CITATION: KISANA *V.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2009 FCA 189, [2010] 1 F.C.R. 360

A-199-08, A-200-08

A-199-08

Sushil Kisana, Seema Kisana, Subleen Kisana by her Litigation Guardian, Sushil Kisana (*Appellants*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

A-200-08

Sushil Kisana, Seema Kisana, Lovleen Kisana by her Litigation Guardian, Sushil Kisana (*Appellants*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: KISANA v. CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) (F.C.A.)

Federal Court of Appeal, Létourneau, Nadon and Trudel JJ.A.—Toronto, March 11; Ottawa, June 4, 2009.

Citizenship and Immigration — Status in Canada — Permanent Residents — Humanitarian and Compassionate Considerations — Appeals from Federal Court decision dismissing judicial review of immigration officer's refusal to grant minor appellants permanent resident visas on humanitarian and compassionate (H&C) grounds — Appellants not listing daughters as dependents on permanent resident applications as required by Immigration and Refugee Protection Regulations, s. 117(9)(d) — Federal Court concluding officer not failing to be attentive, sensitive to best interests of children, not ignoring evidence — Certifying question as to whether officer conducting interview under duty to obtain further information concerning child's best interests if evidence presented believed insufficient — Per Nadon J.A. (Létourneau J.A. concurring): Applicant not entitled to affirmative result on H&C application simply because best interests of child favouring that result — Officer required to examine best interests of child "with care", weigh interests against other factors — Federal Court not erring in holding officer giving adequate consideration to children's best interests, decision reasonable — Also not erring when determining, in circumstances of case, officer not having duty to make further inquiries to discover evidence favourable to appellants' case, provide other opportunity to produce documents supporting application — Not possible to answer certified question herein — Appeals dismissed — Per Trudel J.A. (concurring): Being "alert, alive, sensitive" to best interests of child not simply requiring that immigration officer take child's interests into account when performing final weighing of evidence — Also requiring officer be "alert, alive, sensitive" to child's needs, interests when being interviewed — However, Court's intervention not warranted in present instance.

These were appeals from a Federal Court decision dismissing applications for judicial review of an immigration officer's determination not to grant the minor appellants, Subleen and Lovleen Kisana, permanent

resident visas on humanitarian and compassionate (H&C) grounds. The minor appellants were born in India out of wedlock and are the twin daughters of Sushil and Seema Kisana, who are Canadian citizens. The twins live in India with their aunt. Neither parent listed the daughters as dependents on their permanent resident applications. The male applicant's application to sponsor his daughters as family class members was refused pursuant to paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* on the ground that they had not been declared as dependants and examined when he had been granted permanent residence. In response to the parents' H&C application to sponsor their daughters, the twins were interviewed by an immigration officer. The application was refused *inter alia* because there were insufficient reasons for the adult applicants to have failed to declare their children on their residency applications and there was little evidence regarding their relationship with their children. The twins also failed to bring proof of communication with their parents to the interview despite having been asked to provide this. On judicial review, the Federal Court concluded that the officer had not failed to be attentive or sensitive to the best interests of the children and that no evidence had been ignored. It also certified the question of whether fairness requires that an officer conducting an interview and assessing a child's application for landing in Canada to join his or her parents be under a duty to obtain further information concerning that child's best interests if the officer believes the evidence presented is insufficient.

In addition to the issue raised by the certified question, the appeals raised the following questions: whether the Federal Court wrongly concluded that the officer's decision was reasonable, and whether it wrongly concluded that the officer had given adequate consideration to the children's best interests.

Held, the appeals should be dismissed.

Per Nadon J.A. (Létourneau J.A. concurring): Based on the Federal Court of Appeal's decision in *Legault v. Canada (Minister of Citizenship and Immigration)*, an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada but this is but one factor that must be weighed together with all other relevant factors. This is unlike the situation in family law cases where the best interests of the children are the determining factor. It is also not for the courts to reweigh the factors considered by an H&C officer. An officer is nevertheless required to examine the best interests of the child "with care" and weigh them against other factors. The fact that the officer in the present case focused her consideration of the children's best interests on the question of hardship did not necessarily lead to the conclusion that she failed to consider their best interests. Factors such as hardship arising from the geographical separation of family members are to be considered in an H&C application. It was clear that the officer considered the girls' relationship with their parents and that she did not discount the interview statements made by them. However, when weighed against the other relevant factors, she found them to be insufficient evidence to justify an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act*. Therefore, the Federal Court did not err in holding that the officer had given adequate consideration to the children's best interests and that her decision was reasonable.

While the officer could have asked more questions to obtain additional information regarding the twins' situation, she was under no duty to do so. Therefore, the Federal Court did not err when it determined that, in the circumstances of the case, it was not the officer's duty to make further inquiries so as to discover evidence that might be favourable to the case put forward by the appellants or provide them with another opportunity to produce documents to support their application. Finally, because of the highly factual and variable circumstances of each H&C application, it was decided not to answer the certified question. However, there may be occasions where fairness may or will require an officer to obtain further and better information.

