

**Date: 20081023**

**Docket: IMM-5292-07**

**Citation: 2008 FC 1188**

**Toronto, Ontario, October 23, 2008**

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

**BETWEEN:**

**JAYAHANTHARAJAH SANTHIRASEKARAM**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND 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 Designated Immigration Officer (Officer) of the Canadian High Commission in Colombo, Sri Lanka, dated June 27, 2007 (Decision) refusing the Applicant's application for permanent residence in Canada under both the skilled worker category and the provisions for persons affected by the Tsunami.

## **BACKGROUND**

[2] The Applicant is a 29-year-old, unmarried, male citizen of Sri Lanka with 13 years of education or the equivalent to a Canadian high school diploma. His work experience includes work as a volunteer teacher from 2000 to 2003, and as a Non-Governmental Organization coordinator since 2003. The Applicant claims basic to moderate proficiency in English and no proficiency in French.

[3] The Applicant has one sibling in Canada. His parents and four other siblings reside in Sri Lanka. One of the Applicant's siblings in Sri Lanka was also affected by the Tsunami.

[4] The Applicant applied for permanent residence in Canada after the December 26, 2004 Tsunami that occurred in the Indian Ocean.

## **DECISION UNDER REVIEW**

[5] No interview was held with the Applicant before the Decision was made. The Applicant was assessed by the Officer in both the skilled worker category and the Tsunami category. The Officer was not satisfied that the Applicant was a skilled worker and gave him a 36 point assessment on a 100 point scale. The Officer notes in her affidavit, however, that she should have awarded 5 more

points because the Applicant has a sibling in Canada. However, an overall 41 point assessment still falls short of the 67 points required for selection under the skilled worker category.

[6] The Applicant was also unsuccessful under the Tsunami category. Although the Officer was satisfied that the Applicant had been affected by the Tsunami, she did not feel the Applicant met the requirements. The *Tsunami and Earthquake Disaster: Operational Instructions*, Clause 2.1.3.

*Existing Cases, Third Priority: Other Directly Affected Persons* state 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 exercising the humanitarian and compassionate provisions of A25. In cases where a positive determination under H and C is made, permanent resident visas, not TRP's should be issued, to avoid further processing requirements within Canada.

[7] The Officer took into account the Applicant's language ability in Canada's official languages, and his education and work experience. The Applicant was assessed by the Officer as having basic to moderate proficiency in English and no proficiency in French, which coincided with what the Applicant had declared on his application. The Officer also noted that the Applicant had not pursued any further education.

[8] Based on the Applicant's language proficiency, education and employment experience, the Officer concluded that the Applicant would not be immediately employable in Canada. She also concluded that the Applicant had no funds to take with him to Canada and would be unable to support himself in Canada.

[9] The Officer considered whether alternative support arrangements existed in Canada for the Applicant. The Officer concluded, however, that the Applicant did not have an assistor in Canada.

[10] Humanitarian and compassionate factors were examined by the Officer to see if they overcame any inadmissibility findings. The Applicant had four siblings and both parents residing in Sri Lanka, and only one of those siblings had been personally affected by the Tsunami. The Officer found, therefore, that the Applicant had stronger family support in Sri Lanka than in Canada.

[11] The Officer's final conclusion was that the Applicant was inadmissible to Canada as he was a person who was unable to support himself and had no other adequate means of support and care in Canada. The humanitarian and compassionate factors that existed did not overcome the conclusion of inadmissibility.

## **ISSUES**

[12] The Applicant has raised the following issues in his application:

- 1) What is the standard of review?
- 2) Are the reasons insufficient because they fail to properly disclose any analysis?
- 3) Was the Applicant denied fairness based upon the evidence?
- 4) Did the Officer err in law by concluding that the Applicant was unable to support himself?
- 5) Did the Officer err in law by concluding that the Applicant was not affected by the tsunami?

## STATUTORY PROVISIONS

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

### **Application before entering Canada**

**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.

### **Humanitarian and compassionate considerations**

**25. (1)** The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements

### **Visa et documents**

**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 présente loi.

### **Séjour pour motif d'ordre humanitaire**

**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.

#### **Financial reasons**

**39.** A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themselves 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.

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.

#### **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.

[14] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are also applicable to these proceedings:

#### **Class**

**75.** (1) For the purposes of

#### **Catégorie**

**75.** (1) Pour l'application du

subsection 12(2) of the Act, the federal skilled worker class is hereby prescribed as a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada and who intend to reside in a province other than the Province of Quebec.

