Federal Court  Cour fédérale

Date: 20130614

Docket: IMM-8790-12

Citation: 2013 FC 656

Ottawa, Ontario, June 14, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DARLEY ALBERTO SANTANILLA BONILLA; CLAUDIA PATRICIA ARANGO PANTOJA; NICOLAS SANTANILLA ARANGO; CAMILA SANTANILLA ARANGO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 9 August 2012 (Decision), which refused the

Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principal Applicant, Darley Alberto Santanilla Bonilla, and his wife and children, the Secondary Applicants, are citizens of Colombia. The Secondary Applicants relied on the claim of Mr. Bonilla, so the Court will refer to him throughout as "the Applicant". The Applicant claimed refugee status on 10 June 2011. His narrative is as follows.

[3] The Applicant owned and operated a shoe business, Fabriano Gabinelli, in Cali, Colombia. It was a successful business; the company produced shoes and operated a retail outlet.

[4] On 28 January 2011, the Applicant received a call on his cell phone from someone who identified himself as a member of the Revolutionary Armed Forces of Colombia (FARC). This person asked him to obtain and pay for certain prescription medications. The Applicant replied that he was in the shoe business, and that this was not in his line of work at all. The caller told him that he knew he had a successful business, that he had to comply, and then hung up.

[5] On 10 February 2011, the Applicant received another call on his cell phone from the same person asking if he had obtained the prescription medication. The Applicant replied that he had not as he had no prescription in order to obtain it. The caller said that if he could not obtain it, then he would have to make a payment to the FARC of 20 million pesos. The Applicant replied that he did not have that amount of money, but the caller said that he knew he had a successful business and

would be able to obtain the money. The caller said that if the Applicant did not give the FARC what it was demanding, his life and the lives of his family members would be in danger.

[6] On 17 February 2011, the Applicant went to the regional attorney's office to tell the Colombian authorities about the threats. They told him that their budget for such cases is limited, and that the best they could do would be to send a police vehicle to drive near the Applicant's location from time to time. That never happened.

[7] The Applicant then went to the newspaper *El Pais* to tell them about the threats made against him by the FARC. The story was published on 23 February 2011, with the Applicant's name changed in the story to Jose Santana to protect his safety.

[8] On 14 March 2011, the Applicant received an obituary with his name on it at his retail store. The envelope was sent by FARC via courier. That day, the Applicant and his family decided to move to his mother's apartment in Cali.

[9] On 25 March 2011, the Applicant was in his office when he heard gun shots. Minutes later he received a call on his cell phone. The same caller told him that they were not joking, and that they knew where his family was. The Applicant's car, which was in the parking lot outside, had been shot multiple times.

[10] The Applicant and his family fled Colombia on 27 March 2011. They first went to the U.S., and then arrived in Canada on 10 June 2011 and filed a refugee claim the same day. Their claim was denied on 9 August 2012.

DECISION UNDER REVIEW

[11] The RPD found the Applicant was not a Convention refugee because he had not established a nexus to a Convention ground, and that he was not person in need of protection because the risk he faced was a generalized rather than a personalized risk.

Nexus

[12] The RPD noted that in order for the Applicant to be considered a Convention refugee, he had to establish a nexus between himself and one of the five grounds. The RPD found that the Applicant was a victim of crime, and that he was not sought out by the extortionists for any reason other than that he was a successful business owner. The RPD thought that neither "perception of wealth," nor "victims of extortion," provided a basis for a social group and refugee status.

[13] The Applicant's counsel submitted that he had a nexus to a Convention ground based on his imputed political opinion. Given the profile of the FARC, and because the initial demand was for medication, counsel argued there was clearly a political agenda involved. The RPD accepted that the FARC is a group with a political agenda, but noted that although the FARC initially demanded medication, the demands immediately changed to money as soon as the Applicant stated that he had no access to medication. Further, the threats to his life were in conjunction with his refusal to pay the FARC the money they demanded. The RPD found on a balance of probabilities that the FARC were simply interested in furthering their financial/criminal interests, and that the objective behind the extortion was purely criminal in nature. The RPD found that the Applicant was a victim of crime, which did not provide a nexus to a Convention ground.

Generalized Risk

[14] The RPD noted that section 97 of the Act requires a personalized review in the context of the actual and potential risks to which the refugee claimant is subject. The RPD said that in cases like this, where the general public is subject to the risk of crime, the fact that some individuals are more exposed to the risk, because they live in more dangerous areas or because they are perceived as being wealthier, does not necessarily make them persons in need of protection.

[15] The RPD found that insufficient reliable and probative evidence was adduced by the Applicant to support the assertion that the risk he faced was particularized. The Applicant testified that he was aware of other businessmen being similarly extorted by the FARC, and in the newspaper article it states that the "criminals doing extortions have become the headache of the business owners."

[16] The RPD found that the FARC was not even aware of the particular abilities of the Applicant, as was evidenced by their demanding medication despite the Applicant having no ability to acquire it. After that, no other demand besides money was made. The reliable and probative evidence suggested that the FARC was extorting the Applicant because they were aware that he was a business owner and had a perceived ability to meet their demands. Any threats that occurred subsequent to the extortion demands flowed from that initial demand for money.

[17] The RPD found that the risk faced by the Applicant was a risk faced generally by other business owners in Colombia, and was not particularized to him. Although his extortionists may have known his identity, the threats that occurred flowed from demands to further their criminal interests and for monetary gain. Insufficient reliable and probative evidence was adduced to indicate

how the members of the FARC came to know the identities of the Applicant and his family. Regardless, the RPD noted that it is settled law that the perpetrators knowledge of a claimant's identity does not mean that the claimant was not a victim of generalized violence.

[18] The RPD stated that, although the Applicant may have been specifically targeted, many people in Colombia face a similar risk. To succeed under section 97, the risk must be a personal or individualized risk and must be likely to occur on a balance of probabilities, and must not be a risk faced generally by other individuals in that country. Although the Applicant was subjected personally to a risk to his life, his testimony and the documentary evidence indicated that this risk is faced generally by people in Colombia who are perceived to have the means to pay the demanded money. The threat of extortion and harm for non-compliance is faced in every part of the country and is faced generally by all individuals in Colombia – a generalized risk does not have to affect everyone in the same ways. The evidence in this case indicated that the risk at issue was a generalized one.

[19] The RPD pointed out that the FARC strike terror into the entire Colombian population and that extortion is part of their *modus operandi*. The Applicant was one of their many victims. The RPD considered the case of *Vickram v Canada (Minister of Citizenship and Immigration)*, 2007 FC 457 [*Vickram*], and noted that the Federal Court found that perception of wealth does not constitute a particularized risk under section 97 of the Act. The RPD was of the view that the risk of violence from criminal organizations is a generalized risk faced by all Colombians, and 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.

[20] The RPD also noted case law stating that it must consider the specific circumstances of the Applicant. It considered the facts of various cases, and noted that all people have an identity, and just because that identity becomes known to a perpetrator does not mean the risk faced is not a generalized one. It also noted the case of *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182 [*Guifarro*], where the Federal Court found that a sub-group of people facing a certain risk could be in the thousands, and even if that constituted a very small percentage of the total population the risk would therefore be considered "general".

[21] The RPD also found that consequential harm experienced by people who are targeted by criminal organizations does not mean that their risk is not generalized. The fact that a group of people may be targeted more frequently, or that the Applicant continued to be pursued after reporting the extortion and that he faced retaliation for not complying with the demands of the criminals, does not mean that the risk is not generalized.

[22] The RPD said that in a country such as Colombia, plagued with violence, criminality destabilizes the country and all citizens are subject to that risk. The documentary evidence suggested that armed groups perpetuate much of the violence and crime around the country, and that these groups use extortion to make money. The RPD found that the Applicant was a victim of crime, and this risk is generally faced by many people who own their own businesses in Colombia. As such, he did not fall under section 97 of the Act.