Per Trudel J.A. (concurring): While the immigration officer could have conducted a more effective interview with the appellants, the poor interviewing techniques in this case did not warrant the Court's intervention. However, in another case, the conditions of a call-in interview may constitute a failure to be "alert, alive and sensitive" to the best interests of the child, which does not simply require that an immigration officer take the child's interests into account when performing the final weighing of the evidence, but also requires that the officer be "alert, alive and sensitive" to the child's needs and interests when he or she is being interviewed.

While the officer is under no obligation to attempt to elicit all evidence that may help a child's case, the interview should be conducted in a manner that will allow the child to express him or herself effectively. Also, while the "best interests of the child" framework used in the family law context should not be imported into immigration applications, that is not to say that the expertise of family courts, where appropriate and relevant, cannot be looked at for valuable information.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1) (as am. by S.C. 2008, c. 28, s. 117).
Immigration and Refugee Protection Regulations, SOR/2002-227, s. 117(9)(*d*) (as am. by SOR/2004-167, s. 41).

CASES CITED

NOT FOLLOWED:

Gill v. Canada (Minister of Citizenship and Immigration), 2008 FC 613, 324 F.T.R. 229, 73 Imm. L.R. (3d) 1; *Del Cid v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 326; *Bassan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 742, 15 Imm. L.R. (3d) 316.

APPLIED:

Legault v. Canada (Minister of Citizenship and Immigration), 2002 FCA 125, [2002] 4 F.C. 358, 212 D.L.R. (4th) 139, 20 Imm. L.R. (3d) 119; leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 220 (QL); *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, 222 D.L.R. (4th) 265, 24 Imm. L.R. (3d) 34.

CONSIDERED:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173; *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123, 2009 DTC 5046, 386 N.R. 212; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635, 318 N.R. 300; *Mulholland v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 597, [2001] 4 F.C. 99, 15 Imm. L.R. (3d) 152, 206 F.T.R. 77.

REFERRED TO:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Thandal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 489; *Momcilovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 79, 42 Imm. L.R. (3d) 61, 268 F.T.R. 150; *Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292; *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, 37 Imm. L.R. (3d) 150; *Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302, (1979), 31 N.R. 34 (C.A.); *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717; *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 156, 309 F.T.R. 243; *Young v. Young*, [1993] 4 S.C.R. 3, (1993), 108 D.L.R. (4th) 193, [1993] 8 W.W.R. 513; *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, [2002] 2 F.C. 413, 208 D.L.R. (4th) 265, 213 F.T.R. 56; *L.E.G. v. A.G.*, 2002 BCSC 1455 (CanLII); *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, 268 N.S.R. (2d) 200, 297 D.L.R. (4th) 1; *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755, 70 Man. R. (2d) 81, [1990] 6 W.W.R. 152.

APPEALS from a Federal Court decision (2008 FC 307) dismissing applications for judicial review of an immigration officer's determination not to grant the minor appellants, Subleen and

Lovleen Kisana, permanent resident visas on humanitarian and compassionate grounds. Appeals dismissed.

APPEARANCES

Barbara L. Jackman for appellants.
Alexis Singer and *Sharon Stewart Guthrie* for respondent.

SOLICITORS OF RECORD

Jackman & Associates, Toronto, for appellants.
Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment rendered in English by

[1] NADON J.A.: These are appeals from a decision of Mr. Justice Mosley of the Federal Court, 2008 FC 307, dated March 6, 2008, who dismissed the appellants' applications for judicial review of a determination made by a visa officer not to grant the minor appellants, Subleen and Lovleen Kisana, permanent resident visas on humanitarian and compassionate (H&C) grounds.

[2] In concluding as he did, Mosley J. certified the following question of general importance:

Does fairness require that an officer conducting an interview and assessment of an application by a child for landing in Canada to join her parents be under a duty to obtain further information concerning the best interests of the child if the officer believes the evidence presented is insufficient?

The Facts

[3] The minor appellants are the twin daughters of Sushil and Seema Kisana. They were born in India on August 20, 1991, before their parents were married. Sushil immigrated to Canada on February 16, 1993, and was landed as an unmarried dependent of his parents. He married Seema upon his return to India in 1994 and subsequently sponsored her for permanent residence in Canada. Seema was landed on April 25, 1999. Both Sushil and Seema are now Canadian citizens.

[4] Neither Sushil nor Seema listed their daughters as dependents on their permanent resident applications. Seema further denied having any children during two call-in interviews while her application was being processed. Their explanation for failing to make the disclosure is that they were ashamed of having had children out of wedlock and that they had not disclosed the fact that they had children to their parents. Sudesh, the girls' aunt, has been caring for them in India since Seema left for Canada.

[5] Sushil applied to sponsor his daughters for permanent residence as members of the family class in 2003. His application was refused because of the twins' ineligibility as members of the family class pursuant to paragraph 117(9)(*d*) [as am. by SOR/2004-167, s. 41] of the *Immigration and Refugee Protection Regulations*, SOR/2002-27 (the Regulations), on the ground that they had not

been declared as dependants and examined at the time their sponsor (Sushil) had been granted permanent residence.

