Federal Court Cour fédérale

**Date: 20100428**

**Docket: IMM-2226-09**

**Citation: 2010 FC 452**

**Ottawa, Ontario, April 28, 2010**

**PRESENT: The Honourable Mr. Justice Pinard**

**BETWEEN:**

**Joseph Frantz NICOLAS alias**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C., 2001, c. 27 (the Act) for judicial review of a decision of an immigration officer, Martine Beaulac (the officer). Joseph Frantz Nicolas (the applicant) is challenging the officer's rejection of his pre-removal risk assessment (PRRA) application in a decision dated April 23, 2009.

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[2] The applicant is a citizen of Haiti. He was sponsored by his then wife and became a permanent resident of Canada in 1988.

[3] On April 16, 1998, the applicant was convicted of four offences relating to drug trafficking. He was sentenced to imprisonment for a term of 20 months.

[4] On September 4, 2007, the applicant was convicted of four offences relating to drug trafficking and of possession of a firearm. He was sentenced to imprisonment for a term of five years.

[5] A report concerning him was prepared under section 44 of the Act confirming that he was inadmissible on the ground of serious criminality, under paragraph 36(1)(*a*) of the Act.

[6] The applicant then made his PRRA application, which the officer rejected. He is seeking judicial review of that decision.

[7] It should be noted that the applicant has HIV and is receiving treatment for that disease.

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[8] The officer rejected the applicant's assertions in relation to three risk factors that the applicant identified in his PRRA application. They were the cruel treatment allegedly suffered in Haiti by criminals deported from this country, the risk to the applicant's life that would be created by the

inhumane conditions of detention and the fact that it is impossible to obtain medical care in Haitian prisons, and the risk that the applicant would suffer discrimination amounting to cruel and unusual treatment in Haiti.

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[9] The following provisions of the Act are relevant in this case:

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| **97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally | **97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : |
| (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or | *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; |
| (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés |

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

**112.** (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force…

(3) Refugee protection may not result from an application for protection if the person

…

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years

**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet …

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

…

*b*) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans …

**113.** Consideration of an application for protection shall be as follows:

…

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 …

**113.** Il est disposé de la demande comme il suit :

…

*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 …

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[10] This case raises the following four issues, on which counsel for the parties were heard at a full and complete hearing on December 16, 2009:

(1) Did the officer err by assigning more weight to the statement by the Canadian migration integrity officer in Port-au-Prince (the MIO) than to the other documents submitted in evidence?

(2) Did the officer err by disregarding the finding in *Lavira v. Attorney General of the United States*, 478 F.3d 158 (3rd Cir. 2007), that conditions of detention in Haiti could constitute torture?

(3) Did the officer give sufficient justification for her conclusion that the applicant's life would not be endangered by his conditions of detention?

(4) Did the officer err by concluding that the discrimination the applicant would suffer in Haiti did not constitute cruel and unusual treatment?

[11] With the exception of the third issue, they relate to the officer's assessment of the evidence and findings of fact. The applicable standard of review is therefore reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 53). The issue of the sufficiency of the officer's reasons involves procedural fairness, and so the applicable standard of review, in theory, is correctness. However, because there is no one form of reasons that is acceptable, and the function of reasons is primarily to ensure that the administrative decision is justified, transparent and intelligible, the standard for the sufficiency of the reasons is in fact more similar to reasonableness than to correctness.

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(1) Did the officer err by assigning more weight to the statement by the Canadian migratory integrity officer in Port-au-Prince (the MIO) than to the other documents submitted in evidence?

[12] The applicant submits that the officer erred by basing her decision on the statement by the MIO rather than on the evidence he submitted, some of which was more recent than the statement. In his submission, that statement is not reliable because it is vague, it was never subject to cross-examination and the MIO has not personally monitored release procedures. In addition, he alleges that the MIO is not reliable, because [TRANSLATION] "he was … for many years a law enforcement officer responsible for removals from Canada and personally handled the removal of certain criminals deported to Haiti". The applicant submits that there is a contradiction between the statement on which the officer relied and another statement by the same MIO regarding the number of Haitian citizens deported from Canada, and that the MIO never replied when counsel for the applicant [TRANSLATION] "personally tried to contact [him] … to clarify that information".

[13] The applicant quoted lengthy passages from the report by Michelle Karshan dated March 23, 2009 (the Karshan report), stating that criminals deported to Haiti, particularly those who have no family who can seek their release, may be imprisoned for lengthy periods or even indefinitely. In the applicant's submission, the officer should have preferred that report to the statement by the MIO, since that statement was not reliable.

