Federal Court  Cour fédérale

Date: 20170103

Docket: IMM-1613-16

Citation: 2017 FC 3

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 3, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

JEAN CLAUDE MUHENDANGANYI
CLAUDE STEPHANE NICITEGETSE
NATHALIE NDAYISHIMIYE
MICHAELLA ISHIMWE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Mr. Jean Claude Muhendanganyi [principal applicant], his adult son, Claude Stéphane, and his minor daughters, Nathalie and Michaella, are seeking the judicial review of a decision by

a Citizenship and Immigration officer rejecting their application to be exempted from the requirement to file their application for permanent residence from outside Canada, for humanitarian and compassionate considerations, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Facts

[2] The applicants are citizens of Burundi. They arrived in Canada on August 15, 2012, and filed a claim for refugee protection on the day of their arrival. That claim and their application for judicial review, filed before this Court, were dismissed.

[3] A year later, they filed an application for permanent residence based on humanitarian and compassionate considerations. This application was rejected the first time, and their first application for judicial review of that decision was allowed on consent of the parties, since it did not contain any analysis regarding the best interests of the minor children affected by the decision.

[4] The application was dismissed for the second time and, even though the applicants were in Canada without status and their file was forwarded to the removal unit of the Canada Border Services Agency, they are currently benefiting from the temporary suspension of removals to Burundi, given the ongoing crisis in that country since the spring of 2015.

III. Disputed decision

[5] From the outset, the officer notes that the applicants have the burden of proving that they will suffer exceptional hardship if their application is not allowed. After weighing all the evidence submitted by the applicants, he finds that the evidence is not sufficient to show that the applicants are well established in Canada. He also finds that the evidence is not sufficient to argue that the children's best interests would counterbalance the other factors considered. The officer states that he is aware of the very troubling situation that currently prevails in Burundi. However, he finds that the applicants did not show that their personal situation justifies granting an exemption from IRPA requirements and that, in any event, they will benefit from the temporary suspension of removal to that country, until the social and political situation improves.

IV. Issues and standard of review

[6] In my view, this application for judicial review raises only one issue:

> *Did the officer err in his assessment of the evidence and the various factors that justify granting permanent residence based on humanitarian and compassionate considerations?*

[7] Decisions based on section 25 of the IRPA are, by nature, discretionary. They are subject to the standard of review of reasonableness (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 10; *Terigho v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 at paragraph 6).

[8] When this standard of review applies, the Court cannot substitute its own conclusion for the one reached by the decision-maker. It must rather determine whether that conclusion falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir v. New Brunswick, 2008 SCC 9 at paragraph 47; *Kanthasamy*, above, at paragraph 111). Even though there may be more than one acceptable outcome, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339 at paragraph 59).

V. Analysis

Did the officer err in his assessment of the evidence and the various factors that justify granting permanent residence based on humanitarian and compassionate considerations?

[9] In my view, the officer's decision is reasonable. He analyzed in turn the best interests of the minor applicants, the impact of the temporary suspension of removals to Burundi, and the applicants' degree of establishment and integration. He assessed these factors in light of the evidence and reasonably determined that the applicants had not discharged their burden of proof to show that their circumstances justified an exemption under subsection 25(1) of the IRPA.

[10] The IRPA confers to the Minister or the Minister's officers a broad discretionary power to grant such an exemption and there are no prescribed circumstances that must lead to a positive exercise of that discretion (*Liang v. Canada (Citizenship and Immigration)*, 2006 FC 967 at paragraph 17).

[11] The applicants must still show that they will encounter “unusual or undeserved” or “disproportionate” hardship if their application is not allowed. Hardship is “unusual or undeserved” if it is not anticipated by the Act or its regulations; it must be the result of independent circumstances beyond the applicants’ control. Disproportionate hardship is defined as “an unreasonable impact on the applicant due to their personal circumstances” (*Kanthasamy*, above, at paragraph 26).

[12] In *Kanthasamy*, the Supreme Court states that what does warrant relief will clearly vary depending on the facts and context of the case. An officer “making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them” (*Kanthasamy*, above, at paragraph 25). In my view, that is what the officer did.

(1) *Best interests of the child*

[13] The officer did a detailed analysis of the minor applicants’ situation. We can understand from his reasons that he was alert, alive, and sensitive to their best interests (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 75; *Kanthasamy*, above, at paragraph 143).

[14] The applicants rely on the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Hawthorne*, 2002 FCA 475, and argue that the officer had to analyze the advantages and inconveniences—for the child—of remaining in Canada or not. Yet,

although the facts in *Hawthorne* are very different than those before me in that the child in question was Canadian, it is my opinion that the officer carried out this exercise.

[15] In *Hawthorne*, the Court notes that the officer is not alert, alive and sensitive to the best interests of the affected child simply because there is a statement to that effect in the officer's reasons (*Hawthorne*, above, at paragraph 32; *Canada (Minister of Citizenship and Immigration) v. Legault*, 2002 FCA 125 at paragraph 12; *Kanthasamy*, above, at paragraph 39). The best interests of the child must be "well identified and defined", and examined "with a great deal of attention" in light of all of the evidence (*Kanthasamy*, above, at paragraph 39).

[16] In this case, the officer points out that the applicants submitted very little evidence regarding the minor children. He considers the fact that the children live in Canada only with their father, and that the rest of their family lives in Burundi, while their mother lives in South Sudan. He finds that the applicants did not show how it would be in the children's interest to remain in Canada; they did not submit a letter from the children's mother and do not put forward any personal circumstances or special needs that would justify such a finding. Taking into account the special conditions of Burundi, the officer finds that the applicants did not establish that the children would be personally at risk for sexual abuse. The evidence shows, rather, that they would benefit from the supervision and protection of their father and the rest of their family.