[6] Sushil and Seema again applied to sponsor their daughters in 2005, this time with the assistance of an immigration consultant. They specifically requested that the application be considered on H&C grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). Pursuant to their H&C submissions, Sushil and Seema requested that the visa officer consider the emotional impact of continued separation and indicated that the girls' aunt was no longer in a position to adequately care for their daughters, since it had not been envisaged that they would remain permanently with her.

[7] The girls were called in for an interview by the Canadian High Commission office in New Delhi. Their call-in letter was a form letter which requested that they bring their birth certificates and documentary evidence pertaining to their relationship with their sponsors. The letter also required other proof of relationship with the sponsors for persons being sponsored by their spouses or by adult parents. On October 11, 2006, the twins and their aunt were interviewed by a designated immigration officer (the officer).

[8] The officer's computerized notes (CAIPS notes) indicate that she asked questions relating to the manner and frequency of contact between the parents and their children, details about the parents' life in Canada and their plans for their daughters, how the twins were supported, their relationship with their aunt and the girls' daily routine in Rohini (where they lived). The officer also noted that the twins had brought only their birth certificates and passports to the interview and that they had provided no proof of communication with their parents despite a follow-up e-mail from the Immigration Section to their consultant which requested that they should bring "proof of communication with sponsor" to the interview.

[9] By letter dated November 7, 2007, the officer refused the application. Specifically, the officer's refusal was based on the following grounds:

1. There were insufficient reasons for the adult applicants to have failed to declare their children on their own residency applications.

2. There were inadequate efforts on the part of the adult applicants to reunite with their children.

3. There was insufficient evidence of the expected regular communication between the parents and their children.

4. There was insufficient evidence of financial support of the children by their parents.

5. Insufficient information had been provided to the girls about Canada and insufficient plans had been made for their future in Canada.

6. The evidence on file at the hearing did not show difficulties or undue hardship faced by the girls in living in India with their aunt.

[10] The girls' parents sought to appeal the officer's decision to the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board. The IAD dismissed their appeal for lack of jurisdiction. As a result, the parents commenced applications for judicial review in the Federal Court.

Decision of the Federal Court

[11] Mosley J. reviewed the officer's decision on the standard of reasonableness, which led him to conclude that the officer had not failed to be attentive or sensitive to the best interests of the children, that she had not ignored evidence or taken irrelevant factors into consideration and that she had not made unreasonable findings of fact. In his view, the officer's reasons were adequate and addressed the question of whether H&C considerations justified granting an exemption from the requirements of the Regulations.

[12] In Mosley J.'s view, it could be taken for granted that the children would want to be reunited with their parents. Thus, there is no merit in the allegation that the officer had failed to assess the twins' emotional response to their separation from their parents and had thereby committed an error.

[13] In the Judge's view, the principal issue before the officer was whether the girls were suffering undue hardship because of their separation from their parents and their having to live in India. The appellants having failed to adduce sufficient evidence to either prove hardship or the existence of a strong relationship between the girls and their parents, the Judge concluded that the officer had not erred in concluding as she did.

[14] The Judge further held that the parents' misrepresentations with respect to their daughters was a proper consideration for the officer in determining the H&C application. Mosley J. opined that "[t]he parents' misrepresentations engaged public policy considerations involving the integrity of the immigration system." He found that paragraph 117(9)(*d*) of the Regulations "would be rendered meaningless if all such [H&C] applications were given special dispensation and approved because of family separation and hardship" (see paragraph 32 of Mosley J.'s reasons).

[15] Finally, although the Judge agreed that it was unlikely that the parents would have had any well-defined plans for their daughters other than school, the officer's conclusion that she would have expected a better effort on the part of the parents to inform the children more fully with respect to Canada did not vitiate her conclusion and was reasonable.

[16] As a result, Mosley J. dismissed the applications for judicial review and certified the question set out at paragraph 2 of these reasons.

The Issues

[17] In addition to the issue raised by the certified question, i.e. whether fairness imposed a duty on the officer to obtain further information concerning the best interests of the children if she believed that the evidence adduced was insufficient, the appeals raise the following questions:

1. Did Mosley J. err in concluding that the officer's decision was reasonable?

2. Did Mosley J. err in concluding that the officer had given adequate consideration to the children's best interests?

Analysis

A. Standard of Review

[18] It is unnecessary to engage in a full standard of review analysis where the appropriate standard of review is already settled by previous jurisprudence (see: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 62). The parties agree that the standard of review to be applied to an H&C decision is reasonableness. This standard is supported by both pre- and post-*Dunsmuir* cases (see: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Thandal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 489; *Gill v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 613, 73 Imm. L.R. (3d) 1).

[19] Whether Mosley J. chose and applied the proper standard of review is a question of law and will be reviewed on a standard of correctness. As my colleague Evans J.A. stated for this Court in *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, [2009] 4 C.T.C. 123 dated January 28, 2009, at paragraph 18:

> Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard. [Emphasis added.]

[20] There can be no doubt that this Court cannot substitute its opinion for that of the original decision maker, even where the H&C application may have merit (see: *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635, at paragraph 12). Thus, our role is to determine whether the Federal Court correctly applied the reasonableness standard of review—essentially, to determine whether the officer's decision was reasonably open to her on the basis of the facts and the applicable law.

B. Legislative Framework

[21] As I have already indicated, the father's 2003 sponsorship application was precluded by paragraph 117(9)(*d*) of the Regulations because the children had not been declared and examined as accompanying members of their parents at the time they had applied for immigration to Canada. That provision reads as follows:

> **117.** (1) . . .
>
> (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a

sponsor if

. . .

(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

[22] However, pursuant to subsection 25(1) [as am. by S.C. 2008, c. 28, s. 117] of the Act, the Minister has discretion to grant a foreign national an exemption from any requirement of the Act or the Regulations on H&C grounds. In exercising this discretion, the Minister is expressly directed to take into account the best interests of any child affected by the decision or public policy considerations:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

C. Did Mosley J. err in finding that the officer had given adequate consideration to the children's best interests and that her decision was reasonable?

[23] I begin with this Court's pronouncement in *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358, leave to appeal to the Supreme Court of Canada denied on November 21, 2002 in file 29221 [[2002] S.C.C.A. No. 220 (QL)], where my colleague Décary J.A. opined as follows at paragraphs 11 and 12:

In *Suresh*, the Supreme Court clearly indicates that *Baker* did not depart from the traditional view that the weighing of relevant factors is the responsibility of the Minister or his delegate. It is certain, with *Baker*, that the interests of the children are one factor that an immigration officer must examine with a great deal of attention. It is equally certain, with *Suresh*, that it is up to the immigration officer to determine the appropriate weight to be accorded to this factor in the circumstances of the case. It is not the role of the courts to re-examine the weight given to the different factors by the officer.

In short, the immigration officer must be "alert, alive and sensitive" (*Baker*, *supra*, at paragraph 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. . . . It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "*refoulement*" of a parent illegally residing in Canada (see *Langner v. Canada (Minister of Employment and Immigration)* (1995), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal refused, [1995] 3 S.C.R. vii). [Emphasis added.]

[24] Thus, an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors

considered by an H&C officer. On the other hand, an officer is required to examine the best interests of the child "with care" and weigh them against other factors. Mere mention that the best interests of the child have been considered will not be sufficient (*Legault*, above, at paragraphs 11 and 13).

[25] The appellants make three primary arguments on this issue: first, that the officer failed to expressly consider that it was the parents and not the twins who made the misrepresentations, that the parents were not subject to enforcement action and that they were permitted to remain in Canada; second, that the officer erred in refusing to accept the consistent oral statements of the twins and their aunt; and third, that the officer limited her consideration of the best interests of the children to hardship, without focusing on other relevant factors.

[26] With respect to the first argument, I am satisfied that it was not incumbent on the officer to highlight the fact that the twins were innocent of any wrongdoing. The first case cited by the appellants for this proposition, *Momcilovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 79, 42 Imm. L.R. (3d) 61, at paragraph 53, does not suggest this in any way. The second, *Mulholland v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 597, [2001] 4 F.C. 99, at paragraphs 29–30, only stands for the proposition that it is unreasonable for an immigration officer to effectively ignore the interests of a child on the basis that it was the parents' "choice" to have the child in the first place.

[27] In this type of case, where children are "left behind" due to a parent's misrepresentation on an immigration application, it will usually be self-evident that the child was not complicit in the misrepresentation. Yet, it is well established that such misrepresentation is a relevant public policy consideration in an H&C assessment (see, for example: *Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292, at paragraph 33). Inevitably, the factors favouring reunification of the family in Canada will not always outweigh the public policy concerns arising from a misrepresentation. This is not tantamount to "visiting the sins of the mother upon the children" as in *Mulholland*, above [at paragraph 29], where the officer failed to consider the children's interests at all. Similarly, in my view, an officer is not bound to mention the fact that the parents' removal from Canada had not been sought as a result of their misrepresentations. If the parents were being removed, they would obviously not be in a position to sponsor a child in the first place. The fact that the parents are entitled to remain in Canada is a fact that will be self-evident in cases of children "left behind".

[28] The appellants' second argument that the officer should have accepted the twins' interview statements as proof of their communication with their parents because of an absence of contradictory evidence is, in my view, without merit. The appellants had the burden of proving their claims. Having failed to adduce satisfactory evidence in that regard, they cannot now argue that the officer erred in finding their interview statements insufficient.

[29] Further, contrary to the situation which prevails in the context of refugee hearings, where it has been held that an applicant's sworn testimony before the Refugee Board is presumed to be true, absent valid reasons to doubt its truthfulness—even if uncorroborated by extrinsic evidence (see: *Sadeghi-Pari v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, 37 Imm. L.R. (3d) 150, at paragraph 21, applying *Maldonado v. Minister of Employment and Immigration*, [1980] 2 F.C. 302 (C.A.))—a call-in interview, in the context of an H&C application, is not an oral hearing

where witnesses must take an oath or must affirm that their testimony will be truthful. Clearly, in the context of a call-in interview, assessment of credibility is neither the prime nor a significant purpose of the interview. Rather, the purpose thereof is to determine whether there exist sufficient H&C grounds to grant permanent resident status or an exemption from the Act and its Regulations.

