**Date: 20091008**

**Docket: IMM-541-09**

**Citation: 2009 FC 1019**

**Montréal, Quebec, October 8, 2009**

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

**BETWEEN:**

**PHILOMENA INNOCENT**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

## Introduction

[1] Ms. Philomena Innocent is a septuagenarian citizen of Haiti who currently lives in Laval, a suburb of Montréal, with her daughter, who is a permanent resident of Canada.

[2] Ms. Innocent arrived in Canada on October 11, 2005, travelling on a temporary resident visa that was granted after she applied to visit her daughter in Canada on a temporary basis.

[3] The temporary resident authorization was renewed or extended a number of times. However, in January 2007, an additional request for an extension was refused. Following this refusal, the applicant applied for refugee status in Canada.

[4] A hearing took place on December 1, 2008, before a panel of the Immigration and Refugee Board (the panel) and, in a decision dated January 14, 2009 (the decision), the panel determined that Ms. Philomena Innocent was neither a "Convention refugee" nor "person in need of protection" (decision para. 20).

[5] Ms. Innocent brought an application for leave and judicial review of that decision, and Mr. Justice Lemieux granted leave on June 17, 2009.

[6] The judicial review hearing took place before the undersigned at Montréal on September 15, 2009.

**Decision submitted for judicial review**

[7] The panel did not question Ms. Innocent's credibility and concluded as follows on this point: "Despite some inconsistencies and evasive responses, the panel takes into account *Maldonado*, which reads in part as follows: 'When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness', and gives [Ms. Innocent] the benefit of the doubt." (decision, para. 12).

[8] The panel accepted Ms. Innocent's narrative as true, and the Minister did not challenge it before the Court.

[9] The panel considered the following facts, as summarized by the panel in its decision:

> [7] The claimant testified that she lived in Port-au-Prince, in the Bel Air neighbourhood, and had a small business in her house. Starting in September 2005, she was allegedly attacked on three occasions. Some people went to her home to rob her, demanding the money that she received from her daughter who lives in Canada.
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> [8] The claimant testified that the police were afraid to go to that neighbourhood. In about September or October 2005, the authorities allegedly ordered the citizens to leave the neighbourhood because the gangs were invading it. The claimant testified that she had nowhere else to go, since her children live in the provinces. . . .

[10] The panel accepted these facts as true and had only one question, i.e., "whether the risk to which the claimant could be subject is personalized or generalized" (decision, para. 13).

[11] The tribunal answered this question in a few paragraphs:

> [13] . . . The documentary evidence has established that a state of violence and insecurity prevails in Haiti and affects the entire population. That said, the panel is of the opinion that business persons are not a particular social group as defined in *Ward*. [*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689].
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> [14] In reaching this conclusion, the panel relies on the recent case law, which establishes in particular that, although being perceived as rich or returning from abroad puts a person at greater risk of being subject to criminal acts, this risk is generalized when there is evidence establishing that the entire population faces the same risk. The reliable and objective documentary evidence adduced and cited

> above confirms that the insecurity prevailing in Haiti is generalized and thus affects all social classes.
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> [15] The documentary evidence also indicates that insecurity, violence and impunity are present in Haiti and particularly the capital, Port-au-Prince. The Port-au-Prince gangs are centred in Cité Soleil and the neighbourhoods to its immediate the north and east, including Cité Militaire, Bel Air, Solino and Delmas. . . .
>
> [16] In short, the entire population of Haiti is victimized by the risks resulting from the violence, insecurity and crime that persist in Haiti. However, the claimant also testified that the police were afraid to go to the neighbourhood where she lived because the gangs had invaded it. The government even asked the citizens to leave the neighbourhood, which the claimant did not do.
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> [17] Consequently, the panel cannot establish a nexus between the fear of persecution and one of the five grounds set out in section 96 of the Act.
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> [18] The panel is of the opinion that, according to the evidence adduced before it, the risk to which the claimant could be subjected is a generalized risk affecting the entire population of the country and not a personalized risk, which means that paragraph 97(1)(*b*) is not applicable.

[12] The tribunal did not consider whether there was an internal flight alternative in Haiti although some of the evidence may suggest that this solution was available to Ms. Innocent. In fact, she testified that some of her children lived in the provinces in Haiti and that the Haitian police were encouraging the residents of her neighbourhood to leave voluntarily. It is not clear whether the failure to examine an internal flight alternative stemmed from the panel's position that the state of violence and insecurity that prevails in Haiti affects the entire country or whether the panel did not believe it was necessary to deal with this issue, given its finding on the lack of a personalized risk.

