

**Cases of Respondents Who Fear Imprisonment as Criminal Deportees to Haiti:
Updates in the Law since *Matter of J-E-***

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October 2, 2008

There are many challenges for Haitians who seek protection in the U.S. This overview will discuss the cases of Haitians who apply for deferral of removal under Article 3 of the Convention Against Torture (“CAT”) because they fear detention as criminal deportees in horrible prison conditions in police station holding cells in Haiti. Such petitioners must seek CAT as their only form of relief because they either have a particularly serious crime that bars them from asylum or withholding of removal under INA § 241(b)(3)² or they are unable to prove that their persecution is on account of their race, religion, ethnicity, political opinion, or membership in a particular social group.³

In *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), the Board of Immigration Appeals (“BIA”) held that a Haitian man who faced prolonged detention in the Haitian National Penitentiary because of his status as a criminal deportee from the U.S. could not prove a case for deferral of removal under CAT. The respondent presented evidence that the Haitian National Penitentiary was overcrowded and that the prisoners there were deprived of adequate food, water, medical care, sanitation, and exercise. He also presented proof of instances of police brutality against prisoners such as burning with cigarettes, choking, hooding, earboxing, and electric shock. The BIA analyzed the definition of “torture” in the regulations at 8 C.F.R. § 208.18 and found that the respondent could not prove that the Haitian authorities specifically intended to inflict severe physical or mental pain or suffering on the criminal deportees. Rather, the Haitian authorities were trying to improve their jail conditions and were responsible for such abysmal conditions due to lack of funds, not specific intent to cause severe pain or suffering on the prisoners. The BIA held that the instances of police brutality against the prisoners were isolated instances and therefore the respondent could not show that it was more likely than not he would be tortured.

Since *Matter of J-E-*, many respondents have attempted to distinguish the case when seeking deferral of removal under CAT. Several unpublished BIA and Immigration Judge (“IJ”) cases have held that criminal deportees with severe medical issues were able to distinguish *Matter of J-E-*. These respondents could prove that the Haitian authorities would specifically intend to cause them severe pain and suffering

¹ I would like to thank Michelle Karshan, Executive Director of Alternative Chance/ Chans Alternativ in Haiti for her contributions.

² See *Matter of Y-L-*, 23 I&N Dec. 270 (AG 2002).

³ See *Toussaint v. AG*, 455 F.3d 409 (3d Cir. 2006); *Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004).

because the Haitian authorities would intentionally detain them knowing that they would not get the medications that they needed to stay alive. Although it is difficult to distinguish the BIA's holding about specific intent to torture in *Matter of J-E-*, such respondents may have been successful because the BIA and judges have felt great sympathy for a respondent who is suffering from a serious medical issue who faces return to such atrocious prison conditions.

In Boston, Judge Matt D'Angelo ruled in December 2007 that a Haitian man who had AIDS and diabetes could distinguish *Matter of J-E-*. Judge D'Angelo adopted all of the arguments set forth in the brief of *pro bono* attorney Melissa Fischler Hed. He ruled that the Haitian government would specifically intend to torture a detainee with health issues such as those of the respondent. Judge D'Angelo also ruled in a 2006 case that a respondent with no medical issues could distinguish *Matter of J-E-*. Judge D'Angelo ruled that the expert testimony in the case proved that the prison conditions for criminal deportees in Haiti had worsened since 2002, when the BIA decided *Matter of J-E-*. Therefore, the respondent in that case was able to prove that the Haitian authorities now specifically intended to cause severe pain and suffering because they had made no improvements to the conditions since 2002. Both of these rulings by Judge D'Angelo were overturned by the BIA and the respondents did not seek judicial review at the First Circuit Court of Appeals.

Respondents also have been successful distinguishing *Matter of J-E-* when the respondent suffers from mental illness. The theory advanced in these cases is that mentally ill detainees, when they do not receive the medication that regularizes their behavior, will act out. Their erratic behavior thus makes them more susceptible to the severe police brutality that the BIA in *Matter of J-E-* dismissed as only "isolated instances."

