Federal Court  Cour fédérale

Date: 20110124

Docket: IMM-1709-10

Citation: 2011 FC 81

Ottawa, Ontario, January 24, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

MELVIN ALONSO CRUZ PINEDA

Applicant

and

THE MINISTER OF CITIZNESHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated February 24, 2010, concluding that the applicant is not a Convention refugee or person in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the applicant does not have a well-founded fear of persecution in Honduras on a Convention ground, nor would he be

subject personally to a risk to his life, or to a risk of cruel and unusual treatment or punishment that is not faced generally by others in Honduras, or to a risk of torture, should he return to Honduras.

FACTS

Background

[2] The applicant is a 30-year-old citizen of Honduras. He has a common-law wife and two sons who remain in Honduras. His father lives in Canada. The applicant entered Canada on November 22, 2007, and claimed refugee protection on the grounds that he faces a serious threat to his life from a Honduran gang.

[3] Beginning in November of 1997, the applicant was employed as a delivery driver and salesman for a large grocery store in Tula, Honduras, in which capacity he would distribute groceries and collect money from stores in his city.

[4] On January 24, 2006, the applicant and his assistant were attacked on the road as they were driving to return the company car to headquarters. They were intercepted by four heavily armed men who stated that they were members of the Mara Salvatrucha (MS-13), a notorious and brutal Honduran gang. The men robbed the claimant of his belongings and demanded access to the truck's locked cash box. When the applicant was unable to give them access, they severely beat the applicant and his assistant, and warned them not to contact the police. Although the applicant told his employer what had happened, he was afraid to contact the police as a result of the threats made to him and his family. The applicant required reconstruction of his gums and teeth as a result of the beating.

[5] Two days after the beating, the applicant quit his job for fear of being killed by MS-13 members.

[6] In late February of 2006 the applicant began working as a driver and salesperson for a poultry company in Tula. On June 17, 2007, the applicant and his assistant were again robbed while on his delivery route. The robbers were the same four armed men who had robbed him in January, and they recognized the applicant. The robbers once again beat the applicant when he was unable to give them access to the truck's locked security box. One of the four men shot the applicant's hand as retribution for what he said was the applicant's unwillingness to cooperate. Ultimately, the applicant was told that he could live but only if he cooperated with them by telling them when and where would be the best times and locations to rob his truck.

[7] Fearing for his life, the applicant agreed to help the gang members. They told him that they knew where he lived and would contact him soon. The robbers again threatened the applicant and his family should he fail to cooperate with their demands.

[8] Again the applicant informed his employer of the incident but refused to go to the police for fear of retribution from the gang. The applicant also went to a hospital for treatment of his injuries.

[9] The applicant again quit his job for fear of being attacked. On June 24, 2007, the applicant moved with his family to hide in his father's house in San Pedro Sula, a town approximately 1.5 hours by car from Tula. Knowing that MS-13 operated throughout Honduras, however, the

applicant did not believe that he would be safe in Honduras. As a result, on September 7, 2007, the applicant left his family and fled to Canada, via Mexico and the United States. The applicant entered Mexico on September 7 by airplane, with the help of a US non-governmental organization, Vive La Casa. The applicant then used smugglers to help him cross into the United States. In the course of his crossing to the United States, the applicant was robbed of his belongings and identity documents.

[10] The applicant arrived in Buffalo on October 31, 2007, and contacted Vive La Casa, who helped him to make his refugee claim in Canada. The applicant entered Canada on November 22, 2007, and made the claim that is the basis of this application.

[11] Since arriving in Canada, the applicant has been in contact with his wife and mother in Honduras. His mother informed him that on December 3, 2007, two men had come looking for the applicant at his mother's house. The applicant's wife has told him that although she has not had any trouble she has taken extraordinary precautions, including hiding in her home and changing her telephone number, in order to evade the MS-13.

