IMMIGRATION AND REFUGEE BOARD OF CANADA

IMMIGRATION APPEAL DIVISION

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

SECTION D'APPEL DE L'IMMIGRATION

IAD File No. / N° de dossier de la SAI : VA4-02959
Client ID no. / N° ID client : 2788-7383

Reasons and Decision – Motifs et décision

Sponsorship

Appellant(s) / **Appelant(s)**

BALJINDER SINGH

Respondent / **Intimé**

The Minister of Citizenship and Immigration
Le Ministre de la Citoyenneté et de l'Immigration

Date(s) and Place of Hearing / **Date(s) et Lieu de l'audience**

October 21, 2005
Vancouver, BC

Date of Decision / **Date de la Décision**

January 25, 2006

Panel / **Tribunal**

Hope Sealy

Appellant's Counsel / **Conseil de l'appelant(s)**

Massood Joomratty
Barrister & Solicitor

Minister's Counsel / **Conseil de l'intimé**

Jim Murray

Reasons for Decision

[1] These are the reasons and decision of the Immigration Appeal Division in the appeal of Baljinder SINGH (the "appellant") from the immigration officer's refusal to approve the sponsored application for a permanent resident visa of his adopted son, Harpreet Singh SIDHU, (the "applicant"), from India.

[2] The application was refused because, in the opinion of the immigration officer, the adoption was not genuine and was entered into primarily for the purpose of acquiring permanent resident status in Canada. The immigration officer therefore found that the applicant was not the adopted child of the appellant pursuant to section 4 of the *Immigration and Refugee Protection Regulations* (the "*IRP Regulations*").[1]

[3] The Immigration officer also found that the adoption of the applicant did not meet the requirements of section 11 (vi) of the *Hindu Adoptions Act*. The details of the refusal are set out in a letter[2] and in the immigration officer's notes.[3]

[4] The panel heard from the appellant's spouse, Gurmit Kaur Sidhu, his daughter, Mannit Kaur Sidhu, and from the applicant. In coming to its decision the panel has considered their testimony along with all materials before it[4] and submissions of counsel.

Background

[5] The appellant and his spouse are both thirty-eight years old. They married in 1991.[5] The appellant was landed in Canada on May 6, 1992.[6] The applicant is seventeen years old.[7] He is the eldest child of his natural parents who later had a daughter and another son.[8] The applicant's

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1 *Immigration and Refugee Protection Regulations*, SOR/2002 – 227.
2 The Record, pp. 92-98.
3 The Record, pp. 102-107.
4 The Record and Exhibit A-1.
5 The Record, p. 103.
6 The Record, p. 2.
7 The Record, p. 2.
8 The Record, p. 103.

natural father Parminder Singh, died on September 27, 1994.[9] The appellant's spouse is a cousin of the applicant's deceased natural father.[10]

[6] On August 28, 1995 a Deed of Adoption was executed between the appellant and his spouse and Gurdarshan Kaur, natural mother of the applicant. Signing for the appellant and his wife was their Power of Attorney – Sardar Gurmail Singh, a relative of the appellant.[11] A ceremony at which the applicant was given in adoption was held on August 20, 1995.[12] As of that date the applicant has been "in the possession of" - lived with - the Power of Attorney – Sardar Gurmail Singh.[13]

[7] An earlier attempt of the appellant to sponsor the applicant to Canada as his adopted son was refused on April 24, 1998, following an interview of the applicant, his natural mother and the Power of Attorney.[14] That refusal was based on subsection 2(1) of the *Immigration Regulations 1978* (the *Regulations*). In addition the immigration officer cited the *Hindu Adoptions Act.* The immigration officer concluded that the necessary genuine parent child relationship had not been created between the appellant and applicant.

