Federal Court Cour fédérale

Date: 20180707

Docket: IMM-2873-18

Citation: 2018 FC 707

Ottawa, Ontario, July 7, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

MARIUS CALIN
NICOLETA CALIN
ANTONIA CALIN
CASIA CALIN

Applicants

and

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

Respondents

ORDER AND REASONS

[1] The applicants bring a motion for a stay of their removal from Canada scheduled for July 9, 2018. The motion was heard yesterday by teleconference. These are my reasons for granting the motion.

I. Facts and Underlying Decision

[2] The applicants are citizens of Romania. They are Roma. Mr. Marius Calin and Ms. Nicoleta Calin are a couple, and Antonia Calin and Casia Calin are their daughters, aged respectively 6 and 4.

[3] The applicants have regular, non-biometric Romanian passports. According to the procedure then in force, they applied for and obtained electronic travel authorizations [eTA] to travel to Canada. On June 5, 2018, at approximately 7:00 am Bucharest time, they boarded a flight that, after a transit in the Netherlands, brought them to Montreal.

[4] On June 5, 2018, at 5:30 am Eastern daylight time, the *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Resident – Romania)*, SOR/2018-109 [the New Regulations], came into force. The effect of the New Regulations is that Romanian citizens who do not hold a biometric passport must obtain a temporary resident visa instead of an eTA, and that eTAs issued after December 1, 2017 are cancelled. On the same day, at an unknown time, the Government of Canada issued a press release announcing the coming into effect of the New Regulations. It contained the following precision:

> Any existing eTAs issued to Romanians who applied with a non-electronic passport on or after December 1, 2017 are no longer valid and these travellers will not be able to use their eTAs for air travel to Canada. The Government of Canada is sending emails to these travellers to inform them of the change and what they need to travel to Canada.

[5] A backgrounder to the press release, available on the Internet, also indicated the following:

> **Flying to Canada on June 5?**
>
> The Government of Canada is working closely with airlines to help facilitate travel if you meet all requirements to enter the country and are already in transit to Canada. However, we may not be able to facilitate everyone and delays are possible.
>
> If you have received an email from the Government of Canada informing you that your eTA is no longer valid, you will not be facilitated and you will need to **apply for a visa** to travel to Canada.
>
> (Motion record, pp 77-78)

[6] The applicants assert that they never received any notice that their eTAs were no longer valid before they boarded the plane to Canada.

[7] Upon landing at Pierre Elliot Trudeau airport in Montreal around 5:00 pm, the applicants were questioned by a CBSA agent who spoke Romanian. They were told that their eTAs were no longer valid and that they could not enter Canada without a visa. A Minister's delegate was also present and issued an inadmissibility report and an exclusion measure. The purported basis for that measure was that the applicants were inadmissible to Canada for failing to comply with the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], contrary to section 41 of the Act. Under section 20(1)(b) of the Act, a foreign national who wants to become a temporary resident must show a visa required by the regulations. Given the coming into force of the New Regulations earlier that day, the applicants did not possess the visa required by the regulations.

[8] The exact sequence of events that afternoon is in dispute, but at some point in time the applicants mentioned that they intended to claim asylum in Canada. The CBSA agent took the position that they could not do so, as they were already subject to an exclusion measure (see section 99(3) of the Act). A note entered in the GCMS system on June 6 states that the exclusion order was pronounced at 5:10 pm on June 5, minutes after the plane landed. However, a "declaration" by Officer Dubé-Caron states: "Avant même la présentation du rapport 44, CALIN MARIUS a déclaré qu'ils ne quitteraient pas et qu'ils voulaient l'asile politique," which casts a doubt on the assertion that the applicants claimed asylum only after an exclusion measure was taken. These declarations or statements must have been written sometime after the facts. The inadmissibility reports themselves do not bear the time at which they were made. At the hearing of this motion, counsel for the respondent suggested that the exclusion order was first made orally. Whether proceeding in this manner can effectively deprive someone of the right to claim asylum is a matter best left for the judge who will hear the merits of the underlying application.

[9] The agents sought to enforce the exclusion measure immediately and took steps to obtain boarding passes for a flight leaving the same day at 6:45 pm, but were eventually unsuccessful.

[10] Mr. Calin was immediately detained. On June 15, 2018, the Immigration Division of the Immigration and Refugee Board continued his detention.

[11] Ms. Calin was detained on June 10, 2018, and the children "accompanied" her. On June 21, 2018, the Immigration Division of the Immigration and Refugee Board continued her detention, as it found that there was a risk that she would not report for removal.

