Federal Court  Cour fédérale

Date: 20101202

Docket: IMM-1980-10

[Unrevised certified translation] **Citation: 2010 FC 1216**

Ottawa, Ontario, December 2, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

NELSON WILKIN BATISTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of an exclusion order issued against the applicant on March 25, 2010.

[2] This case was heard at the same time as Docket No. IMM-1979-10, which involves the person with whom the applicant arrived in Canada. Given that the facts in each case are practically identical, the cases were argued jointly; however, a separate judgment will be rendered for each.

Background

[3] The applicant, aged 30, is a citizen of the Dominican Republic. He arrived in Canada on March 25, 2010, as a stowaway aboard a Canadian military vessel that landed at the port of Québec after having been deployed as part of the Canadian Forces humanitarian mission in Haiti to provide assistance in the aftermath of the earthquake on January 12, 2010. Upon his arrival he had no identity card or authorization to enter Canada. The applicant stated that he wanted to leave his country, but that he had no specific destination in mind and had embarked on the vessel without knowing its destination.

[4] The applicant and his friend were discovered by the ship's crew while they were still at sea. The applicant arrived in Canada on March 25, 2010. He was immediately examined by an officer of the Canada Border Services Agency (the CBSA officer) on board the ship. The services of an interpreter were used because the applicant speaks only Spanish.

[5] After the examination by the CBSA officer, the applicant was placed in detention in order for his identity to be established. He was then advised by an immigration officer of his right to legal representation. Shortly thereafter, the applicant expressed the desire to speak with legal counsel and consult a doctor. He was taken to hospital and, after his medical visit, was able to meet with a lawyer.

[6] The CBSA officer who examined the applicant upon his arrival stated that the applicant said that he did not fear being returned to his country of origin and that he had come to Canada in order

to provide for his family, something he had not been able to do in the Dominican Republic. In addition, the applicant allegedly did not claim refugee protection or mention that he would face any danger if he were to return to the Dominican Republic. Moreover, at no time during the day or evening of March 25, 2010, did the applicant claim refugee protection. He also declined to be identified by means of the Bertillon System.

[7] Pursuant to subsection 44(1) of the IRPA, an inadmissibility report was prepared by an immigration officer on the ground that since the applicant had arrived in Canada without a passport or visa, he was in violation of paragraphs 20(1)(*a*) and (*b*) of the IRPA and of section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). The officer accordingly determined that the applicant was a person described in section 41 of the IRPA and that he was inadmissible on the ground that he had failed to comply with these provisions of the Act. In response to this report, the Minister's representative issued an exclusion order against the applicant on March 25, 2010. The applicant was informed of this that same day at about 11:15 p.m.

Issue and positions of the parties

[8] The applicant complains that the Minister issued the exclusion order hastily and without having given him the opportunity to explain the real reasons why he came to Canada, and without having informed him of the consequences of such an order. He emphasized the circumstances of his examination by the CBSA officer. Among other things, he claims that he was exhausted and under stress, and that he did not understand what was happening. He also argues that, in spite of the services of the interpreter, the was a communication problem between him and the CBSA officer.

However, at the hearing, counsel for the applicant withdrew that last claim but added a complaint that the immigration officer had failed to inform the applicant that an exclusion order could be issued against him and of the consequences of such an order. The applicant also complains that he was unable to obtain the help of a lawyer who could have kept him properly informed prior to the issuing of the exclusion order.

[9] The respondent, for his part, submits that the examination of the applicant was carried out in accordance with accepted practices. He further submits that the examination of the applicant by the CBSA officer was of a routine nature, that the applicant was not detained during the course of it and that the right to retain and instruct counsel protected under paragraph 10(*b*) of the *Canadian Charter of Rights and Freedoms* (the Charter) does not extend to that kind of procedure. He further submits that after being placed in detention, the applicant was given that right.

Analysis

Statutory framework

[10] The applicable sections of the IRPA read as follows:

20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	**20.** (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :
(*a*) to become a permanent	*a*) pour devenir un résident permanent, qu'il détient les

resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and

(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.

visa ou autres documents règlementaires et vient s'y établir en permanence;

b) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

41. A person is inadmissible for failing to comply with this Act

(*a*) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and

(*b*) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Referral or removal order
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Suivi
(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident

Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.
99. (1) A claim for refugee protection may be made in or outside Canada.	**99.** (1) La demande d'asile peut être faite à l'étranger ou au Canada.
. . .	[…]
(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.	(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

The relevant sections of the Regulations read as follows:

6. A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.	**6.** L'étranger ne peut entrer au Canada pour s'y établir en permanence que s'il a préalablement obtenu un visa de résident permanent.
223. There are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.	**223.** Les mesures de renvoi sont de trois types : interdiction de séjour, exclusion, expulsion.

