

Federal Court



Cour fédérale

Date: 20160704

Docket: IMM-2793-16

Citation: 2016 FC 746

BETWEEN:

**JOZSEF CSOKA
JOZSEFNE CSOKA
LAURA CSOKA
VIVIEN CSOKA
JOZSEF CSOKA JR
KEVIN CSOKA**

Applicants

and

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

Respondent

REASONS FOR ORDER

ZINN J.

[1] The Applicants brought a motion, on an urgent basis, seeking an Order staying their removal from Canada. The motion was heard on Saturday, July 2, 2016, and following hearing the submissions of the parties, an Order issued staying the removal of the applicants then scheduled for July 3, 2016. It was indicated to the parties at that time that these written reasons would follow.

[2] The Applicants are a Roma family from Hungary: Jozsef, his wife Jozsefne, their daughters Laura and Vivian, and their sons Jozsef Junior [Junior] and Kevin. The children were born in 1996, 1998, 2002, and 2009, respectively.

[3] The Applicants are subject to a deportation order, having most recently entered Canada without receiving prior authorization to return.

[4] The family first entered Canada on February 4, 2015 and made a claim for Convention refugee status. It is not disputed that on July 2, 2015, the applicants withdrew their claim. On August 19, 2015, the Applicants advised immigration authorities that they wish to leave Canada and asked the tickets be bought for them. On September 11, 2015 they left Canada.

[5] It is also not disputed that some eight months later, on May 18, 2016, the Applicants returned to Canada without authorization. Returning without an authorization entailed that they were deemed ineligible to make a refugee claim and given their circumstances, are not eligible to apply for a Pre-Removal Risk Assessment for 36 months. Soon after arriving, the Applicants filed an application for permanent residence status on humanitarian and compassionate grounds [H&C Application] dated May 30, 2016. On June 20, 2016, the applicants requested a deferral of their removal until the H&C Application could be considered and stated that “the basis of the request can be found in the attached H&C Application” for the family.

[6] When this motion was filed, no decision had yet been rendered on the deferral request; however, by the time the motion was heard, the enforcement officer had denied the request to defer removal. It is that decision which underlies the application for leave and judicial review.

[7] The Applicants are required to meet the tri-partite test for the granting of a stay of removal set out in *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110 and *R.J.R. MacDonald Limited v Canada (AG)*, [1994] 1 SCR 311 and applied by the Federal Court of Appeal to stays of deportation in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA), namely that there is a serious issue to be tried, that the applicant would suffer irreparable harm if removed to his country of origin and that the balance of convenience lies in his favour.

[8] Because the decision that underlies the request for a stay is the decision of an enforcement officer not to defer removal, the threshold for serious issue is higher than merely “not frivolous or vexatious.” The Applicants must persuade the Court that they are likely to succeed on the issues identified in the underlying application: *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 [Wang] and *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, at para 67.

[9] The Applicants submit that the decision of the enforcement officer denying the request to defer their removal is unreasonable to the extent that they submitted that it raises a question whether the officer truly engaged with the evidence they put forward in the request for deferral.

As noted above, the request for deferral was made on the basis of the H&C Application that was submitted to the officer.

[10] The H&C Application includes an affidavit of Jozsef who sets out the treatment the family faced in Hungary which led them to seek refugee status in Canada in February 2015. It also provides the Applicants' explanation for discontinuing their claim and returning to Hungary. Specifically, Jozsef attests that when the family were in Hungary, his mother lived with them but she had to stay behind because she had serious medical issues and could not fly. "Distant relatives" took her in and provided her with shelter and some basic care. However, in June 2015, he received a call from his relatives stating that his mother has a "mental condition and her medical status became worse." The relatives stated that "she cannot continue to provide further care or shelter to her." As a consequence, his mother had become homeless and the police had "arrested her and put her into custody a few times". He attests that his mother was beaten when in custody and was threatened to be put into a psychiatric institute where "she would never be allowed to leave." He states: "We Roma know of the psychiatric institutes. The staff torture, sexually assaulting the sick patients and take their belongings too [sic]." Accordingly, he says "I had no one to care for my mother, so I withdrew my claim." Upon the family's return to Hungary, his mother resumed living with them.

[11] He attests that because they had been evicted from their home prior to coming to Canada in February 2015, they had no place to live on their return; however, a friend rented them his shed, so they were not homeless. The Mayor had instructed Children's Aid and Social Services

to put children of evicted families who were homeless into state institutions, so it was important to the Applicants that they have a place to live.