[12] On June 30, 2018, my colleague Justice Peter Annis ordered that Ms. Calin be released from detention. Justice Annis also directed that the challenge to the detention review decisions be made through a separate application for leave and judicial review (bearing file no. IMM-3002-18).

[13] This application for leave and judicial review was commenced on June 20, 2018. It challenges the inadmissibility reports made against the applicants under section 44 of the Act as well as the exclusion orders made under section 228 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[14] The applicants made a request for an administrative stay of their removal on June 19, 2018. On July 3, 2018, that request was denied.

[15] The applicants then brought a motion to this Court for the stay of their removal.

II. Analysis

[16] The Act does not require a judicial authorization to remove a foreign national from Canada. In that sense, a stay of removal is an exceptional remedy, as it interferes with the normal administrative process.

[17] The statutory basis for a stay of removal is found in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court may make interim orders pending the final

disposition of an application for judicial review. In granting such relief, we apply the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[18] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

A. *Serious Question to be Tried*

[19] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). In the administrative law context, this must be assessed while keeping in mind that the applicable standard of review is reasonableness.

[20] The applicants assert that the inadmissibility reports and exclusion orders are invalid on two grounds: (1) the New Regulations should not apply to them, as they were already on the plane to Canada when they came into force and it was impossible for them to comply; (2) the claim for asylum was made before the exclusion orders and should have been processed.

[21] In the context of a motion for stay of removal, the usual practice is to refrain from making detailed comments on the merits of the underlying application, in order to preserve the freedom of the judge who will hear the merits. In this case, that judge will also have to decide contested factual issues. For those reasons, I will simply say that I am satisfied that the applicants have raised serious questions to be tried.

B. *Irreparable Harm*

[22] The second prong of the *RJR* test relates to irreparable harm.

[23] The applicants invoke two harms: (1) the risk to their lives and security if they are removed to Romania; (2) the fact that their removal would render the underlying application moot.

[24] The context in which these harms must be assessed in this case is unusual. Motions for stay of removal are typically made after the Immigration and Refugee Board has determined that the applicant is not a Convention refugee or protected person and after a negative decision on a pre-removal risk assessment [PRRA]. In many cases, the irreparable harm alleged in support of a

stay motion is, in totality or in large part, the same harm alleged in support of a claim for asylum or PRRA application and already determined to be non-existent.

[25] That explains that a motion for stay of removal is not the appropriate forum to reargue harms that have been adequately assessed by previous decision-makers (see, e.g., *Goshen v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1380 at para 6; *Lebrun v Canada (Citizenship and Immigration)*, 2018 FC 663 at para 15). Likewise, the Federal Court of Appeal has repeatedly stated that the potential mootness of the underlying application does not, in and of itself, constitute irreparable harm (*El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 at para 8; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 50, [2010] 2 FCR 311; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 35-39, [2012] 2 FCR 133; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 56-57). In those cases, however, the applicants had had the benefit of a decision regarding their claim for asylum, their PRRA application or both.

[26] The situation is very different in a case such as this one, where CBSA seeks to remove a person whose risk of prejudice was never assessed by anyone. There is no relitigation of a question already decided. Moreover, the applicants have not had an opportunity to make a claim for asylum or to ask for a PRRA and to state the reasons why they fear returning to their home country.

[27] I would also add that the removal of the applicants may, depending on the circumstances, engage their right to life, liberty and security of the person protected by section 7 of the *Canadian Charter of Rights and Freedoms* [Charter]. Given the urgency of this motion, I cannot engage in a detailed analysis of the implications of section 7 in the immigration context (see, for example, *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3). Yet, the reality is that no one has yet assessed the consequences of removing the applicants to Romania. Given that I am the only decision-maker to address this issue before the proposed removal and that a motion for a stay of removal does not realistically allow the parties to provide me with a full record, I think I should err on the side of caution.

[28] The applicants are Roma from Romania. The United States Department of State report on human rights in Romania for 2017 contains the following:

> Discrimination against Roma continued to be a major problem. Romani groups complained that police harassment and brutality, including beatings, were routine. Both domestic and international media and observers reported societal discrimination against Roma. NGOs reported that Roma were denied access to, or refused service in, many public places. Roma also experienced poor access to government services, a shortage of employment opportunities, high rates of school attrition, and inadequate health care. A lack of identity documents excluded many Roma from participating in elections, receiving social benefits, accessing health insurance, securing property documents, and participating in the labour market. Roma had a higher unemployment rate and a lower life expectancy than non-Roma. Negative stereotypes and discriminatory language regarding Roma were widespread.
>
> Despite an order by the Ministry of Education forbidding segregation of Romani students, segregation along ethnic lines persisted. In March a house, annex, outbuildings, and agricultural storage belonging to Roma were burned and destroyed in the city of Gheorgheni as revenge for an alleged theft that took place earlier the same week. The media reported that, prior to the arson,