At the circuit court level, only the Second, Third, and Eleventh Circuits have decided cases of Haitian applicants for deferral of removal under CAT who attempted to distinguish *Matter of J-E-* based on their medical or mental health conditions. The Third and Eleventh Circuits have each remanded a case where Haitian petitioners with mental or physical illnesses were denied deferral of removal under CAT by the BIA. In both of these cases, the Circuit courts reasoned that the IJ and BIA could not merely rubber-stamp the holding in *Matter of J-E-*; rather, the agency was required to determine whether respondents with these physical or mental health issues could distinguish *Matter of J-E-*. The Second Circuit, and more recently the Third Circuit, have upheld the agency's denial of deferral of removal under CAT for deportees with medical issues.

In *Lavira v. AG*, 478 F.3d 158 (3d Cir. 2007), the Third Circuit decided the case of a Haitian man who faced prolonged detention as a criminal deportee but suffered from HIV and was wheelchair-bound as an amputee. The Third Circuit reasoned that while the general criminal deportee population may not face pain and suffering amounting to torture, *this* man could probably prove that severe pain and suffering was more likely than not. The Third Circuit also suggested that specific intent to cause severe pain and suffering could be proven through evidence of willful blindness by the Haitian

government. For these reasons, the Third Circuit remanded the case to the immigration judge for further findings.

In *Jean-Pierre v. USAG*, 500 F.3d 1315 (11th Cir. 2007), the Eleventh Circuit decided the case of a mentally ill Haitian who was infected with HIV. He presented evidence that mentally ill detainees with HIV are singled out for ear boxing, beatings with metal rods, and confinement to crawl spaces where the detainees cannot stand up. The Eleventh Circuit reasoned that this man presented a case that was very different factually from *Matter of J-E-* and thus remanded the case for further findings.

In *Franck Pierre v. Gonzales*, 502 F.3d 109 (2d Cir. 2007), the Second Circuit refused to second-guess the agency decision upholding *Matter of J-E-*. The Second Circuit decided the case of a man who suffered from type two diabetes and hypertension and faced prolonged detention as a criminal deportee. The IJ in the case had listened to the respondent's evidence distinguishing his case from *Matter of J-E-* and decided that the respondent had not shown evidence sufficient to prove that diabetics are singled out for torture by the Haitian authorities in the National Penitentiary. Therefore, the Second Circuit upheld the agency's decision.

In *Paul Pierre v. USAG*, 528 F.3d 180 (3d Cir. 2008), the Third Circuit also refused to second-guess the agency decision upholding *Matter of J-E-*. The Third Circuit decided the case of a man who suffered from esophageal dysphagia, a condition that limited him to a liquid diet administered through a feeding tube, which required daily medical care. The petitioner faced potentially indefinite detention as a criminal deportee. The IJ did not find that the petitioner's medical needs were sufficient to distinguish his case from *Matter of J-E-* and *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005).⁴ Upholding the agency's decision, the Third Circuit overruled its holding in *Lavira*, which allowed a broad definition of specific intent, and decided that specific intent could only be proven by demonstrating that the Haitian authorities have the goal or purpose of inflicting severe pain or suffering.

For attorneys who consider representing a Haitian CAT petitioner, the above-mentioned unpublished decisions can be made available. Also, attorneys should contact Michelle Karshan of Alternative Chance/Chans Alternativ, with offices in New York and Haiti, altchance@aol.com, 212-613-6033, www.alternativechance.org. Ms. Karshan is the premier expert witness on Criminal Deportation to Haiti and the conditions of their detention in Haiti (Criminal Deportees are currently detained at police station holding cells). Please note that compensation for expert testimony will be requested.

⁴ In *Auguste*, the Third Circuit upheld the BIA's decision in *Matter of J-E-* that Haitian criminal deportees could not show specific intent to torture by documenting the present prison conditions for the deportees.