Federal Court  Cour fédérale

Date: 20110314

Docket: IMM-3295-10

Citation: 2011 FC 302

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 14, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DIKILA M'BOSSO

Applicant

and

THE MINISTER OF IMMIGRATION AND CITIZENSHIP

Respondent

REASONS FOR ORDER AND ORDER

I. Preliminary

[1] When it comes to inadmissibility, one ground is enough. Inadmissibility on grounds of organized criminality pursuant to paragraph 37(1)(*a*) of the *Immigration and Refugee Protection*

Act, S.C. 2001, c. 27 (IRPA), is evidence of Parliament's intent expressed in legislation. Therefore, the Court may dismiss the application for judicial review on this ground alone.

[2] The principle of inadmissibility on grounds of organized criminality does not require the existence of criminal charges or a conviction (*Castelly v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 788, [2009] 2 F.C.R. 327 at paras. 25 and 26 (*Castelly*)).

[3] A finding of inadmissibility under section 37 of the IRPA does not require determining whether criminal convictions and liability to adult sentences give rise to the application of the exception stated in paragraph 36(3)(*e*) of the IRPA.

[4] According to the legislation, the tests for a finding of inadmissibility on grounds of organized criminality are clear: a) an organization referred to in paragraph 37(1)(*a*); b) the person's membership in that organization. In that regard, the legislative considerations to be interpreted are clear and precise, with no hesitation or confusion.

[5] These elements are sufficient in themselves to dismiss the applicant's application for judicial review.

[6] However, to continue the analysis, the chronological maturity of a young person in itself (as an additional factor to be taken into account) would require a thorough consideration of age only in situations where inadmissibility has not yet been determined.

[7] In these other contexts where inadmissibility has not been determined, there are sometimes situations in which the penalties applicable to adults must nevertheless be applied to a young person who has committed crimes. The Supreme Court of Canada specified this in the introductory paragraphs of its reasons in *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3:

> [5] The question is not whether young people who commit more serious crimes can attract more serious penalties. They can. In some cases, it may even be that they should receive the same sentence as an adult. What is before us, however, is whether young people who commit presumptive offences should *automatically* be presumed to attract an adult sentence, or whether, as previously, they continue to be subject to the youth justice sentencing provisions unless the Crown can demonstrate that the combination of the circumstances of the crime and of the offender warrant the imposition of an adult sentence. [Emphasis added.]

[8] In *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, the Supreme Court also referred to the balance that must be struck between recognizing a young person's vulnerability and reduced degree of responsibility and protecting society from crime:

> Section 3(1) attempts to balance the need to make the young offenders responsible for their crimes while recognizing their vulnerability and special needs. It seeks to chart a course that avoids both the harshness of a pure criminal law approach applied to minors and the paternalistic welfare approach that was emphasized in the old *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. Society must be protected from the violent and criminal acts committed by the young just as much as from those committed by adults. The references to responsibility contained in s. 3(1)(*a*) and to the protection of society in paras. (*b*), (*d*) and (*f*) suggest that a traditional criminal law approach should be taken into account in the sentencing of young offenders. Yet we must approach dispositions imposed on young offenders differently because the needs and requirements of the young are distinct from those of adults.

[9] The objectives of the former *Young Offenders Act*, R.S.C. 1985, c. Y-1 (YOA) were set out at section 3 of that Act. Paragraphs 3(*a*) and 3(*b*) stated the importance of two key principles, namely, that young people must not be subject to the same rules as adults with regard to their degree of responsibility and that, in exchange, society must be afforded protection from illegal behaviour. Section 16 of the YOA also stated that where a young person after attaining the age of 14 years

committed an offence, a youth court could order that the file be proceeded against in ordinary court, that is, adult court. Before transferring the young person to adult court, the youth court had to consider a series of criteria set out in subsection 16(2) of the YOA, including the seriousness of the offence and the circumstances in which it was committed, the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency, and the availability of treatment or correctional resources (*R. v. M. (S.H.)*, [1989] 2 S.C.R. 446 at para. 34).

[10] Thus, under the YOA, where the protection of society so required, a youth court could order a young person to be transferred to the competent adult court to hear the case. This transfer involved discontinuing the proceedings taken against the young person under the YOA (subsection 16(7)). It was then up to the adult court to determine guilt and, where applicable, the penalty to be imposed on the young person.

[11] Paragraph 27(1)(*d*) of the old *Immigration Act*, R.S.C. 1985, c. I-2, specified that a permanent resident who had been convicted of an offence under any Act of Parliament could be declared inadmissible by the Immigration Division (ID). Although the *Immigration Act* did not contain any provision equivalent to paragraph 36(3)(*e*), now found in the IRPA, Justice Michael Kelen indicated, in *Tessma v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1126, 240 F.T.R. 43, that only a conviction in adult court was interpreted as an offence within the meaning of the *Immigration Act*:

> [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. I note that this interpretation is consistent with the rationale of Muldoon J. in *De Freitas* v. *Canada (Minister of Citizenship and Immigration)* [1998] F.C.J. No. 1611 at paragraph 2 where he referred to a situation under the old *Immigration Act* and said:
>
> > " ... However, a youth convicted in adult court does have a conviction within the meaning of the Immigration Act."
>
> While the old *Immigration Act* did not have a statutory exception similar to subsection 36(3)(e) of the new *Act*, it was administered so that a contravention under the legislation governing young offenders was not considered a criminal conviction for the purposes of the *Immigration Act*.

[12] The *Immigration Act* was replaced by the IRPA, which came into force on June 28, 2002. On the date of its coming into force, paragraph 36(3)(*e*) of the IRPA read as follows:

36. (3) The following provisions govern subsections (1) and (2) :	**36.** (3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
…	[…]
(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contravention Act* or an offence under the *Young Offenders Act*.	*e*) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ni sur une infraction à la *Loi sur les jeunes contrevenants*.

[13] Approximately ten months after the IRPA came into force, the *Young Offenders Act* was repealed and replaced, on April 1, 2003, with the *Youth Criminal Justice Act*, R.S.C. 2002, c. 1 (YCJA). Section 16 of that Act specifies that the youth justice court has jurisdiction to determine the guilt or innocence of a young person under 18 years of age in respect of an offence committed by

that person. Thus, the youth justice court, where applicable, is empowered to convict a young person. The file is no longer transferred to adult court as was the case under the YOA.

[14] However, the YCJA now includes the concepts of “youth sentence” (“peine spécifique”) and “adult sentence” (“peine applicable aux adultes”). In accordance with the guiding principle of the YOA, the YCJA favours youth sentences for young people. Section 72 of the YCJA states that it is only when a youth sentence would not be of sufficient length to hold the young person accountable for his or her offending behaviour that the youth justice court will order that an adult sentence be imposed. The court must still today consider the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant.

[15] Only an adult sentence imposed by a youth justice court under the YCJA or a conviction and sentence imposed by an adult court at the time of the YOA will have consequences in terms of immigration.

[16] Following a finding of guilt, the YCJA states that an adult sentence may be imposed on a young person. In fact, an adult sentence may be imposed when the sentence under the YCJA would not be of sufficient length to “hold the young person accountable for his or her offending behaviour”:

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	**62.** La peine applicable aux adultes est imposée à l’adolescent déclaré coupable d’une infraction pour laquelle un adulte serait passible d’une

for a term of more than two years in the following cases:

(*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

(*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 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

peine d'emprisonnement de plus de deux ans lorsque :

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

[...]

Ordonnance d'assujettissement ou de non-assujettissement

72. (1) Pour décider de la demande entendue conformément à l'article 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 l'article 38 est d'une durée suffisante

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	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*) 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 young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.	*b*) dans le cas contraire, il ordonne l'imposition de la peine applicable aux adultes.

[17] It should also be noted that when an adult sentence is imposed on a young person under the YCJA, his or her record is dealt with as an adult record and the finding of guilt is deemed to be a conviction for the purposes of the *Criminal Records Act*, R.S. 1985, c. C-47 (section 117 of the YCJA). Thus, the treatment of a young person is not the same when an adult sentence is imposed:

Access to records	**Accès au dossier**
Exception – adult sentence	**Non-application en cas de condamnation à la peine applicable aux adultes**
117. Sections 118 to 129 do not apply to records kept in respect of an offence for which an adult sentence has been imposed once the time allowed for the taking of an appeal is taken, all proceedings in respect of the appeal have been completed and the appeal court has upheld	**117.** Les articles 118 à 129 ne s'appliquent pas aux dossiers tenus relativement aux infractions dont a été déclaré coupable un adolescent et pour lesquelles il s'est vu imposer une peine applicable aux adultes lorsque soit les délais d'appel sont expirés, soit

an adult sentence. The record shall be dealt with as a record of an adult and, for the purposes of the *Criminal Records Act*, the finding of guilt in respect of the offence for which the record is kept is deemed to be a conviction.	l'appel interjeté a fait l'objet d'une décision définitive maintenant une telle peine. Ces dossiers sont traités comme s'ils étaient des dossiers d'adultes et les déclarations de culpabilité à l'égard des infractions visées par ces dossiers sont réputées être des condamnations pour l'application de la *Loi sur le casier judiciaire*.

[18] It was only nearly five years after the YCJA came into force, namely, in February 2008, on the coming into force of the *Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act* (2008, c. 3 – Bill C-3), that paragraph 36(3)(*e*) of the IRPA was amended to insert a reference to the YCJA into the wording of the IRPA:

3. Paragraph 36(3)*e*) of the Act is replaced by the following :	**3.** L'alinéa 36(3)*e*) de la même loi est remplacé par ce qui suit :
…	[...]
(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence designated as a contravention under the *Contraventions Act* or an offence for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985 or the *Youth Criminal Justice Act*.	*e*) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de contravention en vertu de la *Loi sur les contraventions* ni sur une infraction dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985), ou de la *Loi sur le système de justice pénale pour les adolescents*.

[19] The *Balanced Refugee Reform Act* (Bill C-11) was assented to on June 29, 2010. A planned amendment to paragraph 36(3)(*e*) of the IRPA will come into force on June 29, 2012; this amendment adopts the vocabulary of the YCJA and specifies that inadmissibility on grounds of serious criminality cannot be based on an offence for which a youth sentence (”peine spécifique”) was imposed:

7. Paragraph 36(3)*e*) of the Act is replaced by the following :	**7.** L’alinéa 36(3)*e*) de la même loi est remplacé par ce qui suit :
…	[...]
(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence	*e*) l’interdiction de territoire ne peut être fondée sur les infractions suivantes :
(i) designated as a contravention under the *Contravention Act*,	(i) celles qui sont qualifiées de contraventions en vertu de la *Loi sur les contraventions*,
(ii) for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or	(ii) celles dont le ré sident permanent ou l’étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985),
(iii) for which the permanent resident or foreign national received a youth sentence under the *Young Criminal Justice Act*.	(iii) celles pour lesquelles le résident permanent ou l’étranger a reçu une peine spécifique en vertu de la *Loi sur le système de justice pénale pour les adolescents*.

[20] Finally, it should be remembered that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at para. 46).

II. Introduction

[21] The applicant, Dikila M'Bosso, a citizen of the Democratic Republic of the Congo, filed an application for judicial review of a decision of the ID dated June 9, 2010. The ID found the applicant inadmissible on grounds of serious criminality and organized criminality under subsections 36(1) and 37(1) of the IRPA.

[22] The ID issued a deportation order against the applicant, under paragraphs 229(1)(*c*) and 299(1)(*e*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).

[23] What must be determined is whether the ID had reasonable grounds to believe that Mr. M'Bosso had been convicted in Canada of an offence under an Act of Parliament punishable by a term of imprisonment of more than six months and, if so, whether the applicant, Mr. M'Bosso, is subject to the exception provided in paragraph 36(3)(*e*) of the IRPA, that is, whether his offences are offences under the YCJA.

[24] It also must be determined whether the ID had reasonable grounds to believe that the Money Blood Brothers and Young Master Crew street gangs, connected to the street gang known under the name “Bo-Gars”, whose gang colour is red, were criminal organizations for the purposes of

paragraph 37(1)(*a*) of the IRPA, and, if so, whether there were reasonable grounds to believe that Mr. M'Bosso is a member of one of these organizations or has engaged in activities that are part of a pattern of organized criminal activity.

III. Judicial procedure

[25] This is an application for judicial review of a decision made by a member of the ID of the Immigration and Refugee Board (Board), dated June 9, 2010, that the applicant was inadmissible on grounds of serious criminality and organized criminality under subsections 36(1) and 37(1) of the IRPA.

A procedural note with respect to jurisdiction

[26] On June 9, 2010, the applicant filed a notice of appeal from the ID decision with the Immigration Appeal Division (IAD).

[27] Section 64 of the IRPA specifies that persons inadmissible on grounds of organized criminality under section 37 of the IRPA have no right of appeal to the IAD. This is also the case for persons inadmissible on grounds of serious criminality under section 36 of the IRPA where they have committed a crime that was punished in Canada by a term of imprisonment of at least two years:

No appeal for inadmissibility	**Restriction du droit d'appel**
64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent	**64.** (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou

resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	**Grande criminalité**
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

[28] The wording of subsection 64(1) is clear: a foreign national or a permanent resident has no right of appeal to the IAD where he or she has been found inadmissible on grounds of organized criminality under section 37 of the IRPA.

