Federal Court  Cour fédérale

Date: 20180730

Docket: IMM-3002-18

Citation: 2018 FC 731

Ottawa, Ontario, July 30, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

NICOLETA CALIN
MARIUS CALIN
ANTONIA CALIN
CASIA CALIN

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

AMENDED REASONS FOR ORDER

I. Introduction

[1] The Applicant, Nicoleta Calin, seeked an urgent motion dated June 28, 2018 to obtain an interlocutory mandatory injunction pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 for her immediate release from detention, and by extension of her two minor

children, Antonia Calin and Casia Calin [the children], ages 6 and 4, respectively, pending the Court's pronouncement on the application dated June 28, 2018 for judicial review of a decision of a member [the Member] of the Immigration Division [ID] of the Immigration and Refugee Board [Board], dated June 21, 2018 [June 21 Decision], in Montreal, Canada, whereby the detention of the Applicant and by extension her children was continued from June 12, 20188 for a further 30 days pursuant to section 58 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] It should be noted that although the decisions in question were conducted in French, the Applicant indicated her desire to proceed in English in accordance with the preference of her lawyer. Nonetheless, with the Applicant's consent, the Court permitted the Respondent to file its submissions and make oral arguments in the French language.

II. Background

[3] The Applicant, Nicoleta Calin, arrived in Canada with her husband and children on June 5, 2018.

[4] The Calin family was on a plane towards Canada at midnight on June 5, 2018. The policy for Romanian citizens wishing to travel to Canada was changed and enforced at 5:30 am on June 5, 2018. The new policy required travellers to obtain a visa when traveling with a non-biometric passport.

[5] A removal order was issued against the Calin family on June 5, 2018, and they were to leave that same evening. After a telephone conversation with an unknown person, the husband refused to leave and was arrested and detained. The Applicant and her children were released on "humanitarian" grounds. She was subsequently convoked to an interview on June 12, 2018.

[6] On June 12, 2018, during her interview with the immigration agent, the Applicant said that she had no intention of leaving Canada, that even if her plane ticket was bought she would not leave because she "came for a better future and she is going to stay and die in Canada." She repeated the same reply to multiple questions.

[7] At the end of her interview, the Applicant was arrested and upon detention she was informed of her right to consult a lawyer. The Applicant said that she had no friend or family member who could take care of the children and that she did not want the Director of Youth Protection to take care of her children during her detention. She stated that she wanted her children to stay with her.

[8] On June 14, 2018, at the Applicant's 48-hour detention review, her detention was maintained for a further 7 days.

[9] On June 21, 2018, at the Applicant's 7-day detention review, her detention was maintained for a further 30 days. The next detention review was scheduled for July 20, 2018 in the afternoon. The Member of the ID of the Board considered that the Applicant represented a high flight risk and refused her proposal of a $2000 bond.

[10] No removal date for the Applicant and her children was known or scheduled until Saturday June 30, 2018 at 11 am, after the urgent hearing was heard on Thursday, June 28, 2018 at 5:30 pm, and after the Court asked for further written submissions from the parties on Saturday June 30, 2018. The Applicant's removal was scheduled for Monday July 9, 2018.

III. Relevant Legislation

Federal Courts Act	***Lois sur les Cours fédérales***
Interim orders	**Mesures provisoires**
18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.
Federal Courts Rules	***Règles des Cours fédérales***
Availability 373 (1) On motion, a judge may grant an interlocutory injunction.	**Injonction interlocutoire** 373 (1) Un juge peut accorder une injonction interlocutoire sur requête.
Immigration and Refugee Protection Act	**Loi sur l'immigration et la protection des réfugiés**
Release — Immigration Division	**Mise en liberté par la Section de l'immigration**
(b) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);	b) le résident permanent ou l'étranger se soustraira vraisemblablement au contrôle, à l'enquête ou au renvoi, ou à la procédure pouvant mener à la prise par le ministre d'une mesure de renvoi en vertu du paragraphe 44(2);

Continued detention — designated foreign national

58 (1.1) Despite subsection (1), on the conclusion of a review under subsection 57.1(1), the Immigration Division shall order the continued detention of the designated foreign national if it is satisfied that any of the grounds described in paragraphs (1)(a) to (c) and (e) exist, and it may not consider any other factors.

