Federal Court  Cour fédérale

Date: 20180307

Docket: IMM-1999-17

Citation: 2018 FC 251

Ottawa, Ontario, March 7, 2018

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

JULIA NJILABU MPOYI
JOY-RACHEL TSHIABU MPOYI
MAURICE KALONJI KAPUTU MPOYI

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicants, Ms. Julia Mpoyi and her children [Applicants], seek judicial review of a decision [Decision] by a Senior Immigration Officer [Officer] dated April 24, 2017 wherein the Officer refused their application, pursuant to subsection 25(1) of the *Immigration and Refugee*

Protection Act, S.C. 2001, c. 27 [*IRPA*], for permanent resident status in Canada on humanitarian and compassionate [H&C] grounds.

II. Background

[2] The principal Applicant, Ms. Julia Mpoyi, is a citizen of the Democratic Republic of Congo [DRC] and no other country. In 1995, she, her parents, and one of her two sisters immigrated to South Africa from the DRC, where they were recognized as Convention refugees. Ms. Mpoyi is now a Convention refugee and permanent resident of South Africa.

[3] In 2002, Ms. Mpoyi married another Congolese refugee in South Africa, Roger Mpoyi. Together they have two children, the minor Applicants Joy-Rachel Mpoyi and Maurice Mpoyi [the Children]. The Children were born before Ms. Mpoyi obtained permanent residence in South Africa. As a result, both have Congolese, rather than South African, citizenship. The Children are permanent residents of South Africa, and are recognized as refugees in South Africa.

[4] In 2010, Roger Mpoyi and Ms. Mpoyi separated. They were eventually divorced in 2013. Ms. Mpoyi obtained sole custody of the Children. After the separation, Ms. Mpoyi supported herself and the Children through earnings from her full-time position with the South African Revenue Service and from operating her own business in Cape Town, where she sold clothing and accessories. Ms. Mpoyi travelled widely to support her business. The evidence before the Officer demonstrated she traveled to China on nine occasions, twice to Europe and at least once to each of Thailand, Brazil and the United States. In addition, stamps on her passport

demonstrated she had traveled to the DRC, her homeland and the country from which she sought refuge, on 11 separate occasions. While living in South Africa, Ms. Mpoyi and her children traveled regularly on holiday.

[5] The documentary evidence demonstrated that in and around 2008, xenophobic attacks had begun in South Africa, as foreigners became the targets of intimidation, threats and physical violence. Migrants from other African countries were particularly targeted because some black South Africans accused them of taking their jobs and contributing to the high crime rate. During a wave of attacks launched in 2012, Ms. Mpoyi claims that her business was fire-bombed and destroyed. Thereafter, Ms. Mpoyi continued the business from home. Similar xenophobic demonstrations and violence spread across the country again in 2014. Fearful of remaining in Cape Town, Ms. Mpoyi moved to Johannesburg. She transferred locations for her government job, and began to work at the shop of her boyfriend, Guylain Kapongo [Mr. Kapongo].

[6] After relocating her family to Johannesburg, Ms. Mpoyi claims that she began receiving phone calls telling her to "go home" to the DRC. She claims that she reported the threatening calls to the police, but was told they could not intervene until an actual crime had been committed.

[7] On April 1, 2015, after Mr. Kapongo had left his shop, Ms. Mpoyi claims she was approached by a group of men pretending to be customers. They pointed a gun at her. They took all the money in the store, took Ms. Mpoyi to a car, and drove her to her own house. At the house, they assaulted her, called her derogatory names, used racist words, and continued to make

death threats. Someone held a knife to Ms. Mpoyi during this ordeal. They eventually loaded her valuables into a truck and drove off with her possessions. Before they left, these people allegedly told Ms. Mpoyi to leave the country, saying "[i]f you don't leave, we will rape your kids and kill you".

[8] The day after this assault, Ms. Mpoyi went to the police to report the crime. The police instructed her to complete an affidavit and said they would investigate. Ms. Mpoyi says she heard nothing further from the police.

[9] Fearing for their safety, the Applicants left South Africa. They travelled to Rochester in the United States, and then to Buffalo. They attempted to make a refugee claim in Canada at the Fort Erie border crossing on April 28, 2015. A Canada Border Services Agency [CBSA] officer determined that the Applicants were ineligible to make a refugee claim pursuant to paragraph 101(1)(*d*) of the *IRPA* because they had been recognized as Convention refugees in South Africa.

[10] In November 2015 the Applicants applied for permanent resident status on H&C grounds, pursuant to subsection 25(1) of the *IRPA*. On August 8, 2016, the Applicants were notified that a Senior Immigration Officer had refused their H&C application. The Applicants sought judicial review of that decision, which was granted by Madam Justice Simpson on February 23, 2017. Justice Simpson ordered that the matter be returned for redetermination by a different officer (see *Mpoyi v. Canada (Citizenship and Immigration)*, 2017 FC 228, [2017] F.C.J. No. 202 [*Mpoyi*]).