228. (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be (…) (c) if the foreign national is inadmissible under section 41 of the Act on grounds of (…) (iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order (…)	**228.** (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause : (…) c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à : (…) (iii) l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa et autres documents réglementaires, l'exclusion (…)

[11] For the following reasons, I am of the view that the Minister's representative did not commit an error that would result in the exclusion order issued against the applicant being set aside. This order is consistent with the applicable statutory parameters. I will, however, examine the specific arguments submitted by the applicant.

The CBSA officer's conduct

The applicant alleges that during his examination he did not understand what was happening and that the officer who examined him should have informed him of the possibility that an exclusion order could be issued and of the consequences of such an order. Counsel for the applicant argued

that the fact that the applicant refused to be identified by means of the Bertillon System and refused to sign documents demonstrates that he did not understand the process.

[12] With respect, I do not share the applicant's view. First of all, it should be noted that the applicant never indicated to the CBSA officer that he did not understand the questions he was being asked, or that he did not understand why he was being examined, or even that he was indisposed. Moreover, the notes taken by the CBSA officer clearly indicate that the questions that were asked and the applicant's answers to them do not reveal any misunderstanding on the part of the applicant. The questions noted by the CBSA officer were simple and the answers given by the applicant were clear and directly linked to the questions posed. The CBSA officer's notes do not reveal any ambiguity.

[13] In addition, this was a routine examination to identify the reasons why the applicant sought to enter Canada and to determine whether he met the requirements for admission. It is important to remember that the applicant entered Canada as a stowaway and had no identity documents in his possession. The examination was of an administrative nature and the CBSA officer was under no legal obligation to inform the applicant of the possibility that an exclusion order could be issued against him or of the consequences of such an order.

The right to retain counsel

[14] The right to retain and instruct counsel is protected under paragraph 10(*b*) of the Charter when a person is under "arrest" or in "detention".

[15] In *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 (available on CanLII), the Supreme Court held that a person seeking to enter Canada and who is subject to an examination at the port of entry has not been "detained" within the meaning of paragraph 10(*b*) of the Charter because the examination is a routine part of the general screening process for persons seeking to enter Canada and that the element of state compulsion is not sufficient to constitute a "detention" in the constitutional sense (see also *Chen v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 910, [2006] F.C.J. No 1163). Moreover, at the hearing, counsel for the applicant admitted that when the applicant was being examined by the CBSA officer, he was not in "detention" within the meaning of paragraph 10(*b*) of the Charter and did not benefit from the right to retain and instruct counsel at that time.

[16] Therefore, the applicant did not have the right to retain and instruct counsel during his examination by the CBSA officer.

[17] The applicant was later placed in detention. He was then informed of his right to retain and instruct counsel and was able to avail himself of the services of legal counsel. The applicant argues that at that point his right to counsel had become moot because the exclusion order had already been issued or was in the process of being issued. Counsel for the applicant insisted on the fact that the applicant was not asked any questions and that no other steps were taken after he met with counsel. In fact, the decision to issue the exclusion order had already been made. Counsel for the applicant

submitted that, had her client been informed of the impending exclusion order and its consequences, he would have claimed refugee protection.

[18] In this case, the exclusion order was issued as a result of information given by the applicant during his examination and during the course of which he confirmed that he did not fear returning to his country and that he sought to enter Canada in order to provide for his family. However, this information could not have served as the basis for a refugee claim and therefore the exclusion order was warranted and was consistent with the applicable statutory framework. Under the circumstances, there was no need to begin an investigation or to re-examine the applicant.

[19] The applicant is claiming the right to consult with counsel with regard to the consequences of an exclusion order before the issuing of this exclusion order. There is no legal basis for this claim in either the Charter or the IRPA.

[20] Moreover, the applicant was informed of his right to retain and instruct counsel as soon as that right became available to him, namely, at the time he was placed in detention. From the evidence it is not possible to confirm with any certainty whether the exclusion order was issued before or after the applicant had retained counsel. However, what the evidence does show is that the applicant was informed that an exclusion order had been issued against him on March 25, 2010, at about 11:15 p.m. Therefore, it is clear that the exclusion order had not yet been communicated to the applicant at the time he met with counsel. Moreover, the issuing of the order should have come as no surprise. The evidence is silent as to the substance of the conversation between the applicant

and his counsel and as to the information or advice his counsel provided to him. Nor does it indicate whether his counsel spoke with the immigration officers after meeting with the applicant to inquire about what would happen to him or to otherwise intervene on his behalf.

[21] Thus, the evidence shows that the applicant was able to retain and instruct counsel in conformity with the Charter, and that he was able to do so before the exclusion order was communicated to him. Therefore, I fail to see the basis on which he can complain of not having been informed of the possibility that an exclusion order could be issued against him or of the consequences of such an order since, at that point, he had retained counsel.

[22] Therefore, the applicant's rights were not violated and the application for judicial review is without merit. The parties did not propose any question for certification and none will be certified.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Marie-Josée Bédard"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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