Date: 20090702

Docket: IMM-4136-08

Citation: 2009 FC 688

Ottawa, Ontario, July 2, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

VALDANO TOUSSAINT

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary Remarks

[1] In the words of Justice Marshall Rothstein of the Federal Court of Appeal, sitting with Justices Marc Noël and Brian Malone, in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487:

> [56] The Immigration Division found that Mr. Poshteh continued his activity with the MEK until he was seventeen years and eleven months. Where a minor of that age knows of the violent activity of the organization, becomes involved of his own volition, continues for over two years and leaves only after he is arrested, it cannot be said that it is unreasonable for the Immigration Division not to accept his arguments based on his status as a minor and to find him to be a member of the terrorist organization.
>
> ...

> [59] I do not think that the *Convention on the Rights of the Child* is relevant in this case. For purposes of the Convention, the action in this case is the proceeding and decision of the Immigration Division. However, at the time the matter was considered by the Immigration Division, Mr. Poshteh was no longer a minor. He was eighteen when he arrived in Canada. As I read the Convention, it is concerned with the interests of children while they are children. It does not purport to confer rights on adults.
>
> …
>
> [64] I would answer the certified question in the following manner:
>
> ...
>
> (b) the *Convention on the Rights of the Child* does not apply when the proceedings and decision involving an individual take place when the individual is no longer a minor;

II. Judicial Proceedings

[2] This is an application for judicial review of a decision by the Immigration Division of the Immigration and Refugee Board (Board) dated August 29, 2008, finding the applicant inadmissible on grounds of organized criminality within the meaning of section 37 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[3] More specifically, the Board concluded that the street gangs known as the “Bo-Gars” , “Young Master Crew” and “Blood Mafia Family” were organizations contemplated by section 37 of the IRPA. The Board also concluded that there were reasonable grounds to believe that the applicant was a member of those groups.

III. Facts

[4] It would be good to give an overview of the history of proceedings concerning the applicant. It should be noted, however, that those proceedings have little connection with this case, which deals with the decision finding the applicant inadmissible on grounds of organized criminality under section 37 of the IRPA.

[5] The applicant, Valdano Toussaint, was born on October 28, 1986 in Haiti. He remains a citizen of that country. On July 16, 1997, Mr. Toussaint entered Canada as a permanent resident sponsored by his father.

[6] On November 8, 2007, the Immigration Appeal Division (IAD) concluded that Mr. Toussaint was inadmissible on grounds of serious criminality within the meaning of subsection 36(1) of the IRPA.

[7] As indicated at paragraph 17 of the IAD's reasons, on November 8, 2003, and March 19, 2004, when Mr. Toussaint was a minor, he was convicted of a range of offences, namely accessory to robbery (ss. 463(*a*) and 344(*b*) of the *Criminal Code* (Cr.C.)), possession of stolen property (Cr.C. s. 355(*b*)(*i*)), being unlawfully in a dwelling house (Cr.C. s. 349(1)), robbery (Cr.C. s. 344(*b*)), possession of a weapon for a dangerous purpose (Cr.C. s. 88(2)), forcible confinement (Cr.C. s. 279(2)(*a*)), robbery (Cr.C. s. 344(*b*)), two counts of assault with a weapon (Cr.C. s. 267(*a*)), two counts of assault causing bodily harm (Cr.C. s. 267(*b*)) and robbery (Cr.C. s. 344(*a*)).

[8] In addition, according to the Warrant of Committal and Order Respecting Placement of Young Person Receiving an Adult Sentence, Mr. Toussaint was sentenced to 28 months' imprisonment. On June 30, 2004, he was ordered placed in a correctional facility for adults (reasons for the IAD decision, at paragraph 18).

[9] That decision was the subject of an application for leave before this Court, in docket IMM-5148-07. The application was dismissed on March 26, 2008, at the leave stage.

[10] There is therefore *res judicata* on this question.

[11] The issue of the inadmissibility exception under paragraph 36(3)(*e*) was raised both before the IAD and in the memorandums filed before this Court. It is therefore not appropriate to revisit this debate in the case at bar.

[12] The following sequence of facts occurred after Mr.Toussaint reached the age of majority.

[13] On or about October 26, 2005, the National Parole Board (NPB) ordered the conditional release of Mr.Toussaint. His parole conditions included abstaining from alcohol and drugs. On or about December 19, 2005, Mr. Toussaint's parole was suspended for drug use.

[14] On May 31, 2006, Mr. Toussaint was again paroled following a decision of the NPB. He was immediately detained for immigration purposes by the Canada Border Services Agency (CBSA).

[15] On August 4, 2006, the Immigration Division ordered the conditional release of Mr. Toussaint. The conditions were, *inter alia*, that he not leave the residence of his parents without his mother or his father and that he work in the same location and during the same hours as his father.

[16] On or about July 6, 2007, Mr. Toussaint was arrested by the CBSA for violating his conditions, since he had been fired from his job. The CBSA also learned that a warrant had been issued against Mr. Toussaint by the Service de police de la ville de Montréal [Montréal police] (SPVM) for crack cocaine trafficking and conspiracy to traffic.

[17] On July 20, 2007, Mr. Toussaint was released under conditions, one of which was to report to the CBSA once a month.

[18] On March 14, 2008, Mr. Toussaint failed to report and the CBSA issued a warrant for his arrest.

[19] However, three days later, on March 17, 2008, Mr. Toussaint was arrested by the SPVM, a warrant having been issued for attempted murder.

[20] On July 22, 2008, Mr. Toussaint was found guilty of possession of a weapon for a dangerous purpose. Since he had been in preventive detention since February 2008, he served a one-month sentence.

IV. Analysis

Standard of Review

[21] In *Castelly v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 788, 169 A.C.W.S. (3d) 844, Justice Luc Martineau conducted an analysis of the standard applicable in judicial review of a finding of inadmissibility on grounds of organized criminality. The Court noted that this was essentially a factual assessment, reviewable on a standard of reasonableness:

> [10] In *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122, [2005] F.C.J. No. 587 (QL) (*Thanaratnam*), a matter examining the scope of section 37 of the Act, Mr. Justice Evans found at paragraph 27 that determining whether the evidence was sufficient to constitute "reasonable grounds to believe" that an applicant was "engaging in activity that is part of" a pattern of criminal activity was a question of mixed fact and law. However, since the question was so largely factual, Evans J.A. found that the standard of review should be patent unreasonableness. See also *Thaneswaran v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 189, [2007] F.C.J. No. 253 (QL).
>
> [11] Since *Dunsmuir v. New Brunswick*, 2008 SCC 9 dated March 7, 2008, the patent unreasonableness standard has disappeared, giving way to the "reasonableness" standard, a hybrid standard with a broad spectrum of application. In fact, as Justices Bastarache and LeBel point out at paragraph 48, "[t]he move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* [*Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748] formalism". Thus, where assessing the evidence or determining the credibility of witnesses is concerned, this Court should not intervene unless the panel's decision was based "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended; *Anjete v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 644, at paragraphs 3 and 4; and *Bielecki v.*

Canada (Minister of Citizenship and Immigration), 2008 FC 442, at paragraphs 16 to 23).

[12] That said, for the purposes of assessing the lawfulness of the panel's finding that the applicant is inadmissible on grounds of organized criminality because there are reasonable grounds to believe that she was a member of an organization described in paragraph 37(1)(*a*) of the Act, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47).

[22] Essentially, this Court is called upon to review the panel's findings of fact. The reasonableness standard, as described by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, prevails.

Inadmissibility on grounds of organized criminality

[23] Section 37 of the IRPA is worded as follows:

Organized criminality	**Activités de criminalité organisée**
37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37.** (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence	*a*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une

punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) The following provisions govern subsection (1):

Application

(2) Les dispositions suivantes régissent l'application du paragraphe (1) :

(*a*) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;

(*b*) paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal

b) les faits visés à l'alinéa (1)*a*) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont

activity. visées.