[11] Following Justice Simpson's decision, Immigration, Refugees and Citizenship Canada [the IRCC] provided the Applicants with an opportunity to update their file. The Applicants provided the IRCC with further evidence and requested that they be issued Temporary Residence Permits [TRPs] pursuant to s. 24(1) of the *IRPA*, should their H&C application be refused.

[12] On April 24, 2017, the Officer considered and refused the Applicants' updated H&C application. The Officer also refused to consider the Applicants' alternative requests for TRPs. Both decisions are the subject of the current application for judicial review. For the reasons which follow, I grant the application for judicial review relating to the TRPs, but dismiss the application for judicial review relating to the H&C application for relief.

III. Issues raised before the Officer by Ms. Mpoyi, on her own behalf and on behalf of the Children

[13] Ms. Mpoyi claimed it would be in the best interest of the Children if they remained in Canada. She contented they had been the victims of racism at school in South Africa, that removing them from Canada to South Africa would disturb their academic progress, and that her own Post Traumatic Stress Disorder [PTSD] would be aggravated should she return to South Africa, which would negatively impact the Children. She also advised the Officer that one child suffers from asthma and that it is not always easy to obtain medical care in South Africa.

[14] With respect to Establishment in Canada, Ms. Mpoyi advised she had five sisters in Canada and was active in her church and community.

[15] With respect to Risk she advised that her "store was burned down because she was of foreign origin". She also pointed to country conditions showing discrimination against foreigners in South Africa. She alleged she would be subject to discrimination because she owns a business and that this discrimination "could go as far as death".

IV. Officer's Reasons for Decision

[16] The Officer, in the opening lines of his Reasons, stated that he had taken into account all of the documentation submitted by Ms. Mpoyi and her children. He referred to the following H&C factors: establishment in Canada; risk/discrimination; incidents relating to Ms. Mpoyi's business; assault suffered in 2015; medical conditions; best interests of the Children [BIOC], including school life of the Children in South Africa; and school life in Canada.

[17] With respect to the issue of Establishment, the Officer noted that the Applicants arrived in Canada less than two years prior to the hearing. He stated that this constitutes a relatively short period of time. The Officer referred to Ms. Mpoyi's involvement in her community and her church. The Officer considered Ms. Mpoyi's employment. He noted that Ms. Mpoyi produced no proof of any earnings in Canada in 2015. For the year 2016, Ms. Mpoyi produced T-4 slips showing a total income in Canada of $2,425.01. In addition to that income, she was able to support her family with "last resort financial assistance from the government". The Officer acknowledged Ms. Mpoyi's efforts at undertaking courses in an effort to become more employable in Canada. With respect to her five sisters, Ms. Mpoyi admitted the women were not sisters but cousins or close friends. She then advised she had one sister living in Canada. The Officer noted the contradictory statements made by Ms. Mpoyi regarding family in Canada and

also noted that Ms. Mpoyi submitted no evidence to corroborate the familial relationship with the one person she eventually claimed was her sister. However, the Officer gave her the "benefit of the doubt" and accepted Ms. Mpoyi had a sister in Canada. The Officer found there was no evidence that ties to her sister or friends in Canada would be broken by a return to South Africa. The Officer noted that Ms. Mpoyi submitted no evidence to demonstrate she had severed her employment ties in South Africa. Based upon all of the information available, the Officer concluded Ms. Mpoyi's Establishment in Canada was limited.

[18] With respect to the Risk and Discrimination factors, the Officer noted that Ms. Mpoyi is a refugee from the DRC and a permanent resident of South Africa. The Officer acknowledged the assertion that the minor Applicants have been the victims of racist remarks at school and that Ms. Mpoyi was unable to register her son in the school of her choice. The Officer referred to a "bundle of significant documents" presented by the Applicants which speak to racial tensions and the migration of people, particularly foreign merchants, out of South Africa. The Officer noted that Ms. Mpoyi's passport indicates "dozens" of visits to the DRC despite her assertion she knew very little about that country since her departure at the age of 13. The Officer referred in detail to the country condition documents regarding anti-immigrant violence. The Officer noted that while Ms. Mpoyi produced photos of her business before it was burned down in 2012, she produced no photographs, police reports, or newspaper articles referring to the alleged arson. The Officer noted that Ms. Mpoyi said a family member owned the business, but had not offered any evidence about the time she devoted to the business or her business relationship, if any, to the owner. Given Ms. Mpoyi's full-time permanent position with the government of South Africa, the Officer concluded Ms. Mpoyi had revealed a lack of information on this subject. The