**Issues**

[13] We note at the outset that the applicant is not disputing the panel's finding that she does not fall within section 96 of the *Immigration and Refugee Protection Act* (the Act). Accordingly, the application for judicial review applies only to the panel's findings on the application of paragraph 97(1)(*b*) of the Act, which is reproduced below.

[14] In this regard, counsel for the applicant raised two questions in oral argument before the Court:

a. Did the panel err in interpreting paragraph 97(1)(*b*) of the Act?

b. Did the panel err in applying paragraph 97(1)(*b*) of the Act to the facts of this case?

[15] Counsel for the applicant suggests that the Court should apply the correctness standard of review to the first question and the reasonableness standard of review to the second.

[16] Counsel for the Minister notes the two questions raised by the applicant but maintains that the interpretation of paragraph 97(1)(*b*) is not at issue in this case since the panel simply applied the statutory provision to the facts of the case. Consequently, counsel for the Minister contends that only the reasonableness standard of review applies to the entire decision submitted for this judicial review.

**Relevant statutory provisions**

[17] The relevant provisions of the Act are paragraph 3(2)(*a*), paragraph 3(3)(*d*), subsection 97(1) and subsection 107(1):

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| 3(2) The objectives of this Act with respect to refugees are | 3(2) S'agissant des réfugiés, la présente loi a pour objet : |
| (*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted; | *a*) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution; |
| . . . | … |
| 3(3) This Act is to be construed and applied in a manner that | 3(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : |
| . . . | ... |
| (*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada; | *d*) d'assurer que les décisions prises en vertu de la présente loi sont conformes à la *Charte canadienne des droits et libertés*, notamment en ce qui touche les principes, d'une part, d'égalité et de protection contre la discrimination et, d'autre part, d'égalité du français et de l'anglais à titre de langues officielles du Canada; |
| . . . | ... |
| 97(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, | 97(1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a |

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| their country of former habitual residence, would subject them personally | pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : |
| (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or | *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; |
| (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| 107(1) The Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is | 107(1) La Section de la protection des réfugiés accepte ou rejette la demande d'asile selon que le demandeur a ou |

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| a Convention refugee or person in need of protection, and shall otherwise reject the claim. | non la qualité de réfugié ou de personne à protéger. |

**Applicant's position**

[18] Counsel for the applicant notes a debate in the Court's decisions on interpreting subparagraph 97(1)(*b*)(ii) of the Act.

[19] According to the first school of jurisprudence, this provision of the Act should be interpreted as not conferring the status of person in need of protection on applicants who face a risk similar to the risk faced by a significant part of the population of the country in question, despite the fact that these applicants may be members of subgroups who face more significant risk than this generalized risk.

[20] For example, in *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, a Haitian businessman sought person in need of protection status on the ground that wealthy people or those perceived as such in Haiti are more at risk of criminal violence than the entire population of Haiti, although criminal violence is generalized in Haiti. Madam Justice Tremblay-Lamer refused to grant person in need of protection status in such a case on the following grounds:

> [18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general". Under these circumstances, the Court may be faced with an applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a

> segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.
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> [19] Recently, the term "generally" was interpreted in a manner that may include *segments* of the larger population, as well as *all* residents or citizens of a given country: *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] F.C.J. No. 1792 (QL). In that case, the applicant asserted that if he and his young Canadian born son were returned to Colombia it would constitute indirect cruel and unusual treatment/punishment because of the psychological stress that he would experience as a parent worrying about his child's welfare in that country. At paras. 24 and 26 Snider J. stated:
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> > [24] It seems to me that common sense must determine the meaning of s. 97(1)(*b*)(ii) …
> >
> > [26] Further, I can see nothing in s. 97(1)(*b*)(ii) that requires the Board to interpret "generally" as applying to all citizens. The word "generally" is commonly used to mean "prevalent" or "wide-spread". Parliament deliberately chose to include the word "generally" in s. 97(1)(*b*)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene. [Not underlined in the original.]
>
> . . .
>
> [23] Based on the recent jurisprudence of this Court, I am of the view that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms of criminality is general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence.

[21] Other than the *Prophète* decision, above, this first school of jurisprudence includes *Ventura De Parada v. Canada (Citizenship and Immigration*), 2009 FC 845 (Mr. Justice Zinn), *Acosta v. Canada (Citizenship and Immigration)*, 2009 FC 213 (Madam Justice Gauthier), *Cius v. Canada*

*(Citizenship and Immigration)*, 2008 FC 1 (Mr. Justice Beaudry), *Étienne v. Canada (Citizenship and Immigration)*, 2007 FC 64 (Mr. Justice Shore), and *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459 (Madam Justice Snider). A number of other decisions could be added to this list, including *Jeudy v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1124 (Mr. Justice Lemieux).

[22] In the view of counsel for the applicant, the interpretation given to 97(1)(*b*)(ii) of the Act by this school of jurisprudence is erroneous because it would lead to arbitrary results. In fact, this interpretation is based on a prior determination of the existence of an at-risk group sufficiently large to come under the word “generally” used in that subparagraph. In what circumstances is a threatened group large enough for a threatened person to lose Canada’s protection? Is this not a purely arbitrary and subjective determination?

[23] The applicant notes that she is at greater risk than the rest of the Haitian population of being subject to the generalized crime that is prevalent in Haiti because she is part of a group of persons who are perceived as more affluent. Her counsel therefore asks the Court to set aside the panel’s decision on the ground that it erred in law in interpreting subparagraph 97(1)(*b*)(ii) of the Act. This reasoning requires disregarding the jurisprudence cited above and favouring an approach that establishes a personalized risk by reason of membership in an at-risk group, in this case, the group of persons who may be perceived as more affluent and, therefore, more likely to be victims of generalized violence.

[24] Counsel for the applicant submits that this is the approach taken by the second school of jurisprudence of the Court, which includes, *inter alia*, the decisions in *Surajnarain v. Canada (Citizenship and Immigration)*, 2008 FC 1165 (Madam Justice Dawson) and *Sinnappu v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 791 (Mr. Justice McGillis).

[25] In the view of counsel for the applicant, Justice Dawson clearly explained the approach of this second school of jurisprudence in *obiter dictum* in *Surajnarain*, above:

> [16] Of relevance was the requirement that a claimant must establish that his removal would subject him to "an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country."
>
> [17] The Department of Citizenship and Immigration published guidelines [in 1994] to assist officers in the interpretation of the various elements contained in the definition of the PDRCC class. With respect to the requirement that the risk "would not be faced generally by other individuals" the guidelines instructed officers that:
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> > The threat is not restricted to a risk personalized to an individual; it includes risks faced by individuals that may be shared by others who are similarly situated. Neither are risks restricted by ethnic, political, religious or social factors as the concept of persecution is in the Convention refugee definition. Whether or not the risk is associated with a "Convention" ground, a person may fall within the scope of this definition. Notwithstanding this, the limitation imposed by the PDRCC definition in the phrase "which risk . . .would not be faced generally by other individuals in or from that country" applies. Any risk that would apply to all residents or citizens of the country of origin cannot result in a positive decision under this Regulation. [Not underlined in original.]
>
> [18] Justice McGillis had the occasion to consider the guidelines in *Sinnappu*, referred to above. At paragraph 37, Justice McGillis wrote:

> In particular, the PDRCC class guidelines emphasize that the criteria in subsection 2(1) of the Regulations are not only restricted to "a risk personalized to an individual", but also include a risk faced by others similarly situated. Furthermore, the guidelines interpret the exclusionary phrase in the Regulations that the risk must not be "faced generally by other individuals", as meaning a risk faced by all residents or citizens of that country. Indeed, during his cross-examination, Gilbert Troutet, a specialist in PDRCC class applications, stated that the exclusion would apply only "in extreme situations such as a generalized disaster of some sort that would involve all of the inhabitants of a given country. And if such a situation does occur, the [respondent] has specific programs to cover such situations." [Not underlined in original and footnote omitted.]
>
> [19] Thus, the Board should consider whether application of the principles set out in *Salibian* and *Sinnappu* lead to the conclusion that a claimant may only be denied protection under subparagraph 97(1)(*b*)(ii) of the Act if the risk is faced generally by all of the other persons in the country.

[26] Counsel for the applicant notes that the Federal Court of Appeal declined to rule on the interpretation of subparagraph 97(1)(*b*)(ii) of the Act in *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31. Based on that, he concludes that the state of the law on this point is far from satisfactory.

[27] Counsel for the applicant adds as an alternative argument that, even if the Court agrees with the first school of jurisprudence in its interpretation of subparagraph 97(1)(*b*)(ii) of the Act, the panel's decision should nonetheless be set aside because the application of that subparagraph, as interpreted in this way, to the facts in question is not reasonable.

[28] In fact, we are not dealing solely with the case of a person who fears violence by reason of his or her membership in a particular group and who is therefore more at risk than the entire population. In that case, Ms. Prophète was personally targeted by a gang of thugs who attacked her on a number of occasions. The case at bar is analogous to the one examined by Mr. Justice de Montigny in *Martinez Pineda v. Canada (Citizenship and Immigration)*, 2007 FC 365 where he allowed an application for judicial review of a decision refusing person in need of protection status under subsection 97(1)(*b*) of the Act to a Salvadorean citizen.

[29] In that case, Mr. Pineda had been threatened a number of times by members of a street gang after he refused to become a member. Evidence was adduced that street gangs recruited across the country; Mr. Pineda's application was therefore denied by the panel on the ground that the risk faced by the applicant was no different from that faced by the Salvadorean population in general. On this point, Mr. Justice de Montigny noted the following:

> [17] . . . The applicant was not claiming to be subject to a risk to his life or his safety based only on the fact that he was a student, young or from a wealthy family. If such were the case, the application would have to be dismissed for the same reasons that led the Court to confirm the RPD decisions in the two matters mentioned above [*Jeudy* and *Osorio*, above]. But this is not the case. The applicant alleged that he had been personally targeted on more than one occasion, and over quite a long period of time. Unless we question the truthfulness of his story, which the RPD did not do, we have no doubt that he will be personally in danger if he were to return to El Salvador. In the particular circumstances of this matter, to find the opposite amounts to a patently unreasonable error.

**Minister's position**

[30] Counsel for the Minister maintains that the panel's decision does not deal with the interpretation of subsection 97(1)(*b*)(ii) of the Act but is limited to the application of the provision to the facts of the case in light of the clear majority of the Court's jurisprudence concerning the scope of the provision.

[31] In this regard, he notes that even where a person is a direct victim of violence resulting from generalized crime, this does not mean that the risk faced by that person is different from the risk faced by the general population. Each case turns on its own facts, and it is incumbent on the panel to determine the facts in light of the evidence adduced before it. Unless the panel's decision contravenes the deferential standard of reasonableness, the Court should not intervene.

[32] He adds that the Court's recent jurisprudence is clear on the principles to be applied in such cases. Consequently, the decision of Justice Tremblay-Lamer in *Prophète,* above, is determinative, especially because the Federal Court of Appeal upheld the judge's findings in this matter. The *Prophète* decision has largely been followed subsequently, in particular, in *Lebrun Charles v. Canada (Citizenship and Immigration)*, 2009 FC 233 (Mr. Justice Martineau), *Octave v. Canada (Citizenship and Immigration)*, 2009 FC 403 (Mr. Justice Harrington) and *Ventura de Parada*, above (Mr. Justice Zinn).

[33] Counsel for the Minister acknowledges the recent discordant decision by Justice Dawson in *Surajnarain,* above, but notes that her comment was *obiter dictum,* which does not bind the Court

and which is essentially based on the *Sinnappu* decision, above, which dates from 1997 and was made in a different statutory and regulatory context from that of today.

**Analysis**

**Appropriate standard**

[34] In light of the Supreme Court of Canada decisions in *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, the two standards of judicial review are correctness and reasonableness. To establish the appropriate standard in each case, "[a]n exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated." (*Dunsmuir*, above, at para. 57).

[35] Errors of law are generally reviewable on a correctness standard: *Khosa,* above, at paragraph 44. Although a certain deference may be appropriate where a specialized administrative tribunal is interpreting its own statute or statutes closely connected to its function (*Dunsmuir*, above, at para. 54), the relevant jurisprudence generally indicates that questions of law relating to refugee status (and, by implication, person in need of protection status) under the *Immigration and Refugee Protection Act* are reviewable on a standard of correctness*: Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paragraphs 42 to 50, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paragraph 37.

[36] The recent judgements in *Acosta v. Canada (Citizenship and Immigration)*, above, and *Michaud v. Canada (Citizenship and Immigration)*, 2009 FC 886, maintain that the application of subparagraph 97(1)(*b*)(ii) of the Act is a question of fact reviewable on a standard of reasonableness. As I explain below, I agree that this standard applies to judicial review of decisions about the application of this subparagraph. Nonetheless, to arrive at this conclusion, it is necessary in this case to interpret the scope of section 97 of the Act, and this interpretation involves a question of law, which is subject to the correctness standard.

[37] Accordingly, I will apply the correctness standard to the section 97 interpretation and the reasonableness standard to the panel's findings of fact.

**Summary**

[38] The Court is of the view that consideration of an application for protected person status under subsection 97(1)(*b*)(ii) of the Act requires an individualized assessment in the context of existing and prospective risks faced by the applicant. This assessment is based on the particular facts of each case.

[39] The requisite analysis includes not only an analysis of the personalized risk faced by the person in question, but also a separate analysis of the risk faced by other individuals from the country in question. The objective of these analyses is to determine, in each particular case, based on the evidence available, whether the personalized risk faced by the applicant exists "in every part of that country and is not faced generally by other individuals in or from that country".

[40] The Court is also of the view that a textual analysis of subparagraph 97(1)(*b*)(ii) and a pragmatic and functional approach to applying this subparagraph shows that the analysis of the risk faced by other individuals from the country in question is not necessarily limited to an analysis of the risk faced by the entire population but may also include an analysis of the risk faced by only one segment of the population, to the extent that the particular circumstances of each case justify this approach in light of the objectives of the Act and its section 97.

[41] These various analyses are essentially factual and must be carried out on a case-by-case basis. To the extent that these analyses and the conclusions based thereon are reasonable, the Court will not intervene on judicial review of such a decision by the Refugee Protection Division of the Immigration and Refugee Board. In this regard, see *Acosta v. Canada (Citizenship and Immigration)*, above, and *Michaud v. Canada (Citizenship and Immigration)*, above.

[42] For the Court, the analysis required under subsection 97(1)(*b*)(ii) of the Act primarily entails a case-by-case determination of a real and particularized threat directed at an individual. This approach is consistent with the very objectives of the Act, in particular, paragraph 3(2)(*a*), reproduced above, which recognizes that the refugee program is, in the first instance, about saving lives and offering protection to the displaced and persecuted, and paragraph 3(3)(*d*), also reproduced above, which provides that the Act is to be construed and applied in a manner that ensures that decisions taken under the Act are consistent with the *Canadian Charter of Rights and Freedoms*.

[43] These findings are based on the following analyses.

**Textual analysis**

[44] The Supreme Court of Canada recently reiterated the modern principles of statutory interpretation in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[45] A textual analysis of subparagraph 97(1)(*b*)(ii) demonstrates that the provision does not require that the risk be faced by <u>all</u> other individuals from the country in question.

[46] In fact, the subparagraph requires that the person concerned face the risk "in every part of the country" (in French, "*en tout lieu de ce pays*"), thus giving first priority to an internal flight alternative.

[47] Furthermore, the legislation provides that the risk faced by the applicant must not be a risk faced by other individuals from that country ("is not faced generally by other individuals in or from that country"; in French "*que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pa*s").

[48] The provision in question does not require that "all other individuals from that country" face the risk, but that the risk is not faced generally "by other individuals in or from that country". The use of the indefinite article in this context makes the wording clear. In fact, as Grevisse notes, [TRANSLATION] "[the] indefinite article indicates that the person or the object designated by the noun is presented as a certain person or a certain object separate from other persons or objects particular to the type, but whose individualization remains undetermined" (*Le Bon Usage*, 11th edition, pages 347 and 348). A grammatical analysis of the English wording of the provision leads to the same result.

[49] Thus, in cases such as this one, where the general population faces a risk of criminality, the fact that certain individuals are more likely to face this risk, either because they live in more dangerous areas, or because they are perceived as being more affluent, does not necessarily make those individuals eligible for protected person status under subparagraph 97(1)(*b*)(ii). In the first case, the availability of an internal flight alternative would exclude this status and in the other case, the generalized risk would have the same effect.

**Legislative history**

[50] This textual analysis is also supported by the provision's legislative history. A similar provision appeared for the first time in the Regulations in 1993 in order to add a prior review process with respect to individuals to whom the definition of Convention refugee did not apply but who should nonetheless not be returned, since they were at serious risk of harm. The post-determination refugee claimants in Canada class (the PDRCC class) was formally established under the *Immigration Regulations, 1978 — Amendment* SOR/93-44, which provided that the following definition should be inserted into subsection 2(1) of the Regulations:

| | |
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| "member of the post-determination refugee claimants in Canada class" means an immigrant in Canada | « demandeur non reconnu du statut de réfugié au Canada » Immigrant au Canada : |
| (*a*) who the Refugee Division has determined on or after February 1, 1993 is not a Convention refugee . . . | *a*) à l'égard duquel la section du statut a décidé, le 1er février 1993 ou après cette date, de ne pas reconnaître le statut de réfugié au sens de la Convention, ... |
| (*c*) who if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country, | *c*) dont le renvoi vers un pays dans lequel il peut être renvoyé l'expose personnellement, en tout lieu de ce pays, à l'un des risques suivants, objectivement identifiable, auquel ne sont pas généralement exposés d'autres individus provenant de ce pays ou s'y trouvant : |
| (i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health or medical care, | (i) sa vie est menacée pour des raisons autres que l'incapacité de ce pays de fournir des soins médicaux ou de santé adéquats, |

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| (ii) of extreme sanctions against the immigrant, or | (ii) des sanctions excessives peuvent être exercées contre lui, |
| (iii) of inhumane treatment of the immigrant; | (iii) un traitement inhumain peut lui être infligé. |

[51] In this regard, the *Regulatory Impact Statement* accompanying these Regulations (but not a part of them) explicitly states that the risk faced by the applicant must be personalized: "The claimant must be subject to an identifiable risk if forced to leave Canada. The risk must be compelling, consisting of a threat to life, excessive sanctions or inhumane treatment. It must be personal, that is, directed at the individual rather than being based on generalized situations of risk faced by other individuals in the country of return . . . The criteria are intended to be narrowly drawn [in French, "*circonscrits*"] to avoid creating an admissions system on top of the refugee determination system." (*Canada Gazette*, Part II, Vol. 127, No. 3, page 655; emphasis added.)

[52] However, in 1994, a review of the PDRCC class procedures was initiated. Madam Justice McGillis explained the result of this review in her judgement in *Sinnappu v. Canada*, above, at paragraph 36 as follows:

> . . . Following the review, a recommendation was made to broaden the definition in subsection 2(1) of the Regulations by including factors of generalized risk facing the person upon removal to the country in question. Although that recommendation was not accepted, a decision was made to develop guidelines in order to assist officers in interpreting the regulatory criteria. In July 1994, the Department of Citizenship and Immigration (Department) issued guidelines entitled *What is the PDRCC*? (PDRCC class guidelines) to assist officers reviewing applications for landing under the PDRCC class in interpreting the criteria in the Regulations. For the

> purposes of the present case, the following are the relevant portions of the PDRCC class guidelines:
>
> . . .
>
> • ". . .would not be faced generally by other individuals . . ." The threat is not restricted to a risk personalized to an individual; it includes risks faced by individuals that may be shared by others who are similarly situated. Neither are risks restricted by ethnic, political, religious or social factors as the concept of persecution is in the Convention refugee definition. Whether or not the risk is associated with a "Convention" ground, a person may fall within the scope of this definition. Notwithstanding this, the limitation imposed by the PDRCC definition in the phrase "which risk. . . would not be faced generally by other individuals in or from that country" applies. Any risk that would apply to all residents or citizens of the country of origin cannot result in a positive decision under this Regulation. [Emphasis added.]

[53] We note that the guidelines dealt with the wording of the former Regulations and certainly do not bind the Court with respect to interpreting subparagraph 97(1)(*b*)(ii) of the Act as it reads now. That being said, it is important to note that, subsequent to 1994, there were significant regulatory and statutory amendments concerning the PDRCC class.

[54] A report by the Auditor General of Canada dated December 1997 contains the following observations:

> 25.6 Citizenship and Immigration Canada is having difficulties resolving failed refugee claims quickly and efficiently. The review of risk of return contains ambiguities that raise questions about its merit. We also found a lack of rigour in the assessment of humanitarian grounds for allowing failed claimants to remain. Further, the Department is having serious difficulties carrying out removals.
>
> . . .

> 25.116 As discussed in the following paragraphs, the review of risk of return currently contains ambiguities that raise questions about its merit. In its present form, this step is akin to a reassessment of the Board's decision. Further, it entails a duplication of effort that affects the efficiency of the entire claim process. We also found a lack of rigour in the assessment of humanitarian grounds cited by failed refugee claimants. Finally, the Department is having serious difficulties carrying out removals.
>
> . . .
>
> 25.117 Under the Minister's discretionary power to create classes of persons to single out for special treatment, a class of persons called the Post-Determination Refugee Claimants in Canada Class was created by regulation in 1993. It was designed to protect claimants who fail to meet the Convention's definition of refugee but who nonetheless would face personal risk of harm if forced to leave Canada. Establishment of this class formalized a practice that the Department had used since 1989. According to the stated criteria, the risk must be compelling - consisting of a threat to life, extreme sanctions or inhumane treatment - and it must be personal - that is, directed at the individual rather than based on a generalized situation of risk in the country. The objective in this case is different from the Department's when it assesses the general conditions in a country to determine if carrying out removals to that country would be justified. [Emphasis added.]
>
> . . .
>
> 25.125 Citizenship and Immigration Canada should ensure that the risk-of-return review is:
>
> - within the scope of the objectives set for the Post-Determination Refugee Class in Canada . . .
>
> [Emphasis added.]