[8] The fresh application by the appellant that led to the second refusal and to the present appeal was received on September 25, 2001.[15] At that time the relevant legislation was the *Immigration Regulations, 1978* (the *Regulations*). However, as was noted above the officer's refusal of November 3, 2004 was based on the *IRP Regulations*.[16] The refusal letter addresses this matter. This was not a matter raised in contention by either counsel at the hearing of the appeal. The hearing proceeded on the basis of section 4 of the *IRP Regulations*: whether the adoption is a genuine one or was entered into primarily for the purpose of acquiring status under the *Immigration and Refugee Protection Act (*the *"Act").*[17]

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9 The Record, p. 36.
10 The Record, p. 103.
11 The Record, pp. 23–30.
12 The Record, p. 26.
13 The Record, p. 19.
14 The Record, pp. 109-115.
15 The Record, p. 102.
16 The Record, pp. 92–98.
17 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

Analysis

[9] In its analysis the panel will be guided by the following factors that it accepts as being significant in determining the issue of whether a genuine parent-child relationship exists and which are set forth in *De Guzman*[18] and again in *Sahota*.[19] The factors are: the motivation for the adoption; the extent to which the adoptive parents have maintained care and control over the child since the adoption; the nature and extent of contact between the adoptive parents and the child; the extent of knowledge of each other; and their plans and arrangement for the applicant's future. These factors are not exhaustive. The weight assigned to each factor will vary depending on the circumstances of each case. In considering the evidence tendered on these matters the panel also needs to find that, on a balance of probabilities, the evidence before it is credible. In its consideration of the appeal the panel has also been cognizant of the difficulties inherent in international adoptions when vast distances separate the adoptive parents from the adopted child.

[10] It was the testimony of the appellant's spouse, Gurmit Kaur, that she and the appellant first thought about the adoption of a child after the difficult and complicated birth of a daughter in September of 1994. According to Gurmit Kaur her doctors told her at the time that she would not be able soon to bear another child. She did subsequently have other children but their delivery was, she said, also complex. She said that the appellant and herself decided to adopt a boy because they already had a daughter.

[11] When interviewed by an immigration officer the applicant's natural mother gave a somewhat different reason for the appellant's interest in adopting a child. She said that there was something in the family of the appellant that led to their inability to have sons, and that a doctor had told them they could not have a son. Gurmit Kaur was asked about this at the hearing. Her only response was that she and the appellant had told the applicant's natural mother Gurdarshan Kaur, that they did not wish to have another child because of problems with delivery. These are decidedly different reasons and the panel is unable to determine which is accurate. What is clear to the panel is that the appellant and his spouse did continue to attempt to have other children,

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18 *De Guzman, Leonor G. v. M.C.I.* (IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995.

19 *Sahota, Gurdev Kaur v. M.C.I.* (IAD VA2-03374), Mattu, February 23, 2004.

whatever a doctor might have advised them or whatever they thought about having more children in spite of alleged difficulties. The appellant's spouse did later give birth to boy.

[12] September 1994 was also the time of the death of the applicant's father. According to Gurmit Kaur, his widow Gurdarshan Kaur was not at that time in need of funds, so neither she nor the appellant offered financial support. Rather, she said, it was hard for the applicant's mother to take care of three children without the assistance/support of a husband. The applicant was however the eldest son and child. As was noted by the immigration officer in the letter of refusal, "The eldest son is expected to carry the family name and lineage and to take care of his parents as well as perform all religious rituals on their behalf."[20] In 1993, and prior to the adoption of the applicant, the natural mother, Gurdurshan Kaur had given birth to another son. There was therefore another son who the appellant could have sought to adopt. This other son was of an age when bonding with the appellant would surely have been easier than with the then seven-year old applicant. It was however the testimony of Gurmit Kaur that she had developed a relationship with the applicant when she lived in the same house as him in 1990 and on her return visit to India in 1992. The panel finds this persuasive in terms of the motivation of the appellant and his spouse in seeking the adoption.

[13] It was the testimony of Gurmit Kaur that it took her and the appellant two and a half months of telephone urgings before the natural mother of the applicant agreed to give up her first-born son for adoption. Given this insistence on the part of the appellant and his spouse, it is surprising that they did not attend the adoption ceremonies in August of 1995. As was stated by Member Mattu in *Mahli,* "if the adoption were intended to create a genuine parent-child relationship it would be an important and significant event in lives of the appellant [….] And the applicant and something that they would all desire to actively participate in and ensure the applicant understood there was about to be significant changes in his life."[21]

[14] Gurmit Kaur explained their absence. She said that her daughter was very young at the time, she was born in September 1994, and the appellant could not go at the time. The appellant's father, she said, had been present at the ceremony. The panel is not persuaded by the

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[20] The Record, p. 95.