Decision under Review

[12] On February 24, 2010, the Board refused the applicant's claim for protection. The Board separately considered the existence of grounds under section 96 and section 97 of the Act. With regard to section 96, the Board stated at paragraph 8:

> ¶8. The determinative issue in this section 96 analysis is nexus. That is, whether the harm the claimant fears is on account of a Convention ground. I find that it is not.

[13] The Board determined that the applicant had been targeted solely because he was a driver and the gang wished to rob him. The Board referred to case law that supports the finding that there is generally not a link for victims of crime between the crime and a Convention ground. At paragraph 12 the Board concluded:

> ¶12. The claimant's fear in this case is not linked to race, religion, nationality, political opinion or membership in a particular social group. Therefore, I find the claimant is a victim of crime which does not provide him with a link to a Convention ground. . . .

[14] With regard to section 97, the Board stated that determinative issue at paragraph 13:

> ¶13. The determinative issue in this section 97 analysis is whether the claimant faces a personal risk that is not faced generally by others in Honduras. Section 97(1)(b)(ii) of the *IRPA* specifically excludes persons who are at a risk that is faced generally by others in of [*sic*] from that country.

[15] At paragraph 14 of its decision, the Board provided what the parties agree was a correct statement of the law regarding what constitutes a risk faced by a refugee claimant "personally" as opposed to one faced by the general population:

> ¶14. The assessment of risk must be specific to the individual[1] and the evidence must establish a specific, individualized risk of harm with regard to the particular claimant.[2] The risk of harm faced by the claimant cannot be indiscriminate or random, and one faced generally by the population of the country.[3] The risk of harm must arise from something more than an isolated incident[4] or a random act.[5] Where a claimant has been specifically targeted by criminal elements the personalized risk may be made out provided the claimant is not a victim of generalized violence.[6] The fact that a claimant is personally at risk does not necessarily mean that the risk

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[1] *Jarada, Alaa v. M.C.I.* (F.C., no. IMM-4638-04), de Montigny, March 24, 2005, 2005 FC 409; *Prophète, Ralph v. M.C.I.* (F.C.A., no. A-168-08), Létourneau, Blais, Trudel, February 4, 2009, 2009 FCA 31.
[2] *Ahmad, Hasib v. M.C.I.* (F.C., no. IMM-9188-09) Rouleau, June 4, 2004, 2004 FC 808.
[3] *Vickram, Safraz v. M.C.I.* (F.C., no. IMM-3638-06), de Montigny, April 30, 2007, 2007 FC 457.
[4] *Alshynetesky, Leyka v. M.C.I.* (F.C., no. IMM-8131-03), Pinard, October 1, 2004, 2004 FC 1322.
[5] *Sorokin, Yuri v. M.C.I.* (F.C., no. IMM-5656-04), Simpson, March 21, 2006, 2006 FC 368.
[6] *M.C.I. v. Richards Gladstone* (F.C., no. IMM-7310-08), Mosley, September 7, 2004, 2004 FC 218.

> is not one faced generally by others in that country.[7] A generalized risk need not be experienced by every citizen. The word "generally" is commonly used to mean "prevalent" or "widespread". A generalized risk could be one experienced by a particular group or subset of a country's population, thus membership in that category is not sufficient to personalize the risk.[8] The fact that a group of people may be victimized repeatedly or more frequently by criminals (e.g., because of their perceived wealth or because they live in a more dangerous area), does not remove the risk from the exception if it is one faced generally by others.[9]

[16] The Board specifically referred to and considered case law from this Court that a generalized risk is a risk that applies to all residents of a country (see, for example, *Surajnarain v. Canada (Citizenship and Immigration)*, 2008 FC 1165), but the Board rejected that line of cases in favour of more recent cases, including, for example, the decision of the Federal Court of Appeal in *Prophète* and cases that have explicitly rejected the reasoning in *Surajnarain*.

[17] The Board considered the specific threats faced by the applicant. At paragraph 15, the Board found that the claimant was victimized because he was driving a delivery truck in the wrong place at the wrong time, and not because he had been specifically targeted by the MS-13 gang members. The Board stated, however, that:

> ¶15. …The second time the claimant's truck was stopped, a year-and-a-half later, the claimant was again in the wrong place at the wrong time. The MS recognized the claimant from the first time and as a result the claimant became personally subjected to the risk of the MS which was that they wanted him to provide ongoing information

[7] *Prophète, Ralph v. M.C.I.* (F.C., no. IMM-3077-07), Tremblay-Lamer, March 12, 2008, 2008 FC 331; *Prophète, Ralph v. M.C.I.* (F.C.A., no. A-168-08), Létourneau, Blais, Trudel, February 4, 2009, 2009 FCA 31; *Dunis Joel Acosta v. M.C.I.* (F.C., no. IMM03731-08), Gauthier, March 2, 2009, 2009 F.C. 213.
[8] *Osorio, henry Mauricio Gil v. M.C.I.* (F.C., no. IMM-585-05), Snider, October 27, 2005; 2005 FC 1459; *Marcelin Gabriel, Marie Negland v. M.C.I.* (F.C., no. IMM-1816-09), Pinard, November 19, 2009; 2009 FC 1170.
[9] *Prophète, Ralph v. M.C.I.* (F.C., no. IMM-3077-07), Tremblay-Lamer, March 12, 2008, 2008 FC 331; Ventura De Parada, Ana Margarita v. M.C.I. (F.C., no. IMM-1021-09), Zinn, August 27, 2009; 2009 FC 845; *Rodriguez Perez, Henry Sotero v. M.C.I.* (F.C. no. IMM-646-09), Kelen, October 14, 2009; 2009 FC 1029; *Innocent, Philomena v. M.C.I.* (F.C., no. IMM-541-09), Mainville, October 8, 2009; 2009 FC 1019.

> on truck shipments. However, this does not establish that the risk is not one faced generally by the population in Honduras.
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> [Underlining added by Court]

[18] At paragraph 16 of its decision, the Board recognized that the MS-13 is a "particularly violent" gang, and that gangs are contributing to a "particularly acute" problem in Honduras. The Board recognized that gang activity is prevalent throughout Honduras, and is a "widespread problem."

[19] The Board concluded that the applicant does not face a personal, as opposed to a generalized, risk. At paragraph 21 the Board stated:

> ¶21. Crime struck upon the claimant much like a natural disaster strikes its victims. There was a confluence of factors whereupon by chance and circumstance this claimant was in the wrong place at the wrong time. The claimant did not know his attackers before and had he not been driving a truck of goods he may have never met them at all. Also, while they may be criminals, documentation indicates they are successful criminals. It is reasonable to expect criminals to determine their victims by certain favourable factor [sic] such as access, chance of success, and profitability. It seems natural that criminals would target people and property that would allow them to succeed and not waste their time on "low value targets". In this sense they are being selective but not discriminating other than by gain. The claimant was in the sub-group of the population which the MS felt would be profitable to target. They even asked the claimant to tell them when other profitable shipments would be moving. Clearly, the MS does not care about the claimant, but rather, the goods and cash he transported and may knows [*sic*] about.

[20] The Board also rejected the applicant's submission that the gang members insistence that he begin providing them with information about lucrative shipment times and locations was tantamount to an effort to recruit him:

> ¶22. Although the gang wanted the claimant to provide more information about when there would be more lucrative shipments, this is not tantamount to an effort to recruit the claimant into their gang as much as an effort to extort more information from the claimant by threat of violence to him and his family if he failed to cooperate. Every transport driver could be asked the very same thing. Again, this is more a matter of where the claimant happened to be on a certain day rather than anything particularized to the claimant.

[21] Finally, the Board held that the claimant had a viable internal flight alternative (IFA) in Honduras. In particular, the Board held that San Pedro and Tegucigalpa were potential IFA locations.