Maintien en détention — étranger désigné

58 (1.1) Malgré le paragraphe (1), lorsque la section contrôle, au titre du paragraphe 57.1(1), les motifs justifiant le maintien en détention d'un étranger désigné, elle est tenue d'ordonner son maintien en détention sur preuve des faits prévus à l'un ou l'autre des alinéas (1)a) à c) et e); elle ne peut alors tenir compte d'aucun autre critère.

Conditions

53 (3) If the Immigration Division orders the release of a permanent resident or a foreign national, it may impose any conditions that it considers necessary, including the payment of a deposit or the posting of a guarantee for compliance with the conditions.

Conditions

53 (3) Lorsqu'elle ordonne la mise en liberté d'un résident permanent ou d'un étranger, la section peut imposer les conditions qu'elle estime nécessaires, notamment la remise d'une garantie d'exécution.

Minor children

60 For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

Mineurs

60 Pour l'application de la présente section, et compte tenu des autres motifs et critères applicables, y compris l'intérêt supérieur de l'enfant, est affirmé le principe que la détention des mineurs doit n'être qu'une mesure de dernier recours.

Flight risk

245 For the purposes of paragraph 244(a), the factors are the following:

Risque de fuite

245 Pour l'application de l'alinéa 244a), les critères sont les suivants :

(a) being a fugitive from justice in a foreign jurisdiction in relation to an offence that, if committed in Canada, would constitute an offence under an Act of Parliament;

a) la qualité de fugitif à l'égard de la justice d'un pays étranger quant à une infraction qui, si elle était commise au Canada, constituerait une infraction à une loi fédérale;

(b) voluntary compliance with any previous departure order;

b) le fait de s'être conformé librement à une mesure d'interdiction de séjour;

(c) voluntary compliance with any previously required appearance at an immigration or criminal proceeding;

c) le fait de s'être conformé librement à l'obligation de comparaître lors d'une instance en immigration ou d'une instance criminelle;

(d) previous compliance with any conditions imposed in respect of entry, release or a stay of removal;

d) le fait de s'être conformé aux conditions imposées à l'égard de son entrée, de sa mise en liberté ou du sursis à son renvoi;

(e) any previous avoidance of examination or escape from custody, or any previous attempt to do so;

e) le fait de s'être dérobé au contrôle ou de s'être évadé d'un lieu de détention, ou toute tentative à cet égard;

(f) involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for a measure referred to in paragraph 244(a) or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear for such a measure; and

f) l'implication dans des opérations de passage de clandestins ou de trafic de personnes qui mènerait vraisemblablement l'intéressé à se soustraire aux mesures visées à l'alinéa 244a) ou le rendrait susceptible d'être incité ou forcé de s'y soustraire par une organisation se livrant à de telles opérations;

(g) the existence of strong ties to a community in Canada.

g) l'appartenance réelle à une collectivité au Canada.

Immigration and Refugee Protection Regulations	*Règlement sur l'immigration et la protection des réfugiés*
Other factors	**Autres critères**
248 If it is determined that there are grounds for detention, the following factors shall be considered before a decision is made on detention or release:	248 S'il est constaté qu'il existe des motifs de détention, les critères ci-après doivent être pris en compte avant qu'une décision ne soit prise quant à la détention ou la mise en liberté :
(a) the reason for detention;	a) le motif de la détention;
(b) the length of time in detention;	b) la durée de la détention;
(c) whether there are any elements that can assist in determining the length of time that detention is likely to continue and, if so, that length of time;	c) l'existence d'éléments permettant l'évaluation de la durée probable de la détention et, dans l'affirmative, cette période de temps;
(d) any unexplained delays or unexplained lack of diligence caused by the Department, the Canada Border Services Agency or the person concerned; and	d) les retards inexpliqués ou le manque inexpliqué de diligence de la part du ministère, de l'Agence des services frontaliers du Canada ou de l'intéressé;
(e) the existence of alternatives to detention.	e) l'existence de solutions de rechange à la détention.

IV. Issues

[11] The following issues are raised in this matter:

1) What is appropriate test for an interlocutory mandatory injunction for the release of a person in detention under the IRPA?

2) Whether the Applicant met the requirements for an interlocutory mandatory injunction ordering a release from detention?

