Federal Court  Cour fédérale

Date: 20100107

Docket: IMM-1396-09

Citation: 2009 FC 1243

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 7, 2010

Present: The Honourable Mr. Justice Shore

BETWEEN:

ERNST SAINT JEAN

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The only issue in this case is determining whether the applicant is subject to the exception under paragraph 36(3)(*e*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), namely whether his offences are contraventions under the *Contraventions Act*, SC, 1992, c 47 or an offence under the *Young Offenders Act*. This last law has been repealed and replaced, since April 1, 2003, by the *Youth Criminal Justice Act*, SC 2002, c. 1 (YCJA).

[2] It appears from the transcript of the hearing of August 29, 2007, that the applicant was advised of the Crown's request to impose an adult sentence on him. Counsel for the applicant stated that his client had no objection to the sentencing (transcript of the hearing of August 29, 2007, at p. 3; Exhibit "D" of the affidavit of Dominique Toillon).

[3] The YCJA states that when a decision is made to sentence a young person, it is that it is considered that the person can no longer be protected like another young person by the YCJA—the person must be treated like an adult and tried under the *Criminal Code*, RSC 1985, c. C-46 (Cr.C). That is exactly Mr. Saint Jean's situation.

[4] That is why the offences that Mr. Saint Jean was charged with cannot be characterized as contraventions under the *Contravention Act* or offences under the YCJA. Therefore, the exception set out in paragraph 36(3)(*e*) of the IRPA is not applicable to Mr. Saint Jean and he should have been inadmissible for serious criminality.

[5] Also, the Court refers to the objectives of the IRPA described in paragraphs 3(*h*) and (*i*) of this Act, which specifies that the purpose of the IRPA is

3. …	**3.** [...]
(*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	*i*) de promouvoir, à l'échelle

and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	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;
…	[...]

[6] [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 FCR 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;

(*Toussaint v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2009 FC 688, [2009] FCJ No 828 (QL)).

II. Introduction

[7] This is an application for judicial review of a decision by Rolland Ladouceur, member of the Immigration Division (ID) of the Immigration and Refugee Board (Board), rendered on March 5, 2009.

[8] The Board found the applicant inadmissible for serious criminality within the meaning of paragraph 36(1)(*a*) of the IRPA and that he was not covered by the exception under paragraph 36(3)(*e*) of that Act.

[9] Specifically, the member found that the applicant was not a Canadian citizen, that he was convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months was imposed and finally that the exception under paragraph 36(3)(*e*) of the IRPA was not applicable in this case since he was given an adult sentence.

III. Preliminary remarks

Application for Judicial Review of the Refugee Protection Division

[10] The applicant also appealed the Board's decision before the Immigration Appeal Division (IAD).

[11] On May 26, 2008, the ID dismissed the appeal for lack of jurisdiction in accordance with subsections 64(1) and 64(2) of the IRPA, as appears from the IAD decision, Exhibit "A" of the affidavit of Dominique Toillon.

[12] The IAD also found that the exception under paragraph 36(3)(*e*) of the IRPA did not apply to the applicant and the panel had not erred on this topic (IAD decision of May 26, 2009: Exhibit "A" of the affidavit of Dominique Toillon).

[13] On June 22, 2009, the applicant filed with the registry of this Court an Application for Leave and for Judicial Review (ALJR) of the IAD decision in docket IMM-3195-09.

[14] After the applicant appealed the ID decision before the IAD, the IAD found that it did not have jurisdiction to hear the appeal and upheld the ID decision regarding the inapplicability of the exception under paragraph 36(3)(*e*) of the IRPA. The applicant submitted an ALJR of this decision in docket IMM-3195-09. The authority request in this file has not yet been determined by the Court.

Criminal Convictions

[15] The applicant reiterated several times in his memorandum that he was innocent of the criminal charges against him. He claimed that he was simply in the wrong place at the wrong time and blamed his former counsel for having given him the bad advice of pleading guilty to the charges.

[16] First, the applicant's claims of innocence and the serious charges against his counsel and the serious accusations against his lawyer are not even supported by his own affidavit, which is also completely silent on these key points. This is true for several other allegations in his memorandum, in particular his version of events that led to his arrest and conviction (affidavit of Ernst Saint Jean of May 14, 2009, Applicant's Record (AR) at p. 32).

[17] As regards the defamatory allegations against his former counsel (AR at p. 59, para. 12), it should be noted that the applicant failed to provide any evidence that a complaint was allegedly filed against this counsel with the Barreau.

[18] In this case, the evidence on the criminal charges was presented before the proper court, evidence that this Court does not have before it. The applicant pleaded guilty to these charges and was convicted (Sentencing Order of August 29, 2009: AR at p. 32).

[19] There is no evidence that the applicant allegedly disputed the criminal conviction or even the sentence imposed by the Court of Quebec acting as a Youth Justice Court.

[20] He is now attempting to dispute indirectly that which he saw no need to dispute directly.

[21] Moreover, it is not the role of this Court to assess the merits of this previous decision. In this case, it concerns *res judicata*.

Error in the Application for Leave and for Judicial Review

[22] The ALJR underlying this stay motion erroneously indicated that the Board's decision was rendered by Louis Dubé, member, as appears on page 7 of the Applicant's Record.

[23] In this case, the impugned decision was rendered on March 5, 2009, by Rolland Ladouceur, as appears from the transcript of the hearing on page 7 of the Applicant's Record. Thus, the ALJR is amended to avoid any confusion.

III. Facts

[24] The applicant, Ernst Saint Jean, born on May 15, 1989, is a citizen of Haiti. He arrived in Canada, on February 26, 2003, as a permanent resident, sponsored by his father (transcript of the hearing of March 5, 2009, at p. 5, AR at p. 12).

[25] He is still a permanent resident and has never become a Canadian citizen (Confirmation of Permanent Residence, *in a bundle*: Exhibit "B" of the affidavit of Dominique Toillon).

[26] On August 29, 2007, Mr. Saint Jean was convicted of the following charges, committed in 2005 when he was 15 years old: one count of aggravated assault (268 Cr.C.), one count of assault with a weapon (267(*a*) Cr.C.), one count of assault causing bodily harm (267(*b*) Cr.C.) and one count of possession of a weapon for a dangerous purpose (88(2) Cr.C. (Sentencing Order, *in a bundle*: Exhibit "C" of the affidavit of Dominique Toillon)).

[27] Mr. Saint Jean was sentenced to five months, in addition to the 25 months that were credited to him for the preventive time served.

[28] Mr. Saint Jean was sentenced as an adult. On August 29, 2007, he was ordered to be placed in an adult correctional facility, a penitentiary (Sentencing Order of August 29, 2009; AR at p. 32).

[29] Mr. Saint Jean did not dispute the application for an adult sentence (transcript of the judgment of August 29, 2007; Exhibit "D" of the affidavit of Dominique Toillon).

[30] On March 5 2009, the Board found that Mr. Saint Jean was inadmissible on grounds of serious criminality under paragraph 36(1)(*a*) of the IRPA. The Board also found that the exception under paragraph 36(3)(*e*) of the IRPA did not apply to Mr. Saint Jean as he had received an adult sentence. The Board issued a removal order against Mr. Saint Jean.

[31] Following the Board's negative decision, Mr. Saint Jean filed a Pre-Removal Risk Assessment (PRRA). He also filed an application to appeal the Board's decision before the IAD.

[32] On March 20, 2008, Mr. Saint Jean filed this ALJR against the Board's decision.

[33] On May 4, 2009, a negative decision was rendered on the PRRA.

[34] On May 15, 2008, Mr. Saint Jean filed a stay application for the removal order to Haiti planned for May 9, 2009. The stay was attached to this application for judicial review.

[35] On May 18, 2008, the Court granted the stay in this case, finding that the removal order was not effective, given Mr. Saint Jean's appeal to the IAD the Board's decision and the absence of a decision on this application for appeal (Order of May 18, 2008: Exhibit "E" of the affidavit of Dominique Toillon).

[36] On May 19, 2008, Mr. Saint Jean filed an ALJR against the negative PRRA decision in docket IMM-2495-09.

[37] On May 26, 2008, the IAD dismissed Mr. Saint Jean's appeal for lack of jurisdiction, as requested by the Minister of Public Safety and Emergency Preparedness. The IAD also found that the exception provided under paragraph 36(3)(*e*) of the IRPA was not applicable to Mr. Saint Jean (IAD decision of May 26, 2009: Exhibit "A" of the affidavit of Dominique Toillon).

IV. Issue

[38] Is the Board's decision is correct in law?

V. Analysis

[39] This case raises only one question of law.

[40] Mr. Saint Jean is still a permanent resident. He never obtained his Canadian citizenship (Confirmation of Permanent Residence, *in a bundle*: Exhibit "B" of the affidavit of Dominique Toillon).

[41] The Court concurs with the respondent. There is no doubt that the sanctions imposed on Mr. Saint Jean for the offences committed in Canada constitute serious crimes within the meaning of subsection 36(1) of the IRPA:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être convicted au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

[42] For the single offence of aggravated assault (268 Cr.C.), the maximum term of imprisonment is of 14 years. Since Mr. Saint Jean was convicted of this offence, it is sufficient for him to be inadmissible on grounds of serious criminality.

[43] Similarly, the Court is of the view that Mr. Saint Jean's imprisonment was significantly greater than 6 months (see file regarding criminal activities; sentence—global sentence of 30 months following his sentence).

[44] In this case, in accordance with paragraphs 62(*b*) and 72(1)(*b*) of the YCJA, there is no doubt that the adult sentence was imposed on Mr. Saint Jean:

Imposition of adult sentence	**Assujettissement à la peine applicable aux Adultes**
62. An adult sentence shall be imposed on a young person who is found guilty of an indictable offence for which an adult is liable to imprisonment for a term of more than two years in the following cases:	**62.** La peine applicable aux adultes est imposée à l'adolescent convicted d'une infraction pour laquelle un adulte serait passible d'une peine d'emprisonnement de plus de deux ans lorsque :
(*a*) in the case of a presumptive offence, if the youth justice court makes an order under subsection 70(2) or paragraph 72(1)(*b*); or	*a*) dans le cas d'une infraction désignée, le tribunal rend l'ordonnance visée au paragraphe 70(2) ou à l'alinéa 72(1)*b*);
(*b*) in any other case, if the youth justice court makes an order under subsection 64(5) or paragraph 72(1)(*b*) in relation to an offence committed after the young	*b*) dans le cas d'une autre infraction commise par l'adolescent après qu'il a atteint l'âge de quatorze ans, le tribunal rend l'ordonnance visée au

person attained the age of fourteen years.

…

Test — adult sentences

72. (1) In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

(*a*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and

(*b*) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(*b*)(ii) and section 38 would not have sufficient length to hold the

paragraphe 64(5) ou à l'alinéa 72(1)*b*).

[...]

Order d'assujettissement ou de non assujettissement

72. (1) Pour décider de la demande entendue conformément à paragraph 71, le tribunal pour adolescents tient compte de la gravité de l'infraction et des circonstances de sa perpétration et de l'âge, de la maturité, de la personnalité, des antécédents et des condamnations antérieures de l'adolescent et de tout autre élément qu'il estime pertinent et :

a) dans le cas où il estime qu'une peine spécifique conforme aux principes et objectif énoncés au sous-alinéa 3(1)*b*)(ii) et à paragraph 38 est d'une durée suffisante pour tenir l'adolescent responsable de ses actes délictueux, il ordonne le non-assujettissement à la peine applicable aux adultes et l'imposition d'une peine spécifique;

b) dans le cas contraire, il ordonne l'imposition de la peine applicable aux adultes.

> young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.
>
> (Emphasis added.)

(Sentencing order; AR at p. 32: transcript of the hearing of August 29, 2007, at p. 24; Exhibit "D" of the affidavit of Dominique Toillon).

[45] This is why the offences alleged against Mr. Saint Jean could not be characterized as contraventions under the *Contraventions Act* or as an offence under the YCJA. The exception provided under paragraph 36(3)(*e*) of the IRPA does not apply to Mr. Saint Jean and he must be found inadmissible on grounds of serious criminality.

[46] In the matter of *Tessma v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1126, 240 F.T.R. 43, which involved the old *Young Offenders Act* (YOA), Justice Michael Kelen found that a youth who was initially subject to the YOA youth court and who was subsequently convicted under the *Criminal Code* was not covered by the exception under paragraph 36(3)(*e*) of the IRPA. The paragraphs of the reasons state:

> [13] There is no ambiguity or gap in IRPA with respect to a young offender who was initially subject to the jurisdiction of the YOA youth court, but is transferred by a youth court judge to ordinary court, and subsequently convicted of *Criminal Code* offences in ordinary court as if he were an adult.
>
> [14] Under subsection 16(7) of YOA, after the youth court judge has made an order transferring the proceedings to ordinary court, the proceedings under the YOA are discontinued, and the proceedings with respect to the criminal charges are taken before the ordinary court.

> [15] One of the reasons for transferring a young offender from youth court to adult court is to protect the public. The youth court shall take into account the seriousness of the alleged offences and the circumstances in which they were allegedly committed.
>
> [16] I am of the view that the proper interpretation of subsection 16(7) of the YOA is that when an order is made transferring charges from youth court to ordinary court, the applicant is not being tried for offences under the YOA, as that term is used in the exception contained in subsection 36(3)(*e*) of IRPA. The convictions against the applicant in this case are convictions for indictable offences under the Criminal Code in ordinary court, and are not related to offences under the YOA. For this reason the exception in IRPA is not applicable.
> ...
> [Emphasis added.]

[47] *Tessma* was rendered under the YOA, where the procedure was to refer the youth to an adult court. This referral procedure is no longer in place under the YCJA (the differences between the old and new law are explained in *Canada (Minister of Public Safety and Emergency Preparedness) v Toussaint*, 2007 CanLII 60413 (IRB)).

[48] For all the reasons mentioned above, the Board did not err in finding that Mr. Saint Jean could not benefit from the exception under paragraph 36(3)(*e*) of the IRPA.

[49] In this case, the Board stated the following facts: Mr. Saint Jean is not a Canadian citizen; he was given an adult sentence for committing offences under the *Criminal Code* with a maximum sentence of more than 10 years; and the exception under paragraph 36(3)(*e*) did not apply because he was given an adult sentence.

[50] The IRB did not make any error in finding that Mr. Saint Jean was inadmissible on grounds of serious criminality and in issuing a deportation order against him.

[51] Mr. Saint Jean did not raise any serious questions against the Board's decision.

[52] Mr. Saint Jean's arguments deal with several questions that are not relevant to determining whether there is an error in the Board's decision.

[53] In this respect, Mr. Saint Jean's argument on humanitarian and compassionate grounds, Mr. Saint Jean's *de facto* residence in Canada or the risk of returning in Haiti, is not relevant for determining whether Mr. Saint Jean must be found inadmissible.

[54] The role of the Immigration Division is not to decide the issue of Mr. Saint Jean's possible removal to Haiti. Rather, the Board's role is to determine whether Mr. Saint Jean must be found inadmissible on grounds of serious criminality within the meaning of paragraph 36(1)(*a*) of the IRPA. The prevailing situation in Mr. Saint Jean's country of nationality has no bearing on the decision that the Board must make.

[55] Indeed, the IRPA provides other mechanisms for assessing that issue, including an application for protection through a PRRA.

[56] Mr. Saint Jean filed a PRRA application. The application was considered and dismissed.

[57] Mr. Saint Jean filed an ALJR against this decision in docket IMM-2495-09. Indeed, the ALJR of the PRRA decision in docket IMM-2495-09 was rejected by the Court on September 21, 2009. It is in that context and not in this matter that Mr. Saint Jean may dispute the merits of the assessment of his risks of return.

[58] As regards the allegation that Mr. Saint Jean should have the right to appeal the Board's decision before the IAD, this allegation goes against the IAD decision denying the applicant's right of appeal. These arguments are not relevant in the application for judicial review of the Board's decision.

[59] With respect to the argument related to the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.) and Canada's commitments with respect to the rights of children, insofar as Mr. Saint Jean did not comment on the relevant provisions of the YCJA that provide imposing adult sentences on adolescents, his dispute is without merit.

[60] The YCJA also refers to the *United Nations Convention on the Rights of the Child* in its preamble.

[61] Mr. Saint Jean also criticized the Board of misinterpreting Parliament's intention at paragraph 36(3)(*e*) of the IRPA. As indicated in *Tessma*, below, it is not Parliament's intention to prohibit the inadmissibility of a person who has committed offences under the *Criminal Code*.

VI. Conclusion

[62] In light of the foregoing, the documents filed by Mr. Saint Jean in support of his application for judicial review do not raise any serious grounds that would warrant this Court's intervention in this case so as to set aside the Board's decision.

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

JUDGMENT

THE COURT ORDERS that

1. The application for judicial application is dismissed;

2. No serious question of general importance will be certified.

"Michel M.J. Shore"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1396-09
STYLE OF CAUSE:	ERNST SAINT JEAN v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 2, 2009
REASONS FOR JUDGMENT AND JUDGMENT BY:	JUSTICE SHORE
DATED:	January 7, 2010

APPEARANCES:

Stewart Istvanffy	FOR THE APPLICANT
Suzanne Trudel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

STEWART ISTVANFFY, counsel Montréal, Quebec	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT