Cour fédérale Federal Court

Date: 20090608

Docket: IMM-2695-09

Citation: 2009 FC 593

Montréal, Quebec, June 8, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DOUMICK YVENS JEAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] One of the objectives of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is to maintain the security of Canadian society and to promote denying access to Canadian territory to persons who are criminals or security risks:

3. (1) The objectives of this Act with respect to immigration are	**3.** (1) En matière d'immigration, la présente loi a pour objet :
. . .	[...]
(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;	*h*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
(Emphasis added.)	(La Cour souligne.)

[2] The Supreme Court of Canada recognized this objective in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539:

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. . . . (Emphasis added.)

[3] Last, this Court has already refused to grant stays requested by criminalized Haitian nationals who were returned to that country after serving their sentences (*Antoine and M.C.I. and M.P.S.E.P.*, IMM-2642-06 and IMM-2648-06, May 25, 2006, (Justice François Lemieux); *Dauphin*

and M.C.I. and M.P.S.E.P., IMM-2428-08, June 2, 2008, (Justice Luc Martineau); *Brutus and M.C.I. and M.P.S.E.P.,* IMM-5033-08, November 24, 2008, (Chief Justice Allan Lutfy).

II. Introduction

[4] The applicant, Mr. Doumick Yvens Jean, is a citizen of Haiti who is inadmissible to Canada on grounds of "serious criminality". He has a criminal record that includes convictions on May 24, 2007, for trafficking in crack cocaine (crack) and conspiracy to traffic in crack between August 14, 2006, and November 30, 2006; the applicant's record also includes convictions on March 6, 2008, for trafficking in crack cocaine (crack) and possession of crack cocaine (crack) for the purpose of trafficking on August 22, 2007. The applicant has been detained by Citizenship and Immigration Canada (CIC) since March 13, 2009, at the Rivière-des-Prairies detention facility (Exhibits C and D *en liasse* to the Affidavit of Dorothy Niznik).

[5] The applicant also has a history in the Youth Court and was convicted of assaults, bodily harm and escape in 2005 (see Exhibit E *en liasse* to the Affidavit of Dorothy Niznik).

[6] He is asking this Court to stay his removal to Haiti scheduled for Tuesday, June 9, 2009.

[7] This stay motion is accompanied by an application for leave and judicial review (ALJR) of a negative decision by a pre-removal risk assessment officer (PRRA) issued on May 15, 2009, and given to the applicant personally on May 25, 2009 (Exhibit A and Exhibit B *en liasse* to the Affidavit of Dorothy Niznik).

III. Facts

[8] The applicant arrived in Canada on October 23, 2002, at the age of 14. The applicant has been in trouble with the law since 2005. His criminality began when he was a minor and continued in adult courts.

[9] The applicant was the subject of two inadmissibility reports under paragraph 36(1)(*a*) of the IRPA, and removal orders were issued against him. It is to be noted that when he was convicted on March 6, 2008, the court found that the applicant had failed to comply with a probation order relating to his first conviction of May 24, 2007. The last sentence imposed on the applicant totalled 31 months (see the reasons dated March 16, 2009, by member Côté, which are part of Exhibit D *en liasse* to the Affidavit of Dorothy Niznik, and the reasons by the Immigration Appeal Division (IAD) in Exhibit C *en liasse* to the same Affidavit).

[10] It was also put into evidence that the applicant was associated with a criminal organization in the Saint-Michel area that sells 200 rocks of crack per day valued at $20 a rock (Exhibit C *en liasse* to the Affidavit of Dorothy Niznik).

[11] Furthermore, the applicant had given an undertaking on October 28, 2005, to not associate with any member of a street gang when he appeared before the Youth Court (see Exhibit E *en liasse* to the Affidavit of Dorothy Niznik, in particular, conditions 7 and 8 of the probation order dated October 28, 2005). The applicant has clearly not complied with the terms of his probation.

[12] Because of the serious crimes he committed, the applicant is inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(*a*) of the IRPA. The second removal order was issued on August 29, 2008.

[13] The applicant appealed the removal orders. The IAD created one file with the number MA8-03818 to hear the applicant's appeal of the two removal orders. On March 27, 2009, the IAD dismissed the applicant's appeal, and, as of this date, he has not challenged that decision in Federal Court.

[14] On March 27, 2009, the applicant filed an ALJR (Exhibit B *en liasse* to the Affidavit of Dorothy Niznik).

[15] On May 15, 2009, the PRRA officer examined the applicant's allegations regarding the risks of return to Haiti. Given that the applicant is inadmissible on grounds of serious criminality, the PRRA officer had to assess the risks that the applicant might face in Haiti based only on the factors enumerated in section 97 of the IRPA.

[16] After thoroughly reviewing all the evidence, including the applicant's evidence and the recent documentation on the situation in Haiti, the PRRA officer determined that the applicant had not established, on a balance of probabilities, that he would be subjected personally to a danger of torture or to a risk to his life or a risk of cruel and unusual treatment or punishment if he were to return to Haiti (Exhibit B *en liasse* to the Affidavit of Dorothy Niznik).

[17] On May 19, 2009, the applicant was informed that his PRRA application had been denied. The letter informing the applicant of the PRRA officer's negative decision along with the PRRA officer's notes were given to the applicant personally on May 25, 2009.

[18] On May 25, 2009, the applicant contacted the law office of Ms. Marie-Hélène Giroux, told the office about his removal date scheduled for June 9, 2009, and asked that Ms. Giroux contact him as soon as possible (Exhibit A to the Affidavit of Dorothy Niznik).

[19] On May 27, 2009, the respondents were served with an application for leave and judicial review of the negative PRRA decision dated May 15, 2009, alleging, contrary to what has been established, that the applicant had not received the reasons for the decision.

[20] On June 3, 2009, the applicant served a motion to stay the enforcement of the removal order on the respondents.

The applicant does not come to court with clean hands

[21] This motion for a stay could be dismissed on the basis of the "clean hands" maxim.

[22] For his young age, the applicant has a busy criminal past. He has a record of serious criminal offences committed between 2005 and 2007; he has been incarcerated since August 22, 2007, and has not been at large since. On March 13, 2009, the CIC detained the applicant for his removal to Haiti.

[23] Considering that the applicant has been in Canada since 2002 and has not demonstrated any respect for the criminal and immigration laws since his arrival in Canada, the respondents submit that the applicant does not come to Court with clean hands.

[24] The applicant's behaviour is a major obstacle to obtaining the remedy that he seeks:

> [4] It is well established law that the issuing of a stay is an equitable remedy that will only be granted where the applicant appears before the court with clean hands. *See Khalil v. Canada (Secretary of State)*, [1999] 4 F.C. 661 para 20*, Basu v. Canada*, [1992] 2 F.C. 38*, Ksiezopolski v. M.C.I. & S.G.C.*, [2004] F.C.J. No. 1715.
>
> [5] In this case the applicant has anything but clean hands. She has shown a constant and persistent disregard for Canadian family law, criminal law and immigration law. It would be encouraging illegality, serve a detrimental purpose and be contrary to public policy if the court were to grant her the relief sought.
>
> [6] Accordingly, given the circumstances of this case, the court is not prepared to exercise any equitable jurisdiction in respect of the applicant. (Emphasis added.)

(*Brunton v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 33, 145 A.C.W.S. (3rd) 685; also, *Gabra v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1491, 243 F.T.R. 318 at paragraph 5).

[25] Since the applicant has anything but clean hands, this Court is not prepared to exercise its equitable jurisdiction.

TESTS TO OBTAIN JUDICIAL STAY

[26] To obtain a stay of his removal, the applicant had to demonstrate that he satisfied the jurisprudential tests laid down by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3rd) 440 (F.C.A.):

a. there is a serious issue to be tried;
b. the applicant will suffer irreparable harm; and
c. the balance of convenience favours granting the stay.

[27] The three tests must be established for this Court to grant the stay. If one of them is not established or satisfied, the Court cannot grant the stay.

[28] In this case, the applicant did not satisfy any part of the tri-partite test.

A. Serious issue

[29] The applicant primarily alleges, as a serious issue in support of his stay motion, that the PRRA officer did not consider the applicant's submissions to the effect that deported criminals face serious risks to their life and safety on their return to Haiti.

[30] At the outset, it is appropriate to point out that, since the applicant is inadmissible to Canada, the risk analysis had to be conducted under section 97 of the IRPA only, in accordance with paragraph 113(*d*) of the IRPA.

[31] The applicant had to demonstrate that there was a serious risk that he would be subjected to a danger of torture or that, on a balance of probabilities, he would be subjected to a risk to his life or a risk of cruel and unusual treatment or punishment.

[32] The PRRA officer engaged in an exhaustive analysis of all the evidence in the record. He noted and analysed the applicant's allegations of risk and the documents that he filed in support of his PRRA application. The officer's reasons are clear, detailed and based on the evidence adduced.

