of Citizenship and Immigration (the "Respondent") argued that the Applicant cannot be considered a "member of the family class" because there is no evidence that a home study was conducted or approved by a competent authority in the best interests of the child, pursuant to subsection 117(3) of the *Regulations*. The Appellant's counsel conceded that a home study by a competent authority was not conducted or approved. The Appellant's counsel argued that the letter provided by Anne Scully, who represents the competent authority in Alberta, the Alberta Children and Youth Services, fulfills that which is required under paragraph 117(3)(e) or paragraph 117(3)(f) of the *Regulations*. He further argued that the letter provided is conclusive evidence that the Applicant meets the requirements to be considered a member of the family class, as per subsection 117(7) of the *Regulations*. He argued that because the requirements of paragraph 117(3)(e) or paragraph 117(3)(f) have been satisfied, it was not necessary to conduct or approve a home study.

[7] Subsection 117(7) of the *Regulations* provides as follows:

(7) If a statement referred to in clause (1)(g)(iii)(B) or paragraph (3)(e) or (f) has been provided to an officer by the competent authority of the foreign national's province of intended destination, that statement is, except in the case of an adoption that was entered into primarily for the purpose of acquiring any status or privilege under the Act, conclusive evidence that the foreign national meets the following applicable requirements:

(a) ...

(b) ...

(c) in the case of a person referred to in paragraph (1)(b) who is an adopted child described in subsection (2), the requirements set out in paragraphs (3)(a) to (e) and (g).

[8] I do not agree with the Appellant's counsel. The best interest of the child is defined in the *Regulations*. All of subsection 117(3) must be satisfied, including subsection 3(a), which requires that a home study by a competent authority be conducted or approved. Furthermore, paragraph 117(3)(e) requires that the competent authority state in writing that it does not object to the adoption and paragraph 117(3)(f) requires that the competent authority approve the adoption as conforming to the Hague Convention on Adoption, if the international adoption took place in a country that is a signatory of the Convention. I find that the competent authority in this particular case did not approve or provide a letter of no objection in writing. The letters in which the Appellant's counsel refers from Anne Scully states in part, "At the request of the adoptive parents, enclosed please find a "Letter of No Involvement" with respect to sponsorship of a child that they obtained a Deed of Adoption for in 2001." and "Alberta Children and Youth Services has been asked to provide a Letter of No Involvement of behalf of the above-named child... Alberta Children and Youth Services had no role in arranging this adoptive placement. A home assessment report was not completed on Mr. and Mrs. Jhajj in Alberta. The decision concerning the granting of Canadian citizenship to Rajwinder Kaur, rests with Citizenship and Immigration Canada." This letter clearly indicates that the competent authority in this particular circumstance is not involved, which cannot be equated to their approval or not objecting.

[9] The Appellant's counsel submitted that because the Applicant is now over the age of 18 years, a home study is not necessary and the panel should take into consideration that the failure

to conduct a home study prior to her eighteenth birthday was beyond the Appellant's control. The *Immigration and Refugee Protection Regulations* are very clear. This adoption took place when the adopted child was 13 years old; therefore, the best interests of the child as stipulated in paragraph 117(3) must be adhered to. Secondly, section 65 of the *Act* states, "In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations." The Applicant is not a member of the family class because a home study was not conducted or approved in the best interests of the child; therefore I cannot reach beyond the purview of the *Act* and consider whether or not the Appellant's actions or inactions give rise to sympathy.

[Footnotes omitted]

### Issues

[7] Did the Board err in its interpretation of subsection 117(7) of the *IRP Regulations* having regard to the Articles 5.4 and 5.5 of Operational Manual OP 3: Adoptions?

### Analysis

[8] At the center of the disagreement between the parties, is the interpretation of subsection 117(7) of the *IRP Regulations* and the departmental interpretation of that provision as outlined in Articles 5.4 and 5.5 of Operational Manual OP 3: Adoptions (OP 3). The regulatory provisions state:

#### Provincial statement

117(7) Provincial statement - If a statement referred to in clause (1)(g)(iii)(B) or paragraph (3)(e) or (f) [no objection letter] has been

#### Déclaration de la province

117(7) Sauf si l'adoption visait principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi, la déclaration visée à la division

provided to an officer by the competent authority of the foreign national's province of intended destination, that statement is, except in the case of an adoption that was entered into primarily for the purpose of acquiring any status or privilege under the Act, conclusive evidence that the foreign national meets the following applicable requirements:

(a) [Repealed, SOR/2005-61, s. 3]

...

(c) in the case of a person referred to in paragraph (1)(b) who is an adopted child described in subsection (2), the requirements set out in paragraphs (3)(a) to (e) and (g) [eg. a home study].