Officer noted that after the business was burned, Ms. Mpoyi continued her travels as in the past, and continued the business on-line. The Officer chose to give little weight to the alleged arson as being racially motivated given the lack of proof of Ms. Mpoyi's relationship with the owner of the business, the lack of documentation and proof of the alleged arson (photos, police reports, newspaper articles, etc.). It is clear the Officer was equally unconvinced regarding the alleged racial motivation for the attack on Ms. Mpoyi and threats to her children flowing from the 2015 incident. Ms. Mpoyi submitted no police report, no report from a hospital or physician regarding injuries and no photos of the empty premises after the articles were allegedly loaded onto a truck. The Officer, however, once again, stated that he was mindful of the fact the incident would have been traumatic, but concluded, by giving Ms. Mpoyi the "benefit of the doubt", that the events surrounding the assault constituted an "isolated criminal act". The Officer concluded: "I cannot find that this criminal assault was planned owing to her ethnic background. The applicant may have been targeted owing to her business success". The Officer then referred to country conditions and concluded that "the possibility of falling victim to a criminal act in South Africa is not determined by one's ethnic background but rather driven by greed".

[19] The Officer then turned to issues of trauma and medical conditions. The Officer considered the incidents of violence suffered by Ms. Mpoyi and juxtaposed that fact against her 20 years of study, work and success in South Africa. The Officer concluded that Ms. Mpoyi was not discriminated against because of her Congolese origins, but that she was the victim of generalized criminality in South Africa. While accepting that the Applicants submitted documents showing racial tension towards foreign merchants, the Officer concluded those documents failed to establish a link between that tension and the Applicants' situation.

[20] With respect to Ms. Mpoyi's medical condition, the Officer considered the psychiatric assessment report of Dr. Parul Agarwal [Dr. Agarwal] and other medical evidence of Ms. Mpoyi's ongoing counselling for PTSD. The Officer concluded that Ms. Mpoyi could continue with the recommended treatment in South Africa, stating that "nothing indicates that she would not be able to follow the advice of specialists if she had to return to South Africa". Furthermore, he concluded Ms. Mpoyi failed to demonstrate she would not have access to the necessary treatment in South Africa. He also referred to Ms. Mpoyi's health care plan in South Africa.

[21] Finally, the Officer examined the BIOC. The Officer stated that no evidence had been submitted to demonstrate that the Children experienced institutionalized racism. The Officer accepted that Ms. Mpoyi had trouble registering her son at her preferred school. However, the Officer concluded that this alone was insufficient to establish discrimination. The Officer acknowledged the Children may have been exposed to incidents of racism, bullying or derogatory remarks, but these did not engage H&C considerations.

[22] The Officer considered the Children's ability to adapt to the Canadian educational system and acknowledged the South African system must have prepared them relatively well for that transfer. He concluded the Children had received a good education in South Africa and that they would continue to do so.

[23] The Officer concluded that there was no evidence to demonstrate the Children would not have access to schooling or health care, or that returning would have a significant detrimental impact on their education or health.

[24] In relation to Ms. Mpoyi's fear for her Children, the Officer considered all of the evidence and concluded the alleged threat in 2015 constituted part of a random criminal act and was not based upon xenophobia or discrimination. In analysing the BIOC, the Officer addressed the location of other family members, including the Children's father.

[25] In his conclusion, the Officer again noted that Ms. Mpoyi was able to study, work and obtain permanent resident status in South Africa, which in turn allowed her to create a family, obtain a good job, travel, do business and prosper. He observed that the purpose of an H&C application is not to compare the situation of the returning country to that in Canada in order to determine whether an exemption should be granted.

V. Relevant Provisions

[26] The relevant provisions of the *IRPA* are subsections 24(1) and 25(1), which read as follows:

Temporary resident permit	**Permis de séjour temporaire**
24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.	24 (1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.
Humanitarian and compassionate considerations — request of	**Séjour pour motif d'ordre humanitaire à la demande de**

foreign national	**l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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.	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.

VI. Issues

[27] The Applicants raise the following issues in relation to this matter:

1. Did the Officer err by failing to consider and decide the Applicants' alternative request for Temporary Resident Permits;
2. Did the Officer err in discounting the Applicants' personal evidence;

3. Did the Officer err in examining adverse country conditions in South Africa;

4. Did the Officer err in assessing the psychological evidence; and

5. Did the Officer err in assessing the BIOC?

VII. Analysis

A. *Standard of Review*

[28] It is well-settled that the Officer's treatment of the evidence in assessing the BIOC and the other H&C factors is subject to a reasonableness standard of review (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 at paras. 44-45 [*Kanthasamy*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] S.C.J. No 39 at para. 62 [*Baker*]; *Kisana v. Canada (Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 F.C.R. 360 at para. 18; *Tisson v. Canada (Citizenship and Immigration)*, 2015 FC 944, [2015] F.C.J. No. 945 at para. 15).

[29] Where an issue attracts a reasonableness review, the Court must give due consideration to the determinations of the Officer, and ultimately determine "whether the decision 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, [2008] 1 S.C.R. 190 at paras. 47, 49 [*Dunsmuir*]). Furthermore, judicial review, be it on a standard of reasonableness or correctness, is not a line-by-line treasure hunt for error: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34, [2013] 2 S.C.R. 458, at para 54. Save for

the first issue raised by the Applicants, all other issues attract the reasonableness standard of review.

[30] The Court has consistently held that the request for a TRP is reviewable under the standard of correctness (*Abdeli v. Canada (Citizenship and Immigration)*, 2015 FC 146, [2015] F.C.J. No. 110 at para. 30 [*Abdeli*], referring to *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 43; *Shah v. Canada (Citizenship and Immigration)*, 2011 FC 1269, [2011] F.C.J. No. 1553 at para. 36 [*Shah*]; *Dhandal v. Canada (Citizenship and Immigration)*, 2009 FC 865, [2009] F.C.J. No. 1029 at paras. 11-17 [*Dhandal*]; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461, [2006] F.C.J. No. 1841 at para. 18 [*Lee*]).

B. *Did the Officer err by failing to consider and decide the Applicants' alternative request for Temporary Resident Permits?*

[31] In his submissions supporting the Applicants' H&C application, the Applicants' counsel specifically requested: "if the adjudicating officer is not prepared to grant this application for permanent residence, we request that the applicants are issued Temporary Residence Permits, pursuant to s. 24(1) of the IRPA". With respect to this issue, the Officer concluded: "this request does not fall under the scope of my duties" and "a separate application should be submitted to this effect".

[32] The Applicants submitted that this was an error of law which should result in the quashing of the Decision. The Applicants contend a TRP request falls directly within the scope of the Officer's duties. The Respondent contends this position is incorrect because the Officer,

being a Senior Immigration Officer within a Region, did not have the delegated authority to consider a TRP request under item 84 of the *Instrument of Designation and Delegation* signed by the Honourable John McCallum, then Minister of Citizenship and Immigration, on June 22, 2016. The Respondent's position is correct. That being said, the IRCC had a duty to consider the request for TRPs pursuant to s. 24(1) of the *IRPA*. There is no provision governing the form of TRP applications. A simple letter is sufficient to trigger the request (*Japson v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 520, [2004] F.C.J. No. 694 at paras. 23-25 [*Japson*]; *Lee* at paras. 16-18; *Shah* at paras. 77-79; *Dhandal* at paras. at 11-17). As a result, the Officer should have forwarded the Applicants' request for TRPs to the proper decision-maker upon deciding that the application for permanent residence on H&C grounds was refused. His failure to do so constitutes a reviewable error.

[33] The Respondent agrees to the granting of the Applicants' judicial review application as it relates to this issue. I would therefore grant the application, as it relates to the refusal to consider the request for TRPs, and direct the matter be referred to a Senior Immigration Officer with appropriate delegated authority to consider the matter.

C. *Was the H&C decision unreasonable?*

[34] I now turn to the reasonableness of the H&C decision. It bears repeating that judicial review is not a line-by-line treasure hunt for error. A reasonable decision need not be a correct decision, nor must it be the decision a reviewing judge would have made faced with the same set of circumstances.

[35] In Part IV of these reasons, I have outlined in some detail the approach taken, and the conclusions reached, by the Officer. While the Officer may have given little weight to factors the Applicants considered important, and significant weight to factors the Applicants considered relatively minor, the task of weighing the evidence is precisely within the jurisdiction of the Officer. The Officer took considerable effort to address each issue raised by the Applicants. While the Applicants disagree with the Officer's conclusions, I cannot conclude any of them fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VIII. Conclusion

[36] The Officer was correct to conclude that he lacked the authorization to consider the Applicants' alternative TRP request. However, his assertion that a separate application should be submitted for the TRP request constitutes a reviewable error. The Officer should have forwarded this request to the proper decision-maker upon refusing the Applicants' application for permanent residence in Canada on H&C grounds. For this reason, and with the consent of the Respondent, the Applicants' judicial review is granted on this issue. I find the H&C decision to be reasonable. The judicial review in relation to that matter is dismissed.

JUDGMENT in IMM-1999-17

THIS COURT'S JUDGMENT IS:

1. The application for judicial review with respect to the refusal to consider the applications for Temporary Resident Permits is allowed. Those requests are referred to the appropriate authority for re-determination;

2. The application for judicial review with respect to the Officer's refusal to grant an exemption under s. 25(1) of the IRPA, based upon H&C considerations, is dismissed;

3. No question is certified for consideration by the Federal Court of Appeal;

4. No costs are awarded to either party.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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