Federal Court  Cour fédérale

Date: 20180329

Docket: IMM-1222-17

Citation: 2018 FC 356

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 29, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

FATIMA ANTAKLI AND MARYA ABOU
AND
ADEL ABOU

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Pursuant to paragraph 101(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], a refugee claim is ineligible if the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or

their former habitual residence. The United States is "a country designated by the regulations" through the combined effect of the *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, signed by the two countries on December 5, 2002 (commonly known as the *Safe Third Country Agreement* [the Agreement]), and section 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] Under the Agreement, refugee claimants are required to submit their refugee claim in the first safe country in which they arrive. In this case, that is the United States. There are exceptions, however. Pursuant to paragraph 159.4(1)(a) of the Regulations, the Agreement does not apply to a refugee claimant who seeks to enter Canada at "a location that is not a port of entry". When refugee claimants do not fall within this exception because they arrive in Canada at a "port of entry", other exceptions to the Agreement—set out in section 159.5 of the Regulations—may apply. Thus, the Agreement, and consequently paragraph 101(1)(e) of the Act, will not apply if, for example, a member of the refugee claimant's family is already in Canada and has the status of a Canadian citizen, a permanent resident or a protected person, or makes a refugee claim here.

[3] It has been established in this case that none of the exceptions set out in section 159.5 of the Regulations apply to the applicants. Thus, this case concerns only the exception set out in paragraph 159.4(1)(a) of the Regulations.

II. Background

[4] The applicants, Syrian citizens Fatima Antakli and her two minor children, Marya and Adel, maintain that they entered Canada on March 2, 2017, from the United States, at "a location that is not a port of entry" precisely in order to avoid the application of the Agreement. They are claiming refugee protection because they allege that they fear the Syrian security forces, a fear that forced them to leave Syria in 2007 for Saudi Arabia, where Ms. Antakli's husband was able to find work. It was apparently the loss of that job that forced them to leave Saudi Arabia for the United States in mid-February of 2017. They state that they did not want to apply to the American authorities for asylum, as required by the Agreement, because of the current U.S. president and the violence in that country.

[5] In her sworn affidavit supporting this application for judicial review, Ms. Antakli states that she had always intended to settle in Canada since, in her opinion, refugees are treated fairly and with dignity here. Thus, she states that after she and her husband explored various ways to enter Canada to claim refugee protection, she chose to cross the border at a location that is not a port of entry. To do this, while her husband had already made his way to Canada and she was still in Chicago with her two children, she states that she flew, with the children, to Plattsburgh, in New York State. She explains that once they arrived at Plattsburgh airport, a taxi driver agreed to take her and her children very close to the Canada-U.S. border, near the small town of Matthias. She states that, from there, they crossed the border "on foot following the route". Ms. Antakli explains that, when she arrived in Canada, she was stopped by "Canadian police officers" and taken, together with her children, to the St-Armand port of entry after having

waited 30 to 45 minutes for “a car” to pick them up. She reports that she told the police officers when she was stopped that she wanted to make a refugee claim, which she states that she did once she reached the St-Armand port of entry.

[6] On March 3, 2017, a delegate of the Minister of Public Safety and Emergency Preparedness posted to the St-Armand port of entry in Quebec, Marianne Tremblay [Officer Tremblay], deemed the applicants’ refugee claim to be ineligible on the grounds that they were not entitled to the exception set out in paragraph 159.4(1)(a) of the Regulations, nor to those set out in section 159.5 of the Regulations. Satisfied that they did not hold the visas or immigration documents required to enter and reside in Canada, she also issued a removal order against them.

[7] At the time of her decision regarding the exception set out in paragraph 159.4(1)(a) of the Regulations, Officer Tremblay’s file contained an entry in the Global Case Management System [GCMS], as well as a handwritten note from Hakim Hellal [Officer Hellal], the officer who had processed the applicants’ refugee claim upon their arrival at the St-Armand port of entry, stating that the applicants had first presented themselves at the Noyan port of entry, on the Canada-Vermont border, before being escorted to the St-Armand port of entry. The entry in the GCMS reads as follows:

> [TRANSLATION]
> The subject arrived at the Noyan PE and filed a refugee claim. She was taken to the St-Armand PE to have her claim processed. She stated that she has a family member in Canada, a husband with visitor status. She has no other family members in Canada and does not meet any other exceptions under the Safe Third Country Agreement. Local file number: 2557-Rxclusion-707 MXT042.
>
> (Certified Tribunal Record [CTR], at page 10)

[8] In an affidavit she filed as part of this application for judicial review, Officer Tremblay affirms that she had also based her finding as to where the applicants had crossed the Canada-U.S. border on entries in the Integrated Customs System, which indicated that the applicants' passports had been "read" at the Noyan port of entry, thus corroborating the entry in the GCMS and Officer Hellal's handwritten notes.

