Date: 20081223

Docket: IMM-5214-08

Citation: 2008 FC 1410

Ottawa, Ontario, the 23rd day of December 2008

Present: The Honourable Mr. Justice Shore

BETWEEN:

JOZSEF KAKONYI
JOZSEFNE KAKONYI
KARMEN KAKONYI
CINTIA KAKONYI
DZENIFER KAKONYI

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] With regard to a stay in an immigration matter, interpretation of the spirit of the *Toth* test rests on the fact that this test is tripartite and conjunctive. In order for a case to pass the three parts of the *Toth* test, a number of interconnected factors must be present.

A stay in an immigration matter confers a privilege, as much as a right, arising from a number of interconnected factors having to do not only with what the person is or represents in that person's situation, that is, the person's experience, but also with the person's actions and behaviour with regard to Canadian values, as described in the objectives set out in the introduction to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

The *Toth* test is applied by means of a preliminary assessment; in fact the entire assessment process in the *Toth* test is a preliminary stage for, or for subsequent consideration of, a possible review of proceedings setting aside conclusions reached by authorities in the first instance.

In each case, assessment of the responses to the parts of the *Toth* test provides a summary outline of the person's past history and, to the extent possible, a brief judicial overview weighing the person's possible future chances at subsequent stages in light of that person's circumstances.

(*Toth v. Canada (Minister of Employment and Immigration) (1988)*, 86 N.R. 302,
11 A.C.W.S. (3d) 440 (F.C.A.))

II. Judicial Proceedings

[2] This is a motion for a stay of the order for the removal of the applicants to Hungary scheduled for January 29, 2009. The stay motion was made together with an application for leave and for judicial review (ALJR) of the decision of an officer made on July 24, 2008, rejecting their pre-removal risk assessment (PRRA) application.

III. Amendment to the Style of Cause

[3] The respondents note that the applicants commenced their proceeding against only the "Minister of Citizenship and Immigration". Because the "Minister of Public Safety and Emergency Preparedness" is the Minister responsible for enforcing removal orders, he should have been named as a respondent as well (*Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10 and Order in Council made on April 4, 2005 (P.C. 2005-0482).

[4] Accordingly, the style of cause in this case is amended to add the Minister of Public Safety and Emergency Preparedness as a respondent in addition to the Minister of Citizenship and Immigration.

IV. Facts

[5] The principal applicant, Jozsef Kakonyi, his wife, Jozsefne Kakonyi, and their three daughters, Cintia, Karmen and Dzenifer, are citizens of Hungary.

[6] The applicants arrived in Canada on November 6, 2001, and claimed refugee status.

[7] **On June 20, 2003, the Refugee Protection Division (RPD) denied the claimants refugee status**.

[8] They allege that they have a well-founded fear of persecution and that they are persons in need of protection because the principal applicant is Rom and members of that minority group in Hungary are victims of violence and racial crime. The wife and daughters allege that they have a well-founded fear of persecution based on their membership in the family's social group.

[9] The RPD concluded that the applicants were not credible and had failed to establish, by clear and convincing evidence, that the Hungarian state was unable to protect them. They therefore did not have a well-founded fear of persecution if they were to return to their country.

[10] **On November 12, 2003, the Federal Court dismissed the application for leave and judicial review of the decision of the RPD.**

[11] **On May 27, 2005, the principal applicant pleaded guilty to 20 charges arising out of his involvement in a credit card fraud scheme. On September 21, 2007, he was given a conditional discharge with 18 months' probation**.

[12] On December 6, 2006, the applicants filed an application for a permanent resident visa exemption on humanitarian and compassionate grounds (**H&C**).

[13] On June 9, 2008, the applicants were advised regarding the risk assessment review.

[14] On June 16, 2008, the applicants filed their PRRA application, with representations and evidence.

[15] **On July 24, 2008, the PRRA application was rejected**. That decision is the subject of these proceedings. The reasons for the decision were delivered to the applicants on November 25, 2008.

[16] **On July 27, 2007, the H&C application was rejected.**

[17] On November 4, 2008, the Federal Court dismissed the application for leave and for judicial review of the H&C decision.