[12] The following paragraphs summarize some of the specific incidents the Applicants say occurred to them after their return that led them to come back to Canada in May 2016.

[13] They received death threats from the MOR paramilitary parole who “surrounded us, grabbed hold of us and shook us” and who told them that they “were not allowed to resettle or they would report them to the Mayor.”

[14] Junior attended school but was “bullied on a daily basis” and “attacked by Hungarian, white pupils.” Jozsef attests that “My son was beaten up numerous times along with other Roma kids in front of teachers and the principal, who never intervened or protected them. We did not want him to go [to school], but Children’s Aid would take them otherwise.”

[15] Jozsef’s daughters, Laura and Vivian, were followed by a black car almost every day. He attests states that “there is a criminal organization with police members targeting 15–20 year old Roma girls for prostitution.” In January 2016, his daughters were approached by two black cars, men jumped from them, and “they slapped my daughters and pepper sprayed them.” Jozsef was called and he “attacked the kidnappers and pulled my daughter’s free.” The attackers fled but Jozsef took down the license plate number of the vehicles and called the police immediately. He states that “the police refused to take my statement.” Later he went to the police station with a “white neighbour” but says that “the duty sergeant refused to take our report.” “[The police

officer] said my daughters are only good for sex, that's is the only occupational Romani woman can do, so there is nothing wrong if somebody wants to take them. At least they would make good money.”

[16] In January 2016, Jozsef took his son to a shopping mall to buy clothing. As they left, he, his wife, and son were physically attacked. They went to the hospital but they did not want to treat them because they are Roma and he says that “I paid money for the treatment.” He attempted to report this attack to the police he attests that “the duty sergeant confirmed that the monitor saw the attack. They could've sent patrols to help. He refused to take the report from us. He said, we were told many times to leave the country, we don't belong here, why don't we listen and go. He said if we stay here any longer he will call children's aid to take my son, and we will be jailed for disorderly conduct in public. He told us not to make any other reports to police or they will jail us.”

[17] He further attests: “[T]he Mayor stated in a press conference: all Roma returning from Canada especially those with children, must be punished, attacked and forced to leave Hungary. The children must be taken into State Care Institutes, because they left Hungary, they returned to Hungary and because they probably receive social assistance while making refugee claims that means they are not entitled to assistance in Hungary. We are prime targets as we returned from Canada.”

[18] On March 21, 2016, Jozsef and Junior protested with a group of other Roma on the International Day of Anti-Racism. On the way home, they were attacked: Junior was hit on the

head and slapped and Jozsef was kicked and punched and one of the police or MOR commandos jumped on his leg and broke it. A number of newspapers reported the protest and included pictures of his son holding his sign. Shortly thereafter, his son was attacked at school and called the 'Roma Hero', 'Roma Robin Hood' and other nicknames. He attests that "over 10 kids beat him up in the courtyard front of numerous teachers, the principal and vice principals. His nose was bleeding, and he was covered with bruises. They said, he is sick, his ideas are sick; Roma are not equal to white people. Roma are not human. He was taken to the Principals office for questioning. The principal refused to call a doctor or ambulance for him. He was forced to stay on his knees in the corner for more than 2 hrs. The principal said, his behaviour, the attendance at the peace vigil is unacceptable, and you must be kicked out of the school. The principal also said, he will report to children's aid, and will suggest they take my son into juvenile correction facilities, because he is involved in protest, so he is a dangerous element."

[19] On May 10, 2016, his friend was evicted from his house and the Applicants had to leave his shed. At that point they became homeless again.

[20] Jozsef attests that the Roma Minority Council "found a small social elderly home, for my mother." He and his family went into hiding in an abandoned factory. He says that they "fled Hungary to save my children's lives and protect them from further police and Paramilitary attacks."

[21] The officer correctly notes that the deferral request is based on the hardship the applicants would face on return, their risk on return, and the best interests of the children.

[22] The officer also correctly notes that “it is not within my jurisdiction to conduct an adjunct risk assessment” and then says that “my discretion to defer removal is limited to assessing whether removal at this time would expose Ms. Ferdinand [*sic*] to a risk of death, extreme sanction or inhumane treatment [emphasis added].” This is arguably an error as it suggests that the officer did do a risk assessment. That is a much higher test than stated by Justice Pelletier in *Wang* where it was said that when considering a request to defer, the enforcement officer is to consider whether the “failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances where deferral might result in the [removal] order becoming inoperative [emphasis added].” As I said in *Etienne v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 415 at para 53: “The enforcement officer was required to turn his mind to the evidence presented, to consider and assess it, and if it showed that the Etienne family might be at risk in the Turks and Caicos Islands, then he was required to defer removal in order that the risk could be assessed [emphasis added].”