V. Analysis

A. *Special Considerations Relating to Interlocutory Mandatory Injunctions*

[12] In order to obtain an interlocutory injunction, the Applicant is required to demonstrate that there is a serious issue to be considered, that irreparable harm will result if the injunction is not granted and that the balance of convenience favours her, all three factors must be met: see *RJR — MacDonald Inc v Canada (Attorney General*), [1994] 1 SCR 311. However, mandatory interlocutory injunctions are treated as exceptions to the serious issue factor. The applicant is required to demonstrate an elevated threshold beyond that of the application not being frivolous or vexatious, although the exact legal standard remains controversial.

[13] The recent decision of the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*] has clarified the law with respect to the first factor. To succeed on the first factor of the mandatory injunction test "entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": *CBC* at para 18 [emphasis in original]. The Supreme Court's reasoning in support of this elevated standard is summarized at paras 14−15 and 17 of the decision, without reference to the accompanying jurisprudence as follows:

> [14] Canadian courts have, since *RJR—MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.[23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold.[24]
>
> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR—MacDonald* test

> is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel.[25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial".[26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR—Macdonald* as "extensive review of the merits" at the interlocutory stage.[27]
>
> […]
>
> [17] This brings me to just what is entailed by showing a "*strong prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
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> [Emphasis added]

[14] Despite the *CBC* decision, the Court is respectfully of the view that in the interests of justice, the exception to the serious issue test when applied to a mandatory interlocutory injunction for the release of a person held in detention pursuant to the IRPA must be at the level of a likelihood or probability of success on the underlying application. There are a number of

reasons that support the Court's opinion mitigating the standard for the first factor for someone in immigration detention. First, there is no issue of the Respondent having to take "steps to restore the status quo", or to otherwise "put the situation back to what it should be". Second, nor does an individual's release from detention entail any "potentially severe consequences" for the Respondent, besides concerns relating to the public interest, which are considered during the factor pertaining to the balance of convenience.

[15] Third and most importantly is that, contrary to the passage quoted from Justice Sharpe's text, there is no hope whatsoever of restorative relief being obtained from the underlying judicial review application. As a corollary to the third reason, on a matter such as release from detention, it is more often the case that the underlying application will never take place.

[16] Fourth, the loss of the Applicant's liberty raises a highly prejudicial form of irreparable harm that is related to the fundamental precepts of our law that a person should not be held in detention without good cause.

[17] Fifth and specifically with relation to the circumstances of this case, the extension of the Applicant's detention effectively applies to her children, and in addition to a loss of liberty, raises issues of irreparable psychological harm that can only worsen if children remain in confinement with their mother.

[18] In light of the foregoing comments, the Court respectfully concludes that an exception must be applied to the *CBC* decision in the circumstances of this matter such that the Applicant

need only demonstrate a *prima facie* case, or more plainly stated prove a likelihood or probability of success on the underlying application. This test would be similar to those exceptions to the "serious issue" factor where the test is elevated beyond that of demonstrating that the issue is not frivolous or vexatious, such as in a stay removal proceedings: *viz* "[t] he test of serious issue becomes the likelihood of success on the underlying application since granting the relief sought in the interlocutory application will give the applicant the relief sought in the application for judicial review." : *Wang v Canada (Minister of Citizenship & Immigration)*, 2001 FCT 148 at para 11 ; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 66; *Diakité v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 314 at para 8.

[19] The stringent standard of the first factor is a significant hurdle to the injunction. In requiring the Applicant to overcome such a threshold, there is a sense of unfairness in comparison to the interlocutory injunction brought by the Minister to restrain the pending release of an immigrant from detention. The Minister, who is the party most often seeking to challenge orders concerning the release of detained immigrants, must only demonstrate a serious issue that the motion is not be frivolous or vexatious in nature: *Canada (Public Safety and Emergency Preparedness) v Sun*, 2016 FC 1186 at para 9.

[20] Demonstrating a strong likelihood of success is highly disproportionate in terms of the respective legal standards faced by the parties, and smacks of unfairness to the immigrant applicant being held in detention. Fairness suggests the same test should apply in both instances. But proving a likelihood of success is sufficient for these purposes.

[21] On a more positive note, from the Applicant's perspective, there is usually a related benefit from demonstrating a likely successful outcome in an injunction application. When the Court concludes that a party is likely to succeed on an interlocutory injunction, this may be taken into consideration when assessing the other two factors in the three-pronged interlocutory injunction test. Having found a probability of success, and more so for a strong probability, in the interests of justice a court is generally more reluctant to dismiss the application, particularly when considering the balance of convenience: see Robert J Sharpe, *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) at paras 2.600−2.630. This should apply regardless of whether the interlocutory injunction is mandatory or restrictive in nature.

B. *The Applicant met the requirements for an interlocutory mandatory injunction ordering her release from detention*

(1) Likelihood of Success

[22] Detention proceedings in situations of concern over flight are fact driven and not complicated. The record is for the most part completed at the interlocutory stage, without the necessity of further affidavits, cross-examination and the likes. The issues of flight or danger to the public are not matters that courts are unfamiliar with or matters beyond their own expertise. As noted, given the seriousness of the consequences on individual liberty, most provincial Superior Courts are the final arbiters of detention proceedings, although the circumstances are obviously different.

[23] In reviewing the recording of the hearing and the Board's decision maintaining the Applicant's detention, the Court's main criticism is that the procedure was quite perfunctory,

without sufficient regard by the decision-maker for the requirement to properly and fully consider the Applicant's circumstances, i.e. a decision where not all relevant factors have been considered. Moreover, the Court understands that the proper approach in matters concerning the restraint on the liberty of an individual in all forms of detention hearings is to be somewhat proactive in seeking reasons for the Applicant not to be held in detention if legitimate concerns arise, and this is all the more so when children are involved.

[24] The Court has a number of concerns regarding the June 21 Decision. It finds that the Board was not alert and sensitive to the best interest of the children [BIOC] concerning their being housed with the mother while in detention. It also failed to consider the probative value of the "rote-like" answers provided by the Applicant to the officer on June 12, which constituted the sole basis for continuing her detention. The Applicant's capacity for flight is a consideration that the Court concludes should have been considered, as it appears limited without the husband. Finally, the Court considers the robust engagement of the Applicant and her husband in the several immigration procedures undertaken and assisted by lawyers, reflects an intention of compliance with immigration laws, and thereby, a factor that could support the Applicant's release.

[25] With respect to the consideration of the BIOC, the Respondent is correct that the Applicant did not make submissions on this issue. Nonetheless, in listening to the recording of the hearing, there is no reason to conclude that submissions would have affected the outcome. Early on in the hearing during the Respondent's submissions, the Board made reference to accepting the children's situation of being housed with the mother because they were not

detained within the meaning of the IRPA. This was repeated in the only mention in the June 21 Decision that the children were not formally detained under the IRPA: [TRANSLATION] "because there is no other alternative solution for the children." There was no evidence introduced as to what alternatives were considered by the Canada Border Service Agency [CBSA], apart from housing the children with the Director of Youth Protection, as offered by the agent on June 12, 2018 and rejected by the Applicant.

[26] The CBSA policy on the "National Directive for the Detention or Housing of Minors" [the National Directive] defines Alternatives to Detention [ATDs] as follows:

> A policy or practice that ensures people are not detained at an Immigration Holding Centre (IHC), provincial or any other facility for reasons relating to their immigration status. ATDs allows individuals to live in non-custodial, community-based settings while their immigration status is being resolved. ATDs includes Community Programming (in-person reporting, cash or performance bond and community case management and supervision) and Electronic Supervision tools, such as voice reporting.
>
> [Emphasis added]

[27] The Board is aware of the need to consider the humanitarian and compassionate concerns involving the BIOC when their decisions adversely affect the children. The National Directive addresses this issue in its preamble as follows:

> Canada's international obligations and domestic legislative and policy frameworks are the broad underpinnings of this Directive. Section 60 of the IRPA affirms the principle that the detention of a minor must be a measure of last resort, taking into account other applicable grounds and criteria, including the best interests of the child (BIOC). A Federal Court decision in 2016 [*B.B. and Justice for Children and Youth v MCI*, (August 24, 2016), Toronto IMM-

> 5754-15 (FC) [*Justice for Children and Youth*] by Mr. Justice Hughes] ruled that the interests of a housed minor is a factor that can be taken into the decision to detain or maintain detention of a parent and are to be weighed along with other mandatory factors under R.248. The United Nations Convention on the Rights of the Child (CRC), to which Canada is a party, states that the BIOC shall be a primary consideration in all state actions concerning children. In recognizing the vulnerability of children and research on the detrimental effects of detention and family separation on children, the CBSA developed the National Directive for the Detention or Housing of Minors for operational use, which takes a balanced approach to achieve better and consistent outcomes for minors affected by Canada's national immigration detention system.

