

**Date: 19991206**

**Docket: IMM-555-99**

**BETWEEN:**

**MALAR NAVARATNAM also  
known as MALAR SUMITHIRAN**

**Applicant**

**-and-**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**GIBSON, J.:**

[1] These reasons arise out of a decision of an immigration officer to refuse the applicant's application for an exemption from the requirements of subsection 9(1) of the Immigration Act<sup>1</sup> (the "Act") that require the applicant to apply for and obtain an immigrant visa prior to coming to Canada as a permanent resident. The decision to deny the applicant's request for exemption on humanitarian and companionate grounds pursuant to 114(2) of the Act is dated the 28th of October, 1998 and followed an interview conducted with the applicant and her husband on the same date.

---

<sup>1</sup> R.S.C. 1985, c. 1-2

[2] The applicant is a citizen of Sri Lanka. On the 4th of June, 1995 she arrived in Canada and claimed refugee status. In July, 1995, the applicant met a Canadian citizen to whom. Shortly thereafter, they married.

[3] The applicant and her husband were married in a religious ceremony by a Hindu priest on the 27th of August, 1995. Apparently the marriage was not properly registered. The applicant and her husband lived together as husband and wife. On the 9th of April, 1996, their daughter, Jerusha, was born. By birth, Jerusha is a Canadian Citizen.

[4] The applicant's claim to convention refugee status was denied and a judicial review application in respect of that decision was dismissed in November of 1996. The applicant's Post-Determination Refugee Claimants in Canada review was denied in March of 1997.

[5] The applicant's husband had difficulty finding or maintaining work in Toronto. As a result, in February of 1998, he moved to Calgary where he secured employment, albeit that employment was not of long duration. The applicant and Jerusha joined their husband and father some four months later.

[6] In July of 1998 the applicant and her husband attended an interview in Calgary with an immigration officer. The interview related to the removal of the applicant from Canada. It was at that interview that the applicant and her husband were first advised they were not legally married by reason of their failure to properly register the marriage. Within a day or two, the applicant and her husband went through a civil form of marriage. The applicant's husband sought to sponsor

the applicant for landing from within Canada. The result of that application for landing from within Canada on humanitarian and companionate grounds is the decision here under review.

[7] The immigration officer's notes of the interview with the applicant and her husband regarding the application for landing from within Canada, at least part of which was held with each of them separately, disclose significant inconsistencies in the answers to questions regarding the circumstances of their meeting, the circumstances of their first wedding and some of the circumstances of their living together. The notes further indicate that the immigration officer inquired as to whether the applicant and her husband had children and that he was advised that they had one child. A birth certificate was produced. The notes indicate that Jerusha remained in Toronto with her mother after the applicant's husband moved to Calgary to secure employment and until the applicant and Jerusha joined the applicant's husband in Calgary.

[8] The interview notes disclose absolutely no analysis of the written material that was before the interviewing officer and of the results of the interview. No affidavit was filed by the immigration officer in this application for judicial review that might have disclosed the process of analysis by which the decision to deny landing from within Canada was arrived at.

[9] In *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>2</sup>, the Supreme Court of Canada determined that the standard of review of a decision such as that here under review is "reasonableness *simpliciter*".

---

<sup>2</sup> [1999] S.C.J. No. 39 (Q.L.)

[10] On the issue of the duty of fairness, the Court concluded at paragraph 28:

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[11] After acknowledging expressed concerns about the desirability of a written reasons requirement at common law, Madame Justice L'Heureux-Dubé wrote at paragraph 40:

In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

On the facts before the Court in *Baker*, the Court concluded at paragraph 44:

In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision.

As in *Baker*, the notes of the interviewing officer in this matter were eventually provided to the applicant. However, those notes leave it entirely to inference as to how, and for what reasons, the interviewing officer reached his decision. The notes consist of nothing more than a hand-written record of questions and answers. A subsequent document entitled "Case Summary", also shared, dated the 3rd of February, 1999, provides some analysis. That analysis focuses entirely on whether or not the marriage between the applicant and her husband was "...one of substance and likely duration entered into in good faith." The brief analysis makes no mention whatsoever of the impact of the denial of the humanitarian and compassionate grounds application on Jerusha.

[12] The *Baker* decision focussed extensively on the interests of children such as Jerusha.

Madame Justice L'Heureaux-Dubé concluded in paragraph 65:

In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, supra.<sup>3</sup>

Madame Justice L'Heureaux-Dubé continued in paragraph 65:

The officer was completely dismissive of the interests of Ms. Baker's children. ...I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section [subsection 114(2) of the Immigration Act], notwithstanding the important deference that should be given to the decision of the immigration officer.

I am satisfied that here, as in *Baker*, on the material before the Court, the immigration officer "...was completely dismissive of the interests of [Jerusha]".

[13] Madame Justice L'Heureaux-Dubé continued in paragraph 67:

In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.

In paragraph 73, Madame Justice L'Heureaux-Dubé concluded:

The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned.

---

<sup>3</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 where Mr. Justice Iacobucci wrote at paragraph 56:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

I am satisfied that the same must be said on the facts of this matter and the same result must follow.

[14] That is not to say that the decision under review was not reasonably open to the immigration officer, but rather that, in reaching the decision under review, the failure to emphasize the rights, interests, and needs of Jerusha and to provide special attention to childhood in the rationale eventually provided for the decision, resulted in a decision that, whatever its ultimate merit, was simply not "...alive, attentive, or sensitive..." to the interests of Jerusha and "...did not consider [her] as an important factor in making the decision, ..." with the result that the decision, on the analysis provided, was simply not reasonably open to the decision maker.

[15] For the forgoing reasons, this application for judicial review will be allowed, the decision of the immigration officer under review will be set aside and the matter will be referred back to the respondent for redetermination.

[16] No question will be certified. There will be no order as to costs.

"Frederick E. Gibson"

---

Judge

Ottawa, Ontario  
December 6, 1999

FEDERAL COURT OF CANADA  
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-555-99

STYLE OF CAUSE: MALAR NAVARATNAM also  
known as MALAR SUMITHIRAN  
v.  
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: NOVEMBER 22, 1999

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE GIBSON

DATED: DECEMBER 6, 1999

APPEARANCES:

MR. TONY CLARK FOR THE APPLICANT

MR. BRAD HARDSTAFF FOR THE RESPONDENT

SOLICITORS ON THE RECORD:

DUNPHY CALVERT FOR THE APPLICANT  
CALGARY, ALBERTA

MR. MORRIS ROSENBERG FOR THE RESPONDENT  
DEPUTY ATTORNEY GENERAL OF CANADA

**Date: 19991206**

**Docket: IMM-555-99**

**Ottawa, Ontario, Monday, the 6<sup>th</sup> day of December, 1999**

**PRESENT: THE HONOURABLE MR. JUSTICE GIBSON**

**BETWEEN:**

**MALAR NAVARATNAM also  
known as MALAR SUMITHIRAN**

**Applicant**

**-and-**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**ORDER**

This application for judicial review is allowed. The decision of the immigration officer that is under review, dated the 28<sup>th</sup> of October, 1998, is set aside and the applicant's application for landing from within Canada on humanitarian and compassionate grounds is referred back to the respondent for redetermination by a different immigration officer. No question is certified. No Order as to costs.

**"Frederick E. Gibson"**

---

Judge