[22] The Board noted that the applicant had not been discovered in San Pedro when he hid there (for 3 months) while preparing to come to Canada. Moreover, since the applicant has left Honduras, his wife and child have not been harassed in any way by the MS-13 gang. However, his mother has been visited once in December of 2007 by two men asking for the whereabouts of the applicant. Since that time she had moved within the same city and has not been found or bothered.

[23] At paragraph 25 the Board concluded:

> ¶25. . . . It has been more than two years since the claimant stopped driving delivery trucks and left Honduras. If the claimant returned to Honduras and lived in San Pedro or Tegucigalpa, which is more than 200 km away, on a balance of probabilities, it is not likely he would be found by the MS who have shown no interest for quite some time. The claimant said he would have no problem relocating to and living in an IFA if it were not for the fear of the MS. The claimant has not established that there is no alternative occupation reasonably open to him in his country.[10] The claimant has a viable and reasonable IFA in San Pedro and Tegucigalpa.

[10] *Osorio, Henry Mauricio Gil v. M.C.I.* (F.C., no. IMM-585-05), Snider, October 27, 2005; 2005 F.C. 1459.

LEGISLATION

[24] Section 96 of the Act, grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[25] Section 97 of the Act grants protection to persons whose removal would subject them personally to a danger of torture, or to a risk to life, or to a risk of cruel and unusual treatment or punishment:

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, their country of former habitual residence, would subject them personally	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 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 (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[26] The applicant submits the following two issues in this application:

1. Did the Board err in determining that the applicant did not face a personal risk?

2. Did the Board err in finding an IFA in Honduras?

STANDARD OF REVIEW

[27] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, per Justice Binnie at paragraph 53.

[28] As I recognized in *Rodriguez Perez v. Canada (Citizenship and Immigration)*, 2009 FC 1029, at paragraph 23, following *Acosta v. Canada (Citizenship and Immigration)*, 2009 FC 213, and the Federal Court of Appeal in *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31, the interpretation of the exclusion in section 97(1)(b) of the Act of generalized risks of violence is an issue of application of law to the particular facts of a case, subject to review on a standard of reasonableness.

[29] An examination of a Board's determination regarding the viability of a proposed IFA is also a question of mixed law and fact to be determined on a standard of reasonableness: *Duran Mejia v. Canada (Citizenship and Immigration)*, 2009 FC 354 at paragraphs 26, 29; *Syvyryn v. Canada (Citizenship and Immigration)*, 2009 FC 1027, 84 Imm. L.R. (3d) 316, at paragraph 3; and my decision in *Alvarez Cortes v. Canada (Citizenship and Immigration)*, 2010 FC 770 at paragraph 15.

ANALYSIS

Issue 1: Did the Board err in determining that the applicant did not face a personal risk?

[30] As discussed above, the Board concluded that the applicant is excluded from gaining protection under section 97 of the Act by virtue of section 97(1)(b)(ii), which excludes persons whose claim is based on a risk that would be "faced generally by other individuals in or from that country." The Board accepted the applicant's credibility and did not doubt that the attacks related by the applicant had, in fact, occurred. The applicant submits that the Board misconstrued or ignored relevant evidence in making this determination.

[31] First, the applicant submits that the Board failed to properly consider the applicant's evidence regarding the personal attacks that were made on him. The applicant cites *Martinez Pineda v. Canada (Citizenship and Immigration)*, 2007 FC 365, in which Justice de Montigny held at paragraph 15:

> ¶15. . . . It cannot be accepted, by implication at least, that the applicant had been threatened by a well-organized gang that was terrorizing the entire country, according to the documentary evidence, and in the same breath surmise that this same applicant would not be exposed to a personal risk if he were to return to El Salvador. It could very well be that the Maras Salvatruchas recruit from the general population; the fact remains that Mr. Pineda, if his testimony is to be believed, had been specifically targeted and was subjected to repeated threats and attacks. On that basis, he was subjected to a greater risk than the risk faced by the population in general.