[28] The National Directive also defines the BIOC as:

> An international principle to ensure children enjoy the full and effective benefit of all their rights recognized in Canadian law and the CRC. It is also a rule of procedure that includes an assessment of the possible impact (positive or negative) of a decision on the child or children concerned.
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> [Emphasis added].

[29] In addition, the National Directive defines one of its objectives as ensuring "that the detention or housing of a minor or the separation of a minor from his/her detained [parent or legal guardian], where unavoidable, is for the shortest time possible" [emphasis added]. Similarly the National Directive recognizes that "the BIOC are best achieved where children are united with their families in community-based, non-custodial settings where possible." It further states that "[t] he BIOC is to be determined on a case-by-case basis taking all relevant information related to the minor's situation into account."

[30] The Court recognizes that the IRPA distinguishes between the situations of children being in detention and of those being housed with their parents who are in detention.

Nevertheless, while the children may not formally have been detained, effectively they were. The BIOC inescapably required them to remain with their mother, rather than being separated in some form of housing that would prevent the Applicant from providing them with her care and guidance, and likely raise significant anxiety in the children as a result of being separated from their most important caregiver.

[31] In essence, in situations where no real choice exists other than the children being housed with the Applicant, the Board should consider the situation as reflecting the requirement to adhere to section 60 of the IRPA, i.e. that they be detained by extension of their parents' situation "only as a last resort."

[32] Moreover, as the National Directive indicates, this Court has already ruled that the interests of a housed minor is a factor that can be taken into consideration for the decision to detain or maintain detention of a parent to be weighed along with other mandatory factors under section 248 of *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]: *Justice for Children and Youth*.

[33] The Court concludes, on the basis of its foregoing comments, that the Board likely committed a reviewable error by not appropriately considering the BIOC in this matter as a factor that could support their mother's conditional release.

[34] Second, the Court does not accept that the answers provided by the Applicant to the CBSA officer in her June 12 interview could meaningfully be relied upon as the sole basis for

refusing to release her. The Applicant speaks neither English nor French, has little formal education to the point of being illiterate, played no role in the original decision of her husband to refuse to leave Canada, and did not have the benefit of the assistance of a lawyer to explain the procedures she was involved in when interviewed.

[35] In such circumstances, when she repeated the same answer over and over again in a "rote-like" fashion to the various questions posed that she was not going to leave Canada and would die in Canada, the logical conclusion is that she had no understanding of her status or involvement in the Canadian immigration processes. This is not a situation of catching a witness speaking truthfully and unaware of the consequences. Rather it is the circumstance of someone who has demonstrated a lack of understanding of anything that pertains to her situation, with her responses to every question resembling that of her husband when first advising the CBSA officials that he would not voluntarily leave Canada which led to his detention.

[36] The Applicant was present before the Board, she said she thought she had refugee status and wanted to exhaust that remedy by stating how terrible her treatment was in Romania. When she finally understood that this was not the case, she was ready to comply and leave, but the Member made no effort to question her or comment on her credibility when she explained that she did not understand the questions referred to during the June 12 interview and would comply with a removal direction.

[37] In this respect, the Court notes that in the first decision of the Board dated June 14, 2018 continuing the Applicant's detention, the Member indicated at paragraphs 16 and 17 that the

Applicant's education had nothing to do with her intelligence, that she answered all the questions put to her on June 12 and stated that the questions to her responses were coherent, logical and that there was no point in saying "I do not understand". The Court has difficulty accepting this interpretation based on the transcript of the questions and answers of the June 12 letter.

[38] In any event, at the end of the June 14 decision in paragraph 21, the Board member's comments to the Applicant clearly indicate that she did not understand that she was not in a position of making a refugee claim, but on the cusp of being removed stating. The member states [TRANSLATION] "You seem to be…I do not know if…how could I say…I can tell you that you are currently not a refugee claimant. Someone who is under a removal order cannot claim anymore, it is over."

[39] In other words, the statements of the first member confirm the lack of understanding of the Applicant's position, which would have led her to focus on the risk basis for the purposes of the refugee claim. Moreover, the egregious exaggeration of preferring death, could only demonstrate her lack of education and illiteracy. But most importantly, when the Applicant finally grasped that her situation was not one of a refugee claimant in the second hearing, the Board member refused to accept it, despite the comments of the first Board member confirming her lack of understanding by his comments to her.