[14] The respondents submit that it was not up to the officer to assess the evidence and determine what weight to assign to each piece of evidence submitted, relying on *Diallo v. The Minister of Citizenship and Immigration*, 2007 FC 1063. The respondents note that the officer discussed the

Karshan report. In their submission, the applicant's argument amounts to asking the Court to substitute its assessment of the evidence for the officer's, and the Court does not have that authority in a judicial review.

[15] Moreover, they submit that the documentary evidence introduced by the applicant suffers from the same problems as the problems the applicant ascribes to the MIO's statement: it too is vague and is not necessarily based on personal knowledge of the facts (since Ms. Karshan has not resided in Haiti since 2004, contrary to what the officer said). In addition, they submit that Alternative Chance, the organization that Ms. Karshan works for, is not an objective source. The respondents cite the decision of Justice Orville Frenette in *Placide v. The Minister of Citizenship and Immigration et al.*, 2009 FC 490 at paragraph 19, in which he describes the Karshan report as [TRANSLATION] "biased or non-objective opinion, in the nature of argument by counsel in a case", and reiterated that the officer could validly have preferred other documentary evidence to the report.

[16] As a final point, the respondents reject the applicant's argument concerning the inability to cross-examine the MIO and the bias of the MIO. They submit that rather than presenting arguments to the PRRA officer, when informed of the receipt and the content of the MIO's statement, the applicant opted to introduce the Karshan report in evidence. Since the applicant did not make this argument before the officer, he should not be able to do so now.

[17] I am essentially in agreement with the respondents: the applicant would like the Court to reassess the evidence and reach a different conclusion from the officer's. The officer studied the

Karshan report in detail, although she discussed it under the heading of the threat to the applicant's life if he were imprisoned rather than the risk of arbitrary imprisonment.

[18] Notwithstanding both parties' efforts to discredit the MIO's statement and the Karshan report, respectively, the officer's decision to rely on the former rather than the latter is justified, transparent and intelligible. The officer identified contradictions between various items in the documentary evidence, and since she had to choose among the various sources available to her, she preferred the statement by the Canadian officer in Haiti. This does not seem unreasonable to me, even though another choice may also have been justifiable.

(2) Did the officer err by disregarding the finding in *Lavira*, above, that conditions of detention in Haiti could constitute torture?

[19] The applicant submits that the officer erred by rejecting his argument that the detention of a criminal deported to Haiti may constitute torture. That argument was based on, *inter alia*, the judgment of the United States Court of Appeals for the Third Circuit in *Lavira*, above.

[20] The applicant argues that this judgment is applicable in this case because, as in Canada, the United States has incorporated the provisions of the *Convention Against Torture* in its national legislation. The applicant submits that his situation is similar to the situation of the appellant in *Lavira*: both were convicted of drug trafficking and are infected with HIV.

[21] The respondents contend that there is no similarity between *Lavira* and the applicant's case because the appellant in *Lavira* was associated with the Aristide regime and was at risk of being

targeted because of that political affiliation, which is not case for the applicant. The officer was not bound by that decision, but in any event she did not conclude that conditions of detention equivalent to those in *Lavira* could not amount to torture, she simply concluded that the applicant had not proved that possibility in his personal case.

[22] The decision in *Lavira* was based on the conclusion that the Haitian authorities would specifically target the applicant by subjecting him to inhumane conditions of detention, in which his illness would subject him to severe pain and suffering, even death (at page 170). The applicant is not arguing that he would be personally targeted by the Haitian authorities.

[23] In *Lavira*, the Court also left the door open to the possibility that even absent intent to inflict pain and suffering on a prisoner, wilful blindness on the part of the authorities could amount to intent, and so the treatment inflicted would amount to torture. However, that conclusion has been criticized by other circuit courts in the United States (see, for example, *Pierre v. Gonzales*, 502 F.3d 109 at page 118 (2nd Cir. 2007)), and reversed in *Pierre v. Attorney General of the United States*, 528 F.3d 180 at page 189 (3rd Cir. 2008).

[24] In any event, as the respondents point out, the officer could not have been bound by an American decision, which could have only persuasive value. On that point, I note that the Court in *Lavira* assigned considerable weight to the report of Ms. Karshan, whom it described at page 163 as "an expert on mistreatment in Haiti's prisons", and concluded that the applicant "would lose 30 pounds in a matter of weeks" and his life would be in danger. The officer did not assign much weight to the Karshan report, as she was free to do in assessing the evidence, and further concluded

that the applicant would probably be detained for only a short period. Her decision not to follow *Lavira* therefore does not seem to me to be unreasonable.

(3) Did the officer give sufficient justification for her conclusion that the applicant's life would not be endangered by his conditions of detention?

