Federal Court  Cour fédérale

Date: 20111109

Docket: IMM-1198-11

Citation: 2011 FC 1285

Ottawa, Ontario, November 9, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MOHANARAASA SINNIAH

Applicant

and

THE 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 the decision of a Pre-Risk Removal Assessment Officer (Officer), dated 24 January 2011 (Decision), which refused the Applicant's request for an exemption from the in-Canada selection criteria for permanent resident status on humanitarian and compassionate grounds under section 25 of the Act.

BACKGROUND

[2] The Applicant is a 37-year-old Tamil citizen of Sri Lanka. He has most recently been living in Canada since 16 December 2009 with his ex-wife and their two children, Ryan and Ashwinnii. Ryan was born in 2001 and Ashwinii was born in 2005.

[3] The Applicant first arrived in Canada on 5 April 1990, when he claimed refugee status. He was granted refugee status in 1991 and gained permanent resident status in 1992.

[4] In 1994, the Applicant was determined to be criminally inadmissible to Canada on the basis of three convictions and was ordered deported in 1996. After an unsuccessful appeal of the deportation order in 1998, the Minister issued a danger opinion against the Applicant.

[5] In 2002, the Respondent removed the Applicant from Canada to Sri Lanka. From Sri Lanka, he re-located to the United States, where he was granted a temporary stay of removal in 2004. Using an American travel document issued to him under his alias, Chinniah Moganarasa, the Applicant obtained visitor's visas to enter Canada. He entered and left Canada using these visas on several occasions between November 2005 and December 2009. During this time, the Applicant did not obtain an Authorization to Return to Canada (ARC) as he was required to do under subsection 52(1) of the Act, having been the subject of an enforced removal order.

[6] On 6 December 2009, the Applicant re-entered Canada. He came to the attention of immigration authorities when, as the result of a driving incident, he was arrested and charged with

failure to provide a breath sample. In 2010, the Respondent issued a deportation order against him. In February 2010, the Applicant applied for a Pre-Removal Risk Assessment (PRRA) and, in March 2010, applied for an exemption on humanitarian and compassionate (H&C) grounds. The same Officer processed the PRRA and H&C applications. On 24 January 2011, the Officer refused the PRRA and the H&C applications. The Applicant applied for judicial review of the PRRA, which the parties settled on 6 June 2011.

DECISION UNDER REVIEW

[7] The Officer rejected the application for an H&C exemption. She found that the Applicant had not demonstrated that unusual and undeserved or disproportionate hardship would result if he were subject to the applicable provisions of the Act.

Degree of Establishment

[8] The Officer first considered the degree of establishment demonstrated by the Applicant. She found that, although he had most recently been living in Canada for approximately two years prior to the application, he was not employed during that period, nor was he involved in any community groups or activities. His removal from Canada would not cause any unusual and undeserved or disproportionate hardship if he were required to apply for permanent residence abroad, as required by subsection 20(1) of the Act, because of his limited degree of establishment.

[9] The Officer also considered the Applicant's past history of entry into and exit from Canada. She noted that, while the Applicant had been pardoned, which removed criminal responsibility for his convictions and eliminated that impediment to the Applicant's re-entry to Canada, as a removal order had been enforced against him, he was still required to obtain an ARC if he wished to return to Canada. The Officer noted that the Applicant had used aliases to obtain visas to enter Canada six times rather than seeking an ARC after his deportation in 2002. On this basis, the Officer found that the Applicant had shown a disregard for Canadian law and was willing to mislead Canadian officials to his advantage. She also noted that when he applied for visas under his aliases, the same grounds were present as for his H&C application; he could have noted these grounds in an ARC application, yet he chose to enter Canada unlawfully.

Family Ties

[10] The Officer considered the Applicant's family ties to Canada and found that neither he nor his family would suffer any unusual and undeserved or disproportionate hardship if he were required to comply with the statutory requirements. Three of his siblings and his ex-wife had provided letters in support of his application for an H&C exemption. However, his family had lived without the Applicant in Canada for several years so there was not a significant degree of interdependence between him and his siblings in Canada. Although the Applicant's sister wrote that she required the Applicant to be a father figure for her children, the Officer found that this role could be fulfilled by her older brother, with whom she was living at the time. Because of the limited amount of interdependence between the Applicant and his siblings, the Officer found none of them would face more hardship than is usual when a family member is required to leave Canada.