[40] In arriving at this conclusion concerning the Board's finding, the Court recognizes that it should not reweigh the evidence before the Board. However, the Court is in the same position as the Board in having before it the written transcripts of a short interview, upon which the decision

to deny the Applicant's release is entirely based. It is therefore, able to decide whether the Board's conclusion was perverse in drawing what amounts to a conclusive and determinative inference in reliance on evidence which raises issues of the Applicant's native ability to understand how the different immigration processes apply.

[41] Third, it is the Court's view that decision-makers in such circumstances are required to consider an applicant's capacity for flight. The mother apparently speaks neither English nor French. She would not have the advantages of the economic and moral support that is provided upon advancing a refugee claim. She did not demonstrate the intellectual capacity from her discussions with the officer on June 12 or during the hearing that she could take on such a challenging task as fleeing in a foreign land with two young children. She relied on her husband in the first instance when he refused to comply with the request to leave. The circumstances therefore, suggest a degree of not unsubstantial improbability that flight was an alternative to complying with a removal order, at least not without her husband. The Court notes that in the June 12 interview she indicated that she would remain even if her husband was removed, but the answer again was in the same rote-like form that she responded with to any question.

[42] Her only apparent lifeline in the community for the purpose of fleeing was her husband's cousin. However, he lives in Toronto and is also seeking refugee status, such that abetting the Applicant's flight could compromise his application.

[43] Fourth, there is no indication apart from the husband's refusal to leave Canada, which was taken upon the advice of some third person to challenge the removal that the Applicant and

her husband did not intend to comply with Canadian immigration law to advance their refugee claims. The Applicant and her husband had not intended to arrive in Canada in breach of its Regulations. Instead they were victims of happenstance by the tourist visa rules changing while on route to Canada. When they arrived with the expectation of making a refugee claim, which clearly was their intention, they found themselves in an entirely different circumstance. While it may be an abuse of a tourist visa to use it as a basis to gain entry to the country to advance a refugee claim, it does not count for much against a refugee claimant who is otherwise able to prove he or she was at risk by remaining in his or her country of origin.

[44] Otherwise, the Applicant had demonstrated that she would comply with directions from immigration officers by returning for her interview on June 12. Moreover, she and her husband were actively engaged in the legal processes available under immigration law to remain in Canada. They had retained lawyers, who had already sought an administrative stay on their behalf, and in addition to challenging the detention decisions, had given every indication that they were going to oppose the inadmissibility ruling, and no doubt seek to stay any direction for their removal. Unless the CBSA has evidence to the contrary effect, the Court's impression is that persons who are actively engaged in legal processes in close consultation with their lawyers remain in Canada and do not normally flee against their lawyer's advice, which as officers of the Court is to comply with the law.

[45] The Court notes that it is not aware of any basis for the husband's removal not occurring at the same time as that of the Applicant and her children. They came to Canada together as a family under the same legitimate assumption that they complied with all the country's

requirement and could enter and make a refugee claim as a family living together in Canada. They were both determined to be inadmissible on the same grounds. The administrative stay would apply to all members of the family. It is assumed that immigration officials would do everything to ensure that they left Canada as a family on the grounds of their joint situation of both being inadmissible even if the husband had other concerns relating to some possible criminality. The Court understands that the delay in the Applicant's removal is that of obtaining a flight with an escort with the intention that the Applicant and children's removal occur as a family unit with that of the husband.

[46] Finally, in reviewing section 245 of the Regulations, factors pertaining to situations possible to flight, none would appear to apply in a negative fashion to make her a candidate for detention. The only possible factor would have been that of section 245 (g) of "the existence of strong ties to the community in Canada." But for purposes of flight, the absence of any connexion with a community in Canada in the circumstances would be a factor tending to weigh against her capacity to flee with two children and no apparent means of support available to permit flight to occur. It is acknowledged, however, that the factors in section 245 of the Regulations are not exhaustive.

[47] It is further acknowledged that the horizon for the length of the detention was limited, which is a factor under section 248 of the Regulations, if there are grounds for detention. To some extent this factor is mitigated by the consideration of the BIOC. The National Directive indicates that "[m]ental health evidence is clear that both detention and family separation have detrimental consequences for children's well-being." The Applicants have supplemented these

conclusions with studies that indicate even short-term detentions can have an adverse effect on children.

