Federal Court  Cour fédérale

Date: 20111101

Docket: IMM-1223-11

Citation: 2011 FC 1244

Ottawa, Ontario, November 1, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ARTHRINE MELISHA TURTON
VEDA-MAE DOROTHY TURTON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 4 February 2011 (Decision), which refused the Applicants' claims for protection as Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants, Arthrine Melisha Turton (Principal Applicant) and her mother Veda-Mae Dorothy Turton (Secondary Applicant) are citizens of Jamaica. The Principal Applicant arrived in Canada on 26 July 2008. The Secondary Applicant arrived in Canada on 15 November 2008. The Applicants claimed refugee status on 22 January 2009.

[3] On 21 July 2008, the Principal Applicant was abducted on her way home from work and school. Her abductors forced her into the backseat of her own car and drove with her to their neighbourhood. While there, she was seen by a number of people in the neighboured. Her abductors stole her ID, Blackberry, laptop computer, and other items. After dropping off one person in the neighbourhood, her abductors took the Principal Applicant with them on a robbery spree. While she was in the car with the gang members, she heard the name “Lance” mentioned.

[4] While robbing a store, the abductors shot and killed a security guard. As the Principal Applicant later found out, the guard who was killed was John Amos, the nephew of Senior Superintendent Newton Amos**,** a high ranking police officer in the Jamaican Constabulary Force. After they completed their crime spree, the robbers took the Principal Applicant back to their neighbourhood. After giving her directions on how to return to her home, they told her they had been watching her for a while and, if she went to the police, they would find her and kill her. They then let her drive home.

[5] After returning home that night, the Principal Applicant was distraught. When she went in to work the next day, she explained what had happened to her supervisor. Her supervisor contacted the company's head of security who encouraged her to report the incident to the police. Although she was initially reluctant to report the incident because she had been threatened and she believed the police to be corrupt, the Principal Applicant agreed to file a police report. Her reluctance to report the incident was overcome when her company's head of security told her that her licence plate had likely been observed and, if she did not report to the police, she would likely be implicated in the shooting.

[6] Because the Principal Applicant was afraid of being recognized by gang contacts at the police station, the head of security arranged a meeting with three detectives at the Hilton Hotel in Kingston. At the hotel, she told them her story. The police told the Principal Applicant that she was likely targeted at random because she drove a nice car, lived in an upscale neighbourhood, and was a single woman travelling alone. She did not entirely agree, as her assailants had told her that they had been watching her for some time. At this meeting, the detectives told her that the security guard who was killed was the nephew of Senior Superintendent Amos. They also told her that her abductors were likely members of the Clansmen gang, well known for its tactics of violence and intimidation.

[7] After she reported the incident to the police, the Principal Applicant and her company remained concerned for her safety. The company hired a personal bodyguard to protect her around-the-clock. Her company also bought her a plane ticket to come to Canada, where she would be safe from reprisals. On 26 July 2008, the Principal Applicant departed Jamaica and landed in Toronto.

[8] On 28 September 2008, a member of the Clansmen was killed by the police. The Principal Applicant later testified that she found out from the police that the gang member who was killed was the same Lance she had heard mentioned in the course of the robbery spree.

[9] In October of 2008, after the Principal Applicant had left Jamaica, the Secondary Applicant was followed by three men on her way to Church. When the men were approximately 50 meters away from her she cried out for help. The men fled. The Secondary Applicant also testified to an event in Kingston where she was followed while hailing a taxi. At neither of these times were the Secondary Applicant's assailants identified.

[10] After the Applicants made their refugee claim, the RPD gave them a screening form which contained information about their hearing. Under the section marked "Issues," boxes next to the following issues were ticked:

- Subjective Fear
- Delay in Claiming
- State Protection
- Internal Flight Alternative
- Credibility
- Convention Refugee Definition s. 96
- Nexus
- Agent of Persecution
- Victim of Crime
- Risk to Life or Of Cruel and Unusual Treatment Or Punishment s. 97(1)(b)
- Risk to Life
- Agent of Harm

The box next to “Generalized Risk” under “Risk to Life or of Cruel and Unusual Treatment or Punishment *s. 97(1)(b)*” [italics in original] was not ticked on the form.

[11] The hearing into the Applicants’ claims for protection was held in Toronto on 28 January 2011. The Applicants were not represented by counsel. At the hearing, the RPD identified the following as issues in the proceeding:

> a. Credibility – “it really is not an issue because credibility is looked on all claims”
>
> b. Subjective Fear – “do you fear if you were returned to Jamaica, the alleged assailants or whatever you fear, is it subjective? Do you fear being harmed if you went back to Jamaica?”
>
> c. State Protection – “That is, if you returned to Jamaica, could the state protect you? For example, could the police protect you?”
>
> d. Internal Flight Alternative – “Internal Flight Alternative, I think you have heard that one before, because I have seen your narrative. What does that mean? That means that, well, first of all, before you can claim in any other country besides your country of origin, you have to avail yourself, not only of state protection, but is there anywhere safe in your country, in Jamaica, that you could stay rather than come to Canada?”
>
> e. Nexus – “in your particular case, it is… an issue is nexus, do you fit within the five groups? […] or are you a victim only?”

The RPD also noted that the Applicants would have to meet the statutory criteria under section 96 or paragraph 97(1)(*b*), saying

> So, pursuant to the legislation, are you a convention refugee?
>
> Second, is are you at risk to life of cruel or unusual treatment or punishment, pursuant to the legislation?
>
> So your claim is saying to me that you are a convention refugee and/or at risk

> So, those are the questions obviously I am going to be putting to you to see if you fit within the confines of the legislation.

[12] The RPD also informed the Applicants that they would have an opportunity to make submissions at the conclusion of their testimony. The RPD said:

> What is a submission? Well, most people think it is just a summary of the case, well that is not really the purpose because I just heard the evidence I mean I am getting old, I am not that old, I can remember.
>
> So submissions is [sic] a little more than that. It is attaching the case law to it.
>
> […]
>
> And other documentary evidence that you have. Putting it together and informing the panel, basically your case, how…what case law you want me to rely upon and the remedy that you want at the end of the day.
>
> So I am giving you that opportunity. Obviously you do not know the case law, but if you want the opportunity, I am going to give you that to give submissions, okay?

[13] At the conclusion of the hearing, the RPD gave the Applicants the opportunity to make submissions, and asked if everything had been covered that the Applicants wanted to have heard. The RPD made its Decision on 4 February 2011 and informed the Applicants by letter on 9 February 2011.

DECISION UNDER REVIEW

[14] The RPD rejected the Applicants' claims under section 96 and paragraph 97(1)(*b*). The RPD found that they had not established a serious possibility of persecution if they were returned to

Jamaica; nor had they established a risk to their lives or a risk of cruel and unusual treatment or punishment on return to Jamaica.

[15] In the Decision, the RPD noted credibility, nexus to a convention ground, and generalized risk as the issues that determined the claim. As copies of the Applicants' passports were provided to the RPD, identity was established. The RPD also noted that it had considered the IRB Chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Gender Guidelines) because both Applicants are female.

Nexus to a Convention Ground

[16] The RPD determined the section 96 claim on the issue of lack of nexus to a convention ground. It held that there was no nexus to a convention ground because, when she was attacked and forced to participate in the robbery, the Principal Applicant was targeted because she drove a nice car and lived in an upscale neighbourhood. The RPD noted that the "[Principal Applicant] believed that the gunmen were looking for someone who was economically well off compared to the average citizen." The Principal Applicant was targeted because she was such a person.

[17] The RPD accepted the Secondary Applicant's testimony that she had been followed to church by three men. It did not, however, accept her testimony as to the incident in Kingston where she was hailing a taxi and found that both these incidents were "vague". The RPD also found there was no evidence linking the Secondary Applicant's experiences with the Principal Applicant's: the Secondary Applicant's assailants did not identify themselves as members of the Clansmen gang; nor was there any other evidence of a link between the incidents. The RPD also found that the

Secondary Applicant was not contacted by the Clansmen gang after the Principal Applicant left for Canada, nor were any other members of her family contacted.

[18] Though the RPD accepted that the Applicants were victims of crimes in Jamaica, this was not enough to establish a nexus to a Convention ground. They were not targeted because of their race, religion, nationality, political opinion or membership in a particular social group. Since there was no nexus to a Convention ground, the RPD found that their claims under section 96 must fail.

Generalized Risk

[19] The RPD also considered whether the Applicants were persons in need of protection under paragraph 97(1)(*b*) of the Act. Based on the documentary evidence before it, the RPD found that crime is prevalent in Jamaica. In particular, the RPD noted that the Prime Minister of Jamaica had said on 22 July 2008, the day after the Principal Applicant was attacked, that in 2008 there were 269 arrests for serious crimes in June, 202 murders in May, 135 murders in June, and 69 murders to that date in July.

[20] The RPD found that the Applicants had suffered incidents of harm. However, the RPD found that this harm did not amount to a personalized risk to their lives or a risk of cruel and unusual treatment or punishment. Although the Applicant suffered harm, the risk of further harm to them is no greater than that faced by the general population in Jamaica. The Applicants' risk is one that is faced by all citizens of Jamaica, particularly those Jamaicans who are perceived to be well off. The RPD said that in *Vickram v Canada (Minister of Citizenship and Immigration)* 2007 FC 457, [2007] FCJ No. 619 this Court upheld the RPD's finding that the perception of wealth is not enough to establish a particularized risk within the meaning of section 97. The RPD also noted that

in *Prophéte v Canada (Minister of Citizenship and Immigration)* 2008 FC 331, [2008] FCJ No. 415, Justice Danièle Tremblay-Lamer held that where there is a generalized risk of crime, the fact that a victim of crime is wealthy is not enough to establish a personalized risk of harm. In this case, the RPD found that the Applicants feared the same risk of crime as similarly situated persons in Jamaica. Though wealthy people may be targeted more frequently, this does not mean the Applicants were not subject to the same generalized risk. Since they shared the same risk as others, the Applicants did not make their risk a personalized risk within under paragraph 97(1)(*b*) of the Act.

Credibility

[21] Although the RPD noted in the Decision that it considered credibility, the decision does not include an analysis of the Applicants' credibility.

ISSUES

[22] The Applicants raise the following issues:

1. Whether the RPD breached the Applicants' right to procedural fairness by failing to notify them that generalized risk was in issue;
2. Whether the RPD ignored evidence of personalized risk;
3. Whether the RPD failed to consider gender as a ground for the Applicants' claims.

STATUTORY PROVISIONS

[23] The following provisions of the Act are at issue in these proceedings:

Convention refugee **Définition de « réfugié »**

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;

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;

Person in Need of Protection

Personne à protéger

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 :

(*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,

... …

STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] SCJ 9, [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[25] In *Thirunavukkarasu v Canada (Minister of Employment and Immigration),* [1994] 1 FC 589, [1993] FCJ No 1172, the Federal Court of Appeal held at paragraph 10 that "A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met." In *Gomes v Canada (Minister of Citizenship and Immigration)* 2006 FC 419, [2006] FCJ No. 520, [*Gomes*] Justice Robert Barnes found that it was a breach of procedural fairness for the RPD not to notify the claimant that state protection was in issue. Since the right to notice is an issue of procedural fairness, the standard of review on the first issue is correctness.

[26] As the Supreme Court of Canada held in *Dunsmuir*, above, at paragraph 50

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[27] With respect to the second issue, in *Kaleja v Canada (Minister of Citizenship and Immigration)* 2010 FC 252, [2010] FCJ No. 291, Justice John O'Keefe found that the standard of review with respect to a determination under section 97 is one of reasonableness. Further, in *Guerilus v Canada (Minister of Citizenship and Immigration)* 2010 FC 394, [2010] FCJ No. 438 Justice Richard Boivin held at paragraph nine that "The review of a claim made under subsection 97(1) of the Act calls for an individualized inquiry […] Accordingly, the appropriate standard of review is reasonableness." The second issue deals with the RPD's determination under section 97(1), so the standard of review on that issue is reasonableness.

[28] In *Vilmond v Canada (Minister of Citizenship and Immigration)* 2008 FC 926, [2008] FCJ No. 1150, Justice Michel Beaudry found held at paragraph 13 that the RPD's "failure to consider the claim as it is put forward by the applicant constitutes a misapprehension of the facts and the evidence" which is reviewable on the standard of reasonableness. Further, in *Walcott v Canada (Minister of Citizenship and Immigration)* 2010 FC 505, [2010] FCJ No, 612 Justice Frederick Gibson held that the RPD's "failure to place emphasis on the applicant's gender" was an error to be evaluated against the standard of reasonableness. With respect to the third issue, the standard of review in this case is also reasonableness.

[29] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No. 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was

unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicants

The RPD Breached the Applicants' Right to Procedural Fairness

[30] The Applicants argue that the RPD breached their right to procedural fairness by failing to notify them that generalized risk was in issue. The Applicants say that, following *Cardinal v Kent Institution)*, [1985] 2 SCR 643, [1985] SCJ No. 78, they have an unqualified right to a fair trial, including the right to know the case they had to meet. The RPD failed to raise generalized risk as a part of the case they had to meet, and so violated their right to procedural fairness.

[31] The Applicants rely on *Gomes*, above, and *Maimba v Canada (Minister of Citizenship and Immigration)* 2008 FC 226, [2008] FCJ No. 296 [*Maimba*] for the proposition that, where an issue is not raised by the RPD in either the screening form provided to claimants or at the hearing, there is a breach of procedural fairness. Unlike in *Gomes* and *Maimba*, where the issues that were not raised by the RPD were not central to the determination before the RPD, in this case the issue that was not raised was central to the RPD's determination. This makes the breach of the right to procedural fairness that much more egregious.

[32] The Applicants say that *Lin v Canada (Minister of Citizenship and Immigration)* 2010 FC 108, [2010] FCJ No. 124 [*Lin*] teaches that, where some boxes on the screening form are ticked but others are not, the claimant is put on notice that the issues next to the un-ticked boxes are not in play. The screening form provided to the Applicants did not have the "Generalized Risk" box

ticked, though other boxes under “Risk to Life or of Cruel and Unusual Treatment or Punishment” were ticked. Since the “Generalized Risk” box was not ticked while other boxes were ticked, the Applicants were notified that generalized risk was not in issue. For the RPD to then turn around and make its determination on this basis is a violation of procedural fairness.

[33] At the beginning of the hearing the RPD went through a list of things that it thought were in issue in the proceedings. None of the things the RPD listed was sufficient to put the Applicants on notice that generalized risk was in issue in the proceedings. Though the RPD said “are you at risk of cruel and unusual treatment or punishment, pursuant to the legislation?” as it did at page seven of the transcript, this was insufficient to notify them that generalized risk was in issue. They argue that this statement simply notifies them that a risk to life from an agent of harm is in issue.

[34] The Applicants rely on *Velauthar v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 425 (FCA), 141 NR No. 239 and *Kaldeen v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No. 1033, 64 ACWS (3d) 1190 [*Kaldeen*] for the proposition that it is a breach of natural justice through a denial of the right to know the case to meet when a board gives instructions on issues but makes a finding that negates its stipulations. The RPD instructed the Applicants that some things were in issue, yet found against them on a different basis, so there was a breach of procedural fairness in this case.

[35] Following *Augustine v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No. 1069, 81 ACWS (3d) 854, the Applicants say that even a potential misunderstanding of the issues is enough for a reviewing court to quash and remit a decision. Since there was an actual misunderstanding of the issues in this case there was a breach of procedural fairness and the decision of the RPD should be quashed and remitted for redetermination.

[36] The breach of procedural fairness in this case was made more egregious by the fact that the Applicants were unrepresented at the hearing by counsel. Where a claimant is unrepresented at a hearing, the RPD has a more onerous obligation to indicate what issues are in play and explain the case to be met. Since the RPD did not meet this obligation, the Applicants' right to procedural fairness was breached.

The RPD's Conclusion on Generalized Risk was Unreasonable

[37] The Applicants further argue that the RPD erred in law and in fact by ignoring evidence that showed they faced a personalized risk to life or cruel and unusual treatment or punishment. They argue that, because the RPD found the Applicants' testimony to be frank and truthful and there was no issue of credibility, the events the Applicants testified to must have actually occurred as described in their PIFs and oral testimony.

[38] In its assessment of generalized risk, the RPD failed to address the following facts (Listed Facts):

a. the specific targeting of the Principal Applicant by the Clansmen;

b. the Principal Applicant was targeted because she was a single woman who travelled with her mother;

c. the Principal Applicant was a witness to the murder of John Amos, the nephew of the Senior Superintendent of the Jamaican Constabulary Force;

d. the Principal Applicant cooperated with the authorities, which resulted in the death of a Clansmen member;

e. the Principal Applicant's abductors took her to their community, where she was seen by many people who could later recognize her;

f. the Principal Applicant's abductors stole her ID, laptop computer, and other identifying information.

The Principal Applicant argues that all of these uncontradicted facts point to a greater personalized risk, so it was unreasonable for the RPD to find that she only faced a generalized risk.

[39] The Principal Applicant says that what she fears on return to Jamaica is not a general risk of crime, but retaliation from the Clansmen gang for her roll in the killing of one of their members, the Lance she remembers hearing about the night she was abducted. This risk that she fears is not one faced by Jamaicans generally, but is one that is particularized to her. The Applicant analogizes her case to that in *Zacarias v Canada (Minister of Citizenship and Immigration)* 2011 FC 62, [2011] FCJ No. 144 [*Zacharias*], where the RPD's failure to find personalized risk in the face of factual findings that reprisal could occur on the basis of cooperation with authorities, refusal to go along with a gang, and knowledge of the circumstances of a gang member's death was an error. Since the facts in that case and the instant case are similar, it must also be an error not to find a personalized risk in this case.

[40] The Applicants further argue that the RPD has failed to consider the evidence which was before it of the perception by the Principal Applicant's employer of the risk that she faced. The Applicant entered into evidence a letter from her employer stating that it felt that she was at high risk of being victimized and asking Canada to protect her. Since the RPD only mentioned this letter in the "Allegations" section of its decision and not in the "Analysis," it must have ignored this evidence in coming to its conclusion. Its conclusion must therefore be unreasonable.

[41] The Applicants point to the fact that the RPD only mentions Listed Facts in the "Allegations" section of its decision. This shows that the Decision was made in ignorance of the facts that were before it. Simply restating the facts as alleged does not show that the RPD considered the facts that were before it. The RPD did not say why these facts do not show a

personalized risk. Further, because these facts are important facts which go against the RPD's conclusion, relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* [1998] FCJ No. 1425, 157 FTR 35, the Applicants say that the Court can infer that the RPD did not consider them in coming to its conclusions. As it was not based on the evidence before it, the Decision was unreasonable.

[42] The Applicants also say that the RPD ignored documentary evidence that was before it that the Clansmen gang pose a higher risk to women than to other groups in Jamaica. The documentary evidence, as well as the uncontradicted testimony of the Principal Applicant, both establish that the Clansmen are a dangerous gang. Where a general risk of criminality has become particularized through interaction with a gang, as has happened here, this supports a section 97 claim. Because the Clansmen are dangerous and the Principal Applicant witnessed a murder in which one of their members was implicated, and because she has cooperated with the authorities and the Clansmen have her personal information, the risk to the Principal Applicant has become particularized. Ignoring these pieces of evidence shows that the RPD has not adequately analyzed the issue of generalized risk in this case.

[43] The RPD erred when it only considered the factors that lead to the initial incident between the Principal Applicant and the Clansmen gang; the generalized risk analysis must be forward-looking. The RPD's conclusion that the attacks on the Secondary Applicant was unreasonable, as it was made in ignorance of the Principal Applicant's testimony, as well as the documentary evidence that was before the RPD. Included in the documentary package before the RPD was an article from Amnesty International entitled *Let Them Kill Each Other: Public Security in Jamaica's Inner Cities*. Because this report speaks to the risk to women, and the RPD did not disbelieve the Principal

Applicant's testimony that the attacks on her mother were linked to the attack on her, the conclusion that the attacks were not so linked was unreasonable.

[44] The Applicants rely on *Maldonado v Canada (Minister of Employment and Immigration)* [1979] FCJ No. 248, [1980] 2 FC 302 (FCA), for the proposition that when a claimant swears to the truth of certain allegations, this creates a presumption that these allegations are true unless there are reasons to doubt their truthfulness. The RPD's finding that the attacks on the Secondary Applicant were not connected to the attack on the Principal Applicant was unreasonable because there was no evidence the attacks were not connected, though there was testimony that they were. The Decision should be quashed as not based on all the evidence.

The RPD Failed to Consider Gender

[45] The Applicants also argue that the RPD erred by failing to consider whether they faced a personalized risk because of their gender. They say that the RPD has an obligation to consider whether a claimant faces a personalized risk because of her gender, whenever the issue is raised. The Principle Applicant raised the issue when she testified that:

> Well, yes, the fact that I have a Honda Civic motor car, I am a single female, or sometimes I am with my mom in the car**.** I live in a neighbourhood that is associated, economically considered to be an upper class area. They normally tend to prey on people in that area. In terms of when they are trying to… it is a car that is well… is stolen a lot, it is considered to be one of those top cars that is easily accessible. Again, I live in an area that is sort of considered upscale. I am alone most time in my car. So that would be an easy target for them.

Since the Principal Applicant raised the issue of gender when discussing why she was targeted by the Clansmen, the RPD had an obligation to consider gender in its analysis of the claim. She says

that *Bastien v Canada (Minister of Citizenship and Immigration)* 2008 FC 982 and *Michel v Canada (Minister of Citizenship and Immigration)* 2010 FC 159 support this position.

[46] Although the RPD says in its Decision that it considered the Gender Guidelines, the Applicants say that the RPD did not consider gender as a social group. Further, because the Amnesty International report provided to the RPD shows that women in inner-city Jamaica are vulnerable to attacks, this shows that there must be a prevailing attitude of misogyny in Jamaica. There was evidence before the RPD of a gender issue which it was obligated to consider. The Principal Applicant's gender is what made her vulnerable to the attack of the Clansmen, so that failing to consider this means the Decision was unreasonable.

The Respondent

There Was No Breach of Procedural Fairness

[47] The Respondent argues that there was no breach of procedural fairness because generalized risk is an inherent part of section 97 and is therefore in issue in every proceeding under this section. Nothing was required to put the Applicants on notice that this was going to be considered by the RPD. The Respondent says state protection and internal flight alternative are unlike generalized risk because they are not inherent in section 97 so they require notice. Generalized risk is inherent in section 97, so this issue does not require notice.

[48] According to the Respondent, the jurisprudence says that, where an issue is inherent in the definition applicable in the proceeding, no notice of that issue is required. He relies on *Liu v. Canada (Minister of Citizenship and Immigration)* 2007 FC 831, [2007] FCJ No. 1101 [*Liu*] to show that identity is a central issue in every claim so it does not require notice. He also points to

Ibnmogdad v Canada (Minister of Citizenship and Immigration) 2004 FC 321, [2004] FCJ No. 327, [*Ibnmogdad*], *Husein v Canada (Minister of Citizenship and Immigration)* [1998] FCJ No. 726, 80 ACWS (3d) 619 [*Husein*], *Balkhi v Canada (Minister of Citizenship and Immigration)* 2001 FCT 419, [2001] FCJ No. 671 (TD) [*Balkhi*] and *Kante v Canada (Minister of Employment and Immigration)* [1994] FCJ No. 525, 47 ACWS (3d) 798 [*Kante*] for the same proposition.

[49] Further, credibility is always in issue, so it too requires no notice to claimants. For this proposition, the Respondent relies on *Ayimadu-Antwi v Canada (Minister of Citizenship and Immigration),* [1995] FCJ No. 1116 (TD), 57 ACWS (3d) 332 [*Ayimadu-Antwi*] and *Bains v Canada (Minister of Citizenship and Immigration),* [1995] FCJ 1146 Further, he says that *Talukder v Canada (Minister of Citizenship and Immigration)* 2007 FC 668, [2007] FCJ No. 906 [*Talukder*], teaches that boxes ticked on the screening are only a preliminary assessment of the issues in a claim and that a claimant must still present evidence on every aspect of the claim to be successful.

[50] There was also no breach of procedural fairness because the Applicants had notice that generalized risk was in issue. The annex to the PIF, which was provided to the Applicants with the form to fill out, contains the definition of “person in need of protection,” which itself includes the language from subparagraph 97(1)(*b*)(ii) of the Act. This subparagraph sets out the requirement that a person in need of protection must not face a risk that is generally faced by others in the claimant’s country. When they got the form, which includes this requirement, the Applicants had notice that this was in issue, as they knew their claim was under paragraph 97(1)(*b*).

[51] The Respondent says that the Applicants have admitted at paragraph 28 of their Memorandum of Argument that generalized risk was brought up at the hearing. The Applicants

cannot now say that it was not and there cannot have been a breach of procedural fairness if this issue was brought up at the hearing.

[52] The Respondent also argues that the onus was always on the Applicants to make their case before the RPD. Unlike a criminal case where the onus rests on the Crown to prove the case, in a refugee hearing the onus is on claimants to prove that they fall within the criteria for protection. *Madi v Canada (Minister of Citizenship and Immigration)* 2001 FCT 1062, [2001] FCJ No. 1450 [*Madi*] teaches that there is no case against refugee claimants; all claimants bear the onus of proving that they fall within the definition of the section in issue in the proceeding. There was no breach of procedural fairness in this case because the Applicants bore the onus of demonstrating a personalized risk throughout.

[53] The Respondent also says that *Rahaman v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 1153 [*Rahaman*], teaches that whether there is a breach of procedural fairness through lack of notice turns on whether the claimant was actually prejudiced by being taken by surprise or being mislead into not introducing relevant evidence. The Principal Applicant has admitted in the Applicants' Memorandum of Argument that she had an opportunity to testify to all the facts that bore on the generalized risk assessment. There was no actual prejudice and no breach of procedural fairness occurred since neither Applicant was deprived of the opportunity to lead evidence on this issue.

The Finding of Generalized Risk was Reasonable

[54] The Respondent also argues that the RPD's decision on generalized risk was reasonable and should not be interfered with because it discussed all the facts relevant to the generalized risk assessment in the "Facts" and "Analysis" sections of its Decision.

[55] The Applicants have not introduced evidence as to why it was relevant that they feared the Clansmen gang more than other gangs, or that this gang was more dangerous than any other gangs in Jamaica. In its reasons, the RPD discusses why the Principal Applicant was initially targeted; at the hearing she agreed that they were looking for someone who was wealthy and had a similar profile. Further, the she did not claim that she was targeted because she was a woman, but because she had a number of characteristics. Although she did not exactly believe the police when they said she was simply in the wrong place at the wrong time, she was not sure that she had been targeted specifically or whether the Clansmen knew about her before she was abducted. The RPD also found as a fact that there was no evidence linking the attacks on the Secondary Applicant with the abduction of the Principal Applicant. Since the conclusion that the Applicants did not face more than a general risk of crime was based on all of the above evidence, the conclusion was reasonable and ought not be disturbed.

Gender was Properly Considered

[56] The Respondent argues that the Applicants simply did not raise the issue of gender in either their testimony or their PIFs. The Respondent relies on *Pierre-Louis v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 420 [*Pierre-Louis*] for the proposition that the RPD is not required to consider gender where it is not raised on the evidence before it. Since it was not

raised on the evidence before the RPD in this case, it was not an error for the RPD to not consider gender.

The Applicants' Reply

The RPD Failed to Analyze the Listed Facts

[57] The Applicants argue that, when he says that the RPD analyzed all the crucial facts to determine generalized risk, the Respondent does not point to any specific place in the Decision where the RPD actually conducted a generalized risk analysis. Rather, he simply cites the entire Decision. The Applicants argue that, because the RPD only mentions the Listed Facts in the "Allegations" section and not in the "Analysis" section of the Decision, the only conclusions the Court can draw are that the Applicants testified to these facts and the RPD did not doubt the Applicants' credibility. What the Court cannot infer from their mention in the "Allegations" section is that the RPD actually considered the Listed Facts in relation to the Applicants' personalized risk.

[58] The Applicants also argue that, even if the RPD considered the Listed Facts, there is no reason why these facts would not show a personalized risk under subparagraph 97(1)(*b*)(ii) of the Act. The RPD did not explain how these facts did not support a finding of personalized risk so its Decision was unreasonable.

[59] The Applicants also say that the Respondent invites the Court to infer from the RPD's consideration of the attacks on the Secondary Applicant that the Principal Applicant did not face a prospective risk under paragraph 97(1)(*b*). The Applicants argue that this does not meet the *Dunsmuir* standard of justification, transparency, and intelligibility.

[60] The Applicants rely on *Pineda v Canada (Minister of Citizenship and Immigration)* 2011 FC 403, [2011] FCJ No. 525 [*Pineda*] for the proposition that, though an initial encounter with a gang may have been a result of random targeting, the risk may become sufficiently personalized through interaction with that gang. This is what occurred in this case. Although the Principal Applicant may have been initially targeted at random, once the Clansmen had seen her ID, taken her to their community, and she cooperated with the police, resulting in the death of a Clansman member, the risk from the Clansmen gang became sufficiently personalized to support a claim under paragraph 97(1)(*b*). The RPD ignored this so the Decision was unreasonable.

[61] The Applicants further argue that the Respondent's argument is based on the claim that RPD considered all the evidence, when in fact it did not. The RPD ignored documentary evidence, in the form of an article from *The Jamaica Observer* about the former head of the Clansmen Gang, Donovan "Bulbie" Bennett, which showed that the Clansmen were a dangerous gang. The Applicants argue that the evidence shows that the Clansmen are in fact very dangerous and have power and influence in Jamaica; the Respondent has no basis to say that the Applicants did not argue before the RPD that the Clansmen were more dangerous than any other gang. The Respondent does not respond to the evidence that her employer thought the Principal Applicant was at risk of retaliation from the Clansmen gang.

[62] The Decision was unreasonable because the RPD did not sufficiently consider the issue of personalized risk or the facts that pointed to it.

The RPD Breached the Applicants Right to Procedural Fairness

[63] Where the Respondent argues that credibility is in issue in every hearing, the Applicants say that this is not because it is inherent in the definition of "person in need of protection" under section 96 or paragraph 97(1)(*b*). Rather, credibility is in issue in every hearing before the RPD because credibility is always in issue before every tribunal where witnesses are heard. For this proposition, the Applicants rely on *Bains*, above.

[64] The Applicants further argue that, for the Respondent to say that generalized risk was in issue because it is inherent in paragraph 97(1)(*b*) is to say that the RPD has no onus to notify any claimant of anything that is in issue in a hearing. To hold that there is no notice required for issues which are inherent in the definition of these sections would render the screening form meaningless because all of the boxes on the screening form are issues which are inherent in the definitions of sections 96 and 97. At the same time, the jurisprudence clearly establishes that a failure to notify a claimant of an issue is a breach of procedural fairness. The Respondent has not set out what distinguishes internal flight alternative and state protection, which are also inherent in sections 96 and 97, from generalized risk such that notice is required for the former, while not required for the latter.

[65] The Applicants say that the Court has made no ruling that "inherent issues" do not require notice to claimants; the cases relied upon by the Respondent to establish this proposition can be distinguished. The Respondent relies on *Liu*, *Ibnmogdad*, *Balkhi*, and *Hassan*, above, to show that identity is always in issue and so does not require notice but these cases are distinguishable an their facts. In each of those cases, the claimants knew ahead of the hearing that identity would be in issue and the judicial review was only directed to the finding of credibility. In the instant case, the

Applicants did not know that generalized risk would be in issue before the hearing and there was no issue of credibility.

[66] In *Kante*, above, procedural fairness was noted as a concern by the Federal Court of Appeal because the RPD had given the impression that some things were in issue but ultimately decided the application on other issues. Though the Federal Court of Appeal disposed of the case on grounds other than procedural fairness, this case supports the proposition that the RPD must be clear and specific about which issues are on the table and which are not.

[67] The Applicants argue that *Bains*, above, cited by the Respondent to establish that credibility does not require notice, is also distinguishable. *Bains* shows that credibility does not require notice, not because it is inherent in the definition of any of the sections of the Act, but because credibility is always in issue where an adjudicating body hears from witnesses. The Applicants argue that it is not appropriate to import this general feature of adjudication into the specific sections of the Act.

[68] The Applicants also distinguish *Talukder*, above, (relied on by the Respondent to show that ticked boxes on the screening form are only a preliminary assessment of the issues) on the basis that there was notice of the issues at the hearing in that case. There, the Board gave notice of the issues at the hearing and the claimants were represented by counsel. Here, the Applicants were not represented. In this case, they had no notice of generalized risk as an issue at all.

[69] The Applicants distinguish *Madi*, above, saying that in that case there was nothing to mislead the claimant that some things were not in issue because the claimant was not provided with a screening form at all. In this case, the Applicants were provided with a screening form on which some boxes were ticked and some were not. They were mislead into believing that some issues were

not on the table, including generalized risk, because the RPD listed only those issues which were also ticked on the form at the hearing. Also in *Madi*, the claimants were represented by counsel, which they were here.

[70] The Applicants also argue that *Rahaman,* above, is distinguishable. While the RPD did not, in *Rahaman,* raise an issue on the screening form about which it later made a finding, in that case the decision turned on an assessment of credibility not the issue that was not raised in the form. Since the claimant in *Rahaman* had the opportunity to respond to the determinative credibility issue, there was no actual prejudice. The Applicants argue that, in their case, the failure to tick off the "Generalized Risk" box on their form prevented the Principal Applicant from explaining, when asked about why she was targeted, why her profile placed her at risk which shows she suffered actual prejudice.

[71] The RPD found that what the Applicants faced was a generalized risk, but they did not have a chance to answer this aspect of the case. Since they did not know generalized risk was in issue, they did not have the chance to emphasize relevant facts or to highlight evidence in answer to this issue. The failure to consider the factors they would have drawn together demonstrates that the Applicants suffered actual prejudice from a breach of procedural fairness, so that the Decision should be quashed.

The Respondent's Further Memorandum

[72] The Respondent argues that the RPD fully met its duty of procedural fairness and the Decision should stand. There is only a breach of the duty of procedural fairness where there is actual prejudice either by surprise or by misleading the claimant into not leading evidence on an issue.

Neither occurred in this case. The Applicants were informed of the generalized risk issue through the questioning of the RPD. Though the questions put to the Applicants did not raise the generalized risk issue in the language of the Act, there was sufficient opportunity for the Applicants to respond.

[73] At the beginning of the hearing, the RPD alerted the Applicants to their burden of showing that any risk to them must fit in to section 97 for them to qualify protection. Having questioned them on generalized risk and alerted the Applicants to the legal definition of generalized risk, the RPD made them aware of the need to demonstrate that they faced a particularized risk. The Principal Applicant admits as much in her affidavit on judicial review when she says that, "While I did say all of this at various points in the testimony, I feel I could have elaborated more if I had known that generalized risk was an issue."

[74] The Respondent also says that self-represented litigants are not entitled to a higher degree of procedural fairness than others. Procedural entitlements are context-dependent and are intended to ensure a fair hearing where the unrepresented parties will have an opportunity to present their cases. Further, it is not the role of the RPD to act as counsel for claimants; where an applicant chooses to be self-represented, here she must live with the consequences. Though the RPD has an obligation to explain to an unrepresented claimant the process that will be followed, this does not mean that unrepresented claimants get more protection from the RPD than represented claimants. The Respondent notes on this point that this Court has refused to certify questions regarding whether self-represented applicants are owed a greater duty of fairness as this question is settled law in *Adams v Canada (Minister of Citizenship and Immigration)* 2007 FC 529, [2007] FCJ No. 721, *Agri v Canada (Minister of Citizenship and Immigration)* 2007 FC 349, [2007] FCJ No. 487; and *Khan v Canada (Minister of Citizenship and Immigration)* 2006 FC 1183, [2006] FCJ No.1481.

[75] A failure by a claimant to fulfill her obligations and assume her burden of proof does not shift that burden to the RPD, particularly where a claimant is "educated and prepared." The Respondent relies on *Kelly v Nova Scotia (Police Commission)* 2006 NSCA 27, [2006] NSJ No. 78 at paragraphs 46 and 95 on this point:

> In summary, the Board was faced with a self-represented complainant who had a very broad understanding of what was in issue […]
>
> …
>
> […] He was entitled to assistance from the Board about the rules relating to how he could present the case he wished to present. He was not, with respect, entitled to assistance from the Board about what case he ought to present or advice about hearing tactics.

In this case, the Principal Applicant was a sophisticated person; she did not have language difficulties, nor was she unaware of her role in the proceedings or unprepared to proceed. Unlike cases such as *Nemeth v Canada (Minister of Citizenship and Immigration)* 2003 FCT 590, [2003] FCJ No. 776, where increased intervention by the RPD was warranted, the Principal Applicant was alert to the burden she faced and as such she was not entitled to more from the RPD than she received.

[76] The Principal Applicant was familiar with the requirements of section 97, including the generalized risk requirement. She demonstrated through her PIF narrative and testimony at the hearing that she was aware of internal flight alternative as an issue. Since both internal flight alternative and generalized risk are part of subparagraph 97(1)(*b*)(ii), the Principal Applicant cannot claim ignorance of one while having knowledge of the other. Because she knew the requirements of the section and had the opportunity to respond, the Principal Applicant must have had notice of generalized risk and did not suffer actual prejudice. Although the Principal Applicant was self-

represented at the hearing, this does not change her onus to make out her claim. The Decision should stand because there was no breach of procedural fairness.

The Generalized Risk Finding was Reasonable

[77] The finding that the Principal Applicant faced a generalized risk was reasonable as it was based on documentary evidence of the country conditions in Jamaica. The RPD found as a fact that, though the Principal Applicant had been personally targeted by the Clansmen gang, this did not remove her from the generalized risk of crime faced by all Jamaicans. Further, the claimant bears the onus of proving a particularised risk and, where an initial attack is based on a generalized risk, it is open to the RPD to find that future attacks are also based on general risk. Simply because the Principal Applicant has a subjective fear of an attack from the Clansmen gang is not enough to elevate her above the general risk.

[78] The cases relied upon by the Applicants to support their claim of particularized risk do not relate to their factual circumstances and are not relevant to these proceedings. *Zacharias* and *Pineda*, above, and *Pineda v Canada (Minister of Citizenship and Immigration)* 2007 FC 365, [2007] FCJ No. 501, [*Martinez Pineda*] stand for the proposition that particularized risk can be found when an applicant is specifically targeted, and subject to actual repeated threats and attacks by a gang. However, experiencing fear of threats and attacks alone, without more, is insufficient to give rise to a particularized risk.

[79] There was no evidence before the RPD that either of the Applicants was harmed by the gang after the initial attack. The RPD found that the Secondary Applicant's testimony about one of the attacks was "vague" and that, when she was followed on the way to church, there was no evidence

to link this incident with the abduction of the Principal Applicant. Further, the RPD found that no members of her family had been targeted after the Principal Applicant left Jamaica for Canada. While there may, in some cases, be a particularized risk that arises out of a random targeting, there must be evidence to support that risk. Since the RPD found that there was no such evidence here, its conclusion that there was only a generalized risk was reasonable.

There was No Nexus Between a Section 96 Convention Ground and Gender

[80] The Respondent reminds the Court that the Applicants bear the burden of establishing that they require the protection offered by the Convention and the Act. There is no automatic nexus to a Convention ground merely because aspects of an applicant's allegations, such as her gender, relate to a Convention ground. For this proposition, the Respondent relies on *SM v Canada (Minister of Citizenship and Immigration)* 2011 FC 949, [2011] FCJ No. 1224 at paragraph 7:

> In general terms, a claimant's burden is to satisfy the Board that she was targeted as a woman. Stated differently, a claimant needs to demonstrate that she would not have been attacked but for the fact that she was a woman. For example, if a claimant's attackers robbed and attacked her, she would have to satisfy the Board that the robbery was not the motive. Otherwise, a man in her situation (even if he, too, had been raped) would not receive protection but would face the same risk of attack.

[81] In the current case, the evidence before the RPD did not suggest that the Principal Applicant was initially targeted because of her gender. There was no evidence that the Clansmen gang target women more than men; they might have been interested in her solely because she was a witness to the murder of John Amos. The Respondent argues that the Principal Applicant has not demonstrated that she has met the required burden to require that gender be considered. Further, the RPD is not required to go beyond the evidence to find grounds on which a claimant could be found to be a

person in need of protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, [1993] SCJ No. 74). In this case, the RPD considered the Gender Guidelines. It was not an error for the RPD not to consider gender as a ground for protection because there was no evidence of a gender-based claim and the Applicants did not indicate that they wished to base their claims on gender.

ANALYSIS

[82] The Applicants have three issues. However, in my opinion, only one of them has substance and requires extensive analysis.

[83] As regards procedural fairness, the Applicants are asking the court to prefer form over substance. This is not appropriate. See *Hawthorne v Canada (Minister of Citizenship and Immigration)* 2002 FCA 475 at paragraph 3; *Owusu v Canada (Minister of Citizenship and Immigration)* 2003 FCT 94 at paragraph 29; and *Lima v Canada (Minister of Citizenship and Immigration)* 2008 FC 1138. A review of the record reveals that the Applicants were given every opportunity to state the nature of their case. Lines of questioning were pursued at the hearing that gave them fair indication that personalized risk was at issue and they were asked to provide evidence that would speak to this issue. This is what the Applicants did and they made clear what they feared in Jamaica and adduced evidence to support the risks of reprisal from the Clansmen gang.

[84] In her affidavit for this review application, the Principal Applicant says that she was able to testify to the personalized risks she faced and what distinguished her from the general population, but that “I feel I could have elaborated more if I had known that generalized risk was an issue.”

[85] The Principal Applicant does not elaborate to the Court what more she could have said and the transcript of the hearing, as well as the Decision, indicate a full explanation of the generalized/personalized risk issue, as well as full responses from the Principal Applicant on point.

[86] The record shows that, even though she represented herself, the Principal Applicant is an educated and sophisticated individual who was well aware of what the law required of her to establish section 97 risk and that, through its questioning at the hearing, the RPD encouraged her to state what she feared and to provide evidence on point. The RPD's summary of the facts in the Decision reveals that it fully understood the nature of the claim and the facts upon which it was based.

[87] As regards nexus and gender, this was never part of the Applicants' claim and it has only been raised as part of this application. What is more, there was no evidentiary basis that would prompt the RPD to address gender. There is sufficient evidence in the CTR to support the RPD's findings in paragraph 14:

> The claimant testified that on July 21, 2008, she was abducted in her car by three unknown gunmen. The gunmen told her that they had been watching her movement for sometime and that they possessed a good deal of information about her and her family. The claimant did not know exactly what this meant. The police officers she had spoken to thought the incident might be a crime of opportunity; that is, the gunmen took advantage of the claimant, as she was in the wrong place, at the wrong time. The claimant did not exactly believe the police's premise as she believed the gunmen had been watching her for sometime. She believed the gunmen were looking for a person with certain qualities such as living in a good and high end neighbourhood, had an expensive car and had a good job. In summary, the claimant believed that the gunmen were looking for someone who was economically well off compared to an average Jamaican citizen. The claimant maintained that she fit that profile. She did agree with the Panel that the gunmen were looking for someone with these qualifications, and if such a person was in that

> locality at that specific time, the gunmen would have and abducted that person, no matter who he or she was.

[88] The RPD has an obligation to explore all aspects of persecution and risk that arise on the facts before it, but it cannot be faulted for not considering something that was not raised, and for which no evidentiary basis emerged, particularly when the Principal Applicant agreed that the perpetrators would have abducted her no matter who he or she was, provided she had the qualities stated. See *Viafara v Canada (Minister of Citizenship and Immigration)* 2006 FC 1526 at paragraph 24; *Pierre-Louis*, above, at paragraph 3.

[89] In my view, the one matter of substance raised by the Applicants is whether the RPD adequately dealt with the issue of whether, although they had been the victims of generalized crime in the past, the risk of retaliation was not a risk faced by other Jamaicans.

[90] The Principal Applicant says that she fears retaliation as a result of her having given evidence against the Clansmen gang. This resulted in the gang being identified as the killers of the Senior Superintendent's nephew and the subsequent killing by police of one of the gang members. There were no credibility issues raised with respect to the Principal Applicant's evidence on this point.

[91] It seems clear from the evidence that neither of the Applicants have been targeted in the past by the Clansmen gang. In my view, the RPD was reasonable in rejecting the Secondary Applicant's attempts to link what had occurred to her to the Principal Applicant and her fears of the gang. The Secondary Applicant did not provide meaningful responses to questions she was asked on point and what she did say was too vague to raise any connection.

[92] So all I am concerned with here is whether the RPD reasonably addressed the prospective risks of targeting raised by the Principal Applicant in her evidence.

[93] In *SM*, above, Justice Judith Snider has the following to say on point at paragraph 18:

> Someone who is attacked and fears that attacks may occur in the future will no doubt see the attack as personalized. However, if that initial attack was based on a generalized risk, it would likely not be unreasonable for the Board to find that any future risk of an attack was a risk faced generally by the population. That was the situation considered by the Court in *Prophète v Canada (Citizenship and Immigration)*, 2008 FC 331 (aff'd 2009 FCA 31). If however, the first attack took place for a unique or individualized reason, it may be that the risk is not generalized (see, for example, *Pineda*, above).

[94] The issue of targeting is very fact-driven. Justice Snider recently made this clear in *Pineda*, above, at paragraphs 12-13:

> I acknowledge that, on a basic level, the Applicant is a victim of crime. However, the facts of this case are unusual in that the Applicant claims to have been personally and directly targeted by MS-18. The Board did not question the credibility of this aspect of his claim. In other words, this is not a generalized fear of being targeted by MS-18 just because the Applicant is a citizen or because of his profile as a doctor. The nature of the risk he now faces is not the same as the risk he faced prior to treating the gang member - before he treated the gang member, he was susceptible to extortion or violence, whereas now he is specifically and individually targeted for his perceived actions, unlike the general population.
>
> In virtually all of the cases cited by the Respondent, the applicants were not targeted personally *per se*. While the gangs may have known their names, their personal information, and may have even threatened them or assaulted them on a number of occasions, the nature of the threat was still generalized. The gang could have gone after anyone with perceived wealth, or any young person who may be recruited into their gang. These people were essentially means to an end for the gang members. I doubt that it really mattered whether person A or person B gave the gang the money for which they were searching, even if both parties were personally threatened. Similarly, I doubt that it really mattered whether person

> C or person D joined their cause, provided that they continued to increase their membership. The situation before me is fundamentally different. The Applicant presented a story to the Board of being at risk because he was perceived to be a person who "ratted out" an individual gang member.

[95] On the facts of the present case, the Principal Applicant does not claim that she has been personally targeted by the Clansmen gang in the past. She fears that she will be targeted if returned to Jamaica because of the role she played in the events that led to the death of a gang member. In other words, the Principal Applicant is speculating about what might happen to her if she is returned to Jamaica because she witnessed a crime and gave evidence to the police that connects her to the death of a gang member at the hands of the police. The evidence is that the Clansmen gang operates throughout Jamaica and no one is beyond their reach. The evidence is also that the Principal Applicant's employer considered the threat to her personal safety to be so serious that the employers hired a bodyguard to protect her and then advised her to leave Jamaica.

[96] The Applicants rely upon the case of *Diaz v Canada (Minister of Citizenship and Immigration)* 2011 FC 705 and the guidance provided by Justice Beaudry at paragraphs 15-19:

> The applicant submits that the Board had no doubt that the applicant faced a risk in El Salvador (decision, para 15) but found that the risk was not personalized as it was shared by most other Salvadorans. Later on at para 19 the Board wrote "... While you may be specifically targeted, you would be the victim of the general and horrific crime problem in El Salvador. Your risk is no greater or different from most other residents there and your case is therefore not distinguished". The applicant argues that where there is specific targeting there is personalized risk and relies on *Martinez Pineda v. Canada (Citizenship and Immigration)*, 2007 FC 365. Therefore, the Board's decision cannot stand because the conclusion is not justifiable and is contradictory to its findings that the applicant may be specifically targeted in El Salvador.
>
> The respondent, on the other hand, alleges that under section 97 of the Act, it is the applicant that has the burden of demonstrating that

> he personally faces a risk to his life or a risk of cruel and unusual treatment or punishment if returned to El Salvador.
>
> He underscores that the Board carefully weighed and assessed the objective country conditions evidence in El Salvador and noted that gang violence was widespread and pervasive and that no one was immune. Therefore, the Board did not err in finding that the applicant had failed to establish that the risk he faced was a personalized risk rather than a generalized one.
>
> The Court does not agree with the proposition advanced by the respondent. In the case at bar, the applicant has been found credible, his evidence trustworthy and reliable. The Board accepted at para 15 that the applicant was at risk and at para 19 that he was specifically targeted. There are no explanations for these findings. Is it because of the applicant's son's murder that gang members would kill him fearing that he would avenge his death? Or because the applicant's allegations were found credible? When an applicant's credibility is not in question, the Board has the duty to fully analyze and appreciate the personalized risk faced by that applicant in order to render a complete analysis of his claim for asylum under section 97 of IRPA, *Zacarias v. Canada (Minister of Citizenship and Immigration)* 2011 FC 62 para 17.
>
> The Board's conclusion that the applicant is at no greater risk than other Salvadorans cannot be justified when it already accepted that he was at risk and specifically targeted. This outcome is outside the range of acceptable ones as qualified in *Dunsmuir* at para 47.

[97] The problem on the present facts is that there is no finding that the Principal Applicant is at risk, or that she has been specifically targeted. In fact, the evidence is clear that she has not been specifically targeted. She fears that she will be targeted in the future.

[98] The RPD addresses the issue in the following way at paragraph 22 of the Decision:

> The Board finds that the claimant is a victim of forcible confinement, robbery and assault; but these crimes are widespread in Jamaica and are not specific to the claimant. There was no persuasive evidence before the Board that the claimant was targeted for any other reason than she was perceived as being generally well-off and/or having money due to the type of car she had, where she lived and the job she had. The same is true for the mother, that there was no persuasive

> evidence that the mother was specifically targeted; in the mother's case, she was a potential victim of general crime and violence. On the issue of generalized violence, with respect to a risk to their lives, or to a risk of cruel and unusual treatment or punishment, the Board finds that the claimant and her mother did suffer incidents of harm. However, they have not established an identifiable risk that is distinguishable from that of the general population. The Board finds that the claimants' fears of generalized risk is one that is faced by all citizens of Jamaica or, in this particular case, by those in Jamaica who are perceived to be well-off. The Refugee Protection Division does not have a specific legal mandate that extends its protection to persons such as these claimants.

[99] There is nothing unreasonable about the RPD's conclusions about past targeting. It is the conclusions about the future that are troubling. On this issue the RPD says that the Applicants "have not established an identifiable risk that is distinguishable from that of the population" and that "the claimants' fears of generalized risk is one that is faced by all citizens of Jamaica, or, in this particular case, by those in Jamaica were perceived to be well-off."

[100] So it is clear that, in considering future risk to the Applicants, the RPD only considered that risk from the perspective of someone who is "well-off." But, as the Principal Applicant made clear, and as the RPD recited in the facts, the Principal Applicant's fear of targeting in the future is not based upon her being "well-off." It is based, rather, on her fear that she is now associated with the death of a Clansman gang member and that she will, as a result, be specifically targeted by a powerful and vindictive gang. Her employer obviously shared those fears and provided personal protection, so the Principal Applicant has some support for her views of what will happen to her.

[101] In focusing on the "well-off" issue, the RPD appears to have overlooked this aspect of prospective risk. I am not saying that the RPD should have found that the Applicants faced a personalized risk if returned to Jamaica. What I am saying is that the fear of prospective harm at the

hands of the Clansmen gang because of the Principal Applicant's role in assisting the police and the death of a gang member was really the heart of their claim, and I think it was unreasonable for the RPD not to address this stated fear and consider whether, on the facts of this particular case, it raised a personalized risk. See *Zacharias*, above, at paragraph 17.

[102] Because the RPD did not consider this aspect of the claim with regard to the Principal Applicant, it also failed to consider whether, notwithstanding the Secondary Applicant's lack of coherent evidence, she would face a similar risk of targeting if returned because of her close association with the Principal Applicant and the evidence that the Clansmen gang are quite willing and able to harm family members of targets they cannot reach. In other words, does the Secondary Applicant face a specialized risk because of her close family connection to the Principal Applicant?

[103] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application is allowed. The decision is quashed and them matter is returned for reconsideration by a differently constituted RPD.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1223-11
STYLE OF CAUSE:	ARTHRINE MELISHA TURTON VEDA-MAE DOROTHY TURTON - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 27, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	November 1, 2011

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