[32] The applicant submits that his evidence revealed that he is being personally targeted. In particular, on the second occasion in which he was attacked, the applicant was recognized by his attackers, who spared his life only on the condition that he co-operate with them. Moreover, on

December 3, 2007, two men who the applicant believed to be from the MS-13 gang came looking for him. The Board states in paragraph 15 that the applicant "…became personally subjected to the risk of the MS…".

[33] The applicant therefore submits that his claim is based not on the fact that he is a delivery driver, and therefore faces the generalized threat faced by all delivery drivers in Honduras, but that he has been specifically and personally targeted by the MS-13 gang, who wish him to actively participate in their criminal activities by feeding them information regarding deliveries. The applicant submits that the Board misapprehended this evidence in finding that the applicant did not face a personalized risk not faced by every transport driver asked to co-operate with the MS-13.

[34] At paragraph 15 the Board specifically considered the fact that the gang recognized the claimant and attempted to make him provide ongoing information about deliveries. The Board found in paragraph 15 that this constituted a personal risk. However, at paragraph 21, the Board found that the evidence showed that the gang cared not about the applicant but about getting the shipments. At paragraph 22, the Board concluded that the risk faced by the applicant was the same risk as would be faced by any transport driver.

> ¶21. Crime struck upon the claimant much like a natural disaster strikes its victims. There was a confluence of factors whereupon by chance and circumstance this claimant was in the wrong place at the wrong time. The claimant did not know his attackers before and had he not been driving a truck of goods he may have never met them at all. Also, while they may be criminals, documentation indicates they are successful criminals. It is reasonable to expect criminals to determine their victims by certain favourable factor [sic] such as access, chance of success, and profitability. It seems natural that criminals would target people and property that would allow them to succeed and not waste their time on "low value targets". In this sense they are being selective but not discriminating other than by gain.

> The claimant was in the sub-group of the population which the MS felt would be profitable to target. They even asked the claimant to tell them when other profitable shipments would be moving. Clearly, the MS does not care about the claimant, but rather, the goods and cash he transported and may knows [sic] about.
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> ¶22. Although the gang wanted the claimant to provide more information about when there would be more lucrative shipments, this is not tantamount to an effort to recruit the claimant into their gang as much as an effort to extort more information from the claimant by threat of violence to him and his family if he failed to cooperate. Every transport driver could be asked the very same thing. Again, this is more a matter of where the claimant happened to be on a certain day rather than anything particularized to the claimant.

[35] In *Rodriguez Perez v. Canada (Citizenship and Immigration)*, 2009 FC 1029, I considered a claim in which the applicants were small business owners who had received telephone threats from a gang seeking to extort profits from the applicants. At paragraph 34 I held that the mere fact of the threats did not demonstrate a personalized risk:

> ¶34. In this case the applicants were targeted because they owned a small business. The telephone harassment and threats after they shut down their business were a continuation of the extortion. There is no evidence that the *maras* personally targeted the applicants or that they face a greater risk then other small business owners or persons perceived to be relatively wealthy (*Pineda v. Canada (MCI)*, 2007 FC 365, per Justice de Montigny).

[36] In this case, the Board found that all delivery drivers could be subject to the same threats and attacks as was the applicant. The Board explicitly considered the applicant's submissions to the contrary, but ultimately concluded otherwise. The Board's earlier reference in paragraph 15 to the applicant's "personalized risk" is confusing, but in the context of the whole decision, must mean the type of "personalized risk" faced by all truck drivers extorted by the MS-13 gang. Accordingly, I conclude that this decision was reasonably open to the Board, and the reasons that it provides are

justified, transparent and intelligible. This Court cannot interfere with the Board's finding on this basis.

[37] The applicant further submits that the Board ignored probative evidence. In particular, the applicant submits that the Board committed a reviewable error by failing to mention or discuss the evidence provided by Mr. Luis Carrillos, Youth Program Manager of the Hispanic Development Council in Toronto. This evidence is an "opinion letter" dated December 17, 2009 with respect to the applicant. In his evidence, Mr. Carrillos stated the following, based upon his experience researching and studying gang violence in Central America and Honduras:

> . . . there is a strong culture of "payback" or retribution in gang culture. Also, a "slight" against one gang member (that seems to be the case of Mr. Cruz Pineda), is seen as being a "slight" against the gang, as a whole, and as such other members of the gange may target her [sic] who has been seen to have done harm to a "brother". In such situations the "offender" may be green lighted, and he may be killed upon identification. In this case, greenlighting some one means that this person has a death sentence over her head and can be killed anywhere there is a MS13 "clicka" – chapter- in Honduras. For having fled the country, Mr. Cruz Pineda's life would be in danger, were he to find himself back in Honduras.

[38] Although the Board is generally presumed to have considered all of the evidence and need not specifically mention any specific piece of evidence, where the Board fails to mention particularly probative evidence, or fails to refer to contrary evidence while considering evidence that supports its position, the Court may infer that the Board overlooked the contrary or probative evidence. In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 (QL), 157 F.T.R. 35, Justice Evans stated the relevant law at paragraph 17:

> ¶17. However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency

> made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[39] Although in this case the Board did explicitly recognize that the risks posed by gangs in Honduras are serious and pervasive, it failed to consider the specific evidence of Mr. Carillos that was provided by the applicant regarding why the applicant would now face a heightened threat as compared to the general population. Mr. Carillos's evidence is probative and if accepted by the Board could materially affect the outcome of the case. In failing to mention Mr. Carillos's evidence, the Board therefore committed a reviewable error.

Issue 2: Did the Board err in finding an IFA in Honduras?

[40] The applicant submits that the Board failed to consider the applicant's personal circumstances in concluding that the applicant had a viable IFA in Honduras.

[41] The applicant submits that the Board ignored the applicant's evidence regarding the fact that his aunt had been raped and murdered by members of MS-13 in San Pedro due to her failure to pay extortion money to them. The evidence, however, was that this crime occurred prior to the applicant's troubles with the gang. It is not clear how this would impact the applicant's safety in the

proposed IFA location except that the MS-13 gang is obviously in San Pedro, and the applicant was terrorized by the gang so that he hid when in San Pedro.

[42] The applicant further submits that the Board ignored the documentary evidence revealing the prevalence of MS-13 gang activity in both proposed IFA locations.

[43] In this case, the Board accepted that MS-13 operates in the proposed IFA locations. The Board appeared to conclude that the applicant would face no greater risk there than does the general population. The Court finds, however, that the Board's failure to consider the evidence of Mr. Castillo, which if accepted would demonstrate that the applicant's personal circumstances differed from those of the general population, also taints its findings on the viability of the proposed IFA locations. If Mr. Castillo's evidence is accepted, then the fact that the Board recognized that MS-13 operates throughout Honduras would mean that the applicant would be threatened regardless of where he hides.

[44] Thus, although it is true that the finding of an IFA can be determinative of a claim and can stand alone, in this case the Board's finding of a viable IFA was not reasonable because it was not supported on all the evidence. By failing to consider the evidence of Mr. Castillo, the Board failed to render a decision that is justifiable, transparent and intelligible.

CONCLUSION

[45] I agree with the applicant's argument that the Board had a duty to consider the evidence of Mr. Castillo regarding the opinion that the applicant would be specifically targeted by the MS-13

gang because his prior behaviour, including his decision to flee the country. Should he return, while counsel for the respondent made strong submissions why this opinion was based on a weak premise, that rational is one for the Board to raise. In failing to refer to this potentially probative evidence, the Board has therefore committed an error not reasonably open to it. The decision of the Board must be set aside and the matter referred to a differently constituted panel of the Board for redetermination.

CERTIFIED QUESTION

[46] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. this application for judicial review is allowed;

2. the decision of the Board dated February 24, 2010 is set aside; and

3. this refugee claim is referred to a differently constituted panel of the Board for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Toronto, Ontario
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