Federal Court  Cour fédérale

Date: 20120104

Docket: IMM-2409-11

Citation: 2012 FC 11

Ottawa, Ontario, January 4, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ERNESTO BATALLA RODRIGUEZ

Applicant

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 15 March 2011 (Decision), which refused the Applicant's claim for protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Mexico. He fled to Canada on 4 November 2008 and claimed refugee protection on 3 September 2009.

[3] When he lived in Mexico, the Applicant co-owned a restaurant with his business partner, Michelle Martinez (Martinez). In June 2006, the Applicant was approached by two members of the La Familia Cartel Texcoco (La Familia), an emerging drug cartel and crime syndicate. The two cartel members, who the Applicant knew as El Roberlee and El Richard, demanded that he pay La Familia 4,000 pesos (approximately $300) as a "tax" every month. The Applicant agreed and began paying La Familia.

[4] Some time later, two men – who the Applicant knew as El Rabano and Tarzan – approached him at his restaurant. These men identified themselves as La Familia members and demanded that he increase his payment to $500 per month. The Applicant refused to pay this increase, as it would represent more than ten percent of his take-home earnings. El Rabano and Tarzan also demanded that the Applicant permit La Familia to sell drugs in his restaurant, which he refused to allow. When these demands were made, Martinez was away from the restaurant, in the USA. Two weeks later, four men came to the Applicant's restaurant; one of these men was called "El Commandant" by the other three. This man had formerly been in charge of an anti-kidnapping section of the police in Texcoco. El Commandant told the Applicant that if he did not pay the money demanded, he would be killed. The four men also beat the Applicant.

[5] On 28 May 2007, after he refused to pay the increased amount and allow La Familia to sell drugs in his restaurant, the Applicant was beaten by the side of the road outside Texcoco. The

Applicant recognized one of the people beating him as El Rabano, and he believes that La Familia was responsible for this attack. During the beating, someone stabbed the Applicant in the stomach. Because of the injuries he suffered, the Applicant had to spend approximately seven months in hospital recuperating. He was unable to run the restaurant during this time so Martinez took on the management responsibilities. She agreed to pay the increased amount La Familia had demanded.

[6] After the Applicant was discharged from the hospital, he and Martinez decided that it was not worth it for them to continue operating the restaurant, so they decided to sell it. It took some time to find a willing buyer but, in March 2008, they sold the restaurant. The Applicant moved to the neighbouring state of Guerrero. While he was in Guerrero, the Applicant received a telephone call from El Commandant whose voice he recognized from their previous encounter. El Commandant told him that it was a mistake to sell the restaurant without informing the cartel and that the Applicant still owed the cartel money. After receiving this phone call, the Applicant fled to Canada on 4 November 2008 and claimed refugee status on 3 September 2009.

[7] The RPD heard the Applicant's claim on 15 March 2011. At the hearing, the Applicant, his counsel, the RPD panel member, and an interpreter were present. In oral reasons delivered at the end of the hearing, the RPD rejected the Applicant's claim for protection.

DECISION UNDER REVIEW

[8] After the hearing, the RPD concluded that the Applicant was not a convention refugee under section 96 of the Act or a person in need of protection under section 97 of the Act. The RPD found that the Applicant had not established a nexus to a Convention ground, so his claim under section 96 of the Act failed. The RPD also found that the Applicant did not face a personalized risk of torture

or cruel and unusual treatment or punishment on return to Mexico, so he was not a person in need of protection under section 97 of the Act.

[9] The RPD found that the Applicant's identity was established through a certified copy of his passport and went on to consider the substance of his claim.

Allegations

[10] The RPD noted that the Applicant claimed to have owned a restaurant in Mexico and that he had been extorted by La Familia and threatened with death if he did not give them what they wanted. It briefly reviewed the circumstances of the restaurant's sale, the phone call from El Commandant, and the Applicant's flight to Canada.

[11] The RPD found that the Applicant was a credible and trustworthy witness and believed his story.

Convention Refugee

[12] The RPD found the Applicant's claim under section 96 of the Act failed because he had not established a nexus to a convention ground. Though the RPD accepted his story that he had been extorted by La Familia, the Applicant's fear of extortion was not linked to race, religion, nationality, political opinion, or membership in a particular social group. The RPD noted that the Applicant had made submissions that he was a member of a particular social group – business owners – and that he had an imputed political opinion because he had a different political opinion from La Familia. The RPD also noted the Applicant's submissions that El Commandant was formerly a police commander and that La Familia had the ability to put pressure on politicians.

[13] The RPD pointed out that this Court has held that victims of crime, corruption, or vendettas generally fail to establish a link between their fear of persecution and a Convention ground. The RPD pointed to *Leon v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1253; *Calero v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1159; *Vargas v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 802; and *Marincas v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1254. The Applicant was a victim of crime without a nexus to a Convention ground so that his claim for protection under section 96 failed.

Generalized Risk

[14] After it concluded that the Applicant was not a Convention refugee within the meaning of section 96, the RPD separately analyzed his claim under section 97 of the Act and concluded that, because the risk the Applicant faced on return to Mexico was generally faced by the population there, he was not personally at risk. Without a personalized risk, his claim his claim under section 97 failed.

[15] The RPD said that simply being at risk to life is not enough to make a claimant a person in need of protection under section 97 of the Act. The Act specifically excludes people from the definition of "person in need of protection" who face risks that are generally faced by other people in the country (see subparagraph 97(1)(*b*)(ii) of the Act). Even though the Applicant faced a personalized risk to life, or a risk of cruel and unusual treatment or punishment, this risk was also one that was faced generally by others in Mexico. This brought the Applicant within the exception under subparagraph 97(1)(*b*)(ii) of the Act.

[16] In analysing the Applicant's claim under section 97, the RPD reviewed his allegations of extortion. It also noted that the documentary evidence before it indicated that La Familia was a well-organized and brutal criminal organization which had been characterized as an emerging drug cartel. The RPD said that generalized risk has to do with the nature of the harm a claimant faces and that the exception under subparagraph 97(1)(*b*)(ii) includes risks associated with crime, violence, extortion, corruption, abuse of authority, human rights violations, general insecurity, terrorism, suicide bombing, political extremism and activities of armed groups. It also noted that two Responses to Information Requests – included in the documentary package before it – indicated that crime was widespread in Mexico. The Applicant was a victim of crime, but the crimes he was a victim of – extortion and assault – were widespread in Mexico.

[17] Hence, the RPD found that the Applicant's fear was a generalized one. It pointed out that this Court has interpreted generalized risk to mean "prevalent" or "widespread" without requiring that a risk be faced by all citizens in a country to amount to a generalized risk. The RPD considered *Vickram v Canada (Minister of Citizenship and Immigration)* 2007 FC 457, and said that this Court had upheld the RPD's determination that a claimant who faces a risk of criminal activity is at no greater risk than the general population. The RPD also said that this Court held that the perception of wealth does not constitute a particularized risk.

[18] Though *Vickram* was not precisely the same as the case before it, the RPD found that the risks of violence, injury, and crime are generalized risks faced by everyone in Mexico. While some individuals such as the Applicant may be targeted more frequently, this does not remove them from the generalized risk category.

[19] The RPD noted that the Applicant had suggested that *Pineda v Canada (Minister of Citizenship and Immigration*) 2007 FC 365 [*Martinez Pineda*] was applicable to his case. However, the RPD took the position that *Martinez Pineda* was not consistent with the predominant line of cases, including *Acosta v Canada (Minister of Citizenship and Immigration)* 2009 FC 213, *Perez v Canada (Minister of Citizenship and Immigration)* 2010 FC 345, and *Guifarro v Canada (Minister of Citizenship and Immigration)* 2011 FC 182. The fact that victims of generalized violence have an identity that is known to perpetrators of violence does not mean that those victims face a personalized risk.

[20] The RPD also reviewed *Guifarro*, above, and said that it is settled law that claims based on targeting because a claimant is a member of a group that is perceived to be wealthy, where that group is large enough to make the risk widespread, will not meet the requirements of subparagraph 97(1)(*b*)(ii). Though a group may be a small portion of the population of the country of reference, what matters is that the risk is widespread or prevalent.

[21] The RPD found that the Applicant was personally subject to a risk of harm under section 97 involving extortion and gang violence. However, on the evidence before the RPD, the Applicant's risk on return was a generalized one. The Applicant was therefore not a person in need of protection under section 97 of the Act.

STATUTORY PROVISIONS

[22] The following provisions of the Act are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a	**96.** A qualité de réfugié au

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,

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 :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
…	…

ISSUES

[23] The Applicant raises the following issues:

a. Whether the RPD erred in its interpretation of subparagraph 97(1)(*b*)(ii) of the Act; and

b. Whether the RPD failed to appreciate the particularized nature of the threat he faced on return.

STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, 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 *Osorio v Canada (Minister of Citizenship and Immigration)* 2005 FC 1459, Justice Judith Snider concluded at paragraph 26 that the standard of review on a tribunal's interpretation of subparagraph 97(1)(*b*)(ii) is reasonableness. In *Dunsmuir*, above, the Supreme Court of Canada held

at paragraph 54 that a tribunal's interpretation of its enabling statute will generally be accorded deference. The Supreme Court of Canada upheld this approach in *Smith v Alliance Pipeline Ltd.* 2011 SCC 7 at paragraph 26. Most recently, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC61, the Supreme Court of Canada held at paragraph 30 that the standard of review on a tribunal's interpretation of its home statute is reasonableness, unless the interpretation falls into the enumerated categories for which the correctness standard applies: constitutional questions, questions of central importance to the legal system as a whole, questions on the jurisdictional lines between specialized tribunals, and true questions of *vires*. The interpretation of 97(1)(*b*)(ii) does not fall into any of these categories, so the standard of review on the first issue is reasonableness.

[26] In *V.L.N. v Canada (Minister of Citizenship and Immigration)* 2011 FC 768, Justice David Near found that the standard of review with respect to a finding of generalized risk was reasonableness (see paragraphs 15 and 16). In *Vasquez v Canada (Minister of Citizenship and Immigration)* 2011 FC 477, Justice André Scott found that a finding of generalized risk involves a question of mixed fact and law and is to be evaluated on a standard of reasonableness. The standard of review on the second issue is reasonableness (see also *Innocent v Canada (Minister of Citizenship and Immigration)* 2009 FC 1019).

[27] 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 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 Applicant

[28] The Applicant does not take issue with the RPD's conclusion that he is not a Convention refugee; he confines his arguments solely to the RPD's conclusion that he was not a person in need of protection under section 97 of the Act.

The RPD Erred in its Interpretation of 97(1)(*b*)(ii)

***Martinez Pineda* is Good Law**

[29] The Applicant notes that the RPD rejected *Martinez Pineda*, above. He says that the cases the RPD relied on to reject *Martinez Pineda* – *Acosta*, *Perez*, and *Guifarro*, above, – are distinguishable or were decided in error.

[30] *Martinez Pineda* was about a claimant who was repeatedly threatened by a street gang in El Salvador after he refused to become a member of that gang. The Applicant notes that *Martinez Pineda* was recently applied by Justice Simon Noël in *Zacarias v Canada (Minister of Citizenship and Immigration)* 2011 FC 62. In addition to *Zacarias*, the Court has followed and applied *Martinez Pineda* in *Castaneda v Canada (Minister of Citizenship and Immigration)* 2011 FC 200, *Lamour v Canada (Minister of Citizenship and Immigration)* 2011 FC 322, and *M.A.C.P. v Canada (Minister*

of Citizenship and Immigration) 2011 FC 81. Though this Court distinguished *Martinez Pineda* in those cases on its facts, the Applicant says that the Court followed the reasoning.

The Cases Relied on by the RPD are Distinguishable or Wrong

[31] The Applicant argues that *Acosta*, *Perez*, and *Guifarro* are either distinguishable on their facts or were wrongly decided. He says that *Acosta* – a case where the applicant was a bus-fare collector who was threatened after missing an extortion payment – is distinguishable from *Martinez Pineda* on its facts. Justice Johanne Gauthier had this to say in *Acosta*, at paragraph 17:

> Finally, here, the Board found the risk faced by Mr. Acosta was "a result of where he happened to be, or not to be, on the day the Mara wanted their money" (para. 18) whereas Mr. Pineda had been targeted not as a victim of the Gang but rather for recruitment into the Gang.

[32] Unlike *Acosta*, *Martinez Pineda* is factually similar to the facts in this case. The Applicant was not randomly targeted by La Familia; he was specifically targeted for extortion because he owned a restaurant where La Familia wanted to sell drugs. He says that letting La Familia sell drugs through his restaurant would amount to complicity in its acts and participation in its criminal enterprise. La Familia's attempt to get him to allow them to sell drugs in his restaurant is therefore equivalent to recruitment, which makes *Martinez Pineda* applicable.

[33] The Applicant also argues that *Guifarro* and *Perez*, which the RPD relied on to support its analysis of section 97, were wrongly decided because they followed the approach laid out by Justice Snider in *Osorio*, above. On subparagraph 97(1)(*b*)(ii), Justice Snider said at paragraph 26 of her decision:

> […] I can see nothing in s. 97(1)(b)(ii) that requires the Board to interpret "generally" as applying to all citizens. The word "generally"

> is commonly used to mean "prevalent" or "widespread". Parliament deliberately chose to include the word "generally" in s. 97(1)(b)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene.

[34] The Applicant says that this approach is wrong and merits reconsideration. He says the cases which rely on this approach are wrongly decided. The RPD's interpretation of 97(1)(*b*)(ii) was unreasonable because it relied on these wrongly decided cases. The Applicant says that "generalized risk" should be interpreted to mean "a risk faced by all citizens in the country of reference." The RPD's interpretation of "generalized risk" to include risks faced by groups smaller than the entire population of the country of reference was in error. The Applicant says that his interpretation of generalized risk is supported by a textual and contextual analysis of section 97, the legislative history of section 97, and the spirit of the Act.

[35] The Applicant points to the Post-Determination Refugee Claimants in Canada (PDRCC) class established in the former *Immigration Act*, RSC 1985, c. I-2. To be eligible to remain in Canada under that class, claimants had to establish that removal would subject them to "an objectively identifiable risk, which risk would apply in every part of that country and would not be faced generally by other individuals in or from that country." He notes that the Citizenship and Immigration Canada (CIC) Guidelines on that class said that:

> The threat is not restricted to a risk personalized to an individual; it includes risks faced by individuals that may be shared by others who are similarly situated. […] Any risk that would apply to all residents or citizens of the country of origin cannot result in a positive decision under this regulation.

[36] Because these guidelines indicate that a risk to all citizens in a country would exclude a claimant from the PDRCC class, the Applicant argues that "generalized risk" in subparagraph 97(1)(*b*)(ii) of the Act must mean a risk that is faced by all citizens in the country of reference.

[37] The Applicant notes that Justice Donna McGillis considered those Guidelines in *Sinnappu v Canada (Minister of Citizenship and Immigration),* [1997] FCJ No 173. Justice McGillis said in her decision that the guidelines interpret "generalized risk" under the PDRCC class to mean a risk faced by all residents or citizens of that country.

[38] The Applicant refers to a paper produced by the Legal Services Branch of the Immigration and Refugee Board entitled "Consolidated grounds in the *Immigration and Refugee Protection Act*" from which he quotes the following passage:

> If the risk faced by a person stems from a general risk in that country, the person is not protected under section 97(1)(b). Protection is limited to those who face a specific risk not faced generally by others in the country. There must be some particularization of the risk to the person claiming protection as opposed to an indiscriminate or random risk faced by the claimant and others.
>
> A claim based on natural catastrophes such as drought, famine, earthquakes, etc. will not satisfy the definition as the risk is generalized. However, claims based on personal threats, vendettas, etc. may be able to satisfy the definition (provided that all the elements of s. 97(1)(b) are met) as the risk is not indiscriminate or random.
>
> In a civil war situation a claimant would be required to adduce some evidence that the risk faced is not an indiscriminate risk faced generally in that country, but linked to a particular characteristic or status. In a refugee claim, a claimant fleeing a situation of civil war may be able to establish a claim where the risk of persecution is not individualized but is group-based harm that is distinguishable from the general dangers of civil war. There is a requirement of some targeting although the targeted group can be large and there can be several opposing targeted groups. Similarly, the PDRCC Guidelines

> did not require individualized targeting, but would exclude victims of random violence in a civil war situation if all residents were subject to that random violence. This approach to risk arising from civil war is consistent with the IRB's Chairperson's *Civil War Guidelines* and appears to be consistent with the intent of 97(1)(b)(ii).
>
> Therefore, individuals who face a serious and credible risk may not be able to benefit from protection under s. 97(1)(b) as long as the risk is faced generally by citizens in that country irrespective of their personal characteristics or status [references omitted].

[39] The Applicant says that this passage demonstrates that subparagraph 97(1)(*b*)(ii) only operates to exclude from protection claimants who face a risk that is faced by all the citizens in the country of reference.

[40] The Applicant also says that Parliamentary committee debates around the Act support his interpretation of generalized risk. He notes that Gerry Van Kesssel, the Director General, Refugees at the time the Act was before the Standing Committee on Citizenship and Immigration said that the "concept of personal risk as opposed to general risk faced by the entire population is contained in the convention refugee definition and in the convention against torture." This, the Applicant says, demonstrates that "generalized risk" is risk that is faced by all people in the country of reference.

[41] The Applicant also says that, where an individual is personally targeted, this is enough to take that person out of the exclusion from generalized risk. Though the risk that person faces may be faced by a significant portion of the population, personal targeting is enough to particularize the risk and make the 97(1)(*b*)(ii) exclusion from protection inoperative. The Applicant says that this is consistent with the UNHCR's interpretation of "generalized violence." This interpretation also accords with the spirit of the Act, which the Applicant says is primarily about saving lives and

offering protection. Further, this accords with an interpretation of the Act which is consistent with the *Charter of Rights and Freedoms*.

[42] To interpret section 97 as not extending protection to persons in danger who have been personally targeted simply because they form part of a larger segment of the population affected by the same risks would conflict with the wording and spirit of the Act. The Applicant says that this would lead to arbitrary results based on a subjective prior determination of the existence of sufficiently large at-risk group. An interpretation of "generalized risk" which falls short of a risk faced by all citizens in the country would result in a protection gap and would not be consistent with international law. This interpretation would also mean that nobody fleeing persecution from organized crime could ever make a successful claim under section 97.

[43] *Osorio*, above, was therefore wrongly decided and, because the RPD relied on cases that followed the reasoning in *Osorio*, its interpretation of subparagraph 97(1)(*b*)(ii) was unreasonable. The Decision should therefore be returned for reconsideration.

The RPD Failed to Appreciate the Nature of the Threat the Applicant Faced

[44] In the alternative, the Applicant argues that the RPD failed to appreciate the fact that he was specifically and personally targeted. He says that the RPD focused on the fact that he faced extortion and ignored the fact that he was also at risk because of his refusal to allow La Familia to sell drugs in his restaurant. The Applicant says that La Familia's demand to sell drugs in his restaurant is tantamount to recruitment into the cartel and his refusal is the same as refusing to join La Familia. This puts him into the same situation as the claimant in *Martinez Pineda*, above, who

refused to join the Maras Salvatruchas gang over an extended period. The RPD should have made a finding that was consistent with *Martinez Pineda* because the facts of that case are similar.

[45] Although the risk of extortion was generalized, the Applicant says that when he refused to allow La Familia to sell drugs in his restaurant, this sufficiently particularized the risk to him to ground a finding of risk under section 97. The RPD erred, as it did in *Martinez Pineda*, by focussing on the generalized threat to the population in Mexico while at the same time failing to consider the Applicant's particular situation. The Decision is unreasonable on this basis.

[46] The Applicant says that the RPD also failed to appropriately link the country documentation which was before it to his situation. He says that, if it had done so, the RPD would have concluded that he faced a risk which was different from that faced by the general population in Mexico.

The Respondent

The RPD's Decision Was Reasonable

[47] The Respondent says that the RPD assessed the Applicant's personal risk in the context of the evidence and reached a reasonable conclusion that he had not made out a case under section 97. The RPD did not ignore the evidence which was before it and did not err in its analysis of this Court's jurisprudence. The RPD's conclusion that the Applicant faced a generalized risk of harm was open to it on the facts and the law. Since the standard of review on a determination under section 97 is reasonableness, this Court should not interfere in the Decision.

The RPD's Interpretation of Paragraph 97(1)(*b*) was Reasonable

[48] The Respondent notes that section 97 only extends protection to claimants where the risk they face is particularized and is not generally faced by other individuals in the country of reference. When the RPD finds that there is a generalized risk, it need not examine state protection.

[49] The analysis under paragraph 97(1)(*b*) must be grounded in the circumstances of each case. Where a person is a victim of crime, *Innocent*, above, teaches that this is insufficient on its own to extend protection under section 97 of the Act. This Court has rejected the Applicant's argument that it is wrong *per se* not to extend protection to individuals who have been targeted by criminal organizations because they form part of a larger segment of the population affected by the same risks.

[50] The Respondent also relies on *Innocent*, above, at paragraph 49 for the proposition that simply because members of a group may be at higher risk of targeting for crime and violence because they are wealthy does not mean those people have a sufficiently personalized risk to make them persons in need of protection. The targeting and extortion of business people is not enough to establish a personalized risk (see *De Parada v Canada (Minister of Citizenship and Immigration)* 2009 FC 845).

[51] In this case, the RPD assessed the Applicant's personal circumstances, considered this Court's decision in *Martinez Pineda*, above, and decided that that case did not apply. *Martinez Pineda* was not about the proper interpretation of 97(1)(*b*). Justice de Montigny found on the specific facts in that case that the RPD failed to appreciate the specific nature of the risk faced by the claimant. Further, the cases the Applicant relies on to show that *Martinez Pineda* is good law –

Aguilar Zacharias, *Castenada*, *Lamour*, and *M.A.C.P.*, all above – stand only for the proposition that each case must be assessed on its own facts. Those cases do not stand for the proposition that *Martinez Pineda* applies to all cases.

[52] The Respondent says that it was not an error for the RPD to rely on the cases that it did; it did not have to decide the Applicant's case according to *Martinez Pineda*. The RPD's finding that La Familia was not seeking to recruit the Applicant, but was only interested in his business and his money, was open to it on the facts.

[53] The Respondent also argues that the Applicant's attempt to overturn *Osorio* in this case is baseless. Justice Paul Crampton noted in *Guifarro*, above, that *Prophète v Canada (Minister of Citizenship and Immigration)* 2008 FC 331 [*Prophète 1*] was decided in a similar way to *Osorio*. The same approach taken by Justice Danièle Tremblay-Lamer in *Prophète 1*, which was similar to that taken by Justice Snider in *Osorio*, has been upheld by the Federal Court of Appeal (see *Prophète v Canada (Minister of Citizenship and Immigration)* 2009 FCA 31 [*Prophète 2*]).

[54] In *Arias v Canada (Minister of Citizenship and Immigration*) 2010 FC 1029, Justice Marie-Josée Bédard considered *Prophète 2*, *Osorio*, and *Innocent*. The Respondent says that, in that case, Justice Bédard rejected the claimant's assertion that the tribunal erred in determining that the risk he faced was comparable to that facing the general population. The evidence in that case showed that the claimant was part of a subgroup of young men who were more at risk of gang recruitment than the general population. This was insufficient to show that the claimant faced a personalized risk.

[55] The Respondent says that in *Innocent*, Justice Robert Mainville rejected the same arguments the Applicant has raised in this case based on the PDRCC Guidelines, the Consolidated Grounds in

the Act, the legislative history of the Act, and UNHCR's interpretation of "generalized violence." The Respondent points to Justice Mainville's consideration of *Sinnappu*, *Innocent*, both above, where he wrote at paragraph 53 that

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

[56] The Respondent also refers to *Prophète 2* where the Federal Court of Appeal found that it was open to the judge hearing the judicial review application to find that 97(1)(*b*)(ii) applied to a specific number of individuals, or subclass of individuals, who are targeted more frequently because they are wealthy. The Applicant has not addressed *Prophète 2* and there is no reviewable error in the RPD's interpretation of subparagraph 97(1)(*b*)(ii) of the Act.

The RPD's Assesment of the Applicant's Risk was Reasonable

[57] The Respondent says that the RPD's findings of fact are not in question, even though the Applicant says that the RPD failed to appreciate the fact that he was personally targeted. The Applicant has not asserted that the RPD ignored or misconstrued the documentary evidence about the conditions in Mexico.

[58] Contrary to the Applicant's assertion, the RPD appreciated the fundamental dynamics of this case. It did not ignore the Applicant's refusal to allow La Familia to sell drugs in his restaurant. It was open to the RPD to find that this was not recruitment into the gang but was a form of extortion, and that extortion was a risk generally faced by all people in Mexico. Unlike *Martinez Pineda*, where the claimant was targeted for recruitment over a long period of time, the Applicant in this

case was not targeted for recruitment. The risk the Applicant faced was solely connected to his business.

[59] The RPD's Decision falls within the *Dunsmuir* range and so should not be disturbed by this Court.

The Respondent's Further Memorandum

[60] The Respondent says that the Applicant does not dispute the RPD's analysis of the conditions in Mexico or argue that the RPD inappropriately considered country conditions in this case.

[61] In his Memorandum of Argument, the Applicant says that the cook at his restaurant was kidnapped and executed by La Familia members who came to collect on the "taxes" the Applicant owned. This event was not in the Applicant's PIF narrative submitted prior to the hearing. This event was only raised at the hearing, where the Applicant said that the cook was kidnapped, murdered, and found three days later. The Applicant testified that he was told this by the cook's wife and he believed La Familia was responsible.

[62] It was reasonable for the RPD to conclude that the Applicant faced a generalized risk of crime, given that he faced the same risk of extortion from La Familia as other business owners. The Respondent notes that, when asked how being a businessman made him different from other victims of crime, the Applicant said "No, in nothing except that simply I had a restaurant and they stabbed me. That's it. There is no difference except that they threatened me."

[63] The Respondent says that the Applicant has asked this Court to examine his case from a theoretical point of view, when the appropriate approach is to examine the application of subparagraph 97(1)(*b*)(ii) on the specific facts. There was no error in the RPD's analysis of the relevant subparagraph; the Applicant had to bring himself within the exception under subparagraph 97(1)(*b*)(ii), and it was reasonable for the RPD to conclude that he had not.

[64] In *Osorio,* above, Justice Snider said that common sense must govern the application of subparagraph (97(1)(*b*)(ii). The RPD, in this case, found that "generally" is commonly used to mean "prevalent" or "widespread." It was reasonable for the RPD to rely on *Osorio* in interpreting 97(1)(*b*)(ii) as it did and to conclude that the fact that some people share the same risk as other similarly situated persons does not give them a personalized risk.

[65] The Respondent notes that *Osorio* has been considered a number of times by this Court, including in *Prophète 1*, above. The Federal Court of Appeal declined to answer the certified question in *Prophète 1*, saying that answering that question could unduly narrow or widen subparagraph 97(1)(*b*)(ii), depending on the circumstances of the case.

[66] In *Innocent,* above, Justice Mainville emphasized that 97(1)(*b*)(ii) is highly fact dependent and that, to the extent the RPD's analysis and conclusions are reasonable, this Court should not interfere.

[67] The Respondent says that *Martinez Pineda,* above, and *Osorio* are not in conflict. In *S.M. v Canada (Minister of Citizenship and Immigration)* 2011 FC 949, Justice Snider said at paragraphs 17 to 19 that

> One of the key elements of a s. 97(1) analysis is the characterization of the risk faced by a claimant. If the risk can be associated to a Convention ground, it should be considered under s. 96. Where, as in this case, the Board concludes that there is no nexus between the risk and a Convention ground, the Board must consider whether the risk falls within s. 97(1) of the Act. For s. 97(1) purposes, the Board must first evaluate the risk to determine whether it is the type of risk that is generally faced by citizens in the country (*Diaz v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 797 at para 40). It is at this first step that the Applicant failed to make her case to the Board.
>
> 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).
>
> On the particular facts of this case, the Board's conclusion was reasonably open to it. First, the Board reasonably characterized the risk faced by the Applicant as one of extortion. The Applicant's attempt to characterize it otherwise to my mind is not persuasive because, whether the ultimate money will come from the Applicant or her brother, the fact is that she is being targeted for the purpose of extorting money. Second, the Board reasonably found that a risk of extortion by criminal gangs is one faced generally by individuals in El Salvador who are perceived to be wealthy. Finally, the Board correctly applied the jurisprudence, including *Prophète*, that states that even if wealthy people face an elevated risk, that does not constitute a personalized risk under s. 97.

[68] Further, the Respondent says that *Innocent* teaches that care should be taken when relying on external evidence to interpret statutes.

[69] On the cover page of his memorandum, the Applicant has included the following quotation from *Lukman Mohamed v The Secretary of Satate for the Home Department*, a case decided by the

UK Asylum and Immigration Tribunal: “Indiscriminate violence does not by its simple and logical definition, target individuals; it targets no one, but affects anyone and potentially everyone.” This quotation was reproduced in the UNHCR *Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, of January 2008. The Respondent says that nothing turns on this quotation. He also says that the EC Qualification Directive, to which the *Statement on Subsidiary Protection* is addressed, is concerned with protection for people who face indiscriminate violence arising from armed conflict. The EC Qualification Directive is not relevant to the interpretation of subparagraph 97(1)(*b*)(ii), which is the issue before this Court, nor is that document before the Court.

ANALYSIS

[70] The issues raised by the Applicant have received a great deal of consideration by this Court. The Applicant seeks to distinguish himself from one line of cases and invites the Court to disregard and overturn other cases as being wrong in principle. In my view, however, what the whole picture shows is that the principles embodied in subparagraph 97(1)(*b*)(ii) of the Act are clear and understood; the problem is that they are often difficult to apply to the many and varied fact situations that come before the Court when it has to decide whether a particular applicant is subjected personally to a risk that is not faced generally by other individuals in or from that country of origin.

[71] The Court agrees with the Respondent that the jurisprudence of the Court dealing with the application of subparagraph 97(1)(*b*)(ii) is largely contextual in origin and is highly dependent on the individual facts of each case.

[72] In order to bring himself within subparagraph 97(1)(*b*)(ii) the Applicant had to establish that removal to Mexico would subject him personally to a risk to his life or to a risk of cruel and unusual treatment that is not faced generally by other individuals in or from that country.

[73] Based on the evidence before the RPD and the substantial case law of the Court dealing with subparagraph 97(1)(*b*)(ii), it is my view that the RPD did not err in its application of the provision.

[74] In *Osorio*, above, Justice Snider found that common sense must determine the meaning of subparagraph 97(1)(*b*)(ii) at paragraphs 24 to 26:

> It seems to me that common sense must determine the meaning of s. 97(1)(b)(ii). To put the matter simply: if the Applicants are correct that parents in Colombia are a group facing a risk not faced generally by other individuals in Colombia, then it follows that every Colombian national who is a parent and who comes to Canada is automatically a person in need or protection. This cannot be so.
>
> The risk described by the Applicants and the Board in this case is a risk faced by millions of Colombians; indeed, all Colombians who have or will have children are members of this population. It is difficult to define a broader or more general group within a nation than the group consisting of "parents".
>
> Further, I can see nothing in s. 97(1)(b)(ii) that requires the Board to interpret "generally" as applying to all citizens. The word "generally" is commonly used to mean "prevalent" or "widespread". Parliament deliberately chose to include the word "generally" in s. 97(1)(b)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene.

[75] Relying on the decision in *Osorio* in this case, the RPD reasonably stated that the word "generally" was commonly used to mean prevalent or widespread. The RPD relied on the decision in *Osorio* when it stated that "if the risk to violence or injury or crime is a generalized risk faced by

all citizens of Mexico, the fact that a specific number of individuals may be targeted more frequently does not mean that they are not subject to a generalized risk of violence. The fact that they share the same risk as other persons similarly situated does not make their risk a personalized risk subject to protection under section 97."

[76] The decision in *Osorio* has been considered in a number of decisions of the Court in the assessment of the factual context of individual cases. It was relied on by Justice Tremblay-Lamer in *Prophète 1*. Moreover, the Federal Court of Appeal in *Prophète 2* emphasized the importance of the factual context of individual cases. In the Court's reasons for dismissing the appeal, Justice Trudel stated that the Court would not answer the certified question which, depending on the circumstances of each case, would unduly narrow or widen the scope of subparagraph 97(1)(*b*)(ii). In addition, the examination of a claim under subsection 97(1) necessitates an individualized inquiry, which has to be conducted on the basis of the evidence adduced by an applicant. See *Prophète 1*, above, *Prophète 2*, above, *Innocent*, above, *Gabriel v Canada (Minister of Citizenship and Immigration)* 2009 FC 1170, and *Aburto v Canada (Minister of Citizenship and Immigration)* 2011 FC 1049.

[77] The *Prophète* decisions from both this Court and the Federal Court of Appeal have also been applied in a number of court cases. In *Innocent*, Justice Mainville further emphasized that the assessment under subparagraph 97(1)(*b*)(ii) is based on the particular facts of each case. He stated that to the extent the RPD's analysis and conclusions on the facts are reasonable, the Court should not intervene. See *Innocent*, above.

[78] The Respondent submits that, contrary to the Applicant's assertion, the decision of the Court in cases such as *Martinez Pineda* and *Osorio* are not at odds with each other. This is illustrated by

the decision in *S.M.*, above, and the words of Justice Snider at paragraphs 17 and 18 and reproduced in paragraph 67 of these reasons.

[79] The Applicant raises two issues for consideration by the Court. First of all, he says that the RPD failed to consider whether the demand by La Familia to use his restaurant as a place to sell drugs exposed him to a personalized risk that would not be faced generally by other individuals in or from Mexico.

[80] What the Applicant has in mind here is the kind of situation dealt with by Justice Sean Harrington in *Uribe v Canada (Minister of Citizenship and Immigration)* 2011 FC 1164, at paragraphs 6 to 11:

> The member correctly noted that a generalized risk need not be one experienced by every citizen. He found that Los Zetas was a gang highly active in Mexico and, indeed, country documentation indicated that it was the number one organization responsible for the majority of narcotic related homicides, beheadings, kidnappings and extortions which take place in Mexico. However, he went on to say:
>
> > [26] There is no evidence that the claimants were targeted by Los Zetas because of any personal characteristics. The evidence indicates that Los Zetas simply wanted to obtain assets: in this case, a warehouse and the physical help of its workers.
> >
> > [27] I find, on the evidence, that the risk faced by the claimants is one that is faced generally by other individuals from Mexico.
>
> The issue in this judicial review of that decision is whether it was reasonable. I find that it was not reasonable in that there was an inadequate analysis of the Ponce Uribes' personal situation.
>
> The distinction between a "personal risk" and a "generalized risk" under section 97 of IRPA can certainly give rise to difficulties. I

recently set out my own understanding of some of the factors involved in *Jimenez Palomo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1163. The duty to assess an applicant's personal situation in the light of country conditions was well explained by Mr. Justice Simon Noël in *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, [2011] FCJ No 144 (QL), where he said at paragraphs 10 and 17:

> [10] The Board concluded that while this subjective fear was indeed present, the Applicant faced a risk of persecution that is faced by the population in general. This generalized risk spawned from the breadth of gang activities in Guatemala. The Applicant would thus be part of a specific category of people, mainly vendors, which are targeted generally by street gangs. As such, the risk faced by the Applicant was not deemed to be within the range of possibilities provided by section 97 of the IRPA. Furthermore, there was no nexus to a Convention grounds. Consequently, his claim for asylum was rejected.
>
> [17] As was the case in Martinez Pineda, the Board erred in its decision: it focused on the generalized threat suffered by the population of Guatemala while failing to consider the Applicant's particular situation. Because the Applicant's credibility was not in question, the Board had the duty to fully analyse and appreciate the personalized risk faced by the Applicant in order to render a complete analysis of the Applicant's claim for asylum under section 97 of the IRPA. It appears that the Applicant was not targeted in the same manner as any other vendor in the market: reprisal was sought because he had collaborated with authorities, refused to comply with the gang's requests and knew of the circumstance of Mr. Vicente's death.

The facts of this case are not unlike those in *Munoz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 238, [2010] FCJ No 268 (QL), where Mr. Justice Lemieux said at paragraph 32:

> [32] I agree with counsel for the applicants, the extortion and threats which Mr. Munoz alleges were not random. Mr. Munoz was specifically and

> personally targeted by Mr. Garcia because of his unique position - the head of sales at a car dealership which is why Garcia and his friends came there. If returned, Mr. Munoz does not fear being subject to random acts of violence by unknown criminal gangs. He fears Mr. Garcia.

This is not simply a case in which the Ponce Uribe brothers were targeted because they ran a business. They were targeted because they ran a particular business which suited the specific needs of Los Zetas; vehicles could be sent to the carwash and while there, items could be transferred to or from the vehicles into the warehouse.

There is no evidence as to how many other persons would be facing a similar risk. Certainly, there is no indication that the sub-group could number in the thousands as noted by Mr. Justice Crampton in *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No 222 (QL), at paragraph 33:

> Given the frequency with which claims such as those that were advanced in the case at bar continue to be made under s. 97, I find it necessary to underscore that is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of paragraph 97(1)(b)(ii) of the IRPA where (i) such targeting in the claimant's home country occurred or is likely to occur because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons, and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. In my view, a subgroup of such persons numbering in the thousands would be sufficiently large as to render the risk they face widespread or prevalent in their home country, and therefore “general” within the meaning of paragraph 97(1)(b)(ii), even though that subgroup may only constitute a small percentage of the general population in that country.

[81] As in *Uribe*, above, the Applicant argues that the RPD did not address the issue of whether he was targeted because he ran a particular business (i.e., a restaurant) and there was no evidence as to how many other persons would be facing a similar risk. Like the Uribe brothers' carwash, the Applicant's restaurant suited La Familia's needs and they wanted to use it to sell drugs.

[82] The Applicant claims that he raised this issue with the RPD. In his PIF and at various points in his testimony, he referred to La Familia's demand to use his restaurant to sell drugs (see pages 22, 521, 525, and 527 of the CTR), but he says that the RPD remained fixated on the money demands and neglected to consider the restaurant aspect of the threats. He also says that his counsel made submissions on point. The CTR records counsel arguing as follows:

> Under 97, in my submission, the risk faced by the Claimant here is not a risk that is faced generally by other individuals in Mexico. As I said earlier, this is something that is very specific to the Claimant that has arisen out of his particular circumstances. If the Panel finds the Claimant to be credible -- and in my submission there is no reason to find otherwise.
>
> Then the Panel also has to recognize that he was threatened by a well-organized, brutal criminal drug cartel who didn't only just try to extort him, but also demanded that they allow them to engage in their criminal enterprise in his restaurant, making him complicit in their criminal enterprise.
>
> The Claimant was specifically and personally targeted. He was threatened; his life was threatened. He was stabbed. The cook at his restaurant was killed. And one of the principal players here is, as I said, the police chief or ex-police chief in Texcoco.
>
> And so in my submission it's clear here that the Claimant would be exposed to a personal risk and that this risk is greater than that faced by the general population in Mexico.
>
> And I wanted to point the Member to a 2007 Federal Court case. It was *Martinez Pineda v Canada*. And in this case, the federal court [*sic*] allowed the judicial review application based on 97.1(b).

The Claimant there was a Salvadorian citizen. He had been threatened on many occasions by a street gang after he refused to become a member of the gang. And there was evidence adduced that street gangs recruited across the country and that it was widespread. And so Mr. Pineda's application was denied, or his claim was denied on the basis that the risk that he faced was a generalized risk.

On appeal, the federal court noted this, and I'm just going to quote from the decision. It's paragraph 17 of the Decision for your reference.

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

In my submission, in this case, the Claimant is not claiming to be subject to a risk to his life or safety based only on the fact that he is a business owner or entrepreneur in a gang-controlled area. He is saying that he was personally targeted by members of La Familia on more than one occasion.

And even if there are other business owners facing similar circumstances, in my submission, such persons would also face a heightened risk that is greater than that of the general population.

In my submission, if the Board accepts the truthfulness of the Claimant's story and there's no reason not to, then the Board must find that he would be personally in danger if he were to return to Mexico.

> In my submission, the Claimant's claim for protection in Canada should therefore be accepted. And subject to any questions, those are my submissions.

[83] Counsel clearly asked the RPD to consider personalized risk from La Familia not only because the Applicant was extorted, but also because La Familia "demanded that they (*sic*) allow them to engage in their criminal enterprise in his restaurant, making him complicit in their criminal enterprise."

[84] In the Decision, the RPD was obviously aware of, and acknowledged that "After some time, the extortion demands were increased to $500 per month, with a request that they be able to sell drugs in the restaurant."

[85] It is clear then, that when the RPD refers throughout the rest of the Decision to "extortion demands" it means the money paid together with the demand to use the restaurant to sell drugs. The sentence quoted above is immediately followed by "The claimant refused to pay this increase." The RPD concludes that the Applicant was a victim of crime, including extortion demands, but that the crime was not specific to the Applicant.

[86] The RPD then states its general view of the law:

> While that case differs from the present case, I am of the view that if the risk to violence or injury or crime is a generalized risk faced by all citizens of Mexico, the fact that a specific number of individuals may be targeted more frequently, does not mean that they are not subject to a "generalized risk" of violence. The fact that they share the same risk as other persons similarly situated does not make their risk a "personalized risk" subject to protection under section 97.
>
> Counsel submits *Martinez Pineda*, however, that case is not consistent with the predominant line of cases, such as *Acosta*, *Perez*, and *Paz Guifarro*. Acosta was facing death at the hands of the Maras for inadvertently failing to pay the extortion money taken from bus

drivers and fare collectors. Paz Guifarro faced retaliation for not complying with the extortion demands of the Maras and reporting them to the police. That, however, did not turn their risk as one of many such victims of these gangs into a personalized risk. In *Acosta*, the Court stated that victims of generalized violence are often known to the perpetrators, by name, by position, or for any number of different reasons. The fact that the victims of generalized violence happen again today, as all people do, and that that identity is or becomes known to the perpetrator, does not mean that they are not a victim of generalized violence. Furthermore, regarding generalized risk in *Paz Guifarro*:

The Court underscored that it is now settled law that claims will not meet the requirements of section 97(1)(*b*)(ii) of the IRPA where (i) targeting is because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. A sub-group numbering in the thousands would be sufficiently large as to render the risk widespread or prevalent and therefore "general" even though that sub-group may only constitute a small percentage of the general population in that country.

In summary,

> the fact that a person or group of people may be victimized repeatedly or more frequently by criminals, for example, because of their perceived wealth or because they live any [*sic*] more dangerous area,
>
> that the claimant continues to be pursued after reporting to police or relocating,
>
> that the claimant faces retaliation for not complying with the demands of the criminals, does not remove the risk from the exception, if it is one faced generally by others. The consequential harm faced in the circumstances, does not mean that the risk is not a generalized one.

In this case, it is accepted that you were subjected personally to a risk to harm under section 97 of the Act; you were targeted for extortion, and that you became a victim of the gang's violence, when you refused to heed to their extortion demands.

> However, in accordance with the documentary evidence, the risk you faced as a result of being a target of extortion is faced generally by people in Mexico. The extortion would be faced in every part of the country and is faced generally by all residents of Mexico. The evidence in this case shows that the fear of extortion has been recognized as a generalized risk.

[87] The Applicant faults the RPD for this conclusion because he says it did not consider that aspect of his case where La Familia requested the use of his restaurant to sell drugs. In my view, however, the RPD does address this aspect of the case because it treats the request to use the restaurant as part of the "extortion demands" used by La Familia. In my view, then, it is not left out of account when the RPD considers generalized risk. So the issue becomes whether, given that the "extortion demands" include both money and a request to use the restaurant to sell drugs, it was unreasonable for the RPD to conclude that the risk faced by the Applicant "as a result of being a target of extortion is faced generally by all residents of Mexico."

[88] As Justice Harrington pointed out in *Uribe*, above, the distinction between generalized and personalized risk under section 97 can certainly give rise to difficulties, and each fact situation needs to be carefully examined. The Court also has to bear in mind that this is a matter for the RPD to determine and not the Court. Provided the RPD makes a reasonable determination within the *Dunsmuir* range that is supportable on the evidence, the Court should not interfere even if it would have reached a different conclusion. Considering the evidence given by the Applicant himself on this point, I cannot say that the conclusion falls outside of the *Dunsmuir* range. The RPD specifically asked the Applicant to say what made him different:

INTERPRETER: I apologize; it might be my mistake.

MEMBER: No. Okay, so you were a businessman?

CLAIMANT: M’hm.

MEMBER: How does that make you different?

CLAIMANT: No, in nothing except that simply I had a restaurant and they stabbed me. That’s it. There is no difference except that this happened to me. They stabbed me; they threatened me. They fulfilled it, and that’s it. I have the opportunity to leave.

MEMBER: Counsel, do you want to ask questions, or would you like to take a break instead?

COUNSEL FOR CLAIMANT: I have very few questions, so I think I could ask them now; thank you.

MEMBER: Okay. So I don’t have questions for you right now. But your counsel is going to ask you questions.

[89] Having just heard what the Applicant had to say on what made him different, his counsel did not explore this matter further with him or try to elicit evidence that would relate his difference to the request to use the restaurant for selling drugs.

[90] Given this evidentiary basis, I cannot say that the RPD overlooked some point of difference that the Applicant felt took him outside of the general risk from extortion that is faced generally in Mexico.

[91] In submissions at the RPD hearing, counsel ask the RPD to consider the request to use the restaurant, but my reading of the Decision is that this was taken into account as part of the "extortion demands." So I cannot say that this factor was overlooked and I cannot say that, after taking all of the factors at play into account, the RPD reached an unreasonable conclusion about generalized risk.

[92] The Applicant also seeks to have the Decision set aside on the basis that the RPD misinterpreted and misapplied the relevant legislation and jurisprudence, and that decisions such as *Osorio* are flawed and require reconsideration because

> by its very nature, a generalized risk is one that applies to all citizens of country, and that where an individual has been personally targeted, the risk to that person ceases to be a generalized risk regardless of what risks may be faced generally by others in the same country.

[93] The Applicant says that his interpretation of the legislation is supported by a textual and contextual analysis of section 97, including the records of the drafting of this provision, and with the spirit of the Act as a whole. In my view, however, the approach to section 97 of the Act, as found in cases such as *Osorio*, above, is well-settled in the jurisprudence of this Court and is quoted and described accurately in the RPD's Decision.

Certification

[94] In *Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89, Justice Pelletier held at paragraph 11 that a question for certification must be a serious question of general importance which would be dispositive of an appeal. To be dispositive of an appeal, a question must have been raised and dealt with in the decision below. Further, where the judge on judicial review

decides that it does not need to be dealt with, the issue will not be an appropriate question for certification. In *Varela v Canada (Minister of Citizenship and Immigration)* 2009 FCA 145, Justice Pelletier affirmed *Zazai* and held at paragraph 28 that a question for certification must arise from the issues in the case and not from the reviewing judge's reasons.

The Question Proposed

[95] The Applicant proposes the following question for certification in IMM-2409-11:

> Does the limitation of section 97(1)(b)(ii) of the *IRPA* apply to an individual who, unlike an individual who fears the possibility of being targeted, has already been personally targeted by a specific agent of persecution, and who fears that he will be targeted by that agent of persecution?

Arguments on Certification

The Applicant

[96] The Applicant pins his proposed question on the role that a claimant's personal circumstances play in the analysis of section 97. He says that the RPD can grant protection where a claimant's personal circumstances merit it, even where the RPD finds an internal flight alternative exists under 97(1)(*b*)(i) or where state protection exists under 97(1)(*b*)(ii). The Applicant also says that, as the jurisprudence now stands, the RPD cannot grant protection if a claimant faces a generalized risk, even if the claimant's personal circumstances merit protection. Because the RPD is permitted to grant protection based on personal circumstances under 97(1)(*b*)(i) and (ii), this means that the generalized risk exception in 97(1)(*b*)(ii) is not meant to apply to people who have been personally targeted.

[97] The Applicant's position seems to be that once a claimant has been victimized, there can be no more generalized risk. He says that, though the Court has refused to certify similar questions in the past, this does not prevent certification in this case. Previous cases refused certification on narrow factual grounds, while the question he raises is of broad application.

[98] The Applicant argues that, while the Court in *Prophète 2* declined to answer a similar question in a factual vacuum, his question is different. He says that his question deals with the narrow issue of whether there is a difference in law between a person who fears becoming a victim of crime in a country where crime is widespread and a person who has already been a victim of crime. The Applicant also seeks to distinguish his question from that raised in *Prophète 2* by saying that his question would not narrow the scope of 97(1)(*b*)(ii). This was a concern of the Federal Court of Appeal in *Prophète 2*. The Applicant notes that claimants must still establish that they have no internal flight alternative and rebut the presumption of state protection to be granted protection under subsection 97(1). Certifying the question he proposes would not open the floodgates to claims under subsection 97(1).

The Respondent

[99] The Respondent argues that the question the Applicant has proposed does not have the required factual basis to be certified. He says that the question is academic and hypothetical, such that the Federal Court of Appeal cannot meaningfully answer the question. The Respondent notes that Justice Trudel said in *Prophète 2* at paragraph 7 that

> The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on

> the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" for him …

This shows that all claims must be examined on the basis of a prospective risk, regardless of past experience. The distinction the Applicant draws between those who have been targeted in the past and those who only fear potential targeting is in error because all claims must be examined by looking at prospective targeting.

[100] The Respondent also says that, where the Applicant's question refers to the possibility of future targeting, it introduces an uncertain element into the burden of proof under section 97. The jurisprudence establishes that the risk under section 97 must be proven on a balance of probabilities. Further, the Respondent says that the proposed question asks the Court to analyse the internal flight alternative available to the Applicant or to presuppose that the Applicant was at risk from La Familia in every part of Mexico. This is not proper because questions of fact relating to the determination of a refugee claim are within the exclusive jurisdiction of the RPD under section 162 of the Act.

[101] The Respondent further challenges the conceptual basis for the Applicant's question. He notes that the entire analysis under subsection 97(1) looks at the personal circumstances of the claimant and depends on the facts in each case. To say that the RPD cannot consider a claimant's personal circumstances when analysing generalized risk is incorrect. The Respondent points to *S.M.*, above, and says that the RPD must analyze the specific risk to the claimant in every case.

[102] Finally, the Respondent says that if, as the Applicant has said, the question deals only with a narrow issue of law which has nothing to do with the facts, the certified question cannot be answered by the Federal Court of Appeal in any meaningful way. This means that the proposed question is not proper to certify.

[103] In my view, the Federal Court of Appeal has already indicated that it will not answer the kind of question which the Applicant seeks to raise in this case. The Federal Court of Appeal declined to answer the following question in *Prophète 2*:

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

[104] To answer the proposed question in the present case, the Federal Court of Appeal would be called on to decide whether, in all cases where an individual has been previously targeted, the limitation of subparagraph 97(1)(*b*)(ii) should not apply. Referring again to the words of Justice Trudel in *Prophète 2*, above, at paragraph 8,

> The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" for him ….

[105] The proposed question would ask the Federal Court of Appeal to decide a question as a matter of law which it has already said is properly a question to be determined in each case on the facts. The jurisprudence of the Federal Court of Appeal and of this Court clearly establishes that the question of generalized risk is highly fact specific; in some cases, personal targeting can ground protection, and in some it cannot. As Justice Mainville said in *Innocent*, at paragraph 74, "I see no

point in framing a question that the Federal Court of Appeal has clearly indicated it will not answer." For these reasons, it is my view the Applicant's proposed question should not be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-2409-11
STYLE OF CAUSE:	**ERNESTO BATALLA RODRIGUEZ**
	- and -
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 22, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	January 4, 2012

APPEARANCES:

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