(1)g)(iii)(B) ou aux alinéas (3)e) ou f) [lettre de non-opposition] fournie par l'autorité compétente de la province de destination à un agent à l'égard d'un étranger constitue une preuve concluante que ce dernier remplit les conditions suivantes :

a) [Abrogé, DORS/2005-61, art. 3]

...

c) dans le cas de la personne visée à l'alinéa (1)b) qui est l'enfant adoptif mentionné au paragraphe (2), les conditions prévues aux alinéas (3)a) à e) et g) [ex. une étude du milieu familial].

[Emphasis added]

The OP 3 offers the following additional guidance to the decision-maker with respect to provincial Letters of No Objection or No Involvement:

#### **5.4. Home study conducted by a competent authority**

An assessment of prospective parents with respect to their suitability to adopt is undertaken by provincial and

#### **5.4. Évaluation du foyer d'accueil effectuée par une autorité compétente**

Les autorités provinciales ou territoriales effectuent une évaluation de l'aptitude à adopter des parents éventuels en

territorial authorities as a pre-condition to an adoption.

For immigration purposes, the Regulations require that in the case of an adoption a home study be conducted. Therefore, officers must ensure that a favourable home study conducted by a competent authority is available. In Canada, a competent authority includes provincial or territorial authorities and individuals authorized by those authorities, such as an accredited social worker.

A private adoption may take place outside Canada without a proper home study being done, even when the child is destined to Canada. This usually results in a letter of no-involvement by the provincial or territorial authorities.

See Section 7.4 for procedures if a home study has not been provided.

tant que condition préalable à l'adoption.

Pour les fins de l'immigration, le Règlement exige une évaluation du foyer d'accueil d'un enfant devant être adopté. Les agents doivent donc s'assurer de l'existence d'une évaluation favorable du foyer d'accueil effectuée par une autorité compétente. Au Canada, les autorités compétentes incluent les autorités provinciales et territoriales ainsi que les personnes autorisées par ces autorités, par exemple, un travailleur social agréé.

Une adoption privée peut avoir lieu à l'extérieur du Canada sans qu'une évaluation formelle du foyer d'accueil soit effectuée, même quand l'enfant doit être accueilli au Canada. Dans un tel cas, l'autorité provinciale ou territoriale émet habituellement une lettre de non-intervention.

Voir la section 7.4 pour connaître les procédures à suivre au cas où une évaluation du foyer d'accueil n'est pas fournie.



### 5.5. Provincial notification letters

The following table describes the types of provincial notification letters.

Type of Letter	Description
Letter of no-objection	<p>The province or territory where the child will live must state in writing that it does not object to the adoption. This letter is commonly called a "no-objection letter."</p> <p>R117(1)(g)(iii)(B) and R117(3)(e) require that authorities in the province of destination state in writing that they have no objection to the adoption.</p> <p>With respect to adopted</p>

### 5.5. Lettres d'avis des provinces

Le tableau suivant présente les types de lettres d'avis émises par les provinces.

Type de lettre	Description
Lettre de non-opposition	<ul style="list-style-type: none"> <li>• La province ou le territoire où l'enfant résidera doit affirmer par écrit qu'elle ne s'oppose pas à l'adoption. Une telle lettre est habituellement appelée «lettre de non-opposition».</li> <li>• Le R117(1)(g)(iii)B et le R117(3)(e) exigent que les autorités de la province d'accueil déclarent par écrit qu'elles ne s'opposent pas à l'adoption.</li> <li>• En matière d'adoption,</li> </ul>

	<p>children, the requirement for a letter of no-objection applies only to children adopted abroad by sponsors residing in Canada. If a sponsor resides abroad and an adoption takes place abroad, provincial authorities will not provide a letter of no objection.</p>		<p>l'exigence d'une lettre de non-opposition s'applique seulement aux enfants adoptés à l'étranger par des répondants résidant au Canada. Si le répondant réside à l'étranger et que l'adoption a lieu à l'étranger, les autorités provinciales n'émettront pas de lettre de non-opposition.</p>
<p>Letter of no-involvement</p>	<p><u>Some provinces and territories issue a letter of no-involvement</u> ("no-involvement letter") if an adoption is finalised abroad prior to the adopted child's arrival in Canada.</p> <p>The purpose of the letter</p>	<p>Lettre de non-intervention</p>	<ul style="list-style-type: none"> <li>• <u>Certaines provinces ou territoires émettent une lettre de non-intervention</u> dans le cas où une adoption est finalisée à l'étranger préalablement à l'arrivée de l'enfant au Canada.</li> <li>• L'objet de la lettre de</li> </ul>

