Date: 20080409

Docket: IMM-326-07

Citation: 2008 FC 457

Ottawa, Ontario, April 9, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

VALLIPURAM KANAGARATNAM KUHATHASAN
NALINEY KUHATHASAN
KUHATHASAN PRASHANTH
KUHATHASAN VIPUSHANTH
and
KUHATHASAN VITHUSHANTH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [Act] for judicial review of a decision of a visa officer (Officer) dated December 4, 2006, (Decision) refusing the Applicants' application for permanent residence in Canada.

BACKGROUND

[2] The Principal Applicant, Mr. Vallipuran Kanagaratnam Kuhathasan is a 54-year-old male and a land-surveyor by profession. The other Applicants are his wife and three sons. The Applicants are all citizens of Sri Lanka.

[3] The Applicants' house is on the eastern coast of Sri Lanka and is located approximately 200 meters from the shore. On December 26, 2004, the Sri Lankan coastline was hit by a devastating tsunami. At the time, the wife and three children were at home. The Principal Applicant was away, working in Saudi Arabia. The family fled to a neighbouring community where they stayed with relatives for 15 days. Their home was partly damaged, but they were able to continue living in the home after the disaster. However, most of their household items were washed away or rendered useless due to water damage. The Applicants filed a police report listing the damage that was sustained.

[4] As part of the Canadian government's response to the tsunami, Citizenship and Immigration Canada (CIC) implemented a priority-based processing system for applications from persons who were seriously and personally affected by the disaster. Application fees were waived. First priority was given to applications of Family Class applicants under the Act. Second priority was given to applications of sponsored parents. Third priority was given to

other persons directly affected but who were not members of the Family Class. The Applicants fell into this third priority grouping.

[5] According to the Tsunami Operational Instructions, visa officers were instructed to assess individual circumstances on a case-by-case basis (Affidavit of Officer, Exhibit "B", Operational Instructions – 2005 05-005 (RIM), "Tsunami Operational Instructions" at para. 1.1[Operational Instructions]). To be eligible for the special processing of an application, the Operational Instructions provided that an applicant "must have been, and continue to be, seriously and personally affected by the earthquake or tsunami of 26 December" (Operational Instructions at para. 1.0). The Operational Instructions noted that "'seriously and personally affected' would normally include (but is not limited to) situations where, as a result of the earthquake or tsunami … the individual has suffered personal injury, loss of family support, death of immediate family members, loss of housing, employment or schooling" (Operational Instructions at para. 1.1). As provided by the Operational Instructions, the test of "seriously and personally affected" needed to be met at the time an application was under review. Thus, the Applicants were required to establish that they were, and continued to be, seriously and personally affected in such a way that there were humanitarian and compassionate reasons to invoke one or more of the special processing procedures.

[6] In order to avoid further processing requirements within Canada, successful applicants were issued permanent resident visas instead of temporary resident permits.

[7] Specialized forms were not issued for applications under the expedited process. Instead, persons in the first and second priority groups were required to complete Sponsorship Application forms, the standard forms used for sponsoring a person under the Family Class. Applicants who fell within the third priority group were required to complete a Federal Skilled Worker Application form.

[8] The instructions provided to applicants, as found on the Department's website, were as follows:

> Tsunami and Earthquake Disaster Response
>
> Fact Sheet: How to complete a Skilled Worker Application for family members who cannot be sponsored but who have been affected by the tsunami disaster:
>
> …If the member of your family who was affected by the tsunami is your spouse, common-law partner, conjugal partner, dependant child, parent or grandparent, or brother, sister, niece, nephew, or grandchild, orphaned under 18 years of age and who is not a spouse or common-law partner, you should apply in Canada to sponsor your relative.
> All **other close family members** of Canadian citizens and permanent residents of Canada affected by the tsunami disaster should use the federal skilled worker application form.
>
> **Please note the following**:
>
> 1. In order to assist the applicant, the close family member in Canada may wish to complete as much information as possible on behalf of the applicant. **The application must be sent to the applicant in the affected area for review and signature prior to being submitted to the Embassy or High Commission abroad**.
>
> 2. Fees do not have to be paid by those affected by the tsunami disaster. The fee exemption takes effect on the day of the disaster (December 26, 2004).
>
> 3. Include as many of the documents listed in Appendix A of the application kit as possible. You may submit the application even if some information or

documents are missing. However, complete applications are usually processed more quickly.