> local police noticed mobs moving towards the area where Roma lived in the city and observed several groups shouting anti-Roma statements. Romani activists claimed the attackers used social media to organize the attacks. Following the incidents, the Gheorgheni mayor made anti-Roma statements and blamed Roma for triggering the attack on their homes. As of December an investigation was pending before the prosecutor's office attached to the Hargita Tribunal. Forced evictions of Roma continued to be a problem. In February local authorities evicted several Romani families from a building located in Bucharest with no advance notice.

[29] In its *Concluding observations on the fifth periodic report of Romania* (UN Doc CCPR/C/ROU/CO/5, 11 December 2017), the United Nations Human Rights Committee noted the following:

> 11. The Committee reiterates its concern about reports of persistent discrimination against the Roma population, including in the fields of health, education, employment and housing. It is also concerned about reports of the continuing de facto segregation of Roma children in schools, the lower standard of school education, forced evictions of Roma without adequate advance notice or the possibility of legal challenge and without support by governmental agencies to access adequate alternative accommodation, and discrimination in the health sector having a negative impact on the health status and life expectancy of Roma. The Committee is further concerned about the insufficient progress in implementing the government strategy for inclusion of Romanian citizens belonging to the Roma minority and insufficient disaggregated data concerning the Roma population (arts. 2, 6, 17, 26 and 27).
>
> […]
>
> 13. The Committee is concerned about allegations of racially motivated incidents against the Roma population and allegations of police abuse amounting to ill-treatment, especially targeted against Roma (arts. 7 and 20).

[30] From these excerpts, it appears that the situation of Roma in Romania is similar to that in Hungary, which has given rise to a number of decisions of this Court (see, for example, *Canada*

(Citizenship and Immigration) v. Racz, 2015 FC 218; *Farkas v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 658).

[31] Counsel for the respondents submitted that there is no evidence linking the personal situation of the applicants to the conditions described above. I cannot give effect to that argument. While in detention, Mr. Calin provided a short affidavit, ostensibly for the purpose of explaining the sequence of events on June 5. While the focus of the affidavit is not the description of his grounds for claiming asylum, he briefly mentions that he has suffered a lot in Romania, in particular from racism and discrimination, and that he has been deprived of basic social services. In the exceptional context of this motion for stay of removal, this is sufficient to establish the requisite connection.

[32] In the result, I conclude that the applicants have shown that irreparable harm is likely to occur if a stay of removal is not granted.

C. *Balance of Convenience*

[33] At this last stage of the *RJR* test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law. It has sometimes been said that "[w]here the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 at para 48). Nevertheless, balance of convenience is not a purely formal criterion. The conduct of the applicant, for example where the

applicant has a significant criminal record or has a history of evading immigration authorities, may strengthen the interest of the state in enforcing the removal.

[34] However, none of these factors are present in this case. The applicants have always strived to comply with Canadian law as they could reasonably access and understand it.

[35] The public interest may also be taken into account in the balance of convenience (*RJR* at 344). There is, of course, a public interest in the quick removal of persons who do not have a right to be present in Canada. That interest assumes, however, that those persons' entitlement to stay in Canada has been determined through a fair process. The rule of law demands no less. In this case, the conduct of the CBSA officers was apparently calculated to deprive the applicants of the right to claim asylum, a basic human right recognized by Article 14 of the *Universal Declaration of Human Rights* and implemented by the Act. More precisely, section 3(2)(c) of the Act states that one of the objectives of the Act is "to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution." The record before me does not show that the applicants were afforded "fair consideration." This is an additional factor that weighs in favour of granting the stay.

[36] I conclude that the balance of convenience favours the applicants.

[37] In conclusion, the three *RJR* criteria are met and I will issue an order staying the applicants' removal from Canada.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay of the removal of the applicants is granted.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2873-18
STYLE OF CAUSE:	MARIUS CALIN, NICOLETA CALIN, ANTONIA CALIN and CASIA CALIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HELD BY TELECONFERENCE ON JULY 6, 2018 IN OTTAWA, ONTARIO

ORDER AND REASONS:	GRAMMOND J.
DATED:	JULY 7, 2018

ORAL AND WRITTEN REPRESENTATIONS:

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