[9] The affidavits of Officer Hellal and Dominic Picard [Officer Picard], who was one of the two officers on duty at the Noyan port of entry when the applicants arrived there on March 2, 2017, were also filed by the respondent for this judicial review. In his affidavit, Officer Picard essentially states that he had seen the applicants arrive on foot, with their luggage, at the Noyan port of entry inspection booth.

[10] The applicants are asking the Court to prefer their version of the facts surrounding their arrival in Canada over that of the respondent. They argue that the respondent's evidence is problematic in a number of respects. With respect to Officer Tremblay's affidavit, they submit that it is based on hearsay and that it thus contravenes section 12 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, (SOR/93-22), which requires that affidavits filed in connection with an application for leave and for judicial review be confined to such evidence as the deponent could give if testifying as a witness before the Court. They also argue that this affidavit adds to the reasons for Officer Tremblay's decision, which is not permitted. They also criticize Officer Tremblay for not having kept Officer Hellal's notes and the other officers involved in their file for not having recorded the notes, contrary to the respondent's operational manual regarding the application of the legislation.

[11] Furthermore, the applicants contend that the cross-examinations of Officer Tremblay and Officers Picard and Hellal show that Officer Tremblay's decision [TRANSLATION] "was made without actual knowledge of the facts and without real consideration of the applicants' situation." They maintain in this regard that it is [TRANSLATION] "the duty of the officers, when making decisions of such vital importance, to ensure that they have sufficient information to make those decisions, but also, they have the duty to be able to prove that information" (applicants' memorandum of argument, at paragraph 23).

[12] Lastly, the applicants are of the view that if the Court were to prefer the respondent's evidence, the exception in paragraph 159.4(1)(a) of the Regulations would still apply to them since they allege that it is sufficient to demonstrate an intention to make a refugee claim at a location that is not a port of entry, even if that intention does not materialize.

III. Issue and standard of review

[13] This dispute raises only one issue, which is to determine whether Officer Tremblay, in finding that the exception set out in paragraph 159.4(1)(a) of the Regulations did not apply to the applicants' case, erred in a manner that justifies the Court's intervention.

[14] It is settled law that the examination of a refugee claim's eligibility raises questions of mixed fact and law and that the resulting decision is reviewable on the reasonableness standard (*Biosa v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 431 at paragraph 16; *Jeudi Alfred v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 984 at paragraph 12). Thus, the Court will intervene only if the impugned decision does not fall within a

range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190).

IV. Analysis

[15] As I mentioned, the applicants are essentially criticizing Officer Tremblay for having rejected the exception set out in paragraph 159.4(1)(a) of the Regulations [TRANSLATION] "without actual knowledge of the facts and without real consideration of the applicants' situation."

[16] It is settled law that, in principle, only the evidence that was before Officer Tremblay can be considered by the Court in determining whether there are grounds for intervention (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19 [*Access Copyright*]). The submissions regarding the applicants' entry into Canada are supported in Ms. Antakli's sworn affidavit. However, was that evidence before Officer Tremblay?

[17] It is important to recall that under subsection 100(1.1) of the Act, claimants have the burden of proving that their claim is eligible, just as it is up to the claimant challenging a finding of ineligibility before the Court to demonstrate that the decision-maker made an error that justifies the Court's intervention.

[18] Thus, did Ms. Antakli make her submissions when she was before the Canadian authorities on March 2 and 3, 2017? Nothing could be less certain. As the respondent submits in

the supplementary memorandum, if, as she alleges in her affidavit, Ms. Antakli and her two children had been stopped by Canadian authorities on Canadian soil before being taken to the St-Armand port of entry, she should have raised this point at the first opportunity during the interviews she had with the officers on duty at the St-Armand port of entry or at the Noyan port of entry, if it is true that she went there before being escorted to St-Armand.

[19] However, there is no trace in the CTR of this crucial component of the applicants' submissions. In her affidavit, Officer Tremblay relates that Ms. Antakli [TRANSLATION] "reported having paid USD$300 for a taxi to take her from the airport to the Canadian border", and that the taxi dropped her and her children off [TRANSLATION] "near the Canadian border on a road where there is no Canadian customs office at the border" (Officer Tremblay's affidavit at paragraphs 7–8). On cross-examination, Officer Tremblay stated that this is what Ms. Antakli had told her during the interview. Asked whether it was possible that Ms. Antakli could have gone through Canada prior to going to the Noyan port of entry and making her refugee claim there, Officer Tremblay stated that Ms. Antakli had reported on the various forms she was asked to fill out that she had never been to Canada. Counsel for the applicants also asked Officer Tremblay whether, in her opinion, Ms. Antakli had intended to enter Canada in a regular or irregular manner. Counsel for the respondent objected to the question because Officer Tremblay was being asked for her opinion. Nevertheless, it would have allowed Officer Tremblay to relate what Ms. Antakli might have told her on the subject. The question was never admitted.

[20] Nor does Ms. Antakli's affidavit specify what she might have told the officers she encountered in St-Armand or in Noyan. It simply relates the circumstances of the applicants' arrival at the Canada-U.S. border and at the St-Armand port of entry.

[21] If, as the record seems to indicate, Ms. Antakli failed to report to the respondent's officers that she and her two children had been stopped by Canadian authorities on Canadian soil, her affidavit, with regard to this, once again, crucial component of the circumstances surrounding the applicants' entry into Canada, constitutes new evidence within the meaning of *Access Copyright* and, therefore, cannot be considered in determining whether or not Officer Tremblay's finding that the exception set out in paragraph 159.4(1)(a) of the Regulations does not apply to the applicants' case is reasonable. I can understand, in a context where this component of the story of the applicants' entry into Canada was seemingly first brought to the respondent's attention at the judicial review stage, why the respondent would take the rather unusual action of filing such detailed evidence, presumably to respond to these new allegations.

[22] In any event, based on the information that she had before her, specifically the entry in the GCMS (CTR, at page 10) and the entry in the Integrated Customs System indicating that the applicants' passports had been "read" at the Noyan port of entry, Officer Tremblay could reasonably conclude as she did, even if the handwritten notes left by Officer Hellal are excluded. If those notes are included, the finding of reasonableness is even more clear-cut.

[23] My conclusion would be the same if it were assumed that this component of the story of the applicants' entry into Canada had been brought to the attention of the respondent's officers.

In such a scenario, Officer Tremblay would have been required to choose between two versions, the first being that of the applicants, who allege that they had crossed the border on foot before being stopped by Canadian police officers and immediately escorted to the St-Armand port of entry. The second version arises from the information she had on record, consisting of the entry in the GCMS, the entry in the Integrated Customs System and Officer Hellal's handwritten notes, indicating that the applicants had been stopped on American territory by "U.S. Border Patrol" officers and escorted to the U.S. border crossing of Alburg, the American counterpart to the Noyan port of entry. Subsequently, from the Alburg crossing, they proceeded on foot to the Noyan port of entry in order to make a refugee claim there before being taken to the St-Armand port of entry for their claim to be processed.

[24] Given that Officer Tremblay would have chosen the version arising from the information she had on file, it would have been difficult to conclude that her choice was made in an abusive or arbitrary manner without regard for the evidence available to her and, thus, that it is unreasonable. The question of whether the applicants were stopped on American or Canadian territory and whether or not they passed through the Noyan port of entry is a pure question of fact, which commands some deference by the Court with respect to Officer Tremblay's findings.

[25] The argument that Officer Tremblay's decision is fatally flawed because it is based on facts that she did not verify herself cannot be accepted. Ms. Tremblay clearly could not have had personal knowledge of the applicants' arrival in Canada. As a decision-making authority, she could nevertheless reasonably rely on the entries in the GCMS and in the Integrated Customs System, as well as Mr. Hellal's notes, even though he had obtained his information from his

superintendent. The applicants' position, if accepted, would be tantamount to imposing on Officer Tremblay and on all other officials in her position, a duty to verify the veracity and reliability of internal sources of information.