	<p>of no-involvement is to inform the visa office abroad that an adoption order, which is in accordance with the laws of the place where the adoption took place, will be recognised by the adopting parents' province or territory of residence.</p> <p><u>Letters of "no-objection" or "no involvement" satisfy the requirement that adoption is recognised in the place of residence of the adopting parents and fulfil the requirements of R117(1)(g)(iii)(B) and R117(3)(e).</u></p>		<p>non-intervention est d'informer le bureau des visas à l'étranger qu'une ordonnance d'adoption en conformité avec les lois du pays où l'adoption a lieu sera reconnue par la province ou le territoire de résidence des parents adoptifs.</p> <p>• <u>Les lettres de «non-opposition» ou de «non-intervention» satisfont à l'exigence voulant que l'adoption soit reconnue dans l'endroit de résidence des parents adoptifs ainsi qu'aux exigences des R117(1)g)(iii)B et R117(3)e).</u></p>
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	<p>Information about responsible authorities in the provinces and territories can be found in Appendix B.</p> <p>Province specific information can be found in Appendix A.</p>		<ul style="list-style-type: none"> <li>• Des informations sur les autorités responsables dans les provinces et territoires se trouvent à l'Appendice B.</li> <li>• Des informations particulières à certaines provinces se trouvent à l'Appendice A.</li> </ul>
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[Emphasis added]

[9] Counsel for the Applicant argues that once an adoptee reaches the age of majority and the provincial adoption authority expresses no concern about a foreign adoption, there is no requirement for a provincial home study. The Applicant further argues that the letter of March 16, 2009 from Alberta Children's Services was sufficient to satisfy subsection 117(7) of the *IRP Regulations* because OP 3 states that a Letter of No Involvement and a Letter of No Objection are equivalent. In other words, the requirements for a home study, valid parental consent, a genuine adoption in India and Alberta, and no evidence of child trafficking were conclusively evidenced by Alberta's letter.

[10] Counsel for the Respondent contends that the subsection 117(7) characterization of a provincial Letter of No Objection as "conclusive evidence" does not mean that the best interests

requirements identified in subsections 117(3)(a) to (e) and (g) are waived. Notwithstanding a statement by the provincial adoption authority that it does not object to a foreign adoption, the visa officer and the Board must still be satisfied that the competent provincial authority has carried out a home study. The fact that Alberta did not carry out a home study in this case was, therefore, properly found to be fatal to the sponsorship application.

[11] The *IRP Regulations* at the centre of this disagreement are unnecessarily obtuse and the applicable Ministerial Guidelines offer little useful guidance to anyone trying to identify a regulatory intent.

[12] It appears to be the case that the visa officer is expected to pay considerable deference to the provincial adoption authority with respect to some matters concerning the adoption of foreign children into Canadian families. This is not surprising because provincial child welfare authorities have the necessary expertise to assess when an adoption is in the best interests of a child. In the usual case of the adoption of a foreign dependant child, a home study would be completed and the provincial adoption authority would pass judgment on the appropriateness of the placement. I doubt that the Minister ever intended that a visa officer could reinterpret a home assessment that satisfied the provincial authority. Presumably, this was the rationale for the statement in subsection 117(7) that where the provincial adoption authority does not object to the proposed adoption of a foreign child, this is “conclusive evidence” that the best interests of the child requirements have been met.

[13] The interpretative problem that arises from subsection 117(7) is that not all of the “best interests” considerations that are said to be conclusively resolved by a provincial Letter of No Objection are amenable to provincial determination. For instance, the provincial authority has no obvious mechanism to determine if valid consents have been obtained from the natural parents of the child or if the adoption is lawful and genuine in the foreign jurisdiction where it took place. Indeed, in this case, Alberta Children’s Services found it necessary to ask the visa officer if the adoption was valid under Indian law.

[14] I have reservations about whether a home study would still be required pursuant to section 117 if Alberta Children’s Services had said in its letter that it did not have concerns for the best interests of Rajwinder and was not involved in the assessment of the placement because she was an adult. In such a situation, I also doubt that either the visa officer or the Board would have demanded a home study. Here, the fundamental problem was the Applicant’s failure to present sufficient clarifying evidence from Alberta Children’s Services to establish a foundation for the interpretive point he advanced to the Board and to this Court. Specifically, he did not put forward evidence from Alberta Children’s Services as to what it intended by its letter of March 16, 2009 or to verify that it no longer considered a home study to be necessary. . The Applicant did not satisfy the Board on the evidence presented that the letter from Alberta Children’s Services was sufficient to displace the requirement for a home study.

[15] While I have some difficulty with the interpretation of section 117 adopted by the Board, I am not in a position to say that the decision was either incorrect or unreasonable.

[16] In the result, this application is dismissed.

[17] At the conclusion of the hearing in this matter, counsel requested an opportunity to propose a certified question. Should he choose to do so, the Applicant will have five days from the date of this decision to submit a question for certification. The Respondent will then have five days to reply.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed.

"R.L. Barnes"

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Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5521-11

**STYLE OF CAUSE:** JHAJJ v MCI

**PLACE OF HEARING:** Calgary, AB

**DATE OF HEARING:** March 20, 2012

**REASONS FOR JUDGMENT:** BARNES J.

**DATED:** May 3, 2012

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