[11] The Officer also found that the Applicant's ex-wife would not suffer unusual and undeserved or disproportionate hardship. Although the Applicant's ex-wife wrote in her letter that she wants to have him remain in Canada and that life is difficult for her without him, the Officer noted that the Applicant's submissions do not mention his ex-wife. The Officer accepted that the Applicant and his ex-wife had rebuilt their relationship, as he was living with her and their children at the time of the application, but also noted that they were married and had a child together only after the Applicant was subject to a deportation order in 1999. Although the Applicant and his ex-wife had been living together for eleven months prior to the H&C application, their relationship was not such that they would face unusual and undeserved or disproportionate hardship were he removed to Sri Lanka and required to apply for permanent residence from there.

The Best Interests of the Children

[12] The bulk of the submissions to the Officer on the best interests of the child concern the Applicant's son. The Officer ultimately found that denying the H&C application would not run contrary to the best interests of his children. Although the Applicant had been in regular contact with both of his children through visits, phone calls, and, most recently, living with them in his ex-wife's home, the Officer found that removing the Applicant from Canada would not result in unusual and underserved or disproportionate hardship.

[13] Despite submissions to the contrary, the Applicant's continued presence in Canada was not necessary for the psychological well being of his son, Ryan. Although the Applicant's wife wrote in her letter in support of the application that their son had behavioural problems which she believed to

stem from the lack of a father in his life, the Officer found that this role could be fulfilled by someone else. Since this role could be fulfilled by someone else, the Applicant's removal would not cause sufficient hardship to warrant an H&C exemption.

[14] The Officer considered the letter of Dr. Pilowsky, a psychologist, who was retained to assess Ryan to show the hardship that would be caused by the Applicant's removal. The Officer did not give much weight to the opinion of the psychologist, in part because the letter was written after a single meeting with Ryan and his mother approximately one month after the Applicant's release from detention. The Officer was also concerned that the psychologist's assessment seemed to be based primarily on the mother's opinion, noting that Ryan's mother said he had not achieved some developmental milestones, but the psychologist did not note any developmental delays.

[15] According to the Officer, Ryan's problems were not a psychological crisis. The Officer said that Ryan acted out because he did not get enough attention. She considered submissions that Ryan had exhibited suicidal tendencies which had been alleviated by the Applicant's living with him and spending time with him. The Officer also found that there was no indication that the Applicant's ex-wife had sought treatment for these suicidal concerns in the 18 months between their onset and when the psychologist's report was prepared. The Officer also found that, while his mother indicated she had taken Ryan to their family doctor, the hospital, and a counsellor to deal with his suicidal tendencies and behavioural problems, she had not provided any documentation of these events. Ryan had difficulties which were alleviated by the presence of his father in his life, but the difficulties he would face if his father were removed were not uncommon for children raised by a

single parent. As such, denying the H&C exemption and removing the applicant from Canada would not cause unusual hardship.

Risk in Sri Lanka

[16] In addition to establishment, family ties, and the best interests of the children, the Officer also considered the risk that the Applicant would face if he were returned to Sri Lanka. She found that the risk did not amount to unusual and undeserved or disproportionate hardship that would allow for an H&C exemption. The Officer noted that counsel, in support of the application, based his submissions on the 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka (2009 Guidelines). She also noted that, since the local situation had significantly changed as a result of the defeat of the LTTE by government forces, the UNHCR had published a new set of guidelines (2010 Guidelines). Having advised counsel by fax that she would be considering the 2010 guidelines in her Decision, the Officer noted that the risk to the Applicant was different from that suggested by the 2009 Guidelines. She noted that, unlike the 2009 Guidelines, the 2010 Guidelines no longer called for Tamils not to be returned to Sri Lanka. She also found that, after the Applicant was returned to Sri Lanka in 2002, there was little to suggest that he faced difficulties while he was there. She also found that, although Sri Lanka is a country which still faces difficulties, any risk to the Applicant would not be more than faced by other Sri Lankans. As such, the risk to the Applicant on being returned to Sri Lanka did not constitute unusual and undeserved or disproportionate hardship and so did not militate in favour of an H&C exemption.