[29] In the case at bar, the applicant does not have a right of appeal to the IAD based on section 36 of the IRPA, notwithstanding the fact that his was not a crime punished in Canada by a term of imprisonment of at least two years.

[30] In *Sittampalam*, this Court, and the Federal Court of Appeal, specified that when a person is found to be inadmissible on two grounds, one of which cannot be the subject of an appeal to the IAD, the appropriate remedy is an application for judicial review to the Federal Court. The relevant passages from the reasons of Justice Roger Hughes of this Court and from the Federal Court of Appeal explain this point:

> [3] An inquiry commenced in June 2002 and continued until August 2004. When the new *Immigration and Refugee Protection Act* (*IRPA*) came into force in

> June 2002, the inquiry continued under sections 36 and 37 of that Act. It was conceded on behalf of the Applicant that, since he had been convicted for trafficking in narcotics in 1996 and received a sentence of more than six months, namely two years less a day, that he was a person as described in section 36(1)(a) of *IRPA*. The inquiry, therefore, only concerned itself as to whether the Applicant was also a person described in section 37(1)(a). The importance of the continuation of the inquiry in this way is that, since the Applicant's conviction bore a sentence of over six months but less than two years, no appeal to the Immigration Appeal Division could be made having regard to the provisions of subsections 64(1) and (2) of *IRPA* unless it was found that the Applicant was not a person as described in section 37(1)(a) of *IRPA*. Judicial review would remain the only remedy.

(*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1211, 279 F.T.R. 211 (FC)).

> [9] An inquiry under the former Act commenced in January 2002. When the IRPA came into force in June 2002, the inquiry continued under sections 36 and 37 of the IRPA. The appellant conceded that he was a person described in section 36 due to his drug trafficking conviction, but he disputed the organized criminality allegation.
>
> [10] The importance of the inquiry to the appellant was that, unless he was found not to be a person described in paragraph 37(1)(a) of the IRPA, the appellant would be deported to Sri Lanka without a right of an appeal to the IAD, having regard to subsection 64(1) of the IRPA. [Emphasis added.]

(*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198 (FCA)).

[31] In accordance with *Sittampalam*, above, grounds of inadmissibility giving rise to a deportation order cannot be separated and the finding of inadmissibility against the applicant under section 37 of the IRPA means that there is no right of appeal to the IAD.

[32] The Court agrees with the respondent's position that the appeal to the IAD was unfounded and that the only appropriate remedy in this case is an application for judicial review to the Federal Court.

IV. Facts

[33] The applicant, Mr. M'Bosso was born on February 5, 1991, and is a citizen of the Democratic Republic of the Congo. He came to Canada on June 31, 2000, with his father. He was granted refugee status on July 24, 2001, and obtained permanent residence in Canada on March 10, 2003.

[34] The applicant committed a series of criminal offences during his adolescence including: uttering threats, assault, theft under $5,000, conspiracy to commit robbery, escaping from lawful custody, mischief and assault with a weapon (Tribunal Record (TR) at pp. 199-214). Among other things, on March 22, 2007, when he was sixteen years old, the applicant committed an assault with a weapon and uttered death threats against a worker at the Centre jeunesse where he was being held. The applicant broke the window in the door to his unit and threw electronic items at the people who were called for backup to subdue him (Service de Police de la Ville de Montréal (SPVM) Profile, Incident No. 16, TR at p. 210).

[35] On June 13, 2007, the applicant and two accomplices, one of whom is alleged to be a member of a street gang, robbed two seventeen-year-old victims on a public transit bus. The applicant was alleged to have uttered death threats and to have stolen a cellphone, electronic items

and jewellery as well as to have referred to one of the victims as a “CRIP”, that is to say, a member of the rival “blue” gang (SPVM Profile, Incident No. 17, TR at p. 210).

[36] On August 23, 2007, the applicant was convicted of the offences of mischief (430(1)(*a*)(4)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46 (*Criminal Code*)), assault with a weapon (267(*a*) of the *Criminal Code*), and uttering threats to cause death or bodily harm (264.1(1)(*a*)(2)(*a*) of the *Criminal Code*) for the first incident on March 22, 2007. As for the second incident on June 13, 2007, the applicant pled guilty to robbery (344(*b*) of the *Criminal Code*) and forcible confinement (279(2)(*a*) of the *Criminal Code*) (Sentencing Order, TR at p. 139).