[30] I now turn to the appellants' third argument that the officer limited her consideration of the best interests of the children to hardship, without regard to the other relevant factors. The fact that the officer focused her consideration of the children's best interests on the question of hardship does not necessarily lead to the conclusion that she failed to consider their best interests. In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, a majority of this Court (Décary J.A., with whom Rothstein J.A. (as he then was) concurred), held at paragraph 5 that an officer did not assess the best interests of children "in a vacuum" (paragraph 5 of the reasons) and that an officer was presumed to know that living in Canada will generally provide children with many opportunities that are not available to them in other countries and that residing with their parents is generally more desirable than being separated from them.

[31] For the majority in *Hawthorne*, above, an officer's task in assessing the best interests of a child will usually consist in assessing the degree of hardship that is likely to result from the removal of its parents from Canada and then to balance that hardship against other factors that might mitigate their removal. While *Hawthorne*, above, dealt with a situation where parent and child might be separated due to the removal of the parent from Canada, it has also been applied, correctly in my view, in child-sponsorship cases like the one now before us (see: *Li*, above; *Yue v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 717; and *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 156, 309 F.T.R. 243).

[32] It is important in this type of case to keep in mind the incisive remarks made by Décary J.A. in *Hawthorne*, above, and more particularly, those found at paragraphs 4 to 8 of his reasons:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.
>
> The officer does not assess the best interests of the child in a vacuum. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non-removal of the parent. In addition to what I would describe as this implicit premise, the officer has before her a file wherein specific reasons are alleged by a parent, by a child or, as in this case, by both, as to why non-removal of the parent is in the best interests of the child. These specific reasons must, of course, be carefully examined by the officer.
>
> To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial—such a finding will be a given in all but a very few, unusual cases. For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.

The administrative burden facing officers in humanitarian and compassionate assessments—as is illustrated by section 8.5 of Chapter IP 5 of the *Immigration Manual: Inland Processing (IP)* reproduced at paragraph 30 of my colleague's reasons—is demanding enough without adding to it formal requirements as to the words to be used or the approach to be followed in their description and analysis of the relevant facts and factors. When this Court in *Legault* stated at paragraph 12 that the best interests of the child must be "well identified and defined", it was not attempting to impose a magic formula to be used by immigration officers in the exercise of their discretion.

Third, I reject the argument submitted by the intervener, the Canadian Foundation for Children, Youth and the Law, that even if a reasonable balancing of the various factors has been made by the officer, the reviewing Court must go a step further and consider whether the damage to the child's interests is disproportionate to the public benefit produced by the decision. To require such a further step would be to reintroduce through the back door the principle confirmed in *Legault* that the best interests of the child are an important factor, but not a determinative one. [Emphasis added.]

[33] Many of the factors which an officer is required to consider in determining an H&C application can be found in the guidelines issued to immigration officers by the Minister, to which Décary J.A. refers in paragraph 7 of his reasons in *Hawthorne*, above, and which can be found at paragraph 30 of Evans J.A.'s concurring reasons in that case. These factors include hardship arising from the geographical separation of family members. In examining this factor, the officer should consider: the effective links with family members, i.e. in terms of ongoing relationship as opposed to the simple biological fact of relationship; has there been any previous period of separation and, if so, for how long and why; the degree of psychological and emotional support in relation to other family members; options, if any, for the family to be reunited in another country; financial dependence; and the particular circumstances of the children.

[34] It is clear that the officer considered the girls' relationship with their parents and that she did not discount the interview statements made by them. Rather, she considered the interview statements but found them to be insufficient evidence to justify an exemption under subsection 25(1) of the Act.

[35] It cannot be disputed that the appellants had the burden of proving the claims made in their H&C application. In *Owusu*, above, at paragraph 5, Evans J.A., writing for the Court, remarked as follows:

An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless. [Emphasis added.]

[36] The appellants rely on *Gill*, above, a recent child-sponsorship decision where Campbell J. of the Federal Court refused to follow the majority's approach in *Hawthorne*, above, on the basis that its reasoning "does not apply to overseas applications because such applications do not involve the removal of a person from Canada" (see paragraph 12 of his reasons). Campbell J. then went on to hold, relying on the Supreme Court of Canada's decision in *Young v. Young*, [1993] 4 S.C.R. 3, a family law case concerning custody and access to children, that an analysis of the child's best interests required a contextual approach based on family law principles. This led him to opine that

such an analysis "[should] be highly contextual and focused on the future" (see paragraph 15 of his reasons) and that, as a result, officers should conduct their analysis by: identifying the factors impacting on a child's best interests; making a well reasoned choice between available options; and weighing the child's best interests against other relevant factors.

[37] In my view, Campbell J.'s approach is undeniably wrong and should not be followed. The consideration of a child's best interests in an immigration context does not readily lend itself to a family law analysis where the true issues are those of custody and access to children. Contrary to family law cases where "the best interests of the children" are, it goes without saying, the determining factor, it is not so in immigration cases, where the issue is, as in the case before us, whether a child should be exempted from the requirements of the Act and its Regulations and allowed to become a permanent resident. As Décary J.A. made clear in his reasons for the majority in *Hawthorne*, above, the principle which this Court enunciated in *Legault*, above, is that although the best interests of a child are an important factor, they are not determinative of the issue before the officer.