[17] Given her assessment of the above factors, the Officer found that there was not sufficient hardship to justify an H&C exemption.

ISSUES

[18] The Applicant raises the following issues:

a. Whether the Officer ignored the evidence going to the best interests of the child;

b. Whether the Officer's determination of the risk the Applicant faced in Sri Lanka was made without regard to the evidence;

c. Whether the Officer applied the wrong test for best interests of the child.

STATUTORY PROVISIONS

[19] 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 may 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. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	…

Obligation on Entry

20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,

(*a*) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and

(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.

Status and Authorization to Enter

21. (1) A foreign national becomes a permanent resident if an Officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(*a*) and subsection 20(2) and is not inadmissible.

…

Humanitarian and compassionate Considerations — request of foreign national

25. (1) The Minister must, on

Obligation à l'entrée au Canada

20. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :

a) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;

b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

Statut et autorisation d'entrer

21. (1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)*a*) et au paragraphe 20(2) et n'est pas interdit de territoire.

…

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Le ministre doit, sur

request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

…

…

No return without prescribed authorization

Interdiction de retour

52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an Officer or in other prescribed circumstances.

52. (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

STANDARD OF REVIEW

[20] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[21] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39, the Supreme Court of Canada held that, when reviewing an H&C decision, "considerable deference should be accorded to immigration Officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (paragraph 62). Justice Michael Phelan followed this approach in *Thandal v Canada (Minister of Citizenship and Immigration)* 2008 FC 489, at paragraph 7. The overarching standard of review on an H&C application is reasonableness.

[22] In *Hawthorne v Canada (Minister of Citizenship and Immigration)* 2002 FCA 475, the Federal Court of Appeal held at paragraph 6 that

> the officer's task [in an H&C determination] 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.

[23] Further, the Federal Court of Appeal held in *Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 at paragraph 12 that once an officer has identified and defined the best interests of the child, it is up to her to determine what weight it must be given in the circumstances. The degree of hardship a child will face is a question of fact which, following *Dunsmuir*, above, at paragraph 53, will attract a standard of reasonableness. The standard of review on the first issue is reasonableness.

[24] As noted above, the standard of review generally applicable to an H&C determination is reasonableness. The standard of review on the second issue is reasonableness.

[25] 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." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[26] In *Sahota v Canada (Minister of Citizenship and Immigration)* 2011 FC 739, Justice Phelan held at paragraph 7 that the application of the proper legal test is reviewable on the standard of correctness. See also *Garcia v Canada (Minister of Citizenship and Immigration)* 2010 FC 677 at

paragraph 7 and *Markis v Canada (Minister of Citizenship and Immigration)* 2008 FC 428 at paragraph 19. The standard of review with respect to the third issue is correctness.

[27] As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 50,

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

ARGUMENTS

The Applicant

The Best Interests of the Children

[28] The Applicant says that the Officer was not sufficiently alert, alive, or sensitive to the needs of his children. He quotes from the concurring opinion of Justice John Evans in *Hawthorne*, above, at paragraph 32 in support of his contention that the Officer did not sufficiently consider Ryan's interests:

> It was also common ground that an Officer cannot demonstrate that she has been "alert, alive and sensitive" to the best interests of an affected child simply by stating in the reasons for decision that she has taken into account the interests of a child of an H&C applicant (*Legault*, at paragraph 12). Rather, the interests of the child must be "well identified and defined" (*Legault*, at paragraph 12) and "examined . . . with a great deal of attention" (*Legault*, at paragraph 31). For, as the Supreme Court has made clear, the best interests of the child are "an important factor" and must be given "substantial weight" (*Baker*, at paragraph 75) in the exercise of discretion under subsection 114(2).

[29] When the Officer inferred that removing the Applicant would not cause undue hardship for Ryan, she ignored the findings in the psychologist's report. The psychologist's report noted Ryan had nightmares and exhibited aggression and anxiety, which were linked to the Applicant's absence from Ryan's life. In drawing the inference she did, the Officer must have ignored the report.