[21] *Mahli v. Canada (Minister of Citizenship and Immigration)* (IAD VA3-00655), Mattu, April 5, 2004.

explanation around the young age of the appellant's daughter. She may have been young in August 1995 but within months, by the end of that year she, the appellant and his spouse did travel to India.

[15] An explanation offered for the appellant and spouse not being present at the handing over ceremony is noted in the immigration officer's refusal letter[22] and in the immigration officer notes[23]: namely that the cost of the trip at that time was not affordable because the appellant was also sponsoring other family to Canada. The panel finds that whereas it would clearly have been important to the applicant to have his adoptive parents present at the handing over ceremony, the financial explanation for their absence is reasonable. The panel finds the presence at the ceremony of the appellant's father, unrelated to the applicant's natural mother, to be significant.

[16] The appellant his spouse and child did travel to India at the end of 1995 and remained for three months. Since August 1995, the uncontested evidence before the panel is that the applicant has lived with the appellant's Power of Attorney in a village fifty to sixty kilometres distance from the home of his natural mother. The uncontested evidence before the panel is also that the appellant has financed the upbringing of the applicant through monies earned from the appellant's property in India.

[17] The document before the panel granting Power of Attorney gives Sardar Gurmail Singh Sandhu only the power to "take [the applicant] in adoption … in compliance with all legal and social ceremonies necessary under Hindu and customary laws applicable to the adoption and … [to] get registered a formal deed of adoption to authenticate the adoption of [the applicant]."[24] Gurmit Kaur admitted that there was no document giving the Power of Attorney authority regarding the upbringing of the applicant.

[18] The Power of Attorney was interviewed by the immigration officer and stated that his instructions from the appellant and the appellant's spouse regarding the upbringing of the applicant was to give the applicant a good education and take care of him properly until he grew up. This is indeed very general instruction and might speak to carelessness or lack of

22 The Record, p. 96.
23 The Record, p. 106.
24 The Record, pp. 17 and 18.

involvement on the part of the appellant in the upbringing of the applicant, or it might be pragmatic instruction from persons who live a long way away from the applicant. The panel finds, based on the evidence before it, that it is the latter. Important matters such as the change of school, and the choice of school to which the applicant should be sent were the decision of the appellant and his spouse. The testimony of the appellant's spouse is that she visited both the schools that the applicant has attended, that she met the principal of the school to which they moved the applicant, and that they have met with his teachers. These matters speak to care and control within the context of the long distance relationship between the appellant and his family in Canada and the applicant in India.

[19] Important to the panel on the matter of the involvement of the appellant and his spouse in the upbringing and life of the applicant was the detailed knowledge shown by Gurmit Kaur of the applicant, his schooling, his friends, his teachers. After hearing also from the applicant the panel finds that, on a balance of probabilities, the appellant's wife has maintained keen interest in the upbringing of the applicant and is knowledgeable of him and his circumstances. Her knowledge is detailed and wide. Such interest and knowledge does not necessarily speak to a parent child relationship. A loving relative is clearly capable of having such knowledge. But it is an important element in the panel's decision making.

[20] The appellant adopted the applicant when the applicant was seven years old. As mentioned above the appellant then travelled to India and spent a period of three months with the applicant. That was late 1995. Four years passed. Then in 1999 the appellant, his spouse and natural daughter returned to India to spend time with the applicant. This visit followed the prior refusal by an immigration officer of the appellant's sponsorship of the applicant and lasted for six weeks. There was another visit but not until 2002 when the appellant, his spouse and natural daughter remained in India for five weeks. The applicant was then fourteen years old. The appellant has had one further visit with the applicant in India – from October 2004 to February 2005 when again he was accompanied by his spouse and natural daughter. It was early in this visit that the immigration officer interview on October 19 with the applicant took place.

