

Federal Court



Cour fédérale

Date: 20160909

Docket: IMM-3383-16

Citation: 2016 FC 1029

Ottawa, Ontario, September 9, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

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

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] “Justice, justice, you shall pursue” is a universal Biblical dictum, often repeated in the canons of each tradition and in secular legal sources, both by nation states and by international organizations.

[2] The reasons for the dictum, as a watchword phrase, with the repetition of the word “justice”, is to ensure that all evidence in every case, is considered and, at the very least, acknowledged to ensure that no stone will ever be left unturned.

[3] The outcome of a case is never certain; however, the consideration of all evidence should be a given. If it is not, then a decision-maker did not do what is incumbent in such a responsible task.

[4] In this case, the decision-maker stated that evidence, clearly on record, was absent. That is unacceptable and Kafkaesque as it was clearly on file.

[5] The *Kanthisamy* judgment of the Supreme Court (*Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthisamy*]) does not conclude as to how all such cases must be decided in respect of their final respective outcomes; that is not, necessarily, to grant certain status to children in such cases; but, rather, the *Kanthisamy* judgment, most significantly, does point out what primordial considerations must be taken into account in the case of children, due to the fragility and vulnerability of their human condition, as acknowledged both under domestic and international law. Both of which under law require attention which must be clearly demonstrated in decisions in respect of children.

II. Reasons

[6] This judgment is in response to a motion for a stay of removal of an Enforcement Officer's decision refusing to defer the removal of the principal Applicant and her two minor children, also Applicants.

[7] The underlying application is for judicial review of a decision in respect of an application for permanent residence on the basis of Humanitarian and Compassionate considerations.

[8] The principal Applicant was in a relationship with a common-law spouse (originally from the Democratic Republic of the Congo), father of her two minor children.

[9] The case arises due to the abuse by the common-law spouse which consisted of physical and psychological domestic abuse in regard to the principal Applicant, the children, including abuse and sexual improprieties in respect of the minor daughter.

[10] The principal Applicant's common-law spouse spent time in a psychiatric hospital; had been discharged and then threatened to kidnap their daughter to the Democratic Republic of the Congo.

[11] Although the Applicants emanate from Europe in which, as per the European Union, they could settle anywhere therein, and where institutions and entities could serve to protect them, the

Applicants have clearly explained their fear and peril faced in view of a specific fact-pattern of evidence by which to substantiate their sense of impending peril.

[12] A child's letter on file demonstrates their fear of return to a situation where their father would be in their reach, a letter, which was not, at all, acknowledged by the decision-maker, of which was said, there was none.

[13] The Applicants, at the outset of their stay in Canada, withdrew their application for refugee status on recognition that their case did lend itself more so to a request for Humanitarian and Compassionate considerations.

[14] A psychological report and other documents on record demonstrate evidence of fear, anxiety and duress on the basis of peril which the Applicants previously faced; whereas, their lives in Canada have been given a sense of security and serenity which they had not encountered previously prior to their arrival herein. Reference is made to *Bonil Acevedo v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 401 at paras 53-54 [*Acevedo*], and the judgments cited therein, in addition to paragraph 57 of *Acevedo*, wherein the *Baker* judgment of the Supreme Court is also specified with its pertinence to the present case, recalling the *Kim* judgment, mentioned in the *Kanthisamy* decision of the Supreme Court cited above.

[15] Significant evidence on file before the Court was not, at all, acknowledged in the underlying decision. It, therefore, requires, at the very least, a need to be addressed, even if, but briefly.

[16] The most recent *Kanhasamy* judgment specifies most clearly that the interests of children must be “well identified and defined”; thus, assessed “with a great deal of attention” in light of evidence on file.

[17] The *Kanhasamy* judgment does not conclude as to how all such cases must be decided in respect of their final respective outcomes; that is not, necessarily, to grant certain status to children in such cases; but, rather, the *Kanhasamy* judgment, most significantly, does point out what primordial considerations must be taken into account in the case of children, due to the fragility and vulnerability of their human condition, as acknowledged both under domestic and international law. Both of which under law require attention which must be clearly demonstrated in decisions in respect of children.

[18] In view of all of the above, the conjunctive tripartite test in the *Toth* judgment (*Toth v Canada (Citizenship and Immigration)* (1988), 86 NR 302 (FCA)) is fully satisfied by the Applicants.

[19] Therefore, the stay of removal is granted to the Applicants, pending final determination of their underlying application for leave and judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay of removal be granted until the final determination of the underlying application for leave and judicial review.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: MAGUY KIMBULU TSHIMWENZI, TALINA HILLA
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MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

**MOTION HELD VIA TELECONFERENCE ON SEPTEMBER 9, 2016, FROM
OTTAWA, ONTARIO AND TORONTO, ONTARIO**

JUDGMENT AND REASONS: SHORE J.

DATED: SEPTEMBER 9, 2016

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