[48] By the time of the second detention hearing, the Applicant and her children had been confined nine days. The problem was supposedly an inability to arrange a flight back to Romania with an escort No evidence was provided to support this statement. However, the Respondent's counsel, as an officer the Court indicated that he was personally aware that arranging a flight with an escort was the problem, which the Court accepts given the extreme urgency of the motion. Even when first raised before the Court on the evening of June 28 however, the Respondent was unable to indicate when a flight could be arranged apart from it being sometime in the next few weeks. Perhaps not totally unexpectedly, in the delay of rendering the decision, the Court was advised late Saturday afternoon on the Canada Day weekend that removal had been scheduled for July 9, 2018.

[49] As a further point in reply to the Respondent's submission relying upon this Court's decision in *Igbinosa v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1372 [*Igbinosa*], the case is distinguishable. In that matter there was "ample evidence that the applicant did not cooperate by providing proof of his identity or helping the Canada Border Services Agency (CBSA) obtain such proof. He submitted suspicious documents and, on several occasions, provided unreliable and contradictory information about his identity and travel route to mislead the Canadian immigration authorities": *Igbinosa* at para 6. While the husband changed his story to acknowledge that the family had traveled to Canada in order to make a refugee claim,

this is entirely different from the situation in *Igbinosa* and does not in any event reflect on the Applicant.

[50] Accordingly, for all of the above reasons, the Court is satisfied that the Applicant has made a probable case that the Board's Decision maintaining her detention, will likely be set aside in a judicial review application should it be proceeded with.

(2) Irreparable Harm

[51] Irreparable harm varies depending on the circumstances. However, the foundation of irreparable harm in most interlocutory injunctions is that if the order is not given, the final decision will serve no purpose as the harm will already have occurred by the time the decision is made. Thus, normally the applicant is attempting to prevent conduct that will affect the utility of the final decision. A stay of removal falls somewhat into that category. It requires evidence to demonstrate that the prejudice will occur upon return to the country of origin in the future, which raises challenging issues of assessing future outcomes.

[52] In matters of detention, the situation is entirely different. The harm is active and continuing. Each day that the Applicant is detained and her liberty restricted is a day when she suffers irreparable harm. It can never be made up in the future because the harm has already occurred. If the detention is wrongly maintained the Applicant suffers irreparable harm. As a result, the jurisprudence of this Court indicating that "irreparable harm" implies the "serious likelihood of jeopardy to an applicant's life or safety" has no application to the Applicant.

[53] Seen in this light, a judicial review application of the Board's Decision to continue the detention can only serve the purpose of supporting the interlocutory injunction. The final decision can provide no useful remedy when the harm has already occurred. The Court does not possess powers similar to those of a provincial Superior Court, which in reviewing the detention of a person accused of a crime, can directly order the individual's interim release. That also explains why only a mandatory interlocutory injunction can serve any useful purpose to restrain a wrongly extended detention of the Applicant.

[54] There are additional issues which relate to any harm to the children. First, children, by extension of the parent's detention, are likewise detained. This arises whether by order, or because it is in the BIOC that they remain with the parent. Thus, the Court is faced with an apparent conundrum where legally, the children can leave anytime, but effectively they are just as constrained in their movements as the mother. The problem is easily resolved however, inasmuch as irreparable harm must consider the reality of what the Court judges to be reasonable conduct, not the existence of a legal right which cannot be realistically accessed. As indicated, the children had no choice but to remain with their mother.

[55] The more problematic issue concerns the alleged harm to the children from detention. There are different views as to whether the harm must be established in relation to the primary applicant or whether it can relate to family members of the primary Applicant, by virtue of the primary Applicant's situation: *Qureshi v Canada (Citizenship and Immigration)*, 2007 FC 97; *Tesoro v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 148.

[56] There is no doubt that an interpretation that reflects the effects of the Applicant's detention on family members would be most appropriate in the interest of justice. For this reason, the Court is inclined to agree with Justice Zinn's suggestion that in exceptional circumstances, there is irreparable harm to an applicant even where the principal harm was to family members, because their harm was the Applicant's harm too: The Honourable Russel W Zinn, "Stays of Removal" (Notes for Presentation delivered at the County of Carleton Law Association Federal Court Practice: Focus on Immigration, Family and Criminal Law, 1 November 2012), [unpublished, archived online: <http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Speeches/speech-discours-zinn#_ftn2>].