[37] On October 17, 2007, Judge Denis Asselin of the Court of Québec, acting as a Youth Justice Court, imposed a prison sentence of 14 months on the applicant, calculated as follows: eight months for the four months served in pre-sentence custody and six months starting from the sentencing date (Hearing Transcript, TR at p. 194).

[38] On February 15, 2008, the applicant completed his criminal sentence and was remanded to immigration authorities for detention. He was subsequently released by the ID.

[39] Scarcely a month after being released from prison, on March 15, 2008, the applicant was again arrested by the SPVM. The applicant was in possession of a bag containing, amongst other items, a sawed-off 12-calibre shotgun, two 12-calibre bullets, 14 rocks of crack cocaine, and three grams of cannabis. A few days later, the applicant, along with his accomplices, apparently entered the apartment of a person they accused of having stolen the bag in question. The tenant was forcibly

confined in his apartment and the applicant gagged the victim with a red bandana to silence him (SPVM Profile, Incident No. 18, TR at p. 211, and the testimony of Detective Sergeant Jean-Claude Gauthier on March 5, 2010, TR at p. 356).

[40] On April 28, 2009, the applicant received another adult sentence of 15 months after being convicted of: possession of a prohibited weapon, knowing its possession is unauthorized (92(2)(3) of the *Criminal Code*), uttering threats to cause death or bodily harm (264.1(1)(*a*)(2)(*a*) of the *Criminal Code*), possession for the purpose of trafficking a substance included in Schedule I or II (5(2)(3)(*a*) of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19), breaking and entering (348(1)(*a*)(*d*) of the *Criminal Code*), forcible confinement (279(2)(*a*) of the *Criminal Code*), assault with a weapon (267(*a*) of the *Criminal Code*), possession of a prohibited weapon, knowing its possession is unauthorized, contrary to an order of prohibition (117.01 of the *Criminal Code*) (SPVM Profile, Incident No. 18).

[41] The applicant received a prison sentence of 15 months and one year's supervised probation at the end of his prison term. He was given an adult sentence and placed in an adult correctional facility.

[42] The applicant was released from prison on February 26, 2010, and remanded to immigration authorities for detention. On March 1, 2010, he was released on conditions by the ID.

[43] The ID decision is dated June 9, 2010.

V. Decision under judicial review

[44] The ID found Mr. M'Bosso inadmissible on grounds of serious criminality and organized criminality under subsections 36(1) and 37(1) of the IRPA. Consequently, the panel issued a deportation order against the applicant in accordance with paragraphs 229(1)(*c*) and 229(1)(*e*) of the IRPR.

[45] The ID had examined the evidence submitted by the parties, that is, the testimony of the applicant, Mr. M'Bosso, the testimony of Detective Sergeant Gauthier and the testimony of Violaine Lemay, an expert witness on youth law. The ID found that there were reasonable grounds to believe that Mr. M'Bosso was a member of a criminal organization, that is, a street gang, and that there were reasonable grounds to believe that he had 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 for which a term of imprisonment of more than six months has been imposed. The ID also found that the exception provided in paragraph 36(3)(*e*) of the IRPA did not apply to Mr. M'Bosso as he had received an adult sentence.

VI. Issues

[46] (1) Did the ID err in finding the applicant to be inadmissible as a result of his being a person described in subsection 37(1) of the IRPA?

(2) Did the ID err in finding the applicant to be inadmissible as a result of his being a person described in subsection 36(1) of the IRPA?

VII. Relevant legislative provisions

[47] Sections 36 and 37 of the IRPA deal with inadmissibility on grounds of serious criminality and organized criminality:

Serious criminality	**Grande criminalité**
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 déclaré coupable 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;
(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or (*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans; *c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
Criminality	**Criminalité**
(2) A foreign national is	(2) Emportent, sauf

inadmissible on grounds of criminality for

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(*d*) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Application

(3) The following provisions govern subsections (1) and (2):

pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(*a*) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

(*b*) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a pardon has been granted and has not ceased to have effect or been revoked under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou de réhabilitation — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

(*c*) the matters referred to in paragraphs (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

c) les faits visés aux alinéas (1)*b*) ou *c*) et (2)*b*) ou *c*) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

(*d*) a determination of whether a permanent resident has committed an act described in paragraph (1)(*c*) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)*c*) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(*e*) inadmissibility under subsections (1) and (2) may not be based on an offence

e) l'interdiction de territoire ne peut être fondée sur une infraction qualifiée de

designated as a contravention under the *Contraventions Act* or an offence for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985 or the *Youth Criminal Justice Act*.

contravention en vertu de la *Loi sur les contraventions* ni sur une infraction dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985), ou de la *Loi sur le système de justice pénale pour les adolescents*.