[26] I agree with the respondent that this would impose an excessive and unrealistic burden on all delegates of the Minister of Public Safety and Emergency Preparedness tasked with making decisions at ports of entry on the eligibility of refugee claims. Such delegates must be able to rely on the information that the Minister's officers on duty at the ports of entry gather in the performance of their duties. In fact, in carrying out a task as demanding and complex as border control, information gathered by those in authority must be able to circulate and be exchanged for the benefit of those who are required, at the port of entry, to make decisions on the admissibility of foreigners or the eligibility of refugee claims, without having to question the reliability and the veracity of that information at each step. Once again, if it were otherwise, it would place an excessive burden on the border control system.

[27] Clearly, it would have been preferable if Officer Hellal's notes had been recorded or if notes had been gathered and kept at each stage of processing the applicants' file. Still, the fact that this was not done is not fatal to the decision under review in this case.

[28] I say this specifically because I cannot disregard Officer Picard's evidence, which confirms to some extent what Officer Hellal noted. In his affidavit, Officer Picard in fact affirms that he had:

[TRANSLATION]

a. been alerted, on March 2, 2017, by an officer from the Alburg border crossing, that "U.S. Border Patrol" officers had intercepted three travellers walking along a road parallel to the Canada-U.S. border and that they had brought them to the Alburg border crossing;

b. subsequently been advised, by an officer from the same border crossing, that the three travellers would be directed to the Noyan port of entry;

c. observed the three claimants arriving on foot at the Noyan port of entry at 17:30 the same day and being received by Guillaume Trudel [Officer Trudel], the other officer on duty that day at the Noyan port of entry;

d. contacted the officers at the St-Armand port of entry himself after Mr. Trudel had informed him that the applicants wished to make a refugee claim; and

e. noted, after his phone call, that two officers from the St-Armand port of entry, one of whom was Arturo Ventura, had appeared at the Noyan port of entry to pick up the claimants and bring them to the St-Armand port of entry.

[29] Counsel for the applicants, who did not object to the filing of this affidavit, did attempt on cross-examination to undermine the credibility of Officer Picard's testimony, but was unsuccessful. It is true that Officer Picard was unable to name the officer from the Alburg border crossing with whom he had been in contact, nor the officer from the St-Armand port of entry with whom he had spoken on the telephone, but that does not, in my view, suffice to undermine his credibility. Once again, it would have been desirable for Officer Picard to have noted his

observations and actions in the file, but that does not affect the accuracy of his testimony with respect to the essential elements of his account.

[30] Interestingly, the debate at the hearing, as reflected by the cross-examinations led by counsel for the applicants, was not so much about whether the applicants had actually gone to the Noyan port of entry first, but rather, whether it was possible that they could have done so by having first passed through Canada. Yet, in this regard, the question is not whether it is possible that the applicants first passed through Canada, but rather, whether it is probable that this was the case. I note that this is a civil proceeding and that the applicable burden of proof is the balance of probabilities (*Singh v Canada (Citizenship and Immigration)*, 2016 FC 169 at paragraph 6; *Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at paragraph 9).

[31] Added to this is the vagueness of Ms. Antakli's affidavit on the circumstances of her entry into Canada and of her arrival at the St-Armand port of entry: it does not name the Canadian police force that allegedly stopped the applicants and provides no information about the officers who had taken them to St-Armand. Were those officers from the same police force? Were they from a different police force? Or were they officers of the Minister? This evidence is vague at best and is contradicted by the information Officer Tremblay had before her.

[32] In light of all the evidence that I have before me, here is what, in my view, is most likely to have occurred:

a. the applicants were intercepted by "U.S. Border Patrol" officers while they were still on American soil. The assertion that said officers could have been patrolling on the

Canadian side of the border is, at best, highly improbable, unless they were there illegally in contravention of the most basic rules regarding the sovereignty of the States;

b. after having been stopped by the "U.S. Border Patrol" officers, as described in the affidavit and the cross-examination of Mr. Picard, the applicants were taken to the American border crossing in Alburg and, since they had valid American visas, they were able to leave that border crossing and proceed, on foot, to the neighbouring post of Noyan to make a refugee claim there; and

c. from there, since the Noyan port of entry did not have the resources to process the applicants' refugee claim, they were taken to the St-Armand port of entry by officers from that port of entry who came to Noyan to collect them following Officer Picard's call.

[33] Therefore, in light of the information that she had before her, Officer Tremblay reasonably found that the applicants were not covered under the exception in paragraph 159.4(1)(a) of the Regulations. That finding is even more compelling when all of the evidence submitted to the Court for this application for judicial review, even if it was not strictly necessary, is taken into account.

[34] No one could say that the applicants were victims of a stroke of bad luck when they were stopped by the American authorities before crossing the Canadian border at "a location that is not a port of entry", since they would have had the right to have their refugee claim considered if they had been able to get to Canadian territory surreptitiously. Nevertheless, on a balance of

probabilities, they failed to do so and, even if one acknowledges that they did so reluctantly, they made a refugee claim at a port of entry. The Court is required to apply the law as written and must refrain from questioning its wisdom (*Canada Employment and Immigration Commission v Dallialian*, [1980] 2 SCR 582 at page 587). Respect for and observance of Canadian border control laws is an objective whose legitimacy and importance cannot be doubted, as evidenced by subsection 18(1) of the Act, under which "... every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada." Yielding to an examination is the normal way to cross the Canadian border. The applicants needed more solid evidence than that which they submitted in order for an exception to that rule to be made in their case.

[35] According to the Agreement, the applicants must submit their refugee claim to the United States. The spectre of returning to Syria makes them fear the worst, with good reason. Nevertheless, I note that, as subsection 102(2) of the Act stipulates, and as is reflected in the preamble to the Agreement, for the purpose of designating a country under paragraph 101(1)(e) of the Act, Canada must consider the following factors:

a. Whether the country is a party to the United Nations Convention Relating to the Status of Refugees and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

b. The country's policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention Against Torture; and

c. The country's human rights record.

[36] Pursuant to subsection 102(3) of the Act, the government must ensure the continuing review of these factors with respect to each designated country, and section 159.7 of the Regulations allows it to suspend the Agreement, in whole or in part. Nevertheless, the Agreement is still in force, and I have not been asked to declare that Canada should suspend its application, nor have I been provided with evidence to that effect. I must, therefore, assume that the United States continues to comply with the Agreement and its guiding principles.

[37] Finally, I cannot allow the argument that the mere intention to enter Canada at "a location that is not a port of entry" is sufficient to trigger the application of the exception set out in paragraph 159.4(1)(a) of the Regulations. The applicants were satisfied with a simple statement in this regard. They did not develop the argument. In my view, the words "seeks to enter Canada" in subsection 159.4(1) of the Regulations ("cherche à entrer au Canada" in the French version), which are furthermore found throughout the Act, refer not to a simple expression of intent, but rather, to the action itself of seeking to be authorized to enter and remain in Canada.

[38] In any event, as noted above, nothing is less certain than whether Ms. Antakli had expressed that intention when she encountered the officers from the St-Armand port of entry. Moreover, Officer Hellal stated during his cross-examination that Ms. Antakli sought to avail herself of one of the exceptions set out in section 159.5 of the Regulations, the one that relates to the presence in Canada of a family member, in this case, her husband. The entry in the GCMS, reproduced at paragraph 7 of these reasons, appears to confirm this. Verifications ensued, with Officer Tremblay stating that she had even [TRANSLATION] "several times, and right up until the last minute, verified the status of Ms. Antakli's husband in the GCMS in case he made a refugee

claim from within the country. .. being aware of the impact that [her] decision had on the entire family, and knowing that a refugee claim by the husband could change the admissibility of Ms. Antakli in her favour...".

[39] The applicants' application for judicial review will therefore be dismissed.

[40] The parties agree that there is no need, in this case, to certify a question for the Federal Court of Appeal. I am of the same view, since the outcome of this case is largely dependent on its particular facts.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There is no question to be certified.

"René LeBlanc"
Judge

Certified true translation
This 20th day of January 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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