Federal Court  Cour fédérale

Date: 20091001

Docket: IMM-4712-09
IMM-4767-09
IMM-4766-09
IMM-5691-08

Citation: 2009 FC 989

Ottawa, Ontario, October 1, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMED SAID JAMA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND
THE MINISTER OF CITIZENSHIP AND IMMIGRATON

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] On a stay application, on balance in assessing risk, the protection of the Canadian public must be of paramount consideration. The violent criminal history of the Applicant has led both the Minister's delegate (twice) and the Immigration Division to have considered the Applicant to be a danger to the public. The integrity of the government (in all of its three branches under the

separation of powers) is at stake in regard to the confidence of the public in Canada's Immigration system. The Canadian public, composed of individual members, who, together, constitute Canadian society, needs to feel secure; yet, nevertheless, the Canadian public recognizes, through legislation, that the fragility of the human condition of one individual is also to be taken into account. Both are to be balanced in assessing risk. In this matter, the Respondents have fully considered both the Applicant and the Canadian public. The Respondents stand ready to disburse $50,000 for a charter flight to ensure that the specific final destination of the Applicant will have taken into account his personal risk situation; yet, nevertheless, the Respondents recognize their paramount responsibility for the security of the Canadian public.

[2] In deciding any immigration matter, the Court recognizes, acknowledges and understands that the objectives of the new *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), as set out by Parliament, in Section 3, represent the very premise in respect of the interpretation to be given to each and every subsequent section of the IRPA.

[3] For the Court in this matter, the relevant subsections of Section 3 are (2)(*g*) and (*h*) which specify:

(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and	*g*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et

claimants, who are security risks or serious criminals.	demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

[4] As pertaining to the security of Canadian society, the decision in (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539), interprets through the judiciary of Canada's highest Court, the essence of Canada's legislative objectives in its IRPA.

II. Introduction

[5] This decision is in response to an application for an interim order temporarily prohibiting the Minister of Public Safety and Emergency Preparedness from removing the Applicant from Canada. The Court is fully in accord with the position of the Respondents.

III. Background

[6] The Applicant's criminal record, in summary, specifies:

November 15, 1995 – Burnaby, B.C., convicted:

- **Driving While Ability Impaired** – Section 253(*a*) of the *Criminal Code*. He was sentenced to $300 fine, in default of 3 days imprisonment, and prohibition of driving for 1 year;

May 18, 2005 – Winnipeg, MB, convicted:

- **Possession of a Weapon** – Section 88 of the *Criminal Code*. He was sentenced to 9 months and a mandatory prohibition order under section 109 of the *Criminal Code*.

- **Public Mischief** Section 140(1)(*b*) of the *Criminal Code*. He was sentenced to 8 months concurrent.
- **Robbery** – Section 344(*b*) of the *Criminal Code*. He was sentenced to 6 months concurrent and a mandatory prohibition order under section 109 of the *Criminal Code* concurrent.
- **Failure to Comply with Recognizance (x2)** – Section 145(3) of the *Criminal Code*. He was sentenced to 3 months on each count concurrent and concurrent to the other convictions.

August 25, 2005 – Winnipeg, MB, convicted:

- **Failure to Comply with Recognizance** – Section 145(3) of the *Criminal Code*. He was sentenced to 1 day (and 15 days pre-sentence custody).

December 4, 2006 – Winnipeg, MB, convicted:

- **Robbery** – Section 344(*b*) of the *Criminal Code*. He was sentenced to 7 years (with credit for the equivalent of 27 months pre-sentence custody) and mandatory prohibition order under section 109 of the *Criminal Code* on each charge concurrent.
- **Aggravated Assault** – Section 268(1) of the *Criminal Code*. He was sentenced to 7 years (with credit for the equivalent of 27 months pre-sentence custody) and mandatory prohibition order under section 109 of the *Criminal Code* on each charge concurrent.
- **Assault with a Weapon** – Section 267(*a*) of the *Criminal Code*. He was sentenced to 7 years (with credit for the equivalent of 27 months pre-sentence custody) and

mandatory prohibition order under section 109 of the *Criminal Code* on each charge concurrent.