### **Skilled workers**

(2) A foreign national is a skilled worker if

(a) within the 10 years preceding the date of their application for a permanent resident visa, they have at least one year of continuous full-time employment experience, as described in subsection 80(7), or the equivalent in continuous part-time employment in one or more occupations, other than a restricted occupation, that are listed in Skill Type 0 Management Occupations or Skill Level A or B of the *National Occupational Classification* matrix;

(b) during that period of employment they performed the actions described in the lead statement for the occupation as set out in the

paragraphe 12(2) de la Loi, la catégorie des travailleurs qualifiés (fédéral) est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents du fait de leur capacité à réussir leur établissement économique au Canada, qui sont des travailleurs qualifiés et qui cherchent à s'établir dans une province autre que le Québec.

### **Qualité**

(2) Est un travailleur qualifié l'étranger qui satisfait aux exigences suivantes :

a) il a accumulé au moins une année continue d'expérience de travail à temps plein au sens du paragraphe 80(7), ou l'équivalent s'il travaille à temps partiel de façon continue, au cours des dix années qui ont précédé la date de présentation de la demande de visa de résident permanent, dans au moins une des professions appartenant au genre 0 Gestion ou niveaux de compétences A ou B de la *Classification nationale des professions* — exception faite des professions d'accès limité;

b) pendant cette période d'emploi, il a accompli l'ensemble des tâches figurant dans l'énoncé principal établi pour la profession dans les

occupational descriptions of the *National Occupational Classification*; and

(c) during that period of employment they performed a substantial number of the main duties of the occupation as set out in the occupational descriptions of the *National Occupational Classification*, including all of the essential duties.

### **Minimal requirements**

(3) If the foreign national fails to meet the requirements of subsection (2), the application for a permanent resident visa shall be refused and no further assessment is required.

### **Selection Criteria**

**76.** (1) For the purpose of determining whether a skilled worker, as a member of the federal skilled worker class, will be able to become economically established in Canada, they must be assessed on the basis of the following criteria:

(a) the skilled worker must be awarded not less than the minimum number of required points referred to in subsection (2) on the basis of the following factors, namely,

(i) education, in accordance with section 78,

descriptions des professions de cette classification;

c) pendant cette période d'emploi, il a exercé une partie appréciable des fonctions principales de la profession figurant dans les descriptions des professions de cette classification, notamment toutes les fonctions essentielles.

### **Exigences**

(3) Si l'étranger ne satisfait pas aux exigences prévues au paragraphe (2), l'agent met fin à l'examen de la demande de visa de résident permanent et la refuse.

### **Critères de sélection**

**76.** (1) Les critères ci-après indiquent que le travailleur qualifié peut réussir son établissement économique au Canada à titre de membre de la catégorie des travailleurs qualifiés (fédéral) :

a) le travailleur qualifié accumule le nombre minimum de points visé au paragraphe (2), au titre des facteurs suivants :

(i) les études, aux termes de l'article 78,



- |  |   |
|--|---|
| (ii) proficiency in the official languages of Canada, in accordance with section 79,   | (ii) la compétence dans les langues officielles du Canada, aux termes de l'article 79,  |
| (iii) experience, in accordance with section 80,   | (iii) l'expérience, aux termes de l'article 80,   |
| (iv) age, in accordance with section 81,   | (iv) l'âge, aux termes de l'article 81,   |
| (v) arranged employment, in accordance with section 82, and  | (v) l'exercice d'un emploi réservé, aux termes de l'article 82,   |
| (vi) adaptability, in accordance with section 83; and  | (vi) la capacité d'adaptation, aux termes de l'article 83;  |
| <i>(b)</i> the skilled worker must   | <i>b)</i> le travailleur qualifié :   |
| (i) have in the form of transferable and available funds, unencumbered by debts or other obligations, an amount equal to half the minimum necessary income applicable in respect of the group of persons consisting of the skilled worker and their family members, or | (i) soit dispose de fonds transférables — non grevés de dettes ou d'autres obligations financières — d'un montant égal à la moitié du revenu vital minimum qui lui permettrait de subvenir à ses propres besoins et à ceux des membres de sa famille, |
| (ii) be awarded the number of points referred to in subsection 82(2) for arranged employment in Canada within the meaning of subsection 82(1).   | (ii) soit s'est vu attribuer le nombre de points prévu au paragraphe 82(2) pour un emploi réservé au Canada au sens du paragraphe 82(1).  |

**Number of points**

**Nombre de points**

(2) The Minister shall fix and make available to the public the minimum number of points required of a skilled worker,

(2) Le ministre établit le nombre minimum de points que doit obtenir le travailleur qualifié en se fondant sur les

on the basis of

(a) the number of applications by skilled workers as members of the federal skilled worker class currently being processed;

(b) the number of skilled workers projected to become permanent residents according to the report to Parliament referred to in section 94 of the Act; and

(c) the potential, taking into account economic and other relevant factors, for the establishment of skilled workers in Canada.

**Circumstances for officer's substituted evaluation**

(3) Whether or not the skilled worker has been awarded the minimum number of required points referred to in subsection (2), an officer may substitute for the criteria set out in paragraph (1)(a) their evaluation of the likelihood of the ability of the skilled worker to become economically established in Canada if the number of points awarded is not a sufficient indicator of whether the skilled worker may become economically established in Canada.

éléments ci-après et en informe le public :

a) le nombre de demandes, au titre de la catégorie des travailleurs qualifiés (fédéral), déjà en cours de traitement;

b) le nombre de travailleurs qualifiés qui devraient devenir résidents permanents selon le rapport présenté au Parlement conformément à l'article 94 de la Loi;

c) les perspectives d'établissement des travailleurs qualifiés au Canada, compte tenu des facteurs économiques et autres facteurs pertinents.

**Substitution de l'appréciation de l'agent à la grille**

(3) Si le nombre de points obtenu par un travailleur qualifié — que celui-ci obtienne ou non le nombre minimum de points visé au paragraphe (2) — ne reflète pas l'aptitude de ce travailleur qualifié à réussir son établissement économique au Canada, l'agent peut substituer son appréciation aux critères prévus à l'alinéa (1)a).

### **Concurrence**

(4) An evaluation made under subsection (3) requires the concurrence of a second officer.

### **Confirmation**

(4) Toute décision de l'agent au titre du paragraphe (3) doit être confirmée par un autre agent.

[15] The *Operational Instructions – 2005 for the Response to 26 December Tsunami and Earthquake Disaster* provide in relevant part as follows:

#### 1.0 Eligibility

To be eligible for any of the South and Southeast Asia Disaster Special Procedures outlined in these instructions, the applicant must *have been, and continue to be, seriously and personally affected by the earthquake or tsunami of 26 December.*

#### 2.1.3 Existing Cases, Third Priority: Other Directly Affected Persons

Visa offices will have other classes of cases (e.g. Skilled Workers) in their immigrant inventories from individuals in affected areas, some who have been seriously and personally affected. Some of these individuals may have relatives in Canada (siblings, uncles, aunts etc.); others may have only friends or community ties.

Visa offices should remember that for expedited processing to be effective, the group of cases receiving special attention must be limited. Therefore, visa offices will not examine their case inventories for other individuals, outside the Family Class, who may have been affected.

However, visa offices will receive some correspondence from applicants or their relatives in Canada stating that they have been directly affected by the tsunami or earthquake. In these cases, visa offices should examine the file and make any needed inquiries to determine whether the applicant appears to meet the criteria of personally and seriously affected. If they do, the case should be moved to the front of the office's processing queue in the pertinent visa class, and processed on an expedited basis.

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 exercising the humanitarian and compassionate provisions of A25. *In cases where a positive determination under H and C is made, permanent resident visas, not TRPs, should be issued, to avoid further processing requirements within Canada.*

#### 2.2.1 Advice to Applicants on their Canadian Relatives

Those without existing immigration applications who wish to seek entry as permanent residents due to having been personally and seriously affected by the disaster should be advised *to have their relative in Canada* submit an application using the Skilled Worker kit (fee exempt), accompanied by a cover letter prominently displaying the word *tsunami* and explaining in detail their personal situation and what ties and support, if any, they have in Canada. *In order to receive expedited attention to the case, it is strongly recommended that the application bear a covering letter from the relative in Canada.*

## **STANDARD OF REVIEW**

[16] Both the Applicant and the Respondent agree that, apart from procedural fairness issues, the appropriate standard of review on this application is reasonableness. The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, has collapsed the standards of review of reasonableness *simpliciter* and patent unreasonableness into a single form of “reasonableness”

review. This means that the Decision in the present application is reviewable in accordance with the reasonableness criteria set forth by the Supreme Court of Canada in *Dunsmuir*.

[17] Of particular assistance in this regard is the guidance provided by Justice Bastarache in *Dunsmuir*:

47. Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[18] The Applicant also raises procedural fairness issues to which a standard of correctness applies: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1.

## **ARGUMENTS**

### **The Applicant**

#### **Officer's Affidavit**

[19] The Applicant has raised serious objections to the Officer's after-the-fact affidavit which goes beyond mere elaboration of matters dealt with in the Officer's CAIPS notes and reasons.