[18] On November 25, 2008, the applicants applied for an administrative stay of removal. On December 11, 2008, the removals officer refused to postpone the departure date and informed the applicants that they would have to leave on the date scheduled, January 29, 2009.

V. Analysis

[19] The applicants do not meet any of the three tests for obtaining a judicial stay as stated by the Federal Court of Appeal in *Toth*:

a. a serious issue to be tried;

b. irreparable harm; and

c. the balance of convenience.

A. Serious Issue

[20] The applicants have not established that there is a serious issue to be tried by this Court.

[21] Merely reading the detailed reasons of the PRRA officer shows that her conclusion may reasonably be inferred from the evidence and that she had regard to all of the evidence before her.

[22] The applicants have simply argued, generally, that the officer erred in her conclusion concerning the situation in Hungary. In a nutshell, they are asking that this Court substitute its own opinion for the officer's regarding the sufficiency of the allegations and the evidence they submitted in support of their PRRA application (*Figurado v. Canada (Solicitor General),* 2004 FC 241, 129 A.C.W.S. (3d) 374 at paragraphs. 6 and 7).

[23] The PRRA officer did a detailed analysis of the applicants' personal situation, having regard to the **objective, recent** documentary evidence obtained from **reliable sources**, dealing with the current situation in Hungary.

[24] It is clear from the reasons for the PRRA decision that the applicants submitted numerous documents relating to their activities in Canada, as well as documents concerning the situation of the Roma in Hungary. Those documents were duly considered by the officer.

[25] The officer appropriately evaluated the evidence submitted by the applicants and determined which evidence met the requirements of paragraph 113(*a*) of the IRPA. Only the documents dealing with the situation of the Roma in Hungary and the "psychological" report by David L.B. Woodbury, a member of the Ordre professionnel des conseillers et conseillères d'orientation et des

psychoéducateurs et psychoéducatrices du Québec, were considered, as being related to the risks of return. The officer did a detailed analysis and concluded that this new evidence was not conclusive regarding the risks alleged.

[26] Having regard to the new evidence submitted, it was reasonable and justified for the officer to assign weight to the negative decision of the IRB concerning the risk of return for the applicants and the availability of state protection, since the facts and risks cited were the same.

[27] Accordingly, the officer had regard to all the evidence submitted by the applicants and did her own analysis.

[28] The officer's reasons are clear: the applicants had not met their burden of proof, that is, of establishing that they would be **personally** at risk in Hungary (*Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176, 155 A.C.W.S. (3d) 396 at paragraph 16).

[29] The decisions of this Court and the Federal Court of Appeal are consistent. The applicants must establish a **personalized risk** in the event of return:

> [28] That said, the assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual (*Ahmad v. M.C.I.*, [2004] F.C.J. No. 995 (F.C.); *Gonulcan v. M.C.I.*, [2004] F.C.J. No. 486 (F.C.); *Rahim v. M.C.I.*, [2005] F.C.J. No. 18 (F.C.)). ...

(*Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL); see also *Rizkallah v. Canada (Minister of Employment and Immigration)* (1992), 156 N.R. 1,

33 A.C.W.S. (3d) 940 (F.C.A.); *Pillai v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1312, [2008] F.C.J. No. 506 (QL); *Toure v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 479, 160 A.C.W.S. (3d) 333).

[30] Although the situation in Hungary for some Roma is difficult, that situation in itself is not sufficient for a favourable determination to be made.

[31] The applicants had to establish a nexus between the current situation in their country and their personal situation, and they did not do this. The officer's reasons are clear and detailed on this point.

[32] The officer therefore rejected the PRRA application, finding that there was no evidence from which it could be concluded that there was more than a mere possibility that the applicants would be persecuted and that there were no serious reasons to believe that they would be subject to torture or to a risk to their life or to cruel and unusual treatment or punishment (*Cupid*, *supra*).

[33] The PRRA officer's decision is well founded in fact and in law, having regard to the aim and objectives of the pre-removal risk assessment procedure.

Best Interests of the Children

[34] In their submissions, under the heading [TRANSLATION] "serious issues", the applicants allege that the officer was [TRANSLATION] "insensitive to the best interests of the three children educated in Canada". In support of that allegation, they essentially argue that she was insensitive to the facts that the daughters were educated in Canada, that they do not know how to read and write Hungarian and that they will be discriminated against and placed in special schools.

[35] In doing her analysis of the PRRA application, the officer did have to consider and analyze the **risks of return**, both for the adults and for the three children, because they are all affected by removal to Hungary.

[36] Section 112 of the IRPA, which is in Division 3, dealing with the PRRA, provides that a person in Canada, other than certain persons, may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order. Applicants have the burden of showing that they are in need of protection.

[37] Humanitarian and compassionate reasons, such as the fact that children's schooling would be interrupted and they would have better future prospects for education, **do not come under this definition**. The decisions of this Court and the higher courts are clear and consistent:

> [13] Neither the Charter nor the *Convention on the Rights of the Child* requires that the interests of affected children be considered under every provision of *IRPA*: *de Guzman v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 655**,** 2005 FCA 436 at para. 105. If a statutory scheme provides an effective opportunity for considering the interests of any affected children, including those born Canada, such as is provided by subsection 25(1), they do not also have to be

> considered before the making of every decision which may adversely affect them. Hence, it was an error for the Applications Judge to read into the statutory provisions defining the scope of the PRRA officer's task a duty also to consider the interests of the adult respondents' Canadian-born children. (Emphasis added.)

(*Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 F.C.T. 3).

> [19] It is clear from *Varga*, above, that a PRRA is not the place to assess the interests of children affected by the deportation of their parents. The fact that this PRRA Officer appears to have embarked upon such an exercise does not give rise to an argument that the decision is vulnerable if that exercise was flawed. Were it otherwise, the matter would be required to be remitted for reconsideration on an issue falling outside of the proper scope of PRRA review, leading to the pointless result that the reconsideration would proceed without any assessment of the children's interests. Regardless, it appears that the PRRA Officer's discussion about the children was primarily and properly focused on the related risk implications and impediments facing the Applicants if they returned home with two young foreign-born children.

(*Zhou v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1129, 161 A.C.W.S. (3d) 626).

[38] In this case, the PRRA officer properly considered the children's situation, in accordance with the provisions of the IRPA regarding PRRA applications. The officer even made a point of doing a detailed analysis of the **risks of return** for the three daughters, under the heading [TRANSLATION] "Special risks for the children" in her reasons (AR at p. 17).

[39] The officer considered the "psychological" report but assigned little weight to it, because it is a personal opinion and because it does not necessarily demonstrate the knowledge needed in order to draw conclusions regarding Hungary and the situation of Roma children in that country. She assigned greater weight to the independent documentary sources, which were recent and came

from reliable sources. She analyzed the daughters' personal situation having regard to that objective evidence.

[40] The conclusion reached by the PRRA officer is based on the evidence submitted and is reasonable.

[41] Essentially, the applicants dispute the weight assigned by the officer to the report submitted in support of their PRRA application.

[42] As well, an H&C application was made by the applicants; a negative decision was made on July 27, 2008, in which the best interests of the children were analyzed in depth, and that decision was affirmed by the Court on November 4, 2008. The applicants had also submitted the report in support of the H&C application.

[43] The applicants have not established that there is a serious issue to be tried with respect to the ALJR filed against the PRRA decision.

B. Irreparable Harm

[44] On the question of irreparable harm, the applicants allege generally, relying on somewhat outdated documentary evidence, that they would suffer irreparable harm because they fear for their lives if they return to Hungary, because the principal applicant is of Roma origin.

[45] The harm alleged by the applicants consists of the **same facts and risks as were presented before the RPD and in the H&C application**, which risks were not found to be credible or sufficient for their claim to be allowed or the exemption granted. The same facts have also been reviewed by the Federal Court **on two occasions**, when it dismissed the ALJR against the decision of the RPD and the ALJR against the H&C decision.

[46] The PRRA officer also concluded, after doing her own analysis of the evidence submitted to her, that the applicants had not established that they would be at personal risk in Hungary.