[30] The Applicant also asserts that the Officer inferred Ryan's psychological condition was not genuine from the lack of treatment or counseling prescribed. She ignored the letter in support of the application from Ryan's mother, the Applicant's ex-wife. That letter states that no diagnosis of Ryan's condition had been made, nor had he been prescribed medication or counseling, though he was being monitored at school and had been referred for counseling. The Applicant argues that the inferences made by the Officer ignore this evidence.

[31] The Applicant also says that the Officer erroneously made an adverse inference of credibility with regard to Ryan's condition. This inference was drawn from the lack of documentary support for the ex-wife's statement in her letter that Ryan had been taken to the hospital in relation to his psychological problems, and from the lack of documents from his school confirming its concerns about Ryan's behavior.

[32] The Officer also erred in finding that the Applicant's role as a father-figure in Ryan's life could be taken over by another relative or a community group. There was no evidence before the Officer with respect to the availability of another relative or a community group to take over this role so the finding was mere speculation.

[33] The Officer's finding that Ryan was not in psychological distress was also made in error because the psychologist's report conclusively determined that Ryan was suffering from various psychological problems.

The Risk to the Applicant in Sri Lanka

[34] The Applicant also argues that the Officer erred in finding that he would not suffer unusual or disproportionate hardship if removed to Sri Lanka because she ignored evidence that was before her with respect to the risk the Applicant would face. First, the Officer found that the Applicant would not face serious hardship if returned to Sri Lanka because he had not faced difficulties when returned there in 2002, but she ignored the evidence that there was a peace accord in place at that time. She also ignored evidence that he had not left the place where he was staying because he was afraid.

[35] Second, the Officer erroneously found that the Applicant did not fit into a profile group that would face hardships above and beyond those faced by ordinary Sri Lankans. This finding ignored the 2010 Guidelines, which the Officer informed counsel she would be considering. Specifically, the Applicant points to a footnote in the report highlighting the difficulties faced by Tamils in Sri Lanka and the statement in the 2010 Guidelines that young Tamil men could encounter scrutiny by police and may sometimes be denied residence permits. The Applicant also points to a report from the UK Border Agency which was not included in the Applicant's record for this application, but which was included in the Applicant's record for his application for judicial review of his PRRA.

[36] Third, the Applicant points to a statement in the 2010 Guidelines that, when considering internal flight alternatives in North and East Sri Lanka, refugee determination bodies should consider the lack of basic infrastructure. Refugee determination bodies should also consider the fact that special economic zones and high security zones prevent civilians from getting to areas used for agriculture, fishing, cattle grazing, and other livelihood activities. Because these risks are only faced by Tamils and not the majority of Sri Lankans, the Officer's finding that there would be no unusual and undeserved or disproportionate harm to the Applicant from his removal to Sri Lanka was made in disregard of the evidence before her.

The Respondent

[37] The Respondent argues that this Decision ought not be disturbed on judicial review unless it was unreasonable because an H&C decision involves a discretionary weighing of factors. In this case, the Officer weighed all the relevant factors and examined all the evidence before her; hence, the Decision should stand.

An H&C Decision is Discretionary and Exceptional

[38] By virtue of section 11 of the Act, a foreign national wishing to come to Canada must first apply for a visa from outside of Canada. Under section 25 of the Act, the Minister may grant an exemption from any applicable criteria or obligations under the Act on H&C grounds. To qualify, the IP 5 guidelines require that an applicant for an H&C exemption must demonstrate to the Minister that compliance with the provisions of the Act would result in unusual and undeserved or

disproportionate hardship. The Respondent says *Serda v Canada (Minister of Citizenship and Immigration)* 2006 FC 356 stands for the proposition that an H&C exemption is necessarily discretionary and exceptional and is designed to give the Minister the flexibility to allow for exceptions from the legislation in deserving cases. Though there is always some hardship in leaving Canada, this hardship on its own is not enough to justify an H&C exemption.

[39] Taken together, all of the above factors show that an officer's decision in an H&C case should be granted deference. Where all the relevant factors and evidence have been considered, and an officer has come to a conclusion that is within the acceptable range of outcomes, a reviewing court should not interfere. The Officer assessed all the relevant factors and evidence, so the decision to deny the Applicant's request for an H&C exemption should not be interfered with by the Court.