[21] The appellant and his spouse have spent a total of some eight and a half months with the applicant in the last ten years as a result of their travel back to India where the appellant

continues to have a home and farmlands. The panel finds this to be a not insignificant amount of time, even while realizing that the purpose of the trips, given the appellant's lands in India and other family there, was not necessarily solely to spend time with the applicant. Of significance to the panel is the opportunity that the applicant has had during the visits to interact not only with the appellant and his spouse but also with their natural daughter.

[22] The Power of Attorney reportedly told the immigration officer that the appellant telephones the applicant about two to three times per month.[25] Gurmit Kaur testified to a frequency of one to two calls per week. The panel had before it from the appellant copies of telephone statements that show calls from his telephone number in Canada to the telephone number at which the panel contacted the applicant during the hearing of the appeal.[26] Looking through the documents the panel concerned itself only with calls that lasted for more than five minutes and was mindful of the visits to India of the appellant and his family in 1999, 2002 and 2004/05.

[23] The records for 1998 show multiple calls for all months except July when there is no record of any telephonic contact between these two numbers. In 1999 there are also multiple calls for all months excepting February and April. (The panel does not know in which months of 1999 the appellant and his family visited India). The panel is concerned at the lack of any telephone contact, as reflected in the papers before it for May, June October and November of 2000. This matter did not arise during the hearing and as such the appellant's spouse was not asked to explain the apparent lack of contact during those months. The panel is aware that the telephone number in India is that of the Power of Attorney, at which place the applicant has been living since adoption. The panel is also aware that the calls between the numbers do not necessarily indicate that the applicant was a party to the call. Nevertheless, in view of the detailed knowledge shown by the appellant's spouse of the applicant and his life the panel is satisfied with the frequency of calls in most of the years since the adoption as denoting continuing interest and contact between the appellant and the applicant.

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[25] The Record, p. 105.

[26] Exhibit A-1, Tab. 1

[24] A significant element to the panel when considering whether a genuine parent/child relationship exists between appellant and applicant is the matter of the severance or not of the relationship between the applicant and his natural parent and family. The panel found the applicant to be not credible in his testimony regarding contact with and memory of his natural mother and siblings. He first said that he had not seen his natural mother since the time of the adoption, but later said that indeed he had seen her at functions. His later statement was supported by the testimony of Gurmit Kaur and by his natural mother at her interview with the immigration officer.[27]

[25] According to the applicant he has no memory of the first seven years of his life, and he did not see much of his natural parents. The panel does not believe him. The panel finds that he was hoping in his testimony on this matter to create a false chasm between him and his natural parents. While the panel needs to be satisfied that there has been severance with the natural parents this clearly does not include not having memories of the past, nor meetings in a social context. The panel prefers the testimony of the appellant's spouse and the applicant's natural mother regarding times when the applicant has met his natural mother at family ceremonies, e.g. weddings and funerals. The panel finds that these meetings do not go towards a finding that there has not been severance in relationship between the applicant and his natural parent and family.

[26] The applicant is now seventeen years old. It is the finding of the panel that, on a balance of probabilities, he has been living for the past ten years with the Power of Attorney, a relative of the appellant and not a relative of his natural parents. The panel finds that it is with the Power of Attorney and the appellant and his family that the applicant has close relations, not his natural mother. The panel also finds, on a balance of probabilities, that it is as a son that the applicant will be treated in Canada by the appellant and his family.

[27] The delay in this adoption process is a factor in this appeal given that the adoption was in 1995 and the first refusal in 1998. The panel does not find that the appellant can be faulted for the delay given the testimony of the appellant's spouse on the matter and other evidence before it

[27] The Record, p. 106.

of the lack of due diligence to this file by the appellant's former lawyer, Balraj Parnar who was subsequently disbarred.[28]

Conclusion

[28] Deciding on appeals of this nature is not easy. The panel has expressed its concerns regarding certain factors that need to be considered. But having considered all the evidence before it the panel finds, on a balance of probabilities, that this is a genuine adoption.

[29] Accordingly, the appeal is allowed.

NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

"Hope Sealy"
Hope Sealy

25 January 2006
Date (day/month/year)

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

[28] The Record, p. 102.