[33] The PRRA officer considered the general situation in Haiti and, specifically, the situation of criminals deported from Canada to that country, as well as the conditions and risk of detention for the applicant.

[34] In his analysis of the evidence, the PRRA officer specifically addressed the detention conditions and the applicant's risk of detention. The PRRA officer considered the evidence as to the risk that the applicant would be unlawfully detained upon his arrival in Haiti and noted that the applicant did not have a criminal record in Haiti; he also noted that the applicant's mother was in Haiti and could act as a surety for him so he could be released within an acceptable period of time. In fact, the Haitian authorities aim to release Haitian deportees to a member of the family as soon as possible, once an identity check has been completed and provisions have been made to ensure that the deportee will be monitored.

[35] In this case, the applicant's identity does not pose a problem, and the applicant intends to tell his mother about his arrival in Haiti.

[36] The PRRA officer considered the representations by Ms. Michelle Karshan of Alternative Chance but determined, based on the objective evidence, that deportees are held for a maximum period of two weeks for preventive purposes. The purpose of the detention is to verify the identity of the deportee, to ensure that he or she has family in Haiti and to minimize the risk that the deportee will engage in criminal activities once there (Exhibit B *en liasse*, page 7 of the PRRA officer's reasons).

[37] With respect to the Affidavit of Ms. Michelle Karshan of Alternative Chance, on March 17, 2009, Mr. Justice Yves de Montigny ruled as follows, in dismissing the applicant Édouard's stay motion:

> [TRANSLATION]
> In any event, the applicant has not demonstrated that his application for leave and judicial review underlying this stay motion raises a serious issue. The PRRA officer **conducted a comprehensive analysis of the evidence in the record and carefully considered the applicant's submissions that criminal deportees face serious risks to their lives and safety on their return to Haiti**. The officer specifically addressed the detention conditions and the applicant's risk of detention; he considered the evidence as to the risk that the applicant would be unlawfully detained on his arrival in Haiti and if the applicant were, in fact, detained, whether the detention would amount to mistreatment or to a risk to his life and whether there was a serious risk of torture while he was in detention. Relying on the sworn declaration by a public servant at the Canadian Embassy in Haiti and on the observations of the U.S. Department of State in the 2007 *Country Reports on Human Rights Practices*, he concluded that the applicant was not more at risk than the rest of the Haitian population because he had lived in Canada for a number of years, and that he would not be unlawfully detained for an indeterminate time. Taking into account that the situation has changed since August 2006, the officer determined that the applicant might be detained

> temporarily for administrative purposes, that the detention would be short and that it had not been demonstrated that deportees from Canada who were similarly detained suffered mistreatment in the last two years. **These findings are not unreasonable given the evidence that was before the PRRA officer who could choose to assign more weight to the Canadian public servant's declaration and to the US DOS Report than to articles from the group Alternative Chance and the affidavit of Ms. Laberge**, especially since she referred only to poor detention conditions in Haitian jails, and not to the situation that prevails during the period of administrative detention that could be imposed on the applicant. (Emphasis added).

(Order issued on March 17, 2009, by Mr. Justice de Montigny in *Édouard* v. *M.C.I. et al*, IMM-1262-09 at pages 3 and 4).

[38] Mr. Justice de Montigny dismissed the stay motion on the basis that the applicant Édouard did not come to Court with clean hands and, for that reason alone, the stay motion should be dismissed. Mr. Justice de Montigny also held that the motion to stay the removal did not raise a serious issue. Last, Mr. Justice de Montigny determined that the applicant had not established irreparable harm should he return to Haiti and that the balance of convenience clearly favoured the respondents.

[39] Mr. Justice Orville Frenette also ruled on the relevance and value of the evidence provided by Ms. Michelle Karshan of Alternative Chance, in his judgment in *Placide v. Canada (Minister of Citizenship and Immigration*), 2009 FC 490, [2009] F.C.J. No. 595 (QL).

[40] It is incumbent on a PRRA officer to weigh the evidence before him or her and to assign it appropriate weight. That is what the officer did in this case.

[41] The PRRA officer chose to assign more weight to the observations by the U.S. Department of State (US DOS) in the "Country Reports on Human Rights Practices – 2008", published on February 25, 2009, and he was entitled to do so.