[23] The RPD found that the Applicant was not a Convention refugee or a person in need of protection under sections 96 or 97 of the Act. As the Applicant's wife's and children's claims rested entirely upon his, they were also refused.

ISSUES

[24] The Applicant raises the following issues in this proceeding:

a. Did the RPD err in its interpretation and application of the definition of a Convention refugee as defined in section 96 of the Act?

b. Did the RPD err in its interpretation and application of the definition of a person in need of protection as defined in section 97 of the Act?

c. Did the RPD err in finding that no nexus exists to the definition of a Convention refugee contained in section 96 of the Act?

d. Did the RPD err in its treatment of the issue of generalized risk?

e. Did the RPD err by ignoring documentary evidence that was before it?

STANDARD OF REVIEW

[25] 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.

[26] The RPD's application of the definition of Convention refugee in section 96 of the Act is a question in which the legal and factual issues are inextricably intertwined. This issue calls into question the RPD's interpretation of the definition set out in section 96 of the Act, and calls for the

RPD to interpret its enabling statute, and so the standard of review is reasonableness (see *Dunsmuir*, above, at paragraph 54, *Smith v Alliance Pipeline Ltd.* 2011 SCC 7 at paragraph 28 and *Celgene Corp. v Canada (Attorney General)* 2011 SCC 1 at paragraph 33). The standard of review on the first issue is reasonableness.

[27] The RPD's application of the facts of the Applicant's case to the definition of a person in need of protection under section 97 is a question of mixed fact and law (*Begum v Canada (Minister of Citizenship and Immigration)*, 2011 FC 10 at paragraph 19). Thus, the standard of review applicable to the second issue is reasonableness.

[28] In *Salvagno v Canada (Minister of Citizenship and Immigration)*, 2011 FC 595, Justice Yvon Pinard said at paragraph 11 that "the standard of review applicable to the Board's interpretation of the nexus issue is that of reasonableness." The third issue is thus reviewable on a reasonableness standard.

[29] The reasonableness standard is also applicable to the RPD's finding that the Applicant faced a generalized risk in Colombia. Justice David Near determined that reasonableness was the appropriate standard of review on this issue in *V.L.N. v Canada (Minister of Citizenship and Immigration)* 2011 FC 768, at paragraphs 15 and 16. As Justice André Scott found in *Vasquez v Canada (Minister of Citizenship and Immigration)* 2011 FC 477, a generalized risk finding involves questions of mixed fact and law to be evaluated on a standard of reasonableness (paragraphs 13 and 14). The standard of review on the fourth issue is reasonableness (see also *Innocent v Canada (Minister of Citizenship and Immigration)* 2009 FC 1019).

[30] The evaluation of evidence is a factual consideration that goes to the RPD's consideration of other issues. Thus, this issue is also evaluated on a reasonableness standard (see *Dunsmuir*, above).

[31] 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."

STATUTORY PROVISIONS

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

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; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

[…]	[…]
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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by	(iv) la menace ou le risque ne

the inability of that country to provide adequate health or medical care	résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENTS

The Applicant

Nexus

[33] The Applicant submits that there is no bright line between "crime" on one hand, and "persecution" on the other. The two concepts are not mutually exclusive; most acts of persecution are simultaneously criminal acts. For example, if a person is beaten due to their political opinion, that is persecution, but it is simultaneously a crime. To merely state that something is a crime does not automatically mean that it is not persecutory. The key issue is whether there is a nexus to a Convention ground. The Applicant submits that the RPD erred by finding crime and persecution to be mutually exclusive. The RPD asked whether the harm feared was crime or persecution, rather than asking if the harm feared was connected to one of the Convention grounds.

[34] The nexus put forward by the Applicant was that of perceived political opinion, which is a concept that has been well-recognized by the Court. At paragraph 9 in *Ismaylov v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 30, the Court said at paragraph 9:

> The CRDD failed completely to address the issue of perceived political opinion as a ground for the Applicants' claim. I am satisfied that this omission on the part of the CRDD constitutes a further reviewable error.

[35] Political opinion may create a nexus, whether the political opinion is perceived or real (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689). The RPD, however, focused on the

Applicant's actual political opinion. It said at paragraph 23 of the Decision that there "is no evidence before me that the claimant was questioned in regard to his political views or that the claimant had been involved politically in Colombia."

[36] The Applicant points out that there was documentary evidence before the RPD that clearly said that the FARC treats any refusal to accede to extortion demands as being indicative of an opinion in opposition to their political agenda. A UNHCR Report says that "Due to the significance of the income derived from ransom and extortion to fund political-military activities, refusal or inability to pay is viewed as an act or indication of political opposition, resulting in persecution and violence" (see page 198 of the Applicants' Record).

[37] The RPD made no reference to the above mentioned document, and it directly contradicts the conclusion that it reached on this issue. Thus, the RPD erred (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (TD) at paragraph 17). In *Orgona v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 346, the Federal Court said at paragraph 31:

> In assessing whether mistreatment of the Roma, and of the applicants, could be considered persecution, the tribunal found much of the evidence of the applicants lacked credibility in light of certain documentary evidence. But it made no reference to the significant documentary evidence which was supportive of the applicants' claims. In so doing, it appears to have ignored relevant evidence. Even though it is not necessary to refer to all of the documentary evidence before it, when evidence which supports the applicants' position is not referred to, and when other documentary evidence is selectively relied upon, the tribunal, in my opinion, errs in law by ignoring relevant evidence.

[38] In *Gilvaja v Canada (Minister of Citizenship and Immigration)*, 2009 FC 598 at paragraph 38:

> Further, there is evidence on the record that contradicts the Board's decision that state protection would be available to the applicant. The Board's role was to make findings of fact and arrive at a reasonable decision based on the evidence, even if conflicting. Certain passages from the documentary evidence appear to show that there is some desire by the present government of Mexico to improve the situation, while other passages suggest that protective measures are ineffective. In this circumstance, the Board had a duty to explain why it preferred the evidence of the efforts the state is taking over the evidence that corruption and impunity continue to be a widespread and pervasive reality in Mexico. Upon reading the documentary evidence and the Board's decision, it is clear that the Board took a selective analysis of the documentary evidence.

[39] In *Goman v Canada (Minister of Citizenship and Immigration)*, 2012 FC 643 at paragraph 13 the Court had the following to say on point:

> It is well-known and accepted that a decision-maker does not have to refer to all evidence upon which it relies but at the same time, when there is relevant contradictory evidence that is unacknowledged by the decision-maker, a reviewing Court may conclude that the Board ignored or misapprehended key facts and came to an erroneous decision…

[40] In *M.P.C.Q. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 297 at paragraph 8 the Court warned as follows:

> Generic statements that "all the evidence" was considered do not suffice in this case. Before stating that there was no "persuasive evidence", the IRB had the duty to meaningfully address the evidence and the principal Applicant's statements, especially if these could reasonably be seen as addressing the IRB's concerns with the sufficiency of state protection. The fact that the IRB must address the evidence before it, especially when it appears as possible "persuasive evidence", is a well established principle in immigration law…

[41] Furthermore, the more important the evidence, the more likely it is that the RPD erred by not referencing it (*Packinathan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 834 at paragraph 9). The Applicant pointed directly to documentary evidence in his written submissions

that the FARC treats any refusal as political opposition, and submits that it was an error for the RPD to ignore it. All that the RPD says with respect to the Applicant's perceived political opinion is that "I find that insufficient evidence was adduced to indicate that the claimant has nexus based on imputed political opinion" (paragraph 19 of the Decision). The RPD does not provide any reasoning as to why the documentary evidence presented by the Applicant is "insufficient."

[42] The RPD also found that because the FARC's demand immediately changed from medication to money, this indicated that "the FARC were simply interested in furthering their financial/criminal interests." The FARC is a political group with a political agenda, and it acquires funds through extortion. Just because the FARC changed its demands to money does not mean it should be simply considered a criminal organization engaging in criminal activities for financial reasons; it is still a political group. The political nature of the FARC is discussed in a variety of documentary materials submitted by the Applicant. Based on the above, the Applicant submits that it was an error for the RPD to find there was no nexus to a Convention ground.

[43] The test applicable under section 96 is whether there is a serious possibility of persecution should the Applicant be returned to Colombia. This standard is lower than a balance of probabilities, but higher than a mere possibility (*Chan v Canada (Minister of Employment and Immigration)*, [1995] 2 SCR 593 at paragraph 120). The test under section 97 is a higher standard: that of a balance of probabilities (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1). As such, the Applicant submits it was an error for the RPD to only apply the higher section 97 test to his claim, instead of the lower section 96 test.

Section 97

[44] The Applicant submits that the RPD also committed an error in its section 97 analysis by finding that the Applicant faces a generalized, as opposed to a personal, risk in Colombia. In *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 [*Pineda*], the Federal Court said at paragraphs 13-15:

> In short, the risk faced by an applicant ought not to be a random and generalized risk indiscriminately faced by all persons living in the country to which the applicant risks to be removed. In this case, the applicant submitted in his Personal Information Form (PIF) that he had been personally subjected to danger; yet the RPD did not take this into account and rather put the accent on the fact that Mr. Pineda had stated in his testimony that the Maras Salvatruchas recruited across the country and targeted all levels of society, regardless of the age of the persons contemplated.
>
> […]
>
> Under these circumstances, the RPD's finding is patently unreasonable. It cannot be accepted, by implication at least, that the applicant had been threatened by a well-organized gang that was terrorizing the entire country, according to the documentary evidence, and in the same breath surmise that this same applicant would not be exposed to a personal risk if he were to return to El Salvador. It could very well be that the Maras Salvatruchas recruit from the general population; the fact remains that Mr. Pineda, if his testimony is to be believed, had been specifically targeted and was subjected to repeated threats and attacks. On that basis, he was subjected to a greater risk than the risk faced by the population in general.

[45] The Applicant points out that he was personally and specifically targeted by the FARC, and he and his family members were personally threatened. Based on *Pineda*, the Applicant was "specifically targeted" and this represents a personalized risk, not a generalized one. As the Court said at paragraphs 36 and 50 in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678:

> As noted, in my view, the interpretation given by the RPD to section 97 of IRPA in the decision is both incorrect and unreasonable. It is simply untenable for the two statements of the Board to coexist: if an individual is subject to a personal risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general. If the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks. Indeed, counsel for the respondent was not able to provide an example of any such situation that would be different in any meaningful way from the facts of the present case. The RPD's interpretation would thus largely strip section 97 of the Act of any content or meaning.
>
> […]
>
> Like the claimants in the many cases cited above, the applicant in this case faced a heightened and different risk not faced by other young men in El Salvador because the MS had threatened him in order to obtain retribution for his having spoken to the police and provided Carlos' mother's address to them. Carlos was shown to have joined the MS and he personally made a death threat to the applicant. The applicant's situation was thus fundamentally different from that of others, who might be generally at risk of recruitment, threats or even assault by the MS. The applicant, though, was found to directly and personally face the risk of death. This is a far cry from the risk of extortion, recruitment or assault and thus the applicant's risk is much more significant and more direct than that faced by other men in El Salvador. Accordingly, the RPD's decision is both unreasonable and incorrect.

[46] The decision in *Munoz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 238 at paragraph 32 differentiates between random acts of criminal violence and those that are targeted. The first represent a generalized risk, and the second a personalized risk. Similarly, in *Diaz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 705, the Court said at paragraph 19, 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."

[47] Furthermore, in *Kaaker v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1401 at paragraph 51 the Court found that:

> The RPD was unreasonable in applying the generalized risk exception to the Applicant when it had accepted that the Applicant had been personally targeted for extortion and kidnapping. The RPD cannot reasonably determine that a claimant faces a risk to his life and simultaneously find that his risk was generalized because criminal extortion and kidnapping is rampant in Afghanistan.

See also *Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 at paragraph 1; *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476 at paragraph 16.

[48] As the RPD accepted the credibility of the Applicant's claim, it was unreasonable for the RPD to find that he was at no greater risk than other Colombians when it was accepted that he was at risk and had been specifically targeted. The Applicant points to paragraph 17 of *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62:

> 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.

[49] The Applicant says that the RPD found that, since criminality is prevalent in Colombia, he does not face a personalized risk. This is erroneous, as was pointed out at paragraphs 27 and 34 of *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210:

> The majority of cases turn on whether or not the last condition has been satisfied, that is, whether the risk faced by the claimant is a risk faced generally by others in the country. I pause to observe that regrettably too many decisions of the RPD and of this Court use imprecise language in this regard. No doubt I too have been guilty of this. Specifically, many decisions state or imply that a generalized risk is not a personal risk. What is usually meant is that the claimant's risk is one faced generally by others and thus the claimant does not meet the requirements of the Act. It is not meant that the claimant has no personal risk. It is important that a decision-maker finds that a claimant has a personal risk because if there is no personal risk to the claimant, then there is no need to do any further analysis of the claim; there is simply no risk. It is only after finding that there is a personal risk that a decision-maker must continue to consider whether that risk is one faced generally by the population.
>
> […]
>
> I do not accept that protection under the Act is limited in the manner submitted by the respondent. This is not to say that persons who face the same or even a heightened risk as others face of random or indiscriminate violence from gangs are eligible for protection. However, where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met.

[50] In *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138, Justice Donald Rennie had the following to say on point at paragraphs 28-29:

> It must be remembered that Parliament is presumed not to have enacted legislation that is devoid of content; thus, the interpretation of section 97 frequently relied on by the Refugee Protection Division cannot be supported: for example, it would not protect individuals from natural disasters, as natural disasters affect everyone; it would not protect individuals from criminal acts, as all are at risk of extortion. Section 97 would thus be reduced, in its application, to the protection of individuals who are victimized by criminal acts in countries where the risk of criminality is not widespread or prevalent. In these cases, state protection, logically, is likely to be available. In consequence, section 97 would be stripped of any content and bereft of meaning, a legislative section in search of meaning.

> As discussed above, the respondent's position stems from a misplaced focus on the reason for the risk - the question is not whether the risk to a claimant is created by criminal activity, but rather whether the claimant would be subjected personally to a risk to his or her life or to a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country. If the Board fails to undertake an individualized inquiry to determine those questions the Court will have basis to intervene.

[51] The Applicant also points to paragraphs 7, 9, 13 and 14 of *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143:

> The Board correctly noted that "consideration of an application under section 97(1)(b)(ii) of the IRPA requires a personalized review in the context of the actual and potential risks to which the claimant is subject." However, the Board went on to find that "even if the claimant does face a personalized risk of harm, in cases like this, where the general public is subject to the risk of crime, a person who is a direct victim of crime is not automatically a person in need of protection within the meaning of section 97 of the Act." I find that the Board misunderstood the applicable legal test under section 97(1)(b)(ii) which rendered its decision unreasonable.
>
> […]
>
> The Board erred in concluding that the applicant faced a particular risk of harm but was ineligible for section 97 protection simply because there is a general risk of criminal or gang activity in El Salvador. *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138, reviewed the basic principles governing the interpretation of section 97(1)(b)(ii) - specifically, that an individualized inquiry must be conducted in each case, and the fact that the risk to an applicant arises from criminal activity does not in itself foreclose the possibility of protection under section 97. The decision under review is not consistent with the jurisprudence, as it completely negates an admitted situation of individualized risk simply because the actions giving rise to that risk are also criminal.
>
> […]
>
> In this case, the Board was guided by an incorrect understanding of the meaning of section 97(1)(b)(ii). Despite finding that the applicant was subject to a particularized risk of harm, it concluded that the risk

> also affected the population at large because all El Salvadorians are at risk of violence from the MS. The Board noted: "There was no persuasive evidence before me that the claimant was targeted for any other reasons than the reasons I have already indicated", i.e. those that motivate the MS to target any member of the population. In this way, the Board incorrectly focused on the reasons for which the applicant was being targeted, rather than the evidence that the MS was specifically targeting the applicant to an extent beyond that experienced by the population at large. As a result, the Board's decision is unreasonable.
>
> As noted in *Vivero*, section 97 must not be interpreted in a manner that strips it of any content or meaning. If any risk created by "criminal activity" is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country. Because the Board failed to properly undertake this inquiry in this case, the decision must be set aside.

[52] The Applicant submits that the RPD made no attempt to distinguish the above mentioned decisions, and simply ignored them while relying on other, earlier decisions.

[53] Further, the Applicant submitted two reports on country conditions which were ignored by the RPD: a report entitled "Country Conditions in Colombia Relating to Asylum Claims in Canada" by Dr. Mark Chernick, and a report entitled "Continued Insecurity" by James J. Brittain. In *Yepes v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1357, Justice Robert Barnes said at paragraph 10 that, "Even if the Board's failure to make factual or credibility findings did not in this case give rise to a reviewable error, its failure to refer at all to the evidence of Drs. Brittain and Chernick is a further basis for sending this matter back for a redetermination…" As the RPD made no reference whatsoever to these reports, the Applicant submits that it further erred.

The Respondent

Nexus

[54] The Respondent points out that this Court has said that while most acts of persecution are criminal in nature, not all criminal acts can be considered acts of persecution (*Alifanova v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1825 (TD); *Sokolov v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1321; *Karaseva v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1725 (TD)). The Applicant faced extortion and threats of bodily harm – these are, in essence, criminal acts.

[55] There is ample jurisprudence stating that victims of criminal activity do not constitute a particular social group (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Mason v Canada (Secretary of State)*, [1995] FCJ No 815 (TD)). A person's fear of persecution by criminals cannot be the basis of a valid refugee claim (*Suarez v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1036 (TD); *Valderrama v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1125 (TD)).

[56] The Applicant was targeted for extortion based on his actual or perceived wealth. The FARC was not persecuting him for any real or imputed political opinion, and the Applicant presented no persuasive arguments in this regard. It was reasonable for the RPD to find that the Applicant had not established a nexus to a Convention ground.

[57] The fact that the FARC is ideological and involved in political attacks does not change the fact that the Applicant was targeted based on his refusal to pay extortion money. Even if one is extorted to pay a war tax, this still does not give rise to a nexus to a Convention ground. In *Caicedo*

v Canada (Minister of Citizenship and Immigration), 2011 FC 749 at paragraphs 36-37 the Court had the following to say:

> The Board found that the father's kidnapping, if he was in fact kidnapped, was for economic reasons, which did not create a nexus to a Convention ground. Nexus is largely a question of fact, which is within the Board's expertise to make: *Prato v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1088 at para 9. There is ample support in the case law that extortion for economic reasons may not create a nexus to a Convention ground: *Saint Hilaire v. Canada (Citizenship and Immigration)*, 2010 FC 178. Still other cases concluded that extortion for war taxes, or extortion from paramilitary groups, for example: *Ospina v. Canada (Citizenship and Immigration)*, 2010 FC 1035; *Montoya v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 63 do not trigger Convention grounds.
>
> Given the case law on this point and the facts before the Board regarding the nature of the principal applicant's fear, it was reasonably open to the Board to conclude that there was no nexus between the father's kidnapping and a Convention ground.

[58] Similarly, the Respondent submits it was reasonable for the RPD in this case to find that the Applicant's refusal to pay the FARC does not lead to an imputed political opinion.

Section 97

[59] The Respondent submits that whether or not the Applicant is a victim of generalized