The Decision Was Reasonable.

[40] The Officer considered all the relevant factors and all the evidence before her in coming to her Decision. The Officer considered the degree to which the Applicant had become established in Canada. There was limited evidence of establishment in Canada, and the affidavit in support of the application for leave for judicial review of the Officer's decision noted only the risk and best interests of the children, so the Officer's conclusion that the degree of establishment is slight was reasonable.

[41] The Officer also considered the Applicant's family ties in Canada and the best interests of his children. There was little evidence adduced concerning the relationship between the Applicant

and his children. Therefore, it was reasonable for the Officer to give little weight to this factor. Further, when considering the best interests of the children, the Respondent notes that the Officer considered the psychologist's report with respect to Ryan's psychological issues, the inconsistencies between the psychologist's report, the school report, and the ex-wife's letter. Though the Applicant may disagree with the conclusions of the Officer, they were based on the evidence before her and the Court should not interfere. The best interests of an affected child are a necessary factor in the H&C analysis but are not necessarily determinative of an application. It was open to the Officer to conclude that, though the H&C exemption might be beneficial to the Applicant's children, this did not outweigh the other factors.

Risk on Return to Sri Lanka

[42] The Officer's conclusion regarding the risk to the Applicant on being returned to Sri Lanka was reasonable and based on the evidence before her. She considered the 2010 Guidelines, which were the most recent information available to her. She also considered the Applicant's prior experience after he was deported to Sri Lanka in 2002, noting that he did not suffer serious harm at that time. This evidence was properly before the Officer and was taken into account so her conclusions should not be disturbed.

The Applicant's Conduct

[43] It was proper for the Officer to consider the past conduct of the Applicant, given that this is a necessarily fact-specific and discretionary decision. There was evidence before the Officer that the

Applicant had misled immigration authorities in the past and was willing to enter Canada unlawfully so it was reasonable for the Officer to conclude that this militated against granting the H&C exemption.

[44] The Decision of the Officer was reasonable and so should not be disturbed because she considered all the evidence before her and examined all the factors necessary.

The Applicant's Reply

[45] The Applicant argues that the Officer erred in concluding that denying the H&C application would not run contrary to the best interests of the Applicant's children. She should not have considered the fact that the psychologist's report was prepared for the purpose of the H&C application when she assessed its relevance.

[46] The Applicant also notes that, although the Officer found that no further treatment was recommended in the psychologist's report, the psychologist did recommend that the Applicant remain in Canada to provide stability for Ryan. When the Officer found that no treatment was underway, she ignored evidence that Ryan had in fact been signed up for counseling through his school, though it had not yet begun.

[47] The Applicant also says that the Officer erred in finding there were inconsistencies between the letter from the school and the letters from the ex-wife and the psychologist. Because schools often use euphemisms in their letters home, the letter from the school was not inconsistent with the

other documentary evidence provided. Rather than focusing on the fact that the letter from school did not mention Ryan's suicidal ideas, the Officer should have looked at the letter as supporting the conclusion that it was in Ryan's best interests to have the Applicant in his life.

[48] The Applicant also takes issue with the Officer's conclusions about the risk he would face if returned to Sri Lanka. The Officer ignored the Applicant's statement that he did not leave his home because he was afraid the last time he was deported to Sri Lanka in 2002. The Officer did not mention any of the possible hardships which the Applicant would face if returned to Sri Lanka. The hardships are faced only by Tamils from the North, so it was incorrect for the Officer to conclude they would be faced equally by all Sri Lankans.

Applicant's Further Memorandum

The Officer Applied the Incorrect Test to the Best Interests of the Children

[49] The Applicant says that the Officer applied the wrong test when examining the best interests of his children. She applied a "disproportionate hardship" test, when she should have examined what "runs counter to the children's best interests."

[50] The Officer found that "I do not find sufficient evidence to establish that either child or the applicant would likely face an unusual or disproportionate hardship if he were required to leave Canada and return to Sri Lanka to apply for permanent residence from abroad." This statement demonstrates that the Officer applied the disproportionate hardship test in examining the best

interests of the children. The Applicant relies on *Mangru v Canada (Minister of Citizenship and Immigration)* 2011 FC 779.