[38] Thus, although there cannot be much doubt in the present instance that the best interests of the minor children, Subleen and Lovleen, would require that they be reunited with their parents, that is not the question which the officer had to decide. She had to determine whether the girls' best interests, when weighed against the other relevant factors, justified an exemption on H&C grounds so as to allow them to enter Canada.

[39] What Campbell J. was attempting to do in *Gill*, above, is, in my respectful view, what Décary J.A. alluded to in his reasons in *Hawthorne*, above, when he stated at paragraph 8 that the intervener, the Canadian Foundation for Children, Youth and the Law, was attempting to circumvent the principle enunciated by this Court in *Legault*, above, that "the best interests of the child are an important factor, but not a determinative one."

[40] I therefore conclude that Mosley J. made no error in holding that the officer had given adequate con-sideration to the children's best interests and that her decision was reasonable.

[41] I now turn to the issue raised by the certified question.

D. Did fairness impose a duty on the officer to obtain further information concerning the best interests of Subleen and Lovleen if she believed that the evidence was insufficient?

[42] The Judge dealt briefly with this issue when he said at paragraph 28 of his reasons: "The applicants failed to provide sufficient evidence of that hardship [i.e., resulting from their geographical separation] and cannot now complain that the officer did not delve deeply enough to fill the void left by that failure."

[43] Thus, the Judge was of the view that it was not the officer's duty to make further inquiries so as to discover evidence that might be favourable to the case put forward by the appellants. For the reasons that follow, I see no error in the Judge's determination.

[44] The appellants argue that in the circumstances of this case, the officer was obliged to make an

effort to obtain further information regarding the best interests of the children if she was of the opinion that what was before her was insufficient. The respondent argues that an applicant bears the burden of making his or her case on an H&C application and that, in the circumstances of this case, the officer was not under any duty to assist the appellants in discharging that onus.

[45] It is trite law that the content of procedural fairness is variable and contextual (see: *Baker*, above, at paragraph 21; and *Khan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345, [2002] 2 F.C. 413). The ultimate question in each case is whether the person affected by a decision "had a meaningful opportunity to present their case fully and fairly" (see: *Baker*, above, at paragraph 30). In the context of H&C applications, it has been consistently held that the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is under no duty to high-light weaknesses in an application and to request further submissions (see, for example: *Thandal*, above, at paragraph 9). In *Owusu*, above, this Court held that an H&C officer was not under a positive obligation to make inquiries concerning the best interests of children in circumstances where the issue was raised only in an "oblique, cursory and obscure" way (at paragraph 9). The H&C submissions in that case consisted of a seven-page letter in which the only reference to the best interests of the children was contained in the sentence: "Should he be forced to return to Ghana, [Mr. Owusu] will not have any ways to support his family financially and he will have to live every day of his life in constant fear" (at paragraph 6).

[46] In support of their view that there was a duty upon the officer to make further inquiries, the appellants rely on two Federal Court decisions, namely, *Del Cid v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 326; and *Bassan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 742, 15 Imm. L.R. (3d) 316. In *Del Cid*, above, O'Keefe J. expressed the view that the officer had an obligation to make further inquiries regarding the best interests of the children. However, he recognized this duty specifically in respect of Canadian-born children (at paragraphs 30 and 33). His finding was also contingent on his view that the evidence initially placed before the officer was sufficient to merit further inquiries (at paragraph 43 of these reasons).

[47] It is important to note that in *Del Cid*, above, there was evidence before the officer that the applicant's very young children were negatively affected by the separation: they were unable to eat, cried for extensive periods of time, were integrated into the Canadian system and spoke English as their language, and would be losing the love and support of their custodial parent. Failure to balance these factors made the officer's decision unreasonable.

[48] In *Bassan*, above, McKeown J. expressed a view similar to that expressed by O'Keefe J. in *Del Cid*, above, when he said at paragraph 6:

> An H and C officer must make further inquiries when a Canadian born child is involved in order to show that he or she has been attentive and sensitive to the importance of the rights of the child, the child's best interests and the hardship that may be caused to the child by a negative decision. As stated by Madam Justice L'Heureux-Dubé, such further inquiry "is essential for an H and C decision to be made in a reasonable manner".

[49] For the reasons that follow, I need not express a view as to the correctness of the decisions in *Del Cid* and *Bassan*, above. However, to the extent that these decisions reached a conclusion inconsistent with these reasons, they should not be followed.

[50] In the present matter, the minor appellants are not Canadian born, they speak Hindi as their native language, are currently cared for by their aunt, are integrated into the school system in India and did not disclose any information suggesting they suffered undue hardship beyond that normally caused by family separation. As one example, when asked what the parents and children spoke of on the telephone, one of the twins answered (see appeal book, at page 33):

[Child appellant]: They ask us how we are, whether we are happy.

[Interviewer]: What do you say?

[Child appellant]: We say we are fine.

[51] The question for determination is whether, in these circumstances, there was a duty upon the officer to pursue further inquiries so as to uncover the existence of additional elements to support a case of hardship resulting from the children's separation from their parents.

