

Federal Court



Cour fédérale

Date: 20190417

Docket: IMM-4349-18

Citation: 2019 FC 465

Ottawa, Ontario, April 17, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

**DAIANA MICLESCU
TEOFIL MICLESCU**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Daiana Miclescu and Teofil Miclescu, who are both minors, seek judicial review of an oral decision (Decision) of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada. The RPD concluded that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be allowed.

I. Background

[3] The Applicants are two children: Daiana Miculescu (born February 28, 2002) and Teofil Miculescu (born June 12, 2005). They are Romanian citizens of Roma ethnicity. The Applicants arrived in Canada on October 23, 2012 with Mr. Spartacus Miculescu and Ms. Valoarea Mitita, whom they state are their father and mother. In the Decision, the RPD questioned whether Mr. Miculescu and Ms. Mitita are in fact the Applicants' parents.

[4] The Applicants left Romania on June 25, 2012 with Ms. Mitita. They travelled initially to England and then immediately to Mexico. On July 14, 2012, the group entered the United States where it appears they reunited with Mr. Miculescu. A number of months later, the family came to Canada and made refugee claims.

[5] The Minister issued a first Notice of Intervention in the family's refugee claims on May 31, 2013. On June 17, 2013, Notifications of Designated Foreign National were issued by the Canada Border Services Agency (CBSA) in the names of each of the Applicants, Ms. Mitita and Mr. Miculescu pursuant to paragraph 20.1(1)(b) of the IRPA.

[6] In 2014, the RPD was informed that Ms. Mitita and the Applicants had separated from Mr. Miculescu. Ms. Mitita and the Applicants requested that their refugee claims be severed from that of Mr. Miculescu. The RPD ended Mr. Miculescu's status as designated representative (DR) for the Applicants on July 22, 2014 and designated Ms. Mitita as their DR on the same date.

[7] Mr. Miclescu's refugee claim was suspended in October 2015 pursuant to subsection 103(1) of the IRPA due to a sexual assault charge against him. His claim was subsequently reinstated when the charge was withdrawn.

[8] The Minister issued a second Notice of Intervention in the family's refugee claims on November 30, 2017.

[9] On May 3, 2017, Mr. Miclescu's counsel indicated that the Applicants' parents had reconciled and requested that his refugee claim be joined with those of the Applicants and Ms. Mitita. On May 15, 2018, the RPD issued a decision joining the four claims.

[10] On May 16, 2018, the refugee claims of both Mr. Miclescu and Ms. Mitita were suspended pursuant to subsection 103(1) of the IRPA. The hearing of the Applicants' claims was to proceed as scheduled.

[11] An RPD document, "Request Record", dated May 16, 2018 contains the following direction:

Although the female adult claimant is suspended nothing prevents her from acting as the DR for her children. Hearing on minor children to proceed on June 6, 2018 as scheduled.

[12] The Applicants' refugee claims were heard by the RPD on June 28, 2018.

II. Decision under Review

[13] The Decision is dated June 28, 2018. It was delivered orally on the same day as the hearing. The Decision is difficult to summarize as it returns repeatedly to the issue of Ms. Mitita's status as the DR for the Applicants and queries whether she is their mother. The panel's analysis of the Applicants' underlying refugee claims is interspersed with paragraphs addressing this identity question.

[14] The RPD began its analysis by reviewing the IRB Chairperson's Guideline 3: *Child Refugee Claimants Procedural and Evidentiary Issues* (issued pursuant to subsection 65(3) of the IRPA) (*Guidelines*) as the panel found that identity was a significant issue in the case. Specifically, the identity of Mr. Miclescu and Ms. Mitita as the Applicants' parents was questioned at the beginning of the Decision as the panel stated, "at the present time who they really are, is part of the questions that I came into the hearing with and unfortunately that has not been resolved to my satisfaction at this point in time". As a result, the RPD was not satisfied that the Applicants had arrived in Canada accompanied by their parents.

[15] The RPD expressed concern as to how to proceed with the hearing given its uncertainty regarding Ms. Mitita as the DR due to the fact that Mr. Miclescu had signed the Applicants' Personal Information Forms (PIFs). After some discussion, the RPD clarified that Ms. Mitita was prepared to act on behalf of the Applicants.

[16] The RPD analyzed Ms. Mitita's relationship to the Applicants. The panel focused on why she and the Applicants had different last names and questioned whether they were her children and not simply other family members. The RPD stated:

On the basis of that, I find that you have not established that there is a serious possibility of persecution on a Convention ground or that, on a balance of probabilities, you would personally be subjected to a danger of torture or face a risk to life or a risk of cruel or unusual treatment or punishment upon return to your country and my reasons are as follows.

[17] The panel briefly reviewed the fears recounted by Ms. Mitita in her PIF. She stated that she had experienced violence in Romania and that she did not want the same treatment for her children. She also stated that the Applicants had been discriminated against in school and described an incident in a park in Romania during which the family was harassed. Ms. Mitita indicated that she and her family went to the police to report the incident but the police took no action.

[18] The RPD then returned to the question of identity, referring to a letter from the Roma Community Centre in Toronto attesting to the fact that the Applicants were Roma. The panel noted that the letter did not mention details of the relationships among Mr. Miclescu, Ms. Mitita and the children. The RPD referred to the copies of the Applicants' birth certificates and passports on file and to the identity documentation of Mr. Miclescu and Ms. Mitita. However, the panel did not analyze the contents of the documents.

[19] The RPD concluded that it was unsure of the relationship between the Applicants and Ms. Mitita, although it was satisfied that the Applicants came from Romania and that their names were Teofil and Daiana. The panel attempted to establish a link to Ms. Mitita through school documents, vaccination information and medical records but could not do so as the Applicants had not provided documents of this nature. As part of this discussion, the panel appears to have also assessed the substance of the Applicants' claims and the issues of medical care and schooling for Roma children in Romania.

[20] The RPD then questioned Ms. Mitita's explanation of why the family had not claimed refugee status in the United Kingdom or the United States and stated that the fact Ms. Mitita wanted better economic conditions and a better future for her children did not support a claim for international protection. The panel highlighted the family's delay in leaving Romania and did not accept Ms. Mitita's explanation that they had required a period of time to save money to leave the country. The RPD questioned why Ms. Mitita would not use the money saved to pay for better housing in Romania and for vaccinations for the children. The panel concluded that Ms. Mitita was not credible and, as a result, denied the Applicants' refugee claims.

[21] The RPD reviewed the information in Mr. Miculescu's PIF and stated that his narrative was contradicted by the country documentation for Romania. Finally, the RPD found that the Applicants had not rebutted the presumption of state protection.

III. Issues and Standard of Review

[22] The Applicants raise three issues in their written submissions. They question the RPD's application of the *Guidelines* and its formulation of the test for section 96 claims, and submit that the RPD disregarded evidence that the Applicants were persons in need of protection by virtue of their Roma ethnicity.

[23] In oral argument, the Applicants focused on the Decision itself and submitted that it lacked intelligibility and transparency. They argue that the panel unreasonably centred the Decision on its concerns regarding the relationship of Ms. Mitita to the Applicants and failed to adequately address the substance of their refugee claims. The Applicants also argue that the RPD ignored the evidence before it regarding the issue of identity and familial relationships. Finally, they point to numerous instances in the Decision where the panel conflated references to the DR and the Applicants.

[24] As I explain in the next section of this judgment, the Decision contains a number of serious errors. In my opinion, it is unnecessary to compartmentalize my review of the Decision and I will analyze the RPD's findings of fact and assessments of credibility and evidence for reasonableness (*Wang v Canada (Citizenship and Immigration)*, 2011 FC 969 at para 22; *Behary v Canada (Minister of Citizenship and Immigration)*, 2015 FC 794 at para 7; *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 22 (*Rahal*); *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at para 4, 160 NR 315 (FCA)).

IV. Analysis

Was the Decision Reasonable?

[25] I find that the Decision was not reasonable. It does not meet the requirements of justification, transparency and intelligibility. The Decision fails to adequately address the substance of the Applicants' refugee claims with the result that it is not possible to assess whether the RPD's refusal of refugee protection falls within or outside the range of possible, acceptable outcomes which are defensible in this case (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In my opinion, the Decision suffers greatly from the fact that it was delivered orally. The brief sections in which the RPD considered the merits of the Applicants' claims are lost within a confusing analysis of their relationship with Ms. Mitita.

[26] There appears to be ample evidence of identity in the Certified Tribunal Record (CTR), including that of the Applicants, Ms. Mitita, and the relationship between them. However, the RPD undertook no analysis of either the content or authenticity of this evidence. Daiana's Romanian birth certificate (2002) lists Spartacus Miclescu and Valoarea Mitita as her parents. Her passport indicates that she is a citizen of Romania. Teofil's birth certificate (2005) from Romania notes Spartacus Miclescu and Valoarea Miclescu as his parents and his passport indicates that he too is a citizen of Romania.

[27] The issue of Ms. Mitita's last name cannot be regarded as determinative of the Applicants' claims, which is the suggestion in the Decision in light of the panel's repeated return to the issue. Ms. Mitita's maiden name was Miclescu. She apparently entered into a relationship

with Spartacus Miclescu in Romania (given the children's birthdates) but during her adult years in Romania was also for some time married to Mr. Mitita. She appears to have rekindled her relationship with Mr. Miclescu prior to leaving Romania. This sequence of events can be gleaned from the CTR and should have been considered by the RPD against its stated concerns regarding the family's make-up.

[28] It is also not clear why the issue of Ms. Mitita and her status as the Applicants' mother became a pressing issue for the RPD. Just over a month before the hearing, following the suspension of the refugee claims of Mr. Miclescu and Ms. Mitita, the RPD had recognized Ms. Mitita as the DR "for her children".

[29] No doubt there are indications in the CTR of serious, unresolved immigration issues surrounding Mr. Miclescu and Ms. Mitita. The issuance of the four Notifications of Designated Foreign National by the CBSA in 2013, the interventions by the Minister, and Mr. Miclescu's immigration history are matters of concern but the RPD did not discuss these issues as part of its reasoning nor were they necessarily determinative of the Applicants' refugee claims. If the concerns regarding Mr. Miclescu and Ms. Mitita formed the basis of its skepticism regarding the Applicants' claims, the panel was required to identify and address the concerns in the Decision.

[30] The RPD's negative identity conclusions led directly to its rejection of the Applicants' claims. After its initial foray into the question of identity, the panel stated, "On the basis of that", the Applicants were neither Convention refugees nor persons in need of protection. The word 'that' follows immediately after the panel's statement that it could not determine whether the

Applicants were actually Ms. Mitita's children, before any analysis of the substance of the claims. This is a reviewable error on the part of the RPD.

[31] After again returning to the issue of identity, the panel considered certain aspects of Ms. Mitita's and Mr. Miclescu's narratives as they pertained to the Applicants. The RPD found Ms. Mitita not to be credible and dismissed the content of the narratives. The negative credibility finding was based on the panel's discussion regarding identity and its comments on Ms. Mitita's testimony were dismissive.

[32] I make no finding as to whether the Applicants' refugee claims would succeed following a proper analysis of their identities, their parents' issues, identities and narratives, and the prospective risks the Applicants would face as ethnic Roma returning to Romania. These issues are all relevant to the assessment of the Applicants' refugee claims and must be considered thoroughly by another panel of the RPD on redetermination of this matter.

V. Conclusion

[33] The application is allowed. The Decision lacks a cohesive analysis of the Applicants' refugee claims.

[34] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-4349-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. No question of general importance is certified.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4349-18

STYLE OF CAUSE: DAIANA MICLESCU, TEOFIL MICLESCU v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 4, 2019

JUDGMENT AND REASONS: WALKER J.

DATED: APRIL 17, 2019

APPEARANCES:

Peter G. Ivanyi FOR THE APPLICANTS

Asha Gafar FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rochon Genova LLP FOR THE APPLICANT
Barristers & Solicitors
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario