Federal Court  Cour fédérale

Date: 20170704

Docket: IMM-3383-16

Citation: 2017 FC 646

Ottawa, Ontario, July 4, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MAGUY KIMBULU TSHIMWENZI
TALINA HILLA KAKO NZIMBI
GABRIËL JEAN E. NZMIBI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Maguy Kimbulu Tshimwenzi was born in the Democratic Republic of the Congo. The Applicants Talina and Gabriël are Ms. Tshimwenzi's two minor children. They all hold Belgian citizenship.

[2] Ms. Tshimwenzi came to Canada from Belgium after years of physical and psychological abuse, stalking, and sexual improprieties in respect of her daughter at the hands of her previous common law spouse. She filed a refugee claim in December 2015, but withdrew it in January 2016. In March 2016 she filed a Humanitarian & Compassionate [H&C] application. The H&C application was denied.

[3] The Officer was satisfied that Ms. Tshimwenzi had been a victim of domestic violence at the hands of her common law spouse in Belgium. However, the Officer concluded there was insufficient evidence of establishment in Canada, that there was little evidence relating to the children's best interests and the evidence demonstrated that the Belgian authorities were cognisant of, and active in, the fight against domestic violence. Based on the above the Officer found that the circumstances did not rise to the point of justifying the granting of an H&C exemption.

[4] Ms. Tshimwenzi argues that the Officer's decision was unreasonable. She submits that the Officer misapprehended and failed to consider evidence, and failed to assess the nature of the harm she and her children would face on return to Belgium. In reply the Respondent submits that Ms. Tshimwenzi had the onus of establishing sufficient ties to Canada, the best interests of the children, and the circumstances in Belgium, and that there was an overall lack of probative evidence to warrant a positive decision. The Respondent submits that it was the Applicants' failure to place sufficient evidence before the Officer that was at the heart of the decision and that the decision was reasonable.

[5] Having considered the Parties' submissions I am of the view that the Officer failed to consider and address relevant evidence. I am not convinced the outcome would have been the same had the Officer reviewed and considered this evidence. The application is granted for the reasons that follow.

II. Standard of Review

[6] The Parties do not dispute that the Officer's assessment of the evidence is to be reviewed by this Court against a standard of reasonableness (*Chabira v Canada (Citizenship and Immigration)*, 2012 FC 1348 at para 30, 421 FTR 233; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

III. Analysis

[7] In addressing the best interests of the two children the Officer observes that Ms. Tshimwenzi has provided very little information about her children and then proceeds to state:

> [j]e suis en fait surprise qu'elle ne leur donne pas l'opportunité de fournir leur propres avis et sentiments alors qu'ils sont d'âge pour comprendre les raisons d'un retour dans leurs pays de naissance et s'exprimer à leur manière.
>
> [CERTIFIED TRANSLATION]
>
> I am actually surprised that she does not give them the opportunity to express their own opinions and feelings, since they [are] old enough to understand the reasons for return in to their country of birth [and express themselves in their own way].

[8] Contrary to the Officer's contention, the material submitted in support of the application included a letter from each of the children. Gabriel, who was born in 2005 briefly addresses his life in Canada, his home, school and love of sports but does not address fears or concerns with returning to Belgium. Talina, who was born in 2001, provides a more detailed and comprehensive letter where she speaks to not only her life in Canada but the stress she and her family were exposed to when the family lived in Belgium. Ms.Tshimwenzi also included a psychological report which is not referenced or considered by the Officer.

[9] In oral submissions the Respondent acknowledges the Officer appeared to be unaware of the two letters from the children, but relies on the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], to argue that this error is insufficient to set aside the decision (*Newfoundland Nurses* at paras 14 – 16). The Respondent submits that the decision was based on the lack of evidence and is transparent, intelligible and justified. I disagree.

[10] This is not a case where the decision-maker fails to make reference to evidence but benefits from the presumption that all evidence has been reviewed and considered. Instead the Officer has, through their comments, indicated the children's letter evidence was not reviewed and was not considered. This is somewhat analogous to the situation in *Gomez Venezuela v Canada (Citizenship and Immigration),* 2016 FC 603, [2016] FCJ No 571 (QL) [*Gomez Venezuela*], where Justice Alan Diner found that the officer in that case had not only failed to mention key evidence, but had also stated that a letter of support from the mother was missing

when one of the unmentioned pieces of evidence was an authorization by the mother, suggesting that the mother supported the application as she had authorized it [*Gomez Venezuela*, cited to FC, at para 24].

[11] The Officer, in the present case, further opines that the children are in the best position to speak to the impact of return and states:

> [i]l est très regrettable à mon opinion qu'un enfant puisse subir des changements dans sa vie quels qu'ils soient et qu'il ne soit apparemment pas consulté à cet égard.
>
> [CERTIFIED TRANSLATION]
>
> It is very regrettable in my view that any child should have to endure changes in their life without being consulted (it would appear).

The Officer appears to draw an adverse conclusion based on the belief that evidence from the children was not provided.

[12] Taken as a whole the decision indicates that the Officer placed value upon the views of the children. The Officer's belief that their evidence was absent was a factor, possibly a significant factor, in the overall assessment of the children's best interests by the Officer.

[13] The Respondent argues that there is nothing in the children's letters that would lead to a different outcome. However, Talina's letter in particular does address the negative impact the abuse experienced in Belgium had on her life and the lives of her family. This, in my view, is potential evidence of hardship and, coupled with the Officer's emphasis on the alleged absence

of evidence from the children underlines its potential relevance in the assessment of the H&C application.

[14] In conducting the best interests analysis, the Officer had a duty to clearly identify and define the children's best interests, and examine those interests with a great deal of attention in light of all of the evidence (*Kanthasamy* at para 39). I am unable to conclude that such an analysis was undertaken here or that the outcome would necessarily have been the same had that analysis been undertaken.

[15] I am in full agreement with Justice Alan Diner in *Gomez*, where he states at paragraph 27:

> [27] Finally, I do not find that the Officers' failure to address key evidence can be saved by *Newfoundland Nurses*. *Newfoundland Nurses* does not relieve the decision-maker of the obligation to issue reasons that allow the reviewing Court to understand why they made their decision – an obligation which permits the Court to determine whether the conclusion is within the range of acceptable outcomes. Without the Officers' full assessment of the various interests at play through properly addressing the positive aspects of a shared life in both Canada and Ecuador, this Court cannot make that determination. As noted above, key pieces of evidence went unacknowledged and unaddressed. As the Officers failed to consider the evidence *as a whole*, the reasons lack the balanced assessment that *Kanthasamy* and its key precursors require. As a result, I find this decision unreasonable.
>
> [Emphasis in original]

[16] The failure by the Officer to acknowledge and address key pieces of evidence in the present case renders the decision unreasonable.

[17] The Parties have not identified a question of general importance for certification and none arises.

JUDGMENT IN IMM-3383-16

THIS COURT'S JUDGMENT is that the application is granted and the matter returned for redetermination by a different decision-maker. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3383-16
STYLE OF CAUSE:	MAGUY KIMBULU TSHIMWENZI, TALINA HILLA KAKO NZIMBI, GABRIËL JEAN E. NZMIBI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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