April 16, 2007 – Winnipeg, MB, convicted:

- **Failure to Comply with Recognizance** – Section 145(3) of the *Criminal Code*. He was sentenced to 30 days of time served on each charge concurrent.
- **Failure to Attend Court** – Section 145(2)(*a*) of the *Criminal Code*. He was sentenced to 30 days of time served on each charge concurrent.

(Exhibit "D" to Affidavit of Barry Pike, affirmed September 25, 2009, Respondents' Motion Record at pp. 23-25).

[7] The December 4, 2006, convictions resulted from a home invasion. When one of the victims attempted to flee from the apartment, the Applicant pursued him and stabbed him in the face. The victim suffered a two centimetre gash to his left cheek that penetrated to the inside of his mouth. The wound required oral surgery and ongoing plastic surgery to reduce scarring. The sentencing judge described the circumstances as "a vicious and wanton attack" (Exhibits "B", "C", and "D" to Affidavit of Barry Pike, affirmed September 25, 2009, Respondents' Motion Record at pp. 8-10, 16-19, 25-27).

IV. Analysis

[8] The Applicant has not shown (a) a serious issue to be determined; (b) irreparable harm if deported; (c) nor a balance of convenience in his favour.

[9] The Applicant would have had to establish all three factors in order to obtain the relief sought: a serious issue or arguable case, irreparable harm, and a balance of convenience in his favour. The test is conjunctive and a failure to establish any one of the three elements will result in a dismissal of the application (*RJR- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.)).

A. Serious Issue

[10] The first issue is whether or not the Applicant's matters pending before the Federal Court raises a serious issue or arguable case. The Applicant technically has four matters pending before this Court and he has filed this motion for a stay of his removal under all four Court file numbers. The Applicant's four matters and the decision to which they relate are, as follows:

- **IMM-5691-08**: Concerns the Minister's Delegate's December 8, 2008 finding that the Applicant constitutes a danger to the public in Canada under paragraph 115(2)(*a*) of the IRPA. On July 29, 2009, Justice James Russell issued Reasons for Judgment, in which he found no reviewable errors (2009 FC 781). Justice Russell's decision on certification of a question of general importance, and the Judgment remain outstanding;
- **IMM-4712-09**: Purportedly concern the decision of Mr. Barry Pike, dated September 21, 2009, not to defer the Applicant's removal. The September 21, 2009 letter is actually nothing more than notification of travel arrangements. The Applicant has not made any submissions with respect to this matter;

- **IMM-4766-09**: Concerns the Minister's Delegate's September 24, 2009 finding, upon reconsideration, that the Applicant constitutes a danger to the public in Canada under paragraph 115(2)(*a*) of the IRPA; and
- **IMM-4767-09**: Concerns the decision of Mr. Pike, dated September 24, 2009 not to defer the Applicant's removal.

i) **IMM-5691-08 – The Danger Opinion**

[11] The Applicant's submission with respect to this matter effectively assumes that there is a serious issue. Yet, after a full hearing of the Applicant's application for judicial review of the Minister's Delegate's decision, Justice Russell concluded: "I can find no reviewable errors on the points raised by the Applicant and conclude that this application should be dismissed." This matter before this Court has already been finally determined. Only issuance of the formal judgment remains outstanding (*Jama v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 781 at para. 93).

[12] Moreover, the Minister's Delegate's September 24, 2009 reconsideration decision supersedes her December 8, 2008 decision. Thus, even if a question is certified by Justice Russell in IMM-5691-08, any further review of the December 8, 2008 decision by way of appeal to the Federal Court of Appeal is now moot. Consequently, the Applicant's underlying application in IMM-5691-08 does not raise a serious issue.

ii) **IMM-4767-09 – No further Deferral of Removal**

[13] In this matter, the decision being challenged is the implementation of the removal order. In these circumstances, granting the stay effectively grants the relief sought in the underlying judicial review application. The examination of serious issue is the only consideration that the refusal to defer will receive before the Court grants the remedy which is the object of the application for judicial review. Consequently, the Court must engage in an extensive review of the merits of the underlying application. The test of serious issue becomes the likelihood of success on the underlying application (*Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, 2001 FCT 148 (T.D.) at paras. 7-11; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 387 N.R. 278 at paras. 66-67).

[14] In this case considering the law and the facts, Officer Pike's decision was entirely reasonable. The underlying application does not meet the likelihood of success threshold.

[15] "It is trite law that an enforcement officer's discretion to defer removal is limited". Recently, in *Baron*, above, at paragraphs 49 to 51, the Federal Court of Appeal reviewed the law in regard to the principles governing the discretion of removals officers. The Court of Appeal stressed that there were limited circumstances in which a deferral would be appropriate. In *Ferraro v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 815, 168 A.C.W.S. (3d) 828 at paragraph 32, this Court noted that the exercise of this discretion should not be second-guessed on judicial review unless the enforcement officer overlooked an important factor, or seriously

misapprehended the circumstances of a person to be removed. This description cannot be applied to Officer Pike's September 24th decision.

[16] The Applicant asked that the removal order be deferred pending the determination of his request for reconsideration of his danger opinion and pending the decision on certification in IMM-5691-08. Officer Pike waited to make his decision until after a decision was made by Case Management Branch on the Applicant's request for reconsideration, so the first basis deferral disappeared.

[17] The only remaining basis was the Applicant's September 23, 2009 request for delay, which stated:

> …I further request removal arrangements be delayed until final determination in the outstanding Federal Court proceedings challenging the danger opinion against Mr. Jama. I draw your attention to these excerpts from the transcripts of detention reviews for Mr. Jama.

(Motion Record of the Applicant at p. 152).

[18] In response, Officer Pike correctly noted that the Applicant's judicial review application has been dismissed despite the outstanding matter of whether a question will be certified. He also correctly noted that the existence of the outstanding judgment does not prevent the removal from proceeding. In these circumstances, Officer Pike concluded that there is no reason for any further delay. Officer Pike's decision was entirely reasonable (Exhibit "E" to Affidavit of Barry Pike, affirmed September 25, 2009, Respondents' Motion Record at pp. 44-45).

[19] The fact that the existence of the Applicant's application for judicial review of the danger opinion did not give rise to a statutory or regulatory stay at any point in the proceedings is particularly relevant. Absent a statutory stay, the existence of the application in IMM-5691-08 is not, in itself, a ground for delaying removal. To treat it as such "would be to create a statutory stay which Parliament declined to enact" (*Wang*, above, at paras. 45 and 52).

[20] The Applicant's submissions that the statements made by the Minister of Public Safety and Emergency Preparedness to the Immigration Division amount to an undertaking, these submissions have no merit. First, the Applicant's September 23, 2009, request made no mention of the purported undertaking. Officer Pike's decision cannot now be impugned on this basis.

[21] The evidence confirms that the Canada Border Services Agency (CBSA) chose to wait for the Federal Court decision before taking action on the Applicant's removal. The CBSA may have also initially chosen to wait for the decision on certification, although, even this is unclear. In any event, given the length of time since the Federal Court's decision was issued, the increasing length of the Applicant's detention, and the Applicant's reliance on the length of his detention as a factor favouring his release, there was no barrier to proceeding with removal at this time. The Immigration Division was advised of the CBSA's decision in this regard at the September 17, 2009 detention review (Affidavit of Maria Dejaeger, affirmed September 28, 2009, Respondents' Motion Record at pp. 46-50, 54, 58; Motion Record of the Applicant at pp. 66,-68-69).

[22] In these circumstances, Officer Pike's decision was entirely reasonable. The matter having been considered in its entirety, the Applicant's underlying application in this matter has no likelihood of success and, consequently, does not raise a serious issue.

iii) **IMM-4766-09 - Danger Opinion Reconsideration**

[23] The Applicant's last matter before this Court is his application for leave and for judicial review of the Minister's Delegate's September 24, 2009, finding, upon reconsideration, that the Applicant constitutes a danger to the public in Canada under paragraph 115(2)(*a*) of the IRPA. The Applicant submits two issues with respect to this decision, neither of which amount to a serious issue.