[55] In addition to these criticisms about the criteria used in relation to the scope of the objectives set for the PDRCC class, this report by the Auditor General resulted in the creation of an advisory group to amend the statute. This group’s work was the basis for the current immigration and refugee

statute, the I*mmigration and Refugee Protection Act*, S.C. 2001, c. 27, which was enacted by Parliament in 2001 and entered into force on June 28th, 2002.

[56] The new statute includes the wording of sections 96 and 97 as they read now, and it radically changed the scheme governing what was formerly called the PDRCC class. Specifically, we now have a statutory scheme (not regulatory), the decision on the "person in need of protection" status under section 97 is made at the same time as the decision on the "refugee" status under section 96, and both these decisions are made by the Refugee Protection Division of the Immigration and Refugee Board when applications are submitted in Canada.

[57] In this regard, the Immigration and Refugee Board's legal services produced a document entitled *Consolidated Grounds in the Immigration and Refugee Protection Act* dated May 15, 2002, which describes the conditions that must be met under paragraph 97(1)(*b*) of the Act (as of the date of this judgement, this document is on the Board's website). It is, to some extent, the modern counterpart of the departmental guidelines referred to in *Sinnappu*, above. This document contains an interpretation that is quite different from the statutory provision:

> **3.1.7. Risk not faced generally**
>
> If the risk faced by a person stems from a general risk in that country, the person is not protected under section 97(1)(*b*). Protection is limited to those who face a specific risk not faced generally by others in the country. There must be some particularization of the risk to the person claiming protection as opposed to an indiscriminate or random risk faced by the claimant and others.
>
> A claim based on natural catastrophes such as drought, famine, earthquakes, etc. will not satisfy the definition as the risk is

> generalized. However, claims based on personal threats, vendettas, etc. may be able to satisfy the definition (provided that all the elements of s. 97(1)(*b*) are met) as the risk is not indiscriminate or random.
>
> In a civil war situation a claimant would be required to adduce some evidence that the risk faced is not an indiscriminate risk faced generally in that country, but linked to a particular characteristic or status. In a refugee claim, a claimant fleeing a situation of civil war may be able to establish a claim where the risk of persecution is not individualized but is group-based harm that is distinguishable from the general dangers of civil war. There is a requirement of some targeting although the targeted group can be large and there can be several opposing targeted groups. Similarly, the PDRCC Guidelines did not require individualized targeting, but would exclude victims of random violence in a civil war situation if all residents were subject to that random violence. This approach to risk arising from civil war is consistent with the IRB's Chairperson's *Civil War Guidelines* and appears to be consistent with the intent of s. 97(1)(*b*)(ii).
>
> Therefore, individuals who face a serious and credible risk may not be able to benefit from protection under s. 97(1)(*b*) as long as the risk is faced generally by citizens in that country irrespective of their personal characteristics or status. [Emphasis added.]

**Jurisprudence**

[58] The decisions of this Court on paragraph 97(1)(*b*) are grounded on whether or not there is a personalized risk in each case, which is established on the basis of a factual analysis appropriate to the circumstances in each case.

[59] By way of example, in *Cius v. Canada (Citizenship and Immigration)*, 2008 FC 1, *Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331, and *Vickramv v. Canada (Citizenship and Immigration)*, 2007 FC 457, the applicants sought to establish a personalized risk

by reason of their membership in a group of persons who could be perceived as more affluent and thus more likely to be the victims of generalized violence. Their applications were properly dismissed since a personalized risk must target an individual in a particularized way. Similar reasoning was followed in *Osorio v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1459.

[60] However, in *Martinez Pineda v. Canada (Citizenship and Immigration)*, 2007 FC 365, the applicant was able to establish a particularized risk that targeted him personally despite the prevailing general violence, which could, in this case, lead to the application of subparagraph 97(1)(*b*)(ii).