[47] It is settled law that the risks alleged both before the RPD and before the PRRA officer and determined to be unsatisfactory cannot constitute irreparable harm. On this point, the Court refers to the following decisions: *Bou Jaoudeh v. M.C.I and M.P.S.E.P.*, IMM-4129-08, IMM-4130-08, IMM-4269-08, (October 8, 2008, Pinard J.; *Malagon v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness),* 2008 FC 1068, [2008] F.C.J. No. 1586 (QL); *Doumbouya v. M.C.I. and M.P.S.E.P.*, IMM-928-08 (February 20, 2008); *Bizi-Bandoki v. M.C.I.*, IMM-4261-07 (Yves de Montigny J.).

[48] Regarding the children, the applicants allege that they will suffer irreparable harm because (1) the school year will be interrupted, and (2) they will have too little time to prepare for their return to Hungary.

[49] In support of that allegation, the applicants submitted a document entitled [TRANSLATION] “Psychological Report”, prepared by Mr. Woodbury, which is based both on the facts reported by the applicants and on clinical observations.

[50] Mr. Woodbury is a guidance counsellor, not a psychologist. He therefore cannot provide a psychological diagnosis: *Rai v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 133; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2001 FCTD 1376, 110 A.C.W.S. (3d) 1113).

[51] Nonetheless, even if the Court were to assign weight to Mr. Woodbury’s report, the report merely states that in his opinion, the daughters’ behaviour is normal and indicates no psychological problems.

[52] The only significant point in the report is as follows:

> The children came to Canada at such an early age that their identity is Canadian and have little (if anything) in common with young people in Hungary. In my ten years of seeing families in similar circumstances, I have never seen young people of this age group so ill-prepared for removal. (They are more often terrified by stories of the homeland than “protected,” and kept in ignorance of the realities. (Emphasis added.) (AR at p. 40).

[53] The parents, the applicants in this case, are solely responsible for the fact that their daughters are not prepared, particularly since they knew that their status in Canada was precarious. The daughters arrived in Canada when they were five and six years old, but they nonetheless speak Hungarian. Although they have stayed here for several years, they will be accompanied by their two

parents and their grandmother when they return to Hungary. As well, they have several members of their mother's and father's families living in Hungary. Certainly they will have a period of adaptation, but they are young and they will be surrounded by their family:

> [TRANSLATION] The Court is not insensitive to the fact that the applicant's wife has just given birth to their child. In the circumstances, the separation is certainly a difficult situation. However, the courts have held that this is nonetheless a normal consequence of a removal. The applicant knew that his status in Canada was precarious, and he cannot now claim that the respondent created a reasonable expectation simply because he did not carry out the removal sooner. His wife's sponsorship application must therefore take its normal course, as was the case before this Policy was implemented. (Emphasis added.)

(*Hazim v. M.C.I.*, IMM-4390-07, October 29, 2007).

[54] Contrary to the applicants' argument, the applicants' emotional state as a result of their departure from Canada cannot establish irreparable harm. Stress, depression or anxiety is not considered by this Court to be sufficient reason to grant a stay (*Kandiah* v. *Canada (Solicitor General)*, 2004 FC 322, 129 A.C.W.S. (3d) 568).

[55] As well, the irreparable harm must be established by clear and convincing evidence and must be more than that which is inherent in removal (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) at para. 13; *Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 F.T.R. 175 at paras. 39-40).

[56] In this case, the applicants have not established, by clear and convincing evidence, that the children would suffer irreparable harm as defined by the courts.

[57] The interruption in the school year does not constitute irreparable harm:

> [4] The second ground argued by counsel for the applicant is that his clients will suffer irreparable harm by reason of the disruption of their education since the execution of the removal order will take place before the end of their school year. Personal difficulties of this nature, although inconvenient, do not, in my view, constitute irreparable harm. In *Chatterjee* v. *Canada (Minister of Citizenship and Immigration)*, (16 August 1996), [(F.C.T.D.) (Ottawa: IMM-2454-96)], Mr. Justice Richard (as he then was) states that personal difficulties do not constitute irreparable harm ... . (Emphasis added.)