[17] Relying again on *Hawthorne*, the applicants argue that before finding that there was insufficient evidence regarding the minor children's best interests, the officer had the duty to make "further inquiries" into the issue (*Hawthorne*, above, at paragraph 47). In my view, the

applicants misunderstand the passage cited from that decision. In that case, the officer determined that it was not necessary to attach particular importance to the allegations of the father sexually assaulting his stepdaughter, in the absence of evidence of the father having been charged. The concerns of the child affected by the decision, at the thought of living with her father, were nevertheless supported by evidence of reservations expressed by a children's aid society about the father's parenting ability. According to the Court, it was this evidence that should have been the subject of further inquiry.

[18] We cannot infer from this passage that the officer had a duty to inquire further in order to compensate for non-existent or inadequate evidence. The burden of proof undeniably rests on the applicants (*Lu v. Canada (Citizenship and Immigration)*, 2016 FC 175 at paragraph 42). It was their responsibility to submit evidence regarding the impact that the refusal of their application for exemption would have on the minor applicants, based on their personal situation. They did not do so.

(2) *Temporary suspension of removals to Burundi*

[19] The applicants argue that the temporary suspension of removals to Burundi should support their position since it confirms that this country is facing exceptionally dangerous socio-political conditions. They should therefore benefit "ipso facto" from the exemption provided in the IRPA, in the absence of inadmissibility or another legal obstacle.

[20] The existence of dangerous conditions or the temporary suspension of removals to a given country does not create a presumption that a permanent residence applicant has the right to

the exemption set out in subsection 25(1) of the IRPA (*Alcin v. Canada (Citizenship and Immigration)*, 2013 FC 1242 at paragraph 55). The officer considered the current situation in Burundi and the temporary suspension of removals to that country, factors that he weighed along with the rest of the humanitarian and compassionate considerations that he had to consider. Contrary to what the applicants argue, the temporary suspension of removals was not the only factor considered by the officer. He concluded, however, that this suspension frustrated the applicants' allegations that they would suffer exceptional hardship based on Burundi's current socio-political conditions. This analysis of the evidence is, in my view, reasonable.

(3) *Allegation regarding an alleged alternative African country*

[21] Contrary to what the applicants suggest, the officer did not find that the applicants could move to a country on the African continent other than Burundi. The applicants clearly misinterpreted the following passage from the officer's reasons:

> As noted earlier in this decision, the applicants have a number of family members in Burundi and the children's mother reportedly resides in South Sudan. No letter from the children's mother is on file explaining why it would be in the children's best interests to remain in Canada. Without any evidence to the contrary, I find it reasonable to conclude that the children may also benefit from living in closer proximity to their mother and other relatives in Africa, allowing them to develop family relationships and access support. (Decision of the CIC officer, p. 5).
>
> [TRADUCTION] Tel que signalé plus tôt dans la présente décision, plusieurs membres de la famille des demandeurs demeurent au Burundi et la mère des enfants demeure apparemment au Soudan du Sud. Aucune lettre de la part de la mère expliquant pourquoi il serait dans l'intérêt supérieur des enfants de rester au Canada ne se trouve au dossier. En l'absence de preuves contraires, je trouve qu'il est raisonnable de conclure que les enfants pourraient aussi bénéficier de demeurer plus près de leur mère et des autres

> membres de leur famille en Afrique, leur permettant de développer des liens familiaux et d'avoir accès au soutien. (Décision de l'agent de CIC, p 5).

[22] In the context of his analysis of the children's best interests, the officer simply considered the fact that in Canada, the children are in the sole custody of their father and do not have any other family network, while several members of their family live in Burundi and their mother lives in South Sudan, a country much closer to Burundi than Canada. The officer does not at all suggest that the applicants live in an African country other than Burundi, and this argument by the applicants is without merit.

(4) *Degree of establishment and integration*

[23] On this point, the applicants only reiterate certain facts and evidence analyzed by the officer, while hoping that this Court gives them more weight than the officer did. The officer recognized that the applicants had certain ties to Canada, in light of the short period since their arrival; he considered the principal applicant's two jobs, the fact that the children attend school in Canada, the older son's volunteer activities, and the principal applicant's involvement in a community organization.

[24] However, the officer points out that the evidence does not allow him to establish the nature or frequency of the activities of the principal applicant and of his son. There is also very little information on the management of the principal applicant's finances in Canada, other than the fact that he and his wife (who works for the United Nations in South Sudan and earns a good income) qualified for a mortgage to purchase a house in Ottawa.

[25] There is nothing in the officer's reasons that would allow me to find that he made a capricious finding regarding the applicants' establishment and integration in Canada. The officer's decision on this point is, in my view, reasonable.

VI. Conclusion

[26] For the above-mentioned reasons, the applicants' application for judicial review will be dismissed. The parties did not raise any question of general importance for certification and none arises in this case.

JUDGMENT

THE COURT ORDERS that:

1. The applicants' application for judicial review is dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"
Judge

Certified true translation
This 1st day of October, 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1613-16
STYLE OF CAUSE:	JEAN CLAUDE MUHENDANGANYI, CLAUDE STEPHANE NICITEGETSE, NATHALIE NDAYISHIMIYE, MICHAELLA ISHIMWE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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