[23] The Applicants have persuaded me that there is a likelihood they will succeed in the underlying application because the enforcement officer, instead of assessing whether the evidence showed that the Applicants might be at risk, actually did the risk assessment that he is neither qualified nor has the jurisdiction to perform.

[24] Moreover, it is arguable that the officer here made credibility findings in giving little or no weight to the affidavit of Mr. Csoka. In *Atawnah v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 774, at para 93, Justice Mactavish cautioned the officer against making credibility findings:

I agree with the applicants that enforcement officers should limit themselves to considering the sufficiency of the evidence before them, and that they should not make negative credibility findings, veiled or otherwise, on the basis of written submissions. The Supreme Court has held that in light of the important interests at stake in risk-based claims, where a serious issue of credibility arises, "fundamental justice requires that credibility be determined on the basis of an oral hearing": *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at para. 59, [1985] S.C.J. No. 11.

[25] The Minister submits that the officer here made no credibility finding but merely observed that the affidavit "is not supported by any objective corroborating evidence." It is true that the officer does make that observation; however, that too is extremely troubling.

[26] The officer writes: "I note that counsel has provided medical evidence that Mr. Csoka and his family suffered from beatings and consequently sought medical care, insufficient corroborating evidence, such as a police report, was presented to indicate the circumstances of how the injuries incurred, and by whom [emphasis added]." The Applicants point to the officer's ignorance of the affidavit evidence that the police refused to accept any of their reports despite repeated attempts. They point to this as one example supporting the submission that the officer failed to review or understand the evidence that was put before him or her. Certainly, the officer's statement strongly suggests that the treatment of the evidence was unreasonable.

[27] Another such example may be found in the manner in which the officer dealt with Jozsef's mother. The officer writes: "It is submitted by counsel that Mr. Csoka and his family withdrew their CR claim because Mr. Csoka's mother was seriously ill and had no one who could look after her. I note insufficient evidence has been presented to corroborate that Mr.

Csoka's mother was seriously ill and alone in Hungary, while the family was in Canada. Moreover, the deferral request does not speak of Mr. Csoka's mother's current health, and as to how or why the family is able to leave her behind in Hungary, when previously they felt compelled to withdraw their CR claim and return to Hungary."

[28] I agree with the Applicants that the material filed in support of the request focuses not on the mother's health but to the fact that she was made homeless when the relative could no longer care for her. Moreover, the Applicants specifically state that she was put in a care facility prior to their return to Canada.

[29] I am persuaded that the Applicants have established a serious issue on the higher threshold in their submission that the officer's decision is inconsistent and thus unreasonable. The officer states "I find that a newspaper article showing Mr. Csoka and his son attended an anti-racism rally sufficiently establishes that they will be targeted by hate groups or the police, for doing so [emphasis added]." Yet, based on a review of country reports and documents, the officer says: "I am not satisfied that they have established that the family faces a personalized risk upon return to Hungary [emphasis added]." This appears contrary to the earlier finding that at least two family members do face a personalized risk.

[30] Lastly, I agree with the submissions of the Applicants that the officer's treatment of the evidence related to the children, most particularly the failure to even mention the risks of forced prostitution of the girls and the institutionalization of the children as a consequence of the

homelessness of the family supports their submission that the officer failed to fully appreciate the evidence put before him or her and thus raises an arguable issue on the higher standard.

[31] The record, including the affidavit filed, is sufficient to persuade me that the Applicants are most likely to suffer irreparable harm if the risks identified in the H&C Application are not fully and carefully assessed prior to returning them to Hungary.

[32] In all the circumstances as set out, the balance of convenience rests with the Applicants.

[33] For these reasons the deportation order was stayed, pending final disposition of the Application for Leave and Judicial Review.

"Russel W. Zinn"

Judge

Ottawa, Ontario
July 4, 2016

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2793-16

STYLE OF CAUSE: JOZSEF CSOKA ET AL v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

**MOTION HEARING HELD VIA TELECONFERENCE ON JULY 2, 2016,
FROM OTTAWA AND TORONTO, ONTARIO**

REASONS FOR ORDER: ZINN J.

DATED: JULY 4, 2016

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