[24] The Applicant's first submission is that the decision of the Minister's Delegate was made without regard to material before her. Specifically, the Applicant suggests that the Minister's Delegate failed to consider an e-mail sent to Mr. Matas, which provides purported details of the reported death of "Hussien" (sic) Jiliow.

[25] The Applicant's suggestion is unsustainable on the face of the Minister's Delegate's reasons for decision. The Minister's Delegate explicitly refers to the e-mail in question in two places in her reasons. First, in summarizing the submissions made on behalf of he Applicant, the Minister's Delegate reproduces the entire text of the e-mail in her decision. Then, in analyzing the Applicant's risk on return, the Minister's Delegate considers the weight to attach to this new information. Ultimately, she concludes that it is insufficient to meet the standard of proof, which conclusion is

reasonable (Exhibit "D" to Affidavit of Barry Pike, affirmed September 25, 2009, Respondents' Motion Record at pp. 34, 40).

[26] The Applicant's other submission is that the Minister's Delegate should not have relied on the indication from the Minister of Public Safety and Emergency Preparedness that the removal arrangements being made for the Applicant are by direct charter flight, which will not transit through Mogadishu. This submission has no merit. The Minister of Public Safety and Emergency Preparedness has acknowledged that Mr. Abokor Jama's removal did not proceed as intended. The removal arrangements in Mr. Abokor Jama's case included a transit through Mogadishu, which proved problematic. Different arrangements – a direct charter flight (at a $50,000 cost to the Canadian government) – are being used in this case to avoid any possibility of the same issues arising in the present case. It was reasonable for the Minister's Delegate to accord weight to this information (Exhibit "D" to Affidavit of Barry Pike, affirmed September 25, 2009, Respondents' Motion Record at pp. 40-41; Exhibit "B" to Affidavit of Maria Dejaeger, affirmed September 28, 2009, Respondents' Motion Record at p. 56; Motion Record of the Applicant at pp. 143, 149, 150).

[27] For all of these reasons, none of the Applicant's underlying applications raise a serious issue. This motion should be dismissed on this basis alone, given that the test is conjunctive.

B. Irreparable Harm

[28] The onus is on the Applicant to bring forth evidence of irreparable harm. The risk of harm alleged by the Applicant has been considered by the Minister's Delegate. This is not a situation in which there is any un-assessed risk. All of the evidence before this Court has been considered.

[29] The information before this Court with respect to Mr. Hussein Jilaow has not been provided by way of sworn or affirmed evidence. Significant credibility concerns exist with respect to the validity of this information.

[30] The Applicant has failed to demonstrate that he will suffer irreparable harm if removed.

C. Balance of Convenience

[31] Finally, the Applicant has not met the third aspect of the tri-partite test. The balance of convenience favours the Minister of Public Safety and Emergency Preparedness and the public.

[32] The Federal Court of Appeal has recently held that even in a case where the applicant has no criminal record, is not a security concern, and is financially established in and socially integrated into Canada, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove as soon as reasonably practicable. This is not a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's

immigration system (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) 547 (F.C.A.) at para. 22).

[33] In this case, the Applicant is neither financially nor socially integrated into Canada. Rather, he is integrated into the prison system as a result of his lengthy and violent criminal history. Both the Minister's Delegate (twice), and the Immigration Division, in detaining the Applicant, have considered him to be a danger to the public. Despite the latter finding, delay of the Applicant's removal may result in his release from detention – indeed it has been the Applicant's submission that an increasingly lengthy delay is a factor favouring release.

[34] Protection of the Canadian public must be a paramount consideration.

[35] In all of these circumstances, the balance of convenience favours the Ministers.

V. Conclusion

[36] For all of the above reasons, the Applicant's application for a stay of execution of the removal order is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for a stay of execution of the removal order be dismissed.

"Michel M.J. Shore"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4712-09 IMM-5691-08 IMM-4767-09 IMM-4766-09
STYLE OF CAUSE:	MOHAMED SAID JAMA v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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