4. You must include **two letters: 1)** a letter explaining in detail how the persons applying in the affected area have been, and continue to be, seriously and personally affected by the disaster, and **2) a letter from the applicant's family member in Canada** offering financial assistance. Ensure that you place the letters **at the top** of the documents that are being submitted.

5. **All medical and security requirements must still be met.**

6. Please write "Tsunami Disaster" on the outside of the envelope.

[…]

[emphasis in original]

[9] The website also provided the following instructions under the heading "Frequently Asked Questions: Important Application Information":

> **1. How do I make an application to sponsor my close family member for immigration to Canada?**
>
> […]
>
> **2. How can other close family members apply to immigrate to Canada?**
> Other close family members…of Canadian citizens and permanent residents in **Canada**, who have been, and continue to be, seriously and personally affected by the **tsunami** disaster, should complete a **FEDERAL SKILLED WORKER APPLICATION** form. Decisions concerning these applications will be made on a case-by-case basis by the visa officer at the mission abroad…
>
> [emphasis in original]

[10] In February 2005, the Principal Applicant heard that Canada was offering people with relatives in Canada the opportunity to apply for permanent residence in Canada. The Principal

Applicant contacted his first cousin in Canada, Mr. Kandia Balasunderam, and received a written pledge of support from the cousin and his wife, Mrs. Vimaladevi Balasunderam.

[11] The Principal Applicant submitted his application for permanent residency in May 2005. Within his application, his wife and three sons were listed as accompanying family members. The Applicants completed the generic IMM-0008 form (Application for Permanent Residence). On the form, they were required to indicate under which category they were applying for permanent residence in Canada: the Family class, the Economic class, as a Refugee Outside of Canada, or "Other". On their application, the Applicants checked off "Refugee Outside Canada" and under "Other" they noted "Tsunami". Included in their application was a letter explaining how the family was seriously and personally affected by the disaster. They also submitted an undertaking from Mr. and Mrs. Balasunderam in which the couple offered their financial assistance to the Applicants.

[12] In September 2006, the Applicants received a written refusal of their application. This refusal is the Decision under review in this judicial review.

DECISION UNDER REVIEW

[13] In a letter to the Principal Applicant, dated December 4, 2006, the Officer informed the Principal Applicant of her decision to refuse his application for permanent residence in Canada. The Officer accepted that the Applicant was "a person who was seriously and personally

affected by the tsunami" but rejected his application on the basis that, pursuant to section 39 of the Act, the Applicant was inadmissible to Canada for the following reasons:

> …I note that you have completed 12 years of formal education, that you have employment experience as a Land Surveyor, that you have not indicated the proficiency level in English or French other than stating [that] you can communicate in English, but not in French, and that you have no funds to help you settle in Canada. Your cousin in Canada has offered assistance to you and your family, but I am not satisfied that he would be able to provide the level of assistance you would require and for as long as you would require to enable you to successfully settle in Canada.
>
> Pursuant to section 39 of the [Act], I have determined that you are a person who is or will be unable to support yourself or any other person who is dependent on you. You have not satisfied me that adequate arrangements for care and support, other than those that involve social assistance, have been made. As a result, you are inadmissible to Canada…

Because the Principal Applicant's application was refused, the wife and three sons' applications were also unsuccessful since, having applied as accompanying family members, their applications were dependent on that of the Principal Applicant.

ISSUES

[14] The Applicants raise the following issues:

1. **Did the Officer err by failing to consider the existence of humanitarian and compassionate grounds, public policy considerations and the best interests of the children involved?**

2. Did the Officer breach the rules of procedural fairness in not confronting the Applicants with her concerns?

3. Did the Officer err by refusing the Principal Applicant's application for permanent residence on the basis that he was inadmissible pursuant to section 39 of the Act?

Statutory Framework

[15] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.(1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présent loi.
[…]	[…]
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi,

of this Act, and may, on the Minister's own initiative, 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.

et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[…]

[…]

Inadmissibility: Financial reasons

39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.

Interdictions de Territoire: Motifs financiers

39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.

REASONS

Standard of Review

[16] Recently, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the Supreme Court of Canada recognized that, although the reasonableness simpliciter and patent unreasonableness standards are theoretically different, the "analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (*Dunsmuir* at para. 44). Consequently, the Court held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[17] The first issue in the present case, whether the Officer failed to consider the existence of humanitarian and compassionate grounds, public policy considerations and the best interests of the children involved, is a question of mixed fact and law. The third issue involves a review of the Officer's assessment of the evidence. In light of the decision in *Dunsmuir*, and the previous jurisprudence of this Court, I find the standard of review applicable to these issues to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). Further, I note that regardless of the standard of review analysis applied to these two

issues, that is, either pre-*Dunsmuir* reasonableness or patent unreasonableness or post-*Dunsmuir* reasonableness, my conclusions would be the same.

[18] With respect to the second issue, which is a question of procedural fairness, the applicable standard of review is correctness. As stated by the Supreme Court in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28 (QL) at paragraph 100, "it is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Accordingly, the standard of review analysis is not applicable to questions of procedural fairness and these questions are reviewable on a correctness standard (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, 2001 SCC 4 at para. 65). Where a breach of the duty of fairness is found, the decision should generally be set aside (*Benitez v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 631 at para. 44 (QL); *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056 at para. 54 (QL)).

1. **Did the Officer err by failing to consider the existence of humanitarian and compassionate grounds, public policy considerations and the best interests of the children involved?**

The Applicants

[19] The Applicants argue that the Officer failed to apply the Respondent's own criteria for assessing tsunami applications. According to the Applicants, their applications were to be considered on humanitarian and compassionate (H&C) grounds and public policy grounds. Although the Principal Applicant did not expressly request the Officer to consider his application on H&C grounds or public policy grounds, he argues that what he did say in his application was sufficient to engage section 25 of the Act and to give rise to a positive duty on the part of the Officer to consider such grounds. The Applicants add that the tsunami policy under which they applied inherently involved H&C and public policy considerations; thus they were not required to plead humanitarian grounds explicitly in their application. According to the Applicants, the Officer erred in law by refusing their application on the basis of inadmissibility pursuant to section 39 of the Act, without turning her mind to the section 25 H&C and public policy exemptions that were available to overcome this inadmissibility.

[20] In addition, the Applicants argue that the Officer erred in law and fettered her discretion by not considering the best interests of the children. During cross-examination, the Officer admitted that she did not consider the best interests of the minor Applicants when she assessed the application because there was no issue of family separation:

> Q: (Counsel for the Applicant): Did you assess whether it was in the best interests of the minor applicants, since they were children, to come to Canada? Did you assess best interests of the child under section 25.1 of the Act?
>
> A: (Officer): I did not.

Q: Why was that?

A: First he was – the children, the minors, would not be separated from the family if they came – they did not come to Canada. The family unit would still be together in Sri Lanka.

Q: But were you not required under section 25 to consider whether it was in the best interests of the children to come to Canada?

A: Yes.

Q: And yet you did not do that?

A: No, I did not.

Q: Why was that?

A: I have no answer to that. I did not focus on that.

Q: I'm nearing the end […]. Just, I think, one –

A: An issue that would arise as the family unit will remain together.

Q: All right. So your understanding is, if the family unit remains together, you do not have to consider the best interests of a child?

A: Not that I do not have to consider. I do not think in relation to this particular case that it was an issue.

(Cross-Examination of Officer, Questions 115-121 at pages 30-31).

[21] The Applicants submit that section 25(1) of the Act provides a statutory duty to consider the best interests of any child directly affected even if the onus to provide evidence of those interests remains that of the Applicant. A failure to assess those interests, argue the Applicants, constitutes an error in law, both in terms of section 25(1) of the Act and the standard set out by the Supreme Court of Canada in *Baker*. Further, the proviso in section 25 permitting the Officer, "on the Minister's own initiative," to examine whether it was in the best interests of the child is not restricted to situations of family separation.

The Respondent

[22] The Respondent, on the other hand, argues that the Officer considered the H&C factors in the Applicants' case but nevertheless refused their application. According to the Respondent, the H&C considerations underpinning the Operational Instructions were adhered to when the Officer processed the Principal Applicant's application notwithstanding his failure to score enough points to warrant an in-person interview. Further, the H&C considerations were what led to the waiving of processing fees and the processing of the application on an expedited basis. The Respondent submits that the Applicants are suggesting the Officer ought to have deliberately closed her eyes to the fact that neither they nor their cousin had the funds to support and care for them in Canada.

[23] In their written submissions, the Applicants allege that the Respondent had promised that applications from persons seriously and personally affected by the tsunami "would be considered on a priority basis under humanitarian and compassionate grounds" The documents submitted on behalf of the Applicants in support of the quotation attributed by them to the Respondent contain no such express statement. Instead, the Respondent simply provided that applications from persons who were, and continued to be, seriously and personally affected by the tsunami would be given priority and were not required to pay the application processing fee.

[24] H&C factors in the Applicants' case were considered to the extent that their application was accepted for processing on a priority basis and they were not required to pay the application

processing fee. The Officer found that the Principal Applicant had failed to satisfy the requirements for admission under the category in which his application was processed, i.e. the Skilled Worker category. According to her affidavit, the Officer then applied clause 2.1.3 of the Operational Instructions, which provided as follows:

> If the applicant does not meet selection criteria, the visa office should take into account both the extent to which the individual has been affected, any available information about settlement support in Canada, and the extent to which support exists in the country of origin. Canada and the international community are making major efforts to mitigate the long-term impact of the disaster and to rebuild local economies and social services. In many cases, especially where settlement prospects in Canada are poor and the impact of the disaster moderate, admission to Canada on humanitarian grounds may not be warranted. In cases where the individual is not inadmissible, where family ties and settlement prospects in Canada are strong, and where the individual has little or no remaining support within the country of origin and/or has been very severely affected by the disaster, the program manager is encouraged to consider exercizing the humanitarian and compassionate provisions of A25.
>
> (Affidavit of Officer at para. 10; Operational Guidelines, s. 2.1.3, Exhibit “B”.)

[25] With respect to the H&C analysis conducted by the Officer, she notes the following in her affidavit at paragraph 14:

> In light of all the evidence I had before me, I determined that the principal Applicant was inadmissible to Canada because he was a person who would be unable to support himself (and any other person dependant on him) and that adequate arrangements for his and his dependants care and support in Canada, other than social assistance, have not been made (in accordance to Section 39 of the [Act]). I determined that the Humanitarian and Compassionate factors of this case, such as the moderate impact of the Tsunami on the Applicants, was not of such degree as to overcome the issue of inadmissibility.

Conclusions

[26] In my review of the Decision, it is not clear at all how H&C considerations were factored into the Officer's reasons. The Respondent, at the hearing of this matter, acknowledged that H&C considerations were a part of this program but that economic viability was the conclusive factor in this case. As I will discuss later, I see considerable problems with the way that the economic viability issue was handled. However, at this stage, the Officer just does not make it clear how H&C factors affected her Decision. What is clear is that the she failed to consider the interests of the children affected by the Decision entirely, and she failed to address any possible exemption under section 25 of the Act. Section 25 explicitly states that, when considering whether to exercise his or her authority under section 25, the Minister must consider the best interests of a child directly affected:

Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national	**25. (1)** Le ministre doit, sur demande d'un étranger interdit
who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign 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	de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

> relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

[27] This is not to say that H&C factors, or the best interests of the children should have trumped other considerations in this case; but the Officer's failure to refer to these matters and deal with them in her Decision was, in my view, reviewable error.

2. Did the Officer breach the rules of procedural fairness in not confronting the Applicants with her concerns?

The Applicants

[28] The Applicants argue that the the Officer's refusal of their application was based on concerns relating to the Principal Applicant's finances and settlement arrangements. According to the Applicants, the Officer drew inferences and came to a negative conclusion without confronting the Applicants with her concerns.

[29] The Applicants submit that there was no requirement under the tsunami policy to provide proof of settlement funds or demonstrate savings, assets or available support from relatives at a particular level. The written policy simply required "a letter from the applicant's family member in Canada offering financial assistance." According to the Applicants, the only requirements were that an applicant be seriously and personally affected by the tsunami, meet medical and security requirements, have a relative in Canada and provide a letter of assistance

from the Canadian relative. The Applicants note that the Officer took no issue with the Applicants' satisfying these requirements.

[30] The Principal Applicant argues that he could not have anticipated that the information he submitted would be inadequate. Thus, there was a duty on the Officer to confront the Applicants with her concerns and allow them the opportunity to respond to these concerns. In addition, the Principal Applicant states that he had no way of knowing that he was required to indicate his proficiency level in English. The Principal Applicant suggests that the Officer had a duty to confront him about his language abilities. The Principal Applicant submits that this would not have necessarily entailed the "administrative burden of an interview" and recognizes that the Respondent may well have been overburdened with applications under this policy. However, the Respondent simply could have written a letter to the Principal Applicant inviting further documentation, as is routinely done in immigration cases.

The Respondent

[31] The Respondent argues that the Applicants have ignored the fact that the Operational Instructions did not supplant the provisions of the Act. The Operational Instructions were intended to help with the speedy processing and re-settlement in Canada of applicants affected by the tsunami *and* who were deemed capable of making it on their own, or who were able to demonstrate that they would be able to draw on the requisite financial support from family members in Canada.

[32] With respect to the Principal Applicant's argument that he had no way of knowing that he had to satisfy the Officer about his proficiency in one of Canada's official languages, the Respondent argues that this submission is without basis in law and does not point to an error in the Officer's Decision. The Respondent relies on Justice Dawson's decision in *Ramos-Frances v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 142 at para. 8, wherein she stated:

> As a general rule, the jurisprudence is to the effect that when the officer's concern arises directly from the requirements of the legislation or the Regulations, an officer is not under a duty to provide an opportunity for the applicant to address those concerns.

[33] The Respondent submits that the Officer had no obligation to notify the Principal Applicant that he might not qualify or allow him the opportunity to respond to her concerns regarding his application. While an officer may make inquiries, there is no obligation to do so:

> Such submission is tantamount to saying that any time a visa officer thinks that an applicant for permanent residence might be refused, he or she must disclose the expected decision in advance
>
> and give the applicant a second chance to meet requirements. While nothing prevent the visa officer from doing so, there is no such obligation on the officer.
>
> (*Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 at para 8 (F.C.T.D.) (QL)).

[34] Further, there is no requirement that a visa officer advise an applicant that his or her application is ambiguous or that the documentation is unsatisfactory (*Madan v. Canada (Minister of Citizenship and Immigration)* (1999), 172 F.T.R. 262, [1999] F.C.J. No. 1198 at

para. 6 (F.C.T.D.) (QL); *Nehme v. Canada (Minister of Citizenship and Immigration)* (2004), 245 F.T.R. 139, 2004 FC 64 at para. 18). There is no statutory right to an oral interview and no obligation to interview applicants in order to clarify ambiguities in an application.

[35] The Respondent also notes that the Principal Applicant was required by law, under section 39 of the Act, to prove to the Officer that he had the means to support his family, and failing that, to demonstrate that he had made adequate arrangements for their care and support in Canada. The Principal Applicant failed to demonstrate to the Officer's satisfaction that he had the means to support a family of five in Canada and the alternative arrangements he made were found to be inadequate. Further, as an applicant in the Skilled Worker category, the Principal Applicant was required to demonstrate proficiency in either of Canada's official languages. It was not for the Officer to later make inquiries about his proficiency. Regardless, the Officer's finding regarding the Principal Applicant's language abilities is immaterial. The Respondent submits that the paper screening of the application reveals that the Principal Applicant would only have received 4 points for age, 12 points for education, 21 points for experience as a land surveyor and no points for adaptability, for a total of 37 points. Thus, even if he had been awarded points for his proficiency in English, the Principal Applicant would still have fallen far short of the 67 points required.

Conclusions

[36] As suggested by the Respondent, the tsunami policy did not supplant the provisions of the Act. Thus, the Principal Applicant was still required to meet the provisions of the Act or satisfy the Minister that there were sufficient H&C considerations to justify the exercise of the Minister's discretion to exempt him from the provisions of the Act. It is well-settled that, as a general principle, the onus is on an applicant to provide the necessary information. As stated by Justice Evans in *Madan* at paragraph 6, it falls to an applicant to put before the visa officer all material necessary for a favourable decision, and therefore an officer is under no obligation to seek clarification or additional information when the material submitted is insufficient to meet the relevant selection criteria.

[37] There is a considerable body of case law emanating from this Court indicating that there is no duty on a visa officer to try and bolster an incomplete application. A visa officer may make inquiries, when warranted, but is not obliged to inform an applicant of the weaknesses of his or her case and provide an opportunity to strengthen the application. The usual exception is where an officer has concerns about the veracity of an applicant's documents. In *Olorunshola v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1056, Justice Tremblay-Lamer provided the following summary at paragraphs 32-34:

> **32.** In *Yu v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 704 (Q.L.), MacKay J. held that visa officers are not required to stress all concerns which arise directly from the act and regulations, given that these

> instruments are available to all applicants who bear the burden of establishing that they meet the pertinent selection criteria.
>
> **33.** However, this Court has also indicated that where concerns arise which are not directly related to the act and regulations, visa offers may be required to make these concerns known to the applicant. As stated by Mosley J., this is "often the case where the credibility, accuracy or genuine nature of information submitted by the applicant in support of their application" is at issue (*Hassani, supra*, at para. 24).
>
> **34.** Accordingly, where concerns arise with respect to the veracity of documentary evidence, visa officers should make further inquiries (see *Huyen v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 904, [2001] F.C.J. No. 1267(QL), at paras. 2 and 5; *Kojouri v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389, [2003] F.C.J. No. 1779 (QL), at paras. 18 and 19; *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877, [2007 F.C.J. No. 1142] (QL), at paras. 12 to 18).

[38] Justice L'Heureux-Dubé of the Supreme Court of Canada in the context of participatory rights, noted the following in *Baker* at paragraph 22:

> …I emphasize that underlying all [the factors considered in determining what is required by the duty of procedural fairness] is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[39] In considering procedural fairness issues in the present case, I think it has to be borne in mind that the Applicants were dealt with under somewhat exceptional circumstances and that normal procedures had to be adjusted. I see no real evidence that the Applicants had access to the information they needed to satisfy all of the requirements under the Act. The Respondent's

web-site instructions were published to tell applicants and those helping them how to apply. Those instructions told the Applicants to use the Federal Skilled Worker application form and also asked for a letter from a family member in Canada offering financial assistance.

[40] The fact is that the Applicants did all they were asked to do and complied with the instructions that were posted on the web-site. The Officer's principal concern, as shown in the Decision, was general financial viability, although the documentation suggests that there were also peripheral credibility issues regarding the financial capabilities of the Canadian relative.

[41] Under the specific facts in this case, I cannot see how the Applicants could have anticipated and addressed either the financial viability issue, the peripheral credibility issues, or possible language problems in advance. They did what they were told to do in accordance with the instructions on the web-site. General financial viability was obviously a crucial issue in the Decision. On these facts, fairness required the Officer to give the Applicants some kind of opportunity to address her concerns. There is no evidence before me to suggest that, had the Applicants been given such an opportunity, they could not have satisfied the Officer's concerns. The Principal Applicant is an established professional and he has also indicated various other connections and resources he can tap into for financial support.

3. **Did the Officer err by refusing the Principal Applicant's application for permanent residence on the basis that he was inadmissible pursuant to section 39 of the Act?**

The Applicants

[42] The Applicants submit that the Officer's conclusion about lack of financial viability contained three main components, all three of which were erroneous findings of fact. First, the Officer notes in her Decision that "you have no funds to help you settle in Canada" (Decision at para. 2). The Applicants submit that there was no evidence to support the Officer's conclusion, especially given the Principal Applicant's employment as a professional land surveyor for thirty years. Even assuming a certain degree of financial devastation as a result of the tsunami, there was no basis on which to conclude that the Principal Applicant had "no funds."

[43] Second, the Applicants submit that the Officer's conclusion about the Principal Applicant's language capabilities was unreasonable. In her decision, the Officer stated "you have not indicated the proficiency level in English or French other than stating [that] you can communicate in English, but not in French" (Decision at para. 2). The only information before the Officer on this issue was the Principal Applicant's answers in the permanent residence form to the question "Can you communicate in English/French" where he answered "yes" to the question about English and "no" to the question about French. The Principal Applicant submits that he had no way of knowing that more information about his language abilities than that solicited in the form was required. He further submits that the Officer drew a negative inference

with respect to his language capabilities which was applied in her assessment of the Applicants' prospects of settling in Canada successfully.

[44] Third, with respect to the Officer's conclusion that the Applicants' sponsor would not be able to provide the level of assistance that the Applicants would require "for as long as [the Applicants] would require to enable [them] to successfully settle in Canada," the Applicants submit that the Officer erred in two respects. First, there was no evidence to support the Officer's finding that the Applicants' successful settlement in Canada would take a long time and no evidentiary basis for the Officer's conclusion that the sponsor's pledge of support was inadequate. In support of their arguments on this point, the Principal Applicant notes in his affidavit that he has other family members residing in Canada who also have the ability to support him and his family.

The Respondent

[45] In response to the first point raised by the Applicants on this issue, the Respondent argues that neither the Act nor the Operational Instructions required the Officer to make assumptions about the Applicants' finances. Instead, it was the Applicants' obligation to supply all the necessary information to enable the Officer to arrive at a decision. Further, the Applicants take issue with the Officer's finding that they had "no funds," yet the Applicants have not provided any evidence to the contrary. With respect to the Principal Applicant's submission that he has other relatives with the ability to support him and his family, the Respondent submits that

there is no evidence that they have offered their support. Such offers do not mean that the Principal Applicant has the necessary funds, and there is no evidence that such offers of support were ever made known to the Officer. Thus, the Officer's Decision cannot be impugned on the basis of these offers to help.

[46] In addition, the Respondent argues that the Officer's conclusion that the Applicants' sponsors had inadequate funds to help settle the family of four was not unreasonable; the evidence submitted indicated that the cousin is retired and subsisting on his pension income whilst his wife earns $26,500, before taxes, annually. Despite the fact that the Principal Applicant's cousin and his wife undertook to offer their assistance, the objective evidence casts serious doubt about their ability to fulfil the requirements of their undertaking.

Conclusions

[47] In my view, there was no evidence before the Officer supporting her finding that the Principal Applicant had "no funds" to help him settle in Canada. It was not open to the Officer to conclude that the funds available from the Applicants' sponsor and his wife were inadequate, based on the evidence that the cousin is a retired pensioner and his wife's annual income is $26,500 because the support needed from the Canadian relatives was entirely dependent upon what the Applicants had available to them from their own resources. Hence, the Officer's conclusions in this regard were unreasonable. The Respondent is correct that, generally speaking, it is an applicant's obligation to supply all the necessary information to enable a

decision to be made, but on the facts of this case the Applicants followed the instructions on the website and provided what they were asked to provide. I do not see how these Applicants could be in a position to understand that in response to this international disaster, CIC had set up a program that required the Applicants to satisfy all of the skilled worker criteria and, in addition, provide a letter of support from Canadian relatives that would underwrite the whole financial viability of the family.

[48] If financial viability was the major concern – and the Decision suggests it was – then the Applicants should have been given an opportunity, on these facts, to address that concern and, because no such opportunity was provided, it was unreasonable for the Officer to conclude that the Applicants had no funds of their own which, in conjunction with support from Canadian relatives, would have allowed for financial viability in Canada.

[49] For the reasons given on all three points, I think this matter has to be returned for reconsideration.

[50] Counsel are requested to serve and file any submissions with respect to certification of a question of general importance within seven days of receipt of these Reasons for Judgment. Each party will have a further period of three days to serve and file any reply to the submission of the opposite party. Following that, a Judgment will be issued.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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