[52] When the officer interviewed the twins and their aunt, she had before her the letter dated March 6, 2006, sent on their behalf by Peter Carpenter, their immigration consultant. In his letter, Mr. Carpenter made a number of points which may be summarized as follows:

1. The fact that the children's living conditions in India were "far from ideal" in that they were living with their aunt, whose husband, a banker, worked and lived in Mumbai. As a result, he was away from New Delhi and thus, the responsibility of raising the children fell upon his wife, the children's paternal aunt.

2. The fact that these living arrangements were meant to be temporary and not permanent.

3. The fact that the children were innocent victims of their parents' failing to declare them on their application for permanent residence.

4. To deprive the twins of the possibility of being raised by their natural parents [in Canada] "would be harsh and inhuman". It could not be in their best interests to be kept apart from their parents.

5. The officer considering the case should give much weight to the emotional impact on the family resulting from the geographical separation of the children from their parents.

6. The fact that the parents in Canada could provide financially for their children and offer them "a sound education and bright future".

7. The fact that the children's mother can no longer bear children; thus, a permanent separation from her daughters would be devastating to both her and her husband.

[53] As a result, the officer was well aware of all the H&C grounds on which the application was based.

[54] The call-in letter sent to the girls at the end of August 2006 requested that they bring "documentary evidence that establishes their relationship to their sponsor". It also required them to

bring “all evidence of communication with your sponsor, e.g. cards/letters, telephone bills”.

[55] Thus, with the information contained in Mr. Carpenter’s letter in mind, as well as the information revealed by the documents which the twins brought to the interview, the officer conducted her interview of the twins and their aunt on October 11, 2006. Unfortunately for the twins, the officer concluded that the information provided in support of their H&C application was not sufficient to overcome their ineligibility under paragraph 117(9)(*d*) of the Regulations. I have already indicated at paragraph 9 of these reasons the grounds which led the officer to refuse the application.

[56] There can be no doubt that the officer could have asked more questions in order to obtain additional information with regard to the twins’ situation in India, but, as we shall see, she was under no duty to do so in this case. It may be that the pointed and narrow questions disclosed by the CAIPS notes probably did not constitute the most effective manner of obtaining information from these applicants, particularly in light of the lack of documentary evidence provided by them. However, the vacuum, if any, was created by the appellants’ failure to assume their burden of proof. In these circumstances, the officer’s poor interviewing techniques, if that be the case, are, in my view, insufficient to justify intervention on our part.

[57] The appellants have failed to specify what areas of investigation or inquiry the officer should have pursued, other than in the following respects. At paragraph 3 of their memorandum, they state that although the officer asked the girls “what their lives were like with their aunt and how they were doing in school”, she did not ask them “how they coped without their parents, if they missed them or if they had any particular problems because of separation from them”. They then affirm at paragraph 25 of their memorandum that “it is implicit in the officer’s reason for rejecting the application that had the officer been satisfied that the twins were being supported by their parents and had ongoing contact with them—which were asserted but not supported by corroborative evidence—the results might well have been favourable to the girls”.

[58] With respect to the first point, I fail to see the necessity of asking questions with regard to whether the children missed their parents or whether the separation caused them any particular problem. In my judgment, there would have been no purpose in asking these questions, considering that Mr. Carpenter, in his letter of March 6, 2006, had already indicated that the separation was having a considerable emotional impact on the family and that it “would be harsh and inhuman” to prevent the parents from raising their children in Canada. Further, one has to assume that the officer was capable of realizing that it must have been difficult for children of that age to be permanently separated from their parents.

[59] With respect to the second point, it is difficult, if not impossible, to say whether the officer’s decision would have been different had she received additional evidence concerning the nature of the relationship between the parents and their children and, more particularly, with regard to the frequency of their contacts, i.e. daily, weekly, monthly, etc. However, the appellants’ assertion on this point does not lead to the conclusion that the officer ought to have pursued the matter further.

[60] Given that the appellants were represented by an immigration consultant, that the girls were clearly asked to bring to the interview documents pertaining to “communication with your sponsor,

e.g. cards/letters, telephone bills", and considering that their aunt had accompanied them to the interview and was also interviewed and thus had the opportunity of providing an explanation with regard to the children's plight, I cannot conclude that the officer had a duty to make further inquiries. I have not been persuaded that, in the circumstances of this case, fairness required the officer to provide them with another opportunity to produce documents and/or information in support of their application.

[61] The burden was on the appellants to demonstrate to the officer that there were sufficient H&C grounds to grant them an exemption from the requirements of the Act and its Regulations. They were unable to meet that burden. Hence, I conclude that the officer did not have a duty to make further inquiries.

[62] Because of the highly factual and variable circumstances of each H&C application, I cannot see how the certified question can be answered in the affirmative. However, I do not rule out the possibility that there may be occasions where fairness may or will require an officer to obtain further and better information. Whether fairness so requires will therefore depend on the facts of each case.

Disposition

[63] I would therefore dismiss the appeals and decline to answer the certified question.

LÉTOURNEAU J.A.: I agree.