[24] Inadmissibility on grounds of organized criminality therefore requires two elements, namely:

(a) The existence of reasonable grounds to believe that the organization falls under the definition set out in paragraph 37(1)(*a*);

(b) That the person in question be a member of that organization.

(*Castelly*, above, at paragraphs 14-16).

The "Bo-Gars", the "Young Master Crew" and the "Blood Mafia Family" are organizations contemplated by section 37 of the IRPA

[25] Detective-Sergeant Benoît Desjardins-Auclair of the SPVM testified as an expert witness before the Board.

[26] The witness explained that the Blood Mafia Family and the Young Master Crew were affiliates of the Bo-Gars street gang. These organizations are so-called red or Blood street gangs. The Young Master Crew apparently gave way to the Blood Mafia Family.

[27] The Blood Mafia Family is involved mainly in drug trafficking, violent crime, intimidation of police officers and civilians, robbery and vehicle theft. The Blood Mafia Family has 30 members and/or hangers-on (transcript of July 10, 2008, at page 4).

[28] It is therefore not surprising that the Board concluded that there are reasonable grounds to believe that the reds in general, and the Bo-Gars, the Young Master Crew and the Blood Mafia Family in particular, are organizations within the meaning of section 37 of the IRPA.

[29] The Board had this to say at pages 5 and 6 of its reasons:

> So, in my opinion, the testimony given by Officer Desjardins-Auclair was very, very clear, and very well documented, with regard to criminal organizations, street gangs in general, and in particular the Bo-Gars, the Young Master Crew and more recently the emerging Blood Mafia Family group. They are involved in violent crime, prostitution, drug trafficking, influence peddling, and all of that.
>
> ...
>
> ... In my opinion, there are reasonable grounds to believe that the organizations I have named—the Bloods, the reds in general or the Bo-Gars or the Young Master Crew or the Blood Mafia Family in particular—fall under the definition of a criminal organization. (Emphasis added.)

[30] This conclusion is reasonable.

[31] This first facet of the analysis conducted under section 37 is not challenged by Mr. Toussaint. There are reasonable grounds to believe that these organizations are or have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment.

[32] This unequivocal conclusion raises no serious question and must be held as proven.

The applicant is a member of these organizations

[33] Detective-Sergeant Desjardins-Auclair testified that Mr. Toussaint was a member of the Young Master Crew and a leader of the Blood Mafia Family. He stated the following at pages 3 and 4 of the transcript of the hearing of July 10, 2008:

> [TRANSLATION]
>
> ... I still have the same conclusion and more specifically, Mr. Toussaint is now considered by us and has the status of a leader of a criminal organization that is now called BMF, Blood Mafia Family. He was a member of Young MC Crew (*sic*), which is an emerging street gang that was an affiliate of the Beaux Gars (*sic*). (Emphasis added.)

[34] Mr. Toussaint's membership in these groups is contemporary; Mr. Toussaint was a member of the Bo-Gars and the Blood Mafia Family in 2008, when he was an adult.

[35] Thus, any argument seeking to rely on Mr. Toussaint's minority is not probative – Mr. Toussaint, who is of full age, was a member of a criminal organization in August 2008 when the Board made its decision. This finding is distinct from the criminal charges that led to the other finding of inadmissibility for serious criminality under section 36 of the IRPA.

[36] The situation cited by Mr. Toussaint in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 487, [2005] F.C.J. No. 381 (QL), does not apply here. Mr. Poshteh ceased his activities before he was eighteen years old:

> [5] Mr. Poshteh and a friend distributed MEK propaganda leaflets in Tehran one or two times per month. He carried on this activity from February 2000 until June 2002, when he was almost eighteen (seventeen years and eleven months). He ceased

> this activity when he was arrested and detained for two weeks by the police. Aside from distributing the propaganda leaflets, he had no other involvement in MEK activities. (Emphasis added.)

[37] In contrast, Mr. Toussaint continued his activities as a member of street gangs well after reaching the age of majority, becoming a leader of the Blood Mafia Family. Mr. Toussaint's situation is completely different from Mr. Poshteh's. In any event, it should be noted that the decision of the Immigration Division in *Poshteh* was upheld by the Federal Court of Appeal.

[38] Furthermore, in *Castelly*, above, Justice Martineau noted that the application of section 37 of the IRPA did not require the existence of criminal charges or a conviction:

> [26] However, this claim of the applicant does not affect the lawfulness of the panel's decision. In fact, belonging to an organization described in paragraph 37(1)(*a*) of the Act does not require the existence of criminal charges or a conviction. In addition, case law has clearly established that it is not necessary to demonstrate that the person concerned is a member of an organization, but rather that there are reasonable grounds to believe that he or she is a member: paragraph 37(1)(*a*) and section 33 of the Act; *Moreno v. Canada*, [1994] 1 F.C. 298 (C.A.); and *Mugesera* at paragraph 114. (Emphasis added.)

[39] Mr. Toussaint signed an affidavit in support of his application for leave and for judicial review. He does not deny being a member of the Bo-Gars or the Blood Mafia Family. Of course, such a denial would have been expected if he had not been a member of those organizations.

[40] The extrajudicial statements of Mr. Toussaint must be added to this evidence. Upon entering the penitentiary, on April 20, 2004, Mr. Toussaint was required to fill out and sign an information sheet on which he answered the questions as follows:

> Are you a member of a criminal organization?
> If so, which one? “Yes, Bo-Gars”.
>
> Are you affiliated with a criminal organization?
> If so, which one? “Yes, Bo-Gars”.
>
> ...
>
> Are you a supporter of a criminal organization?
> If so, which one? “Yes, Bo-Gars”.

(Exhibit “K” of the affidavit of Hélène Jarry).

[41] It is difficult for the Court to see why Mr. Toussaint would sign such statements if they were inaccurate. These statements constitute part of the considerable evidence leading to the conclusion that there are reasonable grounds to believe that Mr. Toussaint is a member of the Bo-Gars and the Blood Mafia Family.

[42] The Board noted that Mr. Toussaint’s statement to the Immigration Division on June 8, 2006 shows unequivocally that he was a member of street gangs. That membership continues to this day and Mr. Toussaint is now recognized as a leader of the Blood Mafia Family.

[43] The Board took note of the tattoos on Mr. Toussaint’s body, which lead to the conclusion that he is a member of a street gang, and more specifically of the Blood Mafia Family gang. The Board’s reasons note the testimony of Detective-Sergeant Desjardins-Auclair on this point:

> (a) the tattoo on the applicant’s abdomen represents gang life and the life of a criminal;
>
> (b) the “B” marks on the applicant’s body represent the term “Blood” and the initials BMF, Blood Mafia Family.

(Affidavit of Hélène Jarry, exhibit “M”, in a bundle).

[44] Mr. Toussaint alleges that the tattoos could not possibly have been done when he was a minor. That is immaterial, especially since Mr. Toussaint has continued his organized criminal activities to this day.

[45] It was reasonable for the Board to conclude that Mr. Toussaint is a member of the Bo-Gars, the Young Master Crew and the Blood Mafia Family. Mr. Toussaint raises no serious question that could cast doubt on the Board’s finding.

Applicant’s removal is not at issue here

[46] At paragraph 2.1(b) of his memorandum, Mr. Toussaint states that his removal from Canada [TRANSLATION] “is a threat to his life and his safety”.

[47] With respect, the Board’s role is not to decide the issue of Mr. Toussaint’s possible removal to Haiti. Rather, the Board’s role is to determine whether Mr. Toussaint must be found inadmissible on grounds of organized criminality within the meaning of section 37 of the IRPA. The prevailing situation in Mr. Toussaint’s country of nationality has no bearing on the decision that the Board must make.

[48] Indeed, the IRPA provides other mechanisms for assessing that issue, including an application for protection through a pre-removal risk assessment. Mr. Toussaint filed an application for protection in October 2008.

V. Conclusion

[49] For all the above reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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