[20] The Applicant argues that the affidavit of the Officer should not be taken to supplement the original reasons of the Officer as the Officer did not consider certain factors on the record that she claims to have taken into account in her affidavit.

### **Adequacy of Analysis**

[21] The Applicant submits that the reasons provided by the Officer are insufficient because they fail to provide adequate analysis.

### **Opportunity to Reply**

[22] The Applicant also submits that the Officer did not provide him with an opportunity to reply to the Officer's conclusion that the Applicant was unable to support himself, and so committed a breach of natural justice. The Applicant relies upon the case of *Liao v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1926 for the following:

15. Visa Officers have the duty to give an immigrant the opportunity to answer the specific case against him. This duty of fairness may require visa officers to inform an applicant of their concerns or negative impressions regarding the case and give the applicant the opportunity to disabuse them.

...

17. However, this duty to inform the applicant will be fulfilled if the visa officer adopts an appropriate line of questioning or makes reasonable inquiries which give the applicant the opportunity to respond to the visa officer's concerns...

[23] The Applicant points out that the Respondent has completely failed to address the duty of fairness issue in relation to section 39 of the Act. The Applicant submits that the Officer undertook this examination without advising the Applicant and should have given the Applicant an opportunity to make submissions in relation to it. The Applicant goes on to rely upon the case of *Kuhathasan v. Canada (Minister of Citizenship and Immigration)*, 2008 FCJ 587 for the following:

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 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 Applicant 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 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 Applicant been given such an opportunity, they could not have satisfied the Officer's concerns.

### **Reasonableness of Decision**

[24] The Applicant says that an unreasonable decision was made in relation to the Tsunami category because the Officer had evidence before her that the Applicant had been affected by the Tsunami, but provided no explanation as to why that evidence was found to be irrelevant. Further, the Officer only did a very cursory review and did not consider the totality of the evidence.

[25] The Applicant further submits that the Officer ignored the evidence that the Applicant's family would provide the necessary support to the Applicant upon his arrival in Canada. The Applicant acknowledges that a statutory declaration is not the same as a sponsorship undertaking, but submits it is still a relevant factor that must be taken into account.

[26] The Applicant concludes that the Officer's decision to find the Applicant inadmissible under section 39(1) of the Act was unreasonable and an error in law, as the Applicant had presented evidence that he was going to be supported by relatives in Canada who were well established. The Applicant was not likely to access social services.

## **The Respondent**

### **Adequacy of Analysis**

[27] The Respondent submits that an Applicant must first request further reasons from the relevant decision-maker before being able to raise the adequacy of the reasons on judicial review: *Marine Atlantic Inc. v. Canadian Merchant Service Guild*, [2000] F.C.J. No. 1217 (F.C.A.); *Gardner v. Attorney General* 2004 FC 493; *Gaoat Junior v. Canada (Minister of Citizenship and*



*Immigration*) 2007 FC 440 at paragraphs 9-13 and *Ziaei v. Canada (Minister of Citizenship and Immigration)* 2007 FC 1169 at paragraph 22.

[28] The Respondent says there is no evidence before the court that any request for further or more detailed reasons was made to the Officer by the Applicant. Hence, the Applicant is precluded from relying on alleged inadequacies of the reasons as a basis for this Court to intervene in the Decision.

[29] The Respondent says that the Officer's reasons were sufficiently clear and unambiguous. The Applicant's application for permanent residence was refused because he did not meet the employment experience requirements under the Regulations. Also, he would be unable to support himself and had not made adequate arrangements for care and support. Therefore, he was inadmissible to Canada.

### **Opportunity to Reply**

[30] The Respondent submits that the Applicant did not meet the requirements under the categories he was considered under for permanent residence in Canada. The *Tsunami Operational Instructions* were never intended to supplant or negate the explicit requirements of the Act. Therefore, unlike in *Kuhathasan v. Canada (Minister of Citizenship and Immigration)* 2008 FC 587, the Applicant was aware of what was expected of him.

[31] The Respondent submits that there was no breach of natural justice and no error in the Decision. There is no duty on an officer to provide an opportunity to an applicant to address an officer's concerns: *Ramos-Frances v. Canada (Minister of Citizenship and Immigration)* 2007 FC 142; *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 940 at paragraph 8 (F.C.T.D.); *Savin v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1426 at paragraphs 15-16 (F.C.T.D.); *Madan v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1198 at paragraph 6 (F.C.T.D.) and *Nehme v. Canada (Minister of Citizenship and Immigration)* 2004 FC 64 at paragraph 18.

[32] The Respondent says the Applicant was required by law to prove to the Officer that he had the means to support himself and, failing that, to demonstrate that he had made adequate alternative arrangements for his care and support. Therefore, the Applicant failed to demonstrate that the conduct of the Officer fell short of what fairness requires or that she did not live up to the duty of fairness.

### **Reasonableness of Decision**

[33] The Respondent submits that the Officer found that the Applicant was a person affected by the Tsunami but that he was inadmissible to Canada because of section 39 of the Act. The finding of inadmissibility under section 39 of the Act was reasonable as it was supported by evidence that showed that the Applicant:

1. Had basic proficiency in English and no proficiency in French; and
2. Had no funds to help him settle in Canada.

[34] The Respondent notes that neither the June 2005 affidavit nor the supporting financial information was before the Officer. So there was no evidence that there were persons willing to take full responsibility for and provide financial assistance to the Applicant upon his arrival in Canada. The February 9, 2007 letter was considered by the Officer even though it was not submitted in reference to the Applicant's file. In that letter, a sister was assisting the Applicant by sending funds to Sri Lanka, but there was no evidence that this relative could or would assist the Applicant.

[35] The Respondent concludes that even if the Officer did not consider the letter as the Applicant alleges, the February 2007 letter and the facts stated therein could not have outweighed the other factors relevant to the section 39 determination which was considered by the Officer.

### **Reasonableness of Decision**

[36] The Respondent submitted that the Officer made a "reasonable fact-driven decision."

## **ANALYSIS**

### **Officer's Affidavit**

[37] In accordance with the reasons of Justice MacTavish in *bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1482 at paragraph 15, I am satisfied that little weight should be attributed to the Officer's after-the-fact explanations in this case.

15. This is not a situation where the officer is merely elaborating on cursory reasons for an assessment provided in CAIPS notes. What the officer has done with her affidavit is to provide an entire line of reasoning that is not reflected anywhere in her notes. In all of the circumstances, I am thus satisfied that little weight should be attributed to the explanation for the decision provided by the officer in her affidavit.

### **Reasonableness of Decision**

[38] There is really nothing in the Decision itself (the CAIPS notes and reasons) to suggest that the Officer considered H&C grounds. The Officer concedes that she made an error regarding the availability of assistance in Canada. The Officer says in her reasons that she thoroughly reviewed all the submissions made by the Applicant; so clearly to have overlooked such a major issue suggests a very cursory review of those submissions. This is important when considering the indicators of support available to the Applicant in Canada.

[39] In the Officer's affidavit, she says that the June 15, 2005 affidavit of the Applicant's sister in Canada and her spouse was not provided. That affidavit states that the Applicant's sister and her spouse will "take full responsibility to look after them and to provide financial assistance on their arrival to Canada until they are able to support themselves and live independently."

[40] In the Applicant's November 12, 2007 affidavit he states that "my sister is living in Canada and she had given letter to the effect that she would financially support me in Canada and also would provide accommodation free of charge." In the March 27, 2008 affidavit, the Applicant states at paragraph 4 that, "My sister Santhiramoharani Rajiotchanan and her husband Genaratnam

Rajlotchanan of Canada gave assurances that they would support us financially and morally once we immigrate to Canada and accommodate us in their own house.”

[41] Quite apart from these affidavits, however, there was sufficient information before the Officer to alert her to the fact that family and financial support were available to the Applicant in Canada. There is a letter of February 9, 2007 from the assistor in Canada which indicates that “My wife and I gave support letter for Mr. Santhirasekaram Jayahantharajah and Ms. Santhirasekaram Santhirarajani and also paid the processing fee for both as we were asked to pay the processing fees.” Had the Officer thoroughly reviewed the application and “considered all available information” she would have been aware of the family in Canada and their willingness to support the Applicant. Yet in her CAIPS notes she awards 0 points and records “Has indicated no family in CDA,” and in her reasons she says “You have no assistor in Canada.”

[42] These mistakes are highly material to the Decision in question and they render the Decision unreasonable. I am not satisfied that the Officer considered H&C factors at all and the whole basis of her Decision dealing with section 39 of the Act and relief under the Tsunami program is flawed and must be reconsidered on this ground alone. There is no reason to consider other grounds raised by the Applicant.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The Application is allowed and the matter is returned for reconsideration by a different officer.
2. There is no question for certification.

“James Russell”

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Judge

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

**DOCKET:** IMM-5292-07

**STYLE OF CAUSE:** *JAYAHANTHANRAJAH SANTHIRASEKARAM v.  
MCI*

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** September 10, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Justice Russell

**DATED:** October 23, 2008

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