[51] The Applicant also relies on *Sahota*, above, at paragraph 8, in which Justice Phelan wrote that

> The Officer's analysis of the "best interests of the child" is legally flawed. The Officer distorted the analysis and applied the wrong legal test by imposing the burden of showing "disproportionate hardship" rather than the "best interests" test mandated by *Hawthorne v Canada (Minister of Citizenship and Immigration),* 2002 FCA 475.
>
> While the ultimate question in an H&C application is "disproportionate hardship", the "best interests" analysis operates as a separate consideration. The Officer's failure to keep the two issues distinct results in an unreasonable assessment of the children's best interests.

[52] In the present case, the Officer unreasonably blended the disproportionate hardship analysis with the best interests analysis.

The Officer Ignored Evidence Related to the Hardship Faced by the Applicant in Sri Lanka

[53] The Applicant further argues that, because she did not mention specific aspects of the UNHCR guidelines that were related to Sri Lanka, it can be inferred that the Officer ignored this important evidence. The Applicant relies on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration),* [1998] FCJ No. 1425, at paragraphs 15-16.

[54] The Applicant also relies on *Sinnammah v Canada (Minister of Citizenship and Immigration)* 2010 FC 1054, where it was held that an immigration officer erroneously failed to consider evidence that Tamils faced unusual harassment in Sri Lanka.

The Respondent's Further Memorandum

The Officer Considered the Proper Test for the Best Interest of the Children

[55] According to *Pierre v Canada (Minister of Citizenship and Immigration)* 2010 FC 825, simply using the language of hardship does not constitute a reviewable error. What is more important is that the Officer was alert, alive and sensitive to the interests of the Applicant's children. Though the Officer in this case used the language of hardship when analyzing the interests of the Applicant's children, because she was sufficiently alert, alive, and sensitive to their best interests, her Decision was reasonable and should stand.

Hardship Faced by the Applicant

[56] When the Applicant argues that the Officer ignored evidence of the hardship he would face if returned to Sri Lanka, the Respondent notes that *Sinnammah*, above, is distinguishable on its facts. The present case concerns a 37-year-old male Tamil, while *Sinnamah* was a determination regarding a 68-year-old Tamil widow. Further, the *Sinnamah* decision was made in 2009, while the decision under review in this case was made in 2010. As the 2010 Guidelines note, the situation in Sri Lanka changed significantly between the issue of the 2009 Guidelines and the 2010 Guidelines. The evidence before the Officer supported her conclusion that the Applicant would not face undue

hardship if returned. Since she examined the evidence before her and came to a reasonable conclusion, the Decision should stand.

ANALYSIS

[57] The Respondent is correct to point out that the interests of children are not conclusive in an H&C assessment and that it was up to the Officer to determine what weight to give the interests of the Applicant's children. See *Legault*, above, at paragraphs 12-14.

[58] In addition, the Federal Court of Appeal has said that "an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favor that result." See *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189 at paragraph 24.

[59] On the other hand, the jurisprudence from this Court and the Federal Court of Appeal is clear that a "best interests" analysis is a separate consideration and does not require an applicant to establish unusual, undeserved or disproportionate hardship in relation to the best interests of any affected child.

[60] In *Mangru v Canada (Minister of Citizenship and Immigration)*, 2011 FC 779, [2011] FCJ No 978 (QL) the Federal Court considered this issue and made the following finding:

> **23** The officer found that while the children would experience hardship in starting a new life in Guyana, this did not rise to the level of unusual and undeserved or disproportionate hardship.