(*Mahadeo v. Canada (Minister of Citizenship and Immigration)* (1999), 166 F.T.R. 315, 86 A.C.W.S. (3d) 773; see also *Radji*, *supra*).

[58] More recently, in *Chu v. MPSEP*, IMM-4124-08, September 23, 2004, the Court, *per* Montigny J., said:

> The inherent consequences of removal, including a child's separation from school and friends, do not constitute irreparable harm. Neither unpleasant conditions in the country to which the applicant is scheduled to be removed, nor the fact that Canada is a preferable place to live, constitutes irreparable harm. (Emphasis added.)

[59] As well, in the H&C application, last July, the officer did a detailed and satisfactory assessment of the impact on the daughters' education if they were to return to Hungary. She concluded as follows:

> [TRANSLATION] While the difficulty for the girls of leaving their friends and teachers should not be minimized, and recognizing that they will be facing a period of adjustment when they return to their country of nationality, having considered the situation of Roma children in Hungary in light of their personal family circumstances as set out above, it is my opinion that their situation differs significantly from the situation for a large majority of Roma children, and I believe that the best interests of Cintia, Karmen and Dzenifer will not be jeopardized if they return to Hungary.
>
> In this case, the three girls' mother tongue is Hungarian, and if we rely on the information provided, their mother is Hungarian and their maternal grandparents and

> an aunt live in Hungary. I also note that they speak and write French and have some knowledge of English as well. While they have been in Canada for a little over six years, Karmen, Cintia and Dzenifer are only 13 and 11 years old, and have only completed grade six in elementary school, in the case of the twins, and grade four, for the youngest girl. I would note that if they return to their country, all three will be accompanied by their parents, and having considered the objective, up-to-date documentation, it is my opinion that they will have access to an adequate educational and health system.

[60] The applicants thus had an opportunity to make submissions regarding the best interests of the children in the H&C application. The application was rejected on July 29, 2008. The ALJR against that decision was also dismissed by this Court, on November 4, 2008.

[61] As stated earlier, the applicants' allegation that the fact that their daughters are inadequately prepared for leaving Canada constitutes irreparable harm is without merit.

[62] On this point, the applicants received the negative PRRA decision on November 25, and they have known since December 11 that their removal date was set for January 29, 2009. They will therefore have had 50 days to prepare their daughters for leaving.

[63] A stay can be granted only for the period preceding the decision on the underlying application, which in this case is the ALJR against the PRRA decision. Accordingly, the Court cannot stay the removal for any longer period (*Canada (Minister of Citizenship and Immigration) v. Forde* (1997), 210 N.R. 194, 70 A.C.W.S. (3d) 134 (F.C.A.) at paras. 9 and 10).

[64] The applicants have not established the existence of irreparable harm, by clear and convincing evidence.

C. Balance of Convenience

[65] The balance of convenience favours the respondents, in that the applicants have not established the existence of either a serious issue or irreparable harm.

[66] In addition, subsection 48(2) of the IRPA imposes a duty on the respondents to enforce a removal order as soon as is reasonably practicable.

[67] The Federal Court of Appeal has confirmed that in considering the balance of convenience the public interest must be taken into consideration. It has also confirmed that **the fact that an applicant has exercised a number of remedies since arriving in Canada, and all have been unsuccessful, may be taken into consideration in determining the balance of convenience**:

> (iii) Balance of convenience
>
> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the *status quo* until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control. (Emphasis added.)

(*Selliah, supra*; see also *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, 136 A.C.W.S. (3d) 109).

[68] In this case, the applicants have exhausted all of their remedies under the IRPA. The Court is not an appellate forum, as Simon Noël J. recently recalled in *Aghourian-Namagerdy v. M.P.S.E.P.*, IMM-4742-07, IMM-4743-07, IMM-17-08, January 18, 2008.

[69] The balance of convenience therefore favours the respondents.

VI. Conclusion

[70] Having regard to all of the foregoing, the applicants have not met the tests laid down by the courts for obtaining a judicial stay.

[71] The applicants' motion for a stay of the removal order is dismissed.

JUDGMENT

THE COURT ORDERS that the motion filed by the applicants for a stay of the removal order be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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