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The following are the reasons for judgment rendered in English by

[64] TRUDEL J.A.: I am in substantial agreement with the reasons of my learned colleague Nadon J.A.; in this case, I am satisfied that it was not unreasonable for the officer to conclude that Lovleen and Subleen Kisana had not suffered undue hardship as a result of their separation from their parents. I only wish to address some arguments related to the best interests of the child that were raised by the appellants.

[65] As Nadon J.A. acknowledges at paragraph 55 of his reasons, it is clear that the officer could have conducted a more effective interview. I agree with him that the poor interviewing techniques in this case do not warrant this Court's intervention, considering the record as a whole. However, I would not rule out the possibility that in another case, the conditions of a call-in interview may constitute a failure to be "alert, alive and sensitive" to the best interests of the child, as required by the Supreme Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 75.

[66] In my view, being "alert, alive and sensitive" to the best interests of the child does not simply require that an immigration officer take the child's interests into account when he or she performs the final weighing of the evidence. It also requires that the officer be "alert, alive and sensitive" to the child's needs and interests when he or she is being interviewed. Canadian law has long

recognized the special needs of children and acknowledged that sensitivity is required when they are interviewed or examined in the context of family and criminal proceedings (see for example *L.E.G. v. A.G.*, 2002 BCSC 1455 (CanLII), at paragraphs 25–26; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at paragraph 3; *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755, at page 766). While I would not suggest that the same protections given to a child being interrogated by a police officer must be provided in an immigration office, it is clear that a child should not be treated the same as an adult in a call-in interview that will seriously affect his or her interests.

[67] Nor is this to say that an immigration officer is expected to be a child psychologist or a social worker. However, in my view the officer must keep in mind the linguistic, cognitive and emotional differences between children and adults when conducting an interview. In many ways, this is a matter of common sense. It can be presumed that children will be nervous at a call-in interview and may not be very forthcoming. A child confronted with pointed, closed-ended questions will likely give simple "yes" or "no" responses and not make efforts to volunteer any additional information. He or she may be reluctant to ask for clarification if a question is not understood. Younger children may not be capable of comprehending the nature of the interview at all.

[68] An officer who is "alert, alive and sensitive" to the best interests of the child will take these vulnerabilities into account. I would not endeavour to dictate an exhaustive list of procedures that ought to be followed, but generally officers should endeavour to ask age-appropriate questions, satisfy themselves that the questions are understood and ask open-ended questions or follow-up questions where appropriate. Particularly in cases involving very young children, it may be appropriate for an adult to accompany the child in the interview room. In short, while an officer is under no obligation to attempt to elicit all evidence that may help a child's case, being "alert, alive and sensitive" to the child's best interests requires that an interview be conducted in a manner that will allow the child to express him or herself effectively (see *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 F.C. 555, at paragraph 33, *per* Evans J.A., concurring in the result).

[69] The significance of the conduct of a call-in interview is especially apparent in a case like this, where it appears on the record that little documentary evidence was submitted in support of the humanitarian and compassionate (H&C) application. On this note, the appellants argued that they were not clearly informed about the type of evidence that they were expected to bring to the interview. The call-in letter they received, dated August 22, 2006, stated that they were required to bring birth certificates and documents establishing their relationship to their sponsor (e.g. school documents listing parents' names). According to the appellants, that letter could reasonably be read as requiring that other documentary evidence about the nature of the relation-ship between the applicant and sponsor (such as cards, letters, photos and telephone bills) be provided only if the applicant was being sponsored by a spouse or fiancé or an adoptive parent, none of which was applicable to Subleen and Lovleen. I think it is fair to say that the letter, which appears at pages 128–129 of the appeal book, contains some ambiguity.

[70] However, like my colleague, I am satisfied that there has been no breach of procedural fairness in this case, because the call-in letter stated that any further documentation could have been submitted after the interview. An email to the appellants' consultant also stated that Subleen and Lovleen should bring "proof of communication with sponsor" to the interview (at page 47 of the

appeal book).

[71] This e-mail was sent on October 9, 2006, two days before the interview, and I am willing to accept that it could have been difficult for the consultant to get in touch with his clients in India and for them to prepare the necessary documents on such short notice. However, the record demonstrates that the appellants were asked to submit evidence on the closeness of their relationship; certainly, the officer's questions at the interview made it apparent that they should do so. The appellants or their consultant could have submitted documentary evidence following the interview but chose not to do so. I note this confusion only to underscore the potential significance of a call-in interview, and the need for sensitivity when dealing with children where the answers given at an interview will be given significant weight in the disposition of their application.

[72] Finally, I wish to comment very briefly on the relevance of family law in the immigration context. I agree with my colleague Nadon J.A. that it is wholly inappropriate to import the "best interests of the child" framework that is used in custody and access cases into immigration applications. As he points out, the best interests of the child are the determinative factor in a family law case; not so in the immigration context, where it is but one factor to be weighed along with others. This is not to say, however, that considerations and expertise regarding the moral, intellectual, emotional and physical needs of children ought not to be regarded and that, in this respect, the expertise of family courts, where appropriate and relevant, cannot be looked at for valuable information.

[73] Nonetheless, I agree with my colleague that there is not a sufficient basis for the court to intervene in this case, given the lack of hardship disclosed by the record. Like him, I would decline to answer the certified question and I would dismiss the appeals.