[61] The *Sinnappu* decision, above, is based on an analysis of the 1994 departmental guidelines, which were difficult to reconcile with the Regulations applicable at the time and which are, in any event, outdated, given the new legislative context.

[62] Madam Justice Tremblay-Lamer invited the Federal Court of Appeal to rule on the issue raised here by counsel for the applicant by certifying the following question in the *Prophète* case, above:

> Where the population of a country faces a generalized risk of crime, does the limitation of section 97(1)(*b*)(ii) of the IRPA apply to a subgroup of individuals who face a significantly heightened risk of such crime?

[63] In its recent decision dated February 4, 2009, in *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31, the Federal Court of Appeal declined to deal with this subject, noting that the certified question was too broad. Nonetheless, the Court noted that there was evidence before Madam Justice Tremblay-Lamer allowing her to conclude as she did:

> [7] The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" for him (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15) (emphasis in the original). As drafted, the certified question is too broad.
>
> [8] Taking into consideration the broader federal scheme of which section 97 is a part, answering the certified question in a factual vacuum would, depending on the circumstances of each case, result in unduly narrowing or widening the scope of subparagraph 97(1)(*b*)(ii) of the Act.
>
> [9] For these reasons, we decline to answer the certified question.
>
> [10] In the case at bar (*Prophète v. Canada (Citizenship and Immigration)*, 2008 FC 331), there was evidence on record allowing the Applications Judge to conclude:
>
> > [23] . . . that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms of criminality is general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence.

[64] Although the Federal Court of Appeal declined to answer the question, its reasons on this point are consistent with the section 97 analysis that is being carried out here.

**Application to Ms. Innocent's case**

[65] The primary argument of counsel for the applicant that she is more at risk of the generalized crime prevalent in Haiti than the rest of the population because she is perceived to be a member of a group that is more affluent, cannot therefore succeed, and this argument fails for the reasons set out at length below.

[66] However, there remains the alternative argument advanced by counsel for the applicant, i.e., that the applicant was directly targeted by a gang of thugs who attacked her three times. Thus, according to her counsel, the applicant would be subject to a personalized risk that goes beyond the risk faced by those who are perceived as rich since, in her particular case, she was personally and directly targeted.

[67] A person victimized by crime is not, based on that fact alone, a person in need of protection under section 97 of the Act. It depends on the circumstances of each case: *Cius v. Canada (Citizenship and Immigration)*, above, at paragraphs 3, 4 and 23, *Acosta v. Canada (Citizenship and Immigration)*, above.

[68] Moreover, the personalized risk analysis must be prospective. In the circumstances of this case, it is unlikely that the applicant will be subject to a personalized risk by the same band of thugs almost 4 years after the incidents in question. However, it is not the Court's task to carry out this prospective analysis, but the panel's. The panel found that "according to the evidence adduced

before it, the risk to which the claimant could be subjected is a generalized risk affecting the entire population of the country and not a personalized risk . . .” (decision, at para. 18).

[69] As the Supreme Court of Canada noted in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R.190, at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. <u>But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law</u>. [Emphasis added.]

**Conclusion**

[70] For these reasons, the application for judicial review is dismissed.

**Certification of question**

[71] Counsel for the applicant has proposed that the following question be certified for purposes of paragraph 74(*d*) of the Act: “Does the exclusionary provision found in subparagraph 97(1)(*b*)(ii) of the Act apply when the subgroup of which the claimant is a member faces the risk in question or only when the entire population faces the same risk?”

[72] Counsel for the Minister is opposed to the question and notes, first, that subparagraph 97(1)(*b*)(ii) does not contain a restriction but an implementation measure and second, that the question is too broad because it deals with all subgroups, not just the subgroup of individuals who are affluent or are perceived as such.

[73] In my view, the question is improperly framed. However, I will not reframe the question since I am also of the view that the very subject of this question is identical to the subject of the question framed by Madam Justice Tremblay-Lamer in *Prophète*, above, the wording of which is reproduced above and which the Federal Court of Appeal declined to answer in *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31.

[74] I see no point in framing a question that the Federal Court of Appeal has clearly indicated it will not answer. Therefore, no question will be certified for purposes of paragraph 74(*d*) of the Act.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that the application for judicial review is dismissed.

"Robert M. Mainville"
Judge

Certified true translation
Mary Jo Egan, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-541-09 |
| **STYLE OF CAUSE:** | PHILOMENA INNOCENT v. MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | September 15, 2009 |
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| **DATED:** | October 8, 2009 |

**APPEARANCES:**

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