[57] There is considerable evidence that the detention of the children can be highly detrimental to them. For instance the authors Hanna Gros and Yolanda Song in their publication "Mental Health Consequences of Family Separation and Child Detention" in Samer Muscat, ed, "*No Life for a Child*" − *A Roadmap to End Immigration Detention of Children and Family Separation* (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2016) 23 state somewhat as a summary as follows at page 23 of their monograph:

> The detrimental effects of immigration detention on children's mental health have been extensively documented worldwide. Unfortunately, Canadian researchers have severely limited opportunities to conduct studies on the subject because they have had little access to immigration detainees held in IHCs or correctional facilities. Only a few Canadian studies on the mental health of immigration detainees are available. Nevertheless, those studies have confirmed that detained children experience "high rates of psychiatric symptoms including self-harm, suicidality, severe depression, regression of milestones, physical health problems, and post-traumatic presentations." Younger children in detention also experience developmental delays and regression, separation anxiety and attachment issues, and behavioural changes, such as increased aggressiveness. One of the few Canadian studies

> to date confirmed that "immigration detention is an acutely stressful and potentially traumatic experience for children." The same research shows that family separation also has severe detrimental psychological effects on children. As such, neither detention nor family separation account for the best interests of the child.

[58] Because these risks occur over the longer time period and do not manifest themselves until after release from detention, it is not possible to present personal evidence of the harm to children who have been detained or housed with parents in detention. Likewise, it is not possible to demonstrate a serious likelihood of jeopardy to the children's health or safety from confinement in immigration detention centres.

[59] However as indicated, what constitutes irreparable harm must vary depending upon the circumstances. A possibility of a serious risk of harm to children, even arising from short durations in detention, is sufficient as a minimum to add to the irreparable harm of the mother from their risk of mental harm in creating anxiety from her children being detained.

[60] Accordingly, the Court concludes that there is clear and persuasive evidence of irreparable harm that the Applicant will suffer from her continuing detention, including that suffered vicariously by the risk of harm to her children.

(3) Balance of Convenience

[61] The Court recognizes that flight risk may be significant in situations where an applicant's potential to obtain permanent resident status in Canada is limited, and all the more so in

situations of pending removal. Moreover, in these situations there may be few disincentives to flight. Besides all of the advantages of living in Canada and avoiding some of the disadvantages such as paying taxes, depending upon the particular circumstances, various immigration procedures such as Pre-removal risk assessment and humanitarian and compassionate applications, and thereafter a stay of removal motion, may be accessed after arrest, when not available in the first instance. As well, the reason for the delay of removal is often out of the control of immigration authorities due to backlogs and other reasons. These are countervailing factors that the Court has considered, in addition to the public interest in upholding Canadian immigration laws when considering the effects of providing greater opportunity for flight by narrowing recourse to detention if no ATDs are available.

[62] This requires that ATDs be fully canvassed such as to support the conclusion that none are available. This is a factor which is usually in the control of the Minister to some degree and a failure to address them is relevant to the balance of convenience. The Court also questions whether there are not new technologies available, both for predicting situations of flight, and as a means to keep track of those marginal flight risk situations, as alternatives to unnecessarily detaining individuals and family members?

[63] Similarly, where lawyers have been engaged by parties in pending circumstances of removal, nothing would appear to prevent the Court from complying with a request to render its decision on a stay of removal motion in a confidential format to be revealed to both parties simultaneously only upon the applicant’s attendance at the CBSA offices in order to facilitate removal when pending in the very short term.

[64] In this instance, the immediate and continuing irreparable harm that arises from the loss of liberty in a matter that the Court concludes should likely prove successful in its final disposition, in addition to the involvement of the children and their risk of adverse effects from detention, weight the balance of convenience in favour of the mother's release, and by extension, that of her children.

VI. Conclusion

[65] Accordingly, the mandatory interlocutory injunction should be granted requiring that the Applicant be released from detention, as ordered by the Court on the evening of Saturday, June 30, 2018.

[66] The Court recognizes that there are significant issues raised in this decision that affect the final result. These include the appropriate test for a mandatory interlocutory injunction in a detention release situation and the impact of the BIOC on the decision to release the Applicant. ~~If the parties wish to have an issue certified for appeal, they may file submissions for that purpose~~.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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MOTION HELD VIA TELECONFERENCE ON JUNE 28, 2018 FROM OTTAWA, ONTARIO

REASONS FOR ORDER:	ANNIS J.
DATED:	JULY 12, 2018
AMENDED	JULY 30, 2018

ORAL AND WRITTEN REPRESENTATIONS BY:

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