Organized criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(*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 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

(*b*) engaging, in the context of transnational crime, in activities such as people

Activités de criminalité organisée

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

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 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) se livrer, dans le cadre de la criminalité transnationale, à des

smuggling, trafficking in persons or money laundering.	activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.
Application	**Application**
(2) The following provisions govern subsection (1):	(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 activity.	*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 visées.

VIII. Parties' positions

[48] The respondent alleges that Mr. M'Bosso is inadmissible on grounds of organized criminality because there are reasonable grounds to believe that Mr. M'Bosso is a member of a criminal organization, a street gang known as the Money Blood Brothers, which is connected to the street gang Bo-Gars. Mr. M'Bosso therefore appears to be subject to paragraph 37(1)(*a*) of the IRPA, and a deportation order was duly issued against him.

[49] The respondent argues that a single ground of inadmissibility is sufficient. The respondent contends that if the Court were to conclude that the finding of inadmissibility on grounds of organized criminality under paragraph 37(1)(*a*) is reasonable, it could then dismiss the application for judicial review on that ground alone. The respondent notes the principle that inadmissibility on grounds of organized criminality does not require the existence of criminal charges or a conviction (*Castelly*, above).

[50] The respondent is also alleging that Mr. M'Bosso is inadmissible pursuant to paragraph 36(1)(*a*) of the IRPA because there are reasonable grounds to believe 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 for which a term of imprisonment of more than six months has been imposed.

[51] The applicant submits that the inadmissibility finding is unfounded because, in this case, the person concerned was convicted under the YCJA and, therefore, the exception in paragraph 36(3)(*e*) of the IRPA should apply. The applicant is contesting the decisions in *Canada (Minister of Public Safety and Emergency Preparedness) v. Toussaint*, [2007] IADD No. 620, 2007 CanLII 60413 (IRB) – application for leave dismissed March 26, 2008, and in *Saint Jean v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1243, because he is primarily of the opinion that a young person's liability to an adult sentence does not have the effect of converting a finding of guilt under the YCJA into a conviction under the *Criminal Code*. Consequently, according to the applicant, the exception in paragraph 36(3)(*e*) of the IRPA should apply and should always apply in the case of minors.

[52] In addition, the applicant submits that despite the lack of a blanket exemption from paragraph 37(1)(*a*) of the IRPA for minors, in this case, age was a determinative factor that should have been taken into account by the decision-maker.

IX. Standard of review

[53] The ID's finding of admissibility on grounds of organized criminality pursuant to subsection 37(1) of the IRPA is essentially based on an assessment of the facts. Thus, the standard of reasonableness applies in this judicial review (*Castelly*, above, at paras. 10-12).

[54] Having regard to the finding of inadmissibility on grounds of serious criminality pursuant to subsection 36(1) of the IRPA, the ID is required to note the presence of criminal convictions and a term of imprisonment concerning the person in question. An error on these issues may warrant the Court's intervention.

[55] As to questions related to the interpretation of the YCJA and the application of the *Convention on the Rights of the Child*, November 20, 1989, [1992] Can. T.S. No. 3, these are questions of law to be reviewed on the correctness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 50).

X. Analysis

(1) Did the ID err in finding the applicant to be inadmissible as a result of his being a person described in subsection 37(1) of the IRPA?

[56] A finding of inadmissibility on grounds of organized criminality requires the following two elements:

a) The presence of reasonable grounds to believe that the organization meets the definition in paragraph 37(1)(*a*) of the IRPA;

b) Membership of the person in question in the organization in question.

(As clearly specified by Justice Luc Martineau in *Castelly,* above, at paras. 14 to 16 and clearly reiterated by Justice Richard Mosley in *He v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 391, 367 F.T.R. 28 at paras. 28 to 30).

[57] In the case at bar, the evidence concerned street gangs named Money Blood Brother and Young Master Crew, which are now dissolved. These gangs were associated with the "Bo-Gars" gang (Reasons of the ID's decision, at para. 7). The evidence adduced before the ID, and specifically the testimony of Detective Sergeant Gauthier, was aimed at demonstrating that these groups were and are still involved in, among other things, the sale of narcotics, including cocaine, procuring and violent crimes (Testimony of March 5, 2010, of Detective Sergeant Gauthier of the SPVM, TR at p. 349).

[58] Nor was it denied by the applicant that the Bo-Gars gang is an organization with a pattern of criminal activity within the meaning of subsection 37(1) of the IRPA (Reasons of the ID's decision, at para. 25). The applicant's claims were limited to stating that he was not a member of such groups. However, based on the applicant's own admissions, his membership in the Bo-Gars street gang was an entirely reasonable conclusion for the ID to draw.

[59] On October 17, 2007, during his sentencing before Judge Asselin of the Court of Québec, the applicant admitted he was a member of the Bo-Gars (TR at pp. 164, 169 and 170). Moreover, the ID included in its decision certain excerpts from the hearing transcript produced as Exhibit C-6 before the ID:

> [TRANSLATION]
> …I am asking for it, Mr. Justice; I asked for it; me, I want to go to D-5 with my friends. I am labelled Bo-Gars; I want to remain labelled Bo-Gars. If they label me with the CDP guys, I am labelled Bo-Gars, a Bo-Gars; I am a minor, Mr. Justice. I want to go to D-5 Bordeaux, in D-5.
>
> …
>
> Q. (29) I might have a few questions anyway, Mr. M'bosso. I understand that it was denied for a period of time, but do I understand now that you are acknowledging that you are a B.G., as you say, a Bo-Gars, in effect, or...
>
> R. I am a B.G., I am a Bo-Gars.
>
> THE COURT:
>
> Q. (30) I did not see...unless I misread, it seemed that it was clear enough.
> R. That's right; I got in; I asserted myself right away...I am labelled. I have always been labelled.
>
> Q: (32) …not just the label that you are given?
> R. No.
>
> Q. (33) It is acknowledged; that is what you are saying, right?
> R. Yes.

(Reasons of the ID's decision at paras. 46-47).

[60] Before the ID, Detective Sergeant Gauthier had testified concerning Mr. M'Bosso's criminal profile and particularly concerning the two incidents which the ID specifically noted. It was on the basis of these incidents, designated as numbers 17 and 18, that the ID determined that the applicant had participated in street gang activities.

[61] During Incident No. 17, on June 13, 2007, Mr. M'Bosso was accompanied by two other individuals, one of whom was a member of a street gang. One of the suspects was wearing an item that was red and uttered an insult (CRIP) to one of the victims. According to Detective Sergeant Gauthier, this type of incident is typical of street gangs in order to stake their territory in public transit.

[62] The detective sergeant also described before the ID Incident No. 18, which took place between March 12 and 15, 2008. During this incident, the applicant placed a red bandana in the mouth of a victim while the other suspects accompanying him searched the apartment to find a bag left in the hallway some days earlier. In the detective sergeant's opinion, the red bandana was significant, and served to indicate that a street gang was involved.

[63] The Board based its analysis on these incidents, as well as on the admissions of the applicant, in determining that he was a member of a criminalized group, and therefore was subject to subsection 37(1) of the IRPA.

[64] To that is added the principles stated by the Federal Court of Appeal in *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 (*Poshteh*). Given the fact that the applicant was a minor when he carried out these actions, the panel had to determine whether he had the requisite knowledge and mental capacity to understand the nature and effect of his actions. This analysis was carried out by the ID (Reasons of the ID's decision, at paras. 42-45).

[65] In *Poshteh*, above, the Federal Court of Appeal noted that there was no blanket exemption from paragraph 34(1)(*f*) for minors. Obviously, the same observation applies to inadmissibility on grounds of organized criminality provided for in subsection 37(1) of the IRPA. The Federal Court of Appeal added that there is a presumption that the closer a minor is to 18 years of age, the greater will be the likelihood that the minor possesses the requisite knowledge or mental capacity to be inadmissible (*Poshteh* at para. 51). Finally, the Court specified that it would be "very difficult" for a minor to argue that he was not a member of an organization when he was directly involved in violent activities (*Poshteh* at paras. 52 and 64).

[66] In this case, the evidence adduced before the ID showed that the applicant had been an active member of the Bo-Gars for several years, including at the age of 16 and 17 years. He was convicted of multiple offences under the *Criminal Code*, and twice for actions related to his activities within the Bo-Gars gang. Similarly, in 2007, in the Court of Québec, he admitted having voluntary joined the Bo-Gars and actively argued in favour of being incarcerated in the penitentiary and cell block that housed members of the Bo-Gars gang. In view of these facts, the ID found that, given the circumstances surrounding the applicant's actions, the applicant was able, at the age of 16, to understand the nature and consequences of his actions.

[67] The Court also concurs with the ID's assessment of *Poshteh*, as regards the fact that the *Convention on the Rights of the Child* does not apply when the proceeding and the decision occur when the individual involved is no longer a minor (Reasons of the ID decision at para. 33 and *Poshteh* at para. 59).

(2) Did the ID err in finding the applicant to be inadmissible as a result of his being a person described in subsection 36(1) of the IRPA?

[68] At paragraph 41 of the reasons for its decision, the ID determined that there were reasonable grounds to believe that the applicant had 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 for which a term of more than six months has been imposed. More specifically, on August 23, 2007, Mr. M'Bosso was convicted on one count of mischief (430(1)(*a*)(4)(*a*) of the *Criminal Code*), one count of assault with a weapon (267(*a*) of the *Criminal Code*), and one count of uttering threats to cause death or bodily harm (264.1(1)(*a*)(2)(*a*) of the *Criminal Code*). The offence described in paragraph 267(*a*) of the *Criminal Code* is subject to a maximum term of imprisonment of 10 years. In addition, on October 17, 2007, Judge Asselin imposed an adult sentence on Mr. M'Bosso. He imposed a sentence of 14 months on the applicant, taking into account the four months of pre-trial custody, which was given double value, and therefore subtracting eight months from the total sentence. He therefore imposed a term of imprisonment of six months to be served in a provincial adult correctional facility.

[69] The applicant was therefore inadmissible on the grounds of the two alternate components of subsection 36(1) of the IRPA. A term of imprisonment of six months had been imposed on him and he had been convicted of four offences punishable by a maximum term of imprisonment of at least 10 years, namely, mischief, assault with a weapon, robbery and forcible confinement.

[70] In addition, barely one month after his release from prison, on March 15, 2008, the applicant was again arrested by the SPVM. Following that arrest, on April 28, 2009, the applicant received another adult sentence of 15 months, having been convicted of contravening a previous order

prohibiting him from carrying a weapon, unauthorized possession of other weapons, uttering threats of death or bodily harm, possession of prohibited substances for the purpose of trafficking, breaking and entering, forcible confinement and assault with a weapon.

The exception of paragraph 36(3)(*e*) of the IRPA

[71] It is only in exceptional situations that a minor will be inadmissible on grounds of serious criminality under subsection 36(1) of the IRPA. Both the JOA and the YCJA recognize that young people do not have the same degree of responsibility for their actions that adults do. A transfer to adult court under the JOA and the imposition of adult sentences under the YCJA are both exceptional measures.

[72] On this point, the applicant's position can be summarized as follows: since the coming into force of the YCJA, all offences committed by a young person give rise to the exception in paragraph 36(3)(*e*) of the IRPA. The Court is in full agreement with the respondent's position that this is not Parliament's intention and that where an offence attracts an adult sentence, a young person may be found inadmissible on grounds of serious criminality under subsection 36(1) of the IRPA.

[73] Moreover, the *Balanced Refugee Reform Act* provides an amendment to paragraph 36(3)(*e*) of the IRPA. This amendment to paragraph 36(3)(*e*) of the IRPA states that inadmissibility on grounds of serious criminality cannot be based on an offence for which a youth sentence was received. Once again, the Court concurs with the respondent's argument that the objective of this amendment to paragraph 36(3)(*e*) of the IRPA was very simple, namely, the addition of the new

YCJA to the wording of the IRPA. This addition embodies the principle that mere liability to an adult sentence can justify an inadmissibility finding.

[74] This amendment states the applicable law and does not constitute a substantive change in the current law. If that were the case, the parliamentary debates would in some way indicate that this is such a change.

[75] According to the objectives of the IRPA stated in paragraphs 3(*h*) and (*i*), the purpose of Parliament 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 and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and	(i) de promouvoir, à l'échelle 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;
…	[...]

[76] The YOA, the YCJA and the case law have recognized that young people may be brought before an adult court or receive an adult sentence when the protection of society is at stake and when it is necessary for the young person to take responsibility for his or her offences.

[77] Following this assessment of the facts and the evidence filed before the ID and of the current law, and further to the principal objective of public protection in immigration law, the Court finds that the ID had reasonable grounds to believe that the applicant must be found inadmissible on grounds of serious criminality.

XI. Conclusion

[78] In view of the foregoing, the applicant's arguments in support of his application for judicial review do not raise any serious ground that would warrant this Court's intervention in this case to set aside the ID's decision.

[79] The IRB did not make any error in finding that Mr. M'Bosso was inadmissible on grounds of serious criminality and of organized criminality and in issuing a deportation order against him.

[80] For all of the above reasons, the applicant's application for judicial review is dismissed.

ORDER

THE COURT ORDERS that

1. The applicant's application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"

Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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