24 However, the Federal Court of Appeal and this Court have held that it is an error in law to incorporate such a threshold in the analysis of the best interests of the children. Mr. Justice Robert Barnes held in *Arulraj v Canada (Minister of Citizenship and Immigration*), 2006 FC 529 at paragraph 14 that:

> There is simply no legal basis for incorporating a burden of irreparable harm into the consideration of the best interests of the children. There is nothing in the applicable Guidelines (Inland Processing 5, H & C Applications (IP5 Guidelines)) to support such an approach, at least insofar as the interests of children are to be taken into account. The similar terms found in the IP5 Guidelines of "unusual", "undeserved" or "disproportionate" are used in the context of considering an applicant's H & C interests in staying in Canada and not having to apply for landing from abroad. It is an error to incorporate such threshold standards into the exercise of that aspect of the H & C discretion which requires that the interests of the children be weighed. This point is made in *Hawthorne v. Canada (Minister of Citizenship & Immigration)* (2002), [2003] 2 F.C. 555, 2002 FCA 475 (Fed. C.A.) at para. 9 where Justice Robert Décary said "that the concept of 'undeserved hardship' is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship".

25 Further, it is clear that the officer not only described the test for analyzing the best interests of the children incorrectly, but, in fact, assessed their interests as such.

…

27 While the respondent is correct to note that the best interests of the children is one factor to be weighed against the others in assessing H&C considerations, this did not occur in the decision before me. As the Federal Court of Appeal held in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, in all but rare cases, the best interests of the children favour non-removal. This factor is then weighed against the other factors such as public policy considerations. The officer's application of the unusual, undeserved of disproportionate hardship threshold permeates her analysis of the best interests of the children and results in an inappropriate conclusion implying that the best

> interests of the children favour the removal of the applicants. This conclusion led to an omission of any weighing of the interests of the children against the other factors favouring removal.

[61] In *Sahota*, above, the Federal Court came to the same conclusion at paragraph 8:

> The Officer's analysis of the "best interests of the child" is legally flawed. The Officer distorted the analysis and applied the wrong legal test by imposing the burden of showing "disproportionate hardship" rather than the "best interests" test mandated by *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475.
>
> While the ultimate question in an H&C application is "disproportionate hardship", the "best interests" analysis operates as a separate consideration. The Officer's failure to keep the two issues distinct results in an unreasonable assessment of the children's best interests.

[62] In reading the Decision, it seems to me that the Officer in this case has done precisely what the Federal Court of Appeal and this Court have said should not be done when assessing the best interests of affected children. On page 6 of the Decision the Officer says that "there is little before me to suggest that removing the applicant from the current role he plays in the children's lives would cause them an unusual and undeserved or disproportionate hardship." Again, at the conclusion of the best interests portion of the Officer's analysis, he says "I do not find sufficient evidence to establish that either child or the Applicant would likely face an unusual and undeserved or disproportionate hardship if he were required to leave Canada to Sri Lanka to apply for permanent residence from abroad."

[63] By requiring the Applicant to establish unusual and undeserved or disproportionate hardship in relation to the affected children, the Officer has misconceived the nature of the weighing process that was required of him in this case and has placed too high a burden on the Applicant. As Justice

Barnes said in *Arulraj v Canada (Minister of Citizenship and Immigration)* 2006 FC 529 at paragraph 14, “it is an error to incorporate such threshold standards into the exercise of that aspect of the H&C discretion which requires that the interests of the children be weighed.”

[64] The end result is that the Officer either applied the wrong legal test by imposing the burden of showing “disproportionate hardship” rather than the “best interests” test of mandated by *Hawthorne*, above, or unreasonably fettered her discretion by requiring that unusual and undeserved or disproportionate hardship related to the child must be established before the best interests of the affected children can be weighed against the other factors at play in this case. Either way, I think a reviewable error occurs.

[65] I also agree with the Applicant that the Officer commits reviewable errors which reveal she was not alert, alive and sensitive to the best interests of the children. There are speculative findings, for example, that Ryan “could reasonably be viewed as a boy acting due to a lack of attention,” or that some other male could substitute as a father in Ryan’s life, that are not supported by the evidence and which ignore the available psychological report, as well the evidence of the Applicant’s former spouse. There is, however, no need for me to go into further issues at this point. The Officer acknowledged that the best interests of the children was the strongest aspect of the application. This being the case, the mishandling of such an important matter in the ways I have already described means that reviewable errors have occurred and the whole matter requires reconsideration.

[66] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the matter is returned for reconsideration by a different officer.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1198-11
STYLE OF CAUSE:	MOHANARAASA SINNIAH - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 6, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 9, 2011

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