[42] In addition, the sworn declaration by a public servant at the Canadian Embassy in Haiti reveals the following (Exhibit F *en liasse* to the Affidavit of Dorothy Niznik):

- that since August 2006, the situation has changed, and the Haitian government no longer detains Haitian deportees for indeterminate periods;
- that a period of administrative preventive detention on arrival, under the jurisdiction of the Central Directorate of the Judicial Police (CDJP), may vary from two hours to twelve days;
- that since August 2007, sixteen people were deported from Canada to Haiti and that none of them were detained for longer than three days;
- that these preventive detentions only continue until a member of the family or a representative stands as surety for the release conditions.

[43] As for Ms. Laberge's observations in her Affidavit about the poor detention conditions in Haitian jails, this evidence was not before the PRRA officer.

[44] In addition, Ms. Laberge's statements should be qualified since they do not address the detention conditions for **deportees** when they arrive in Haiti. She refers to arrests that occur on a daily basis and that involve the entire Haitian population as well as to conditions in the prisons or

detention centres throughout the country where individuals often wait for months, even years, before their trial. She also does not refer directly to the Central Directorate of the Judicial Police where the applicant will be held upon arrival.

[45] Contrary to the applicant's submission in paragraph 1.16 of his memorandum, the PRRA officer did not conclude that the circumstances in Haiti have changed, within the meaning of the jurisprudence. Moreover, this concept refers to a change in the country of origin of a person who fears persecution. The applicant, who is inadmissible on grounds of serious criminality, cannot allege that he fears persecution.

[46] This being said, the recent documentary evidence indicates that the situation has changed since August 2006 for criminal **deportees** to Haiti (PRRA officer's decision, Exhibit B *en liasse* to the Affidavit of Dorothy Niznik):

> The government detained repatriated citizens upon their return for approximately two weeks…
>
> The authorities used the deportee's time in detention to assess whether the citizen planned to participate in criminal activities and to locate family members. Because of lack of available space in prisons and detention centers, the government made efforts to release the deportees quickly. Deportees, many of whom spent most of their lives abroad, alleged widespread discrimination and social abuse after returning home.

[47] As for the general conditions in Haiti, the PRRA officer was careful to note that the situation continues to be very difficult there, that the living conditions are precarious and that a generalized instability prevails; however; the PRRA officer found that the applicant did not demonstrate that he

would be personally at risk in Haiti because of these difficult conditions. The fact that the applicant will be detained temporarily on arrival does not prove that he will be subjected to a risk to his life or a risk of cruel and unusual treatment or punishment.

[48] The PRRA officer's findings are reasonably supported by the evidence in the record. In these circumstances, this Court cannot substitute its own assessment of the evidence for that of the PRRA officer.

[49] In this case, the applicant has not discharged his burden of demonstrating that there is a serious issue to be tried in his ALJR of the PRRA decision. That, in itself, is sufficient to end the analysis required by *Toth*, above.

B. Irreparable harm

[50] On the issue of irreparable harm, the applicant repeats the risks that the PRRA officer already dismissed and again relies on the documentary evidence about the general situation in Haiti to argue that, as a criminal deported to Haiti, his life and safety are in danger.

[51] When Parliament drafted the IRPA, it decided, in order to maintain the security of Canadian society, to restrict access to Canada to persons who are inadmissible on grounds of criminality or serious criminality and to persons who have committed acts of violence or terrorism or violated human or international rights.

[52] Parliament's intention is particularly reflected in subsection 230(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), in which Parliament provided that temporary stays of removal do not apply to persons who are inadmissible to Canada on grounds of serious criminality, such as the applicant.

[53] Thus, in the case of a person who is inadmissible to Canada and who must be returned to a country where there is a temporary suspension of removals, as in the applicant's case, the documentary evidence on the general situation in Haiti cannot, *per se*, establish irreparable harm.

[54] To find otherwise would directly contradict Parliament's intention.

[55] In the context of irreparable harm, the applicant had to demonstrate a personalized risk for his life and safety in Haiti. For the reasons set out by the PRRA officer, the applicant did not succeed in doing so and cannot repeat the same allegations on this stay motion to argue that he will suffer irreparable harm.

[56] It is appropriate here to point out that it is recognized that the risks alleged before a PRRA officer that have been found unsatisfactory cannot constitute irreparable harm:

> [18] Simply alleging that the persons will suffer the harm they have claimed in their PRRA applications is not sufficient for the purposes of the test. I first note that the vast majority of the affected persons have received the benefit of a number of risk assessments. Prior to the PRAA decisions, in all cases, the affected persons have been party to earlier processes under the *IRPA*. . . . (Emphasis added.)

(*Nalliah v. Canada (Solicitor General)* (F.C.), 2004 FC 1649, [2005] 3 F.C.R. 210).

[57] In any event, it is clear from the applicant's allegations that his fear of returning to Haiti is based solely on the fact that he is a deported criminal in that country.

[58] The preceding paragraphs demonstrate that criminals deported from Canada are not subjected to a risk to their life or safety based solely on the fact that they were convicted of criminal offences in Canada. The documentary evidence describes the current procedures that the Haitian authorities follow when persons are deported from Canada.

[59] Past experience with persons deported from Canada has shown that they are not automatically detained and that, if they are, it is only for a very short period of time.

[60] Exhibit F *en liasse* to the Affidavit of Dorothy Niznik refers to the case of fifteen Haitians deported from Canada, eight of whom had criminal records. The majority of them were released the same day they arrived in Haiti. One person was detained for a period of three days:

> [TRANSLATION]
> 9. Between August 1, 2007, and July 30, 2008, fifteen Haitians were deported from Canada, eight of whom had criminal records. I consulted the files kept by the person responsible for central filing and followed the deportees to the CDJP, Elbé C. Linda, and confirmed the detention period for fourteen of them (one of the files was not indexed):
>
> - Seven were released the same day they arrived. Six of them had a criminal record in Canada;
>
> - Six were not sent to the CDJP. One of them had a criminal record in Canada;

- One person was detained for three days. That person had a criminal record in Canada.

[61] The most recent documentary evidence cited by the PRRA officer confirms the information in Exhibit F to the Affidavit of Dorothy Niznik. In this case, the documentary evidence in the record is far from demonstrating the probability that the applicant will suffer irreparable harm on his return to Haiti.

C. Balance of convenience

[62] The public interest is of central importance in determining the balance of convenience issue. The Federal Court of Appeal spoke about the integrity and fairness of, and **public confidence in, Canada's system of immigration control**. **(***Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) 547).

[63] The applicant had the privilege of coming to Canada as a permanent resident. Since his arrival, he has lived a life characterized by criminality. As a result of the criminal offences he has committed, the applicant is inadmissible to Canada on grounds of serious criminality.

[64] The applicant's removal is the result of the loss of his permanent residence status because of his criminal convictions. The applicant's convictions violated the conditions under which he was permitted to remain in Canada (*Canada (Minister of Employment and Immigration) v. Chiarelli***,** [1992] 1 S.C.R. 711, [1992] F.C.J. No. 27 (QL)).

[65] A review of the applicant's criminal record and of the evidence in the record unequivocally demonstrates his degree of criminality. This necessarily tips the balance of convenience in favour of the respondents who must maintain the security of Canadian society.

[66] The Federal Court has ruled on cases where an applicant's criminal past was much less serious than the applicant's and has determined that, in such circumstances, the balance of convenience favoured the Minister:

> [TRANSLATION] The applicant has proven to be a criminalized person. The balance of convenience weighs heavily in favour of the respondents.

(*Dukuzumuremyi v. MCI and MPSEP*, IMM-4296-07 and IMM-4297-07, October 30, 2007, (Justice Frenette) at page 8; also, *Merkarbèche v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2007 FC 566, [2007] F.C.J. No. 762 (QL) at paragraph 55).

[67] The Court also stated in recent decisions that it could not disregard the fact that a person is inadmissible when assessing the balance of convenience (*Sancho v. M.C.I. and M.P.S.E.P.*, IMM-4405-08, October 17, 2008, at page 5). Similarly, the Court determined that an applicant's behaviour must be considered on a stay motion (*Cyabukombe v. M.C.I. and M.P.S.E.P.,* IMM-2681-08, June 16, 2008, at page 2).

[68] Consequently, the respondents assert that there is nothing that could tip the balance of convenience in favour of the applicant, especially since he has not demonstrated the probability that he will be in danger in Haiti.

IV. Conclusion

[69] In light of all the foregoing, the applicant has not satisfied the jurisprudential tests for obtaining a judicial stay.

[70] The motion to stay the enforcement of the applicant's removal order is dismissed.

JUDGMENT

THE COURT ORDERS that the applicant's motion for a stay of enforcement of the removal order is dismissed.

"Michel M.J. Shore "

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2695-09
STYLE OF CAUSE:	DOUMICK YVENS JEAN v. MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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DATE OF HEARING:	June 8, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	MR. JUSTICE SHORE
DATED:	June 8, 2009

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