[25] The applicant submits that the officer did not give reasons for her conclusion that his life would not be in danger in Haiti because, while she reviewed the documentary evidence on the situation in that country, she failed to examine his personal situation. The applicant renews his attack on the statement by the MIO and reiterates his support for the conclusions in the Karshan report. In his submission, the officer was wrong to conclude that the Karshan report was contradicted by the documentary evidence, since while that evidence reported an improvement in conditions in Haiti, it nonetheless showed that serious problems persist. In addition, the officer allegedly did not explain *why* she preferred the documentary evidence, which relates to general conditions in Haiti, to the Karshan report, which was written specifically for the applicant's case.

[26] The respondents reply that the Karshan report is also based on observations of general conditions in Haiti. They reiterate that it was open to the officer to prefer the documentary evidence in the record and the MIO's statement to that report, which was, in the opinion of Justice Frenette in *Placide*, above, [TRANSLATION] "biased or non-objective opinion, in the nature of argument by counsel in a case".

[27] The applicant's argument is without merit. The officer took into account his personal circumstances, including the fact that he would be removed on the ground of criminality and the fact

of his illness, but she concluded, having regard to her assessment of general conditions in Haiti, that those circumstances are not such as would endanger his life. That is exactly the same approach as was taken in the Karshan report, which was also based on an analysis of general conditions in Haiti, but which interpreted them differently and concluded that in those circumstances there was a risk to the applicant's life.

[28] The officer identified inconsistencies between the Karshan report and other evidence, including the statement by the MIO, that she considered to be reliable. While she admittedly did not expressly state that this was why she did not assign much weight to the Karshan report, and her reasons might have been better organized, the inference that no weight is assigned to evidence that contradicts the evidence expressly stated to have been found to be reliable and probative seems to me to be inescapable.

(4) Did the officer err by concluding that the discrimination the applicant would suffer in Haiti did not constitute cruel and unusual treatment?

[29] The applicant submits that the officer's conclusion that discrimination against the applicant, in particular the association between HIV and voodoo, does not constitute cruel and unusual treatment is unreasonable. The applicant cites a study on HIV/AIDS in Haiti that reported that the voodoo belief system holds that a disease such as HIV is caused by a spell. He also notes that documents that he submitted in evidence report that only 9.2 percent of infected individuals receive retrovirals, and criminals are precluded from receiving them. Since the applicant might also be denied essential drugs on discriminatory grounds, he would be subjected to cruel and unusual treatment. In addition, he submits that the officer made an unreasonable decision when she concluded that the risk that the

applicant could not find a job was shared by the entire population of Haiti, when the applicant would be especially stigmatized because of his illness and criminal record. The applicant relies on passages in the documentary evidence, which indicate that the unemployment rate is extremely high in Haiti, that jobs cannot be found even by people who are in good health, and also that if people who are infected with HIV find a job they conceal their illness for fear of losing the job.

[30] The respondents note that under subparagraph 97(1)(*b*)(iv) of the Act, the officer did not have to consider the risk resulting from Haiti's inability to provide the applicant with medical care. However, as the officer noted, there are several organizations that work to assist prisoners and the sick in Haiti. Moreover, they submit that discrimination in employment is not [TRANSLATION] "a risk referred to in section 97 of the [Act] or a risk to [the applicant's] life".

[31] The applicant's arguments concerning the connection between HIV and voodoo and concerning the discrimination he would suffer in seeking employment are without merit. The applicant fails to explain how the fact that in the voodoo belief system AIDS is caused by a curse would be a threat to his life or would result in cruel and unusual treatment being inflicted on him. As the respondents point out, inability to find a job is not a risk factor to be taken into account in the analysis under section 97 of the Act. Here again, this is not a risk to life or a risk of cruel and unusual treatment.

[32] The argument relating to the alleged discrimination against criminals in access to treatment for HIV is more serious. First, while it is true that, in general, discrimination does not constitute cruel and unusual treatment, the discrimination alleged by the applicant results in a threat to his life.

Second, that threat is not direct and is rather the result of a general inability of the country to provide adequate health care, although it would affect the applicant more than an ordinary member of the public.

[33] In my opinion, because discrimination is not a ground to be considered for the purposes of section 97 of the Act, the question is what the ultimate reason for the risk to an applicant's life is. If, for example, it is threats made by armed groups, whether they are motivated by discriminatory grounds (as in the case of extremist racist groups) or not (as in the case of threats by drug traffickers), then an applicant against whom such threats are made is entitled to protection. If it is inadequate health care, then the Act precludes consideration of that risk. Whether the proportion of people infected with HIV in Haiti who have access to antiretroviral treatment is 9.2 percent or 30 percent, the figure given by Dr. Pierre Dongier (see the officer's decision at page 9), it seems unlikely that the applicant would have access to the treatment he needs, even if there is no discrimination against him, simply because of the inability of the Haitian government to provide medical care for its population.

[34] The applicant's argument must therefore be rejected.

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[35] Following the hearing in this case on December 16, 2009, while my decision was under reserve, the tragic earthquake of January 12, 2010, occurred in Haiti. The Court then informed counsel for the parties that it wished to reopen the hearing on April 20, 2010, at 9:30 in the morning,

once they had filed written submissions [TRANSLATION] "on the subject of the relevance and effect of that tragedy on the disposition of the application for judicial review in question".

[36] The parties filed their submissions on time. However, only counsel for the respondents appeared before the Court on April 20, 2010. The last-minute attempts by the clerk, the usher and counsel for the respondents to locate counsel for the applicant were unsuccessful. After waiting a half hour with no news from her, the Court decided to consider the question of the earthquake in Haiti and dispose of it based on the written submissions of counsel for the parties on that subject. Counsel for the respondents consented to that approach and reiterated that there was no question to be proposed for certification, as both he and counsel for the applicant had done at the end of the hearing on December 16, 2009.

[37] Accordingly, it appears from the applicant's written submissions that he is essentially reiterating the same risks of return as were rejected by the PRRA officer and arguing that the tragic earthquake that devastated Haiti on January 12, 2010, the extent of which has attracted the attention of the world, has merely heightened the risk to which he is subject.

[38] The respondents argue that because the earthquake occurred after the decision of the officer that is in issue, she could not have taken it into account in her decision, which, in an application for judicial review, may be considered only on the basis of the facts before her. I agree.

[39] It is settled law that judicial review of an administrative decision must be based solely on the evidence available to the decision-maker (*Isomi v. The Minister of Citizenship and Immigration*,

2006 FC 1394, at paragraph 6; *Gallardo v. The Minister of Citizenship and Immigration*, 2003 FCT 45, at paragraphs 7 and 8; *Asafov v. The Minister of Employment and Immigration*, [1994] F.C.J. No. 713 (T.D.) (QL)).

[40] The extent of a PRRA officer's authority to grant protection is described in sections 112 and 113 of the Act. The officer has a duty to receive all evidence that may influence his or her decision, up to the date on which the decision is made. The decision and jurisdiction of the PRRA officer are fixed in time, in this instance on April 23, 2009, and are based on the allegations and evidence before the officer on that date.

[41] The event of the earthquake in Haiti took place nearly nine months after the decision of the PRRA officer in issue, and accordingly it can have no impact on that decision.

[42] In conducting a judicial review of the PRRA decision, the Court itself also may not have regard to that later event. It is settled law that it is not the role of the Court in that situation to assess fresh evidence and substitute its decision for the decision of the PRRA officer.

[43] In *Isomi*, above, my colleague Justice Simon Noël stated:

> [10] I do not see how the factual situation described by the applicant or the argument submitted could call into question the case law of this Court. Under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, an application for judicial review of a decision is considered on the basis of the evidence submitted to the decision-maker. Any addition to this evidence would change the role of the judge hearing such cases. The judge would be able to make a determination by taking new evidence into consideration, which would effectively remove the judge from his or her role as a judge hearing an application for judicial review. Moreover, the applicant

> has an alternative at his disposition, namely section 165 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), which allows the filing of a new PRRA application and the use of "new" evidence in support of this application. Accordingly, I do not see how the Charter may be of any use, given the situation in this case.
>
> [Emphasis added.]

[44] In this case, therefore, I agree with counsel for the respondents, that it is in fact the applicant who has the option and obligation to make a subsequent application for protection under section 165 of the Regulations, for reconsideration of the alleged risks of returning, or an application on humanitarian and compassionate grounds. Although such applications do not stay the removal order, the Court notes that because of recent conditions in Haiti, all removals to that country have been temporarily deferred by the Canada Border Services Agency until further notice (see Exhibit "A" to the affidavit of Hélène Exantus sworn on March 17, 2010).

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[45] For all these reasons, intervention by the Court is not warranted and the application for judicial review is dismissed.

[46] No question will be certified.

**JUDGMENT**

The application for judicial review of the decision of the pre-removal risk assessment officer, Martine Beaulac, dated April 23, 2009, is dismissed.

"Yvon Pinard"
Judge

Certified true translation
Susan Deichert, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2226-09 |
| **STYLE OF CAUSE:** | Joseph Frantz NICOLAS alias v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:**<br>**REOPENING OF HEARING:** | December 16, 2009<br>April 20, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Pinard J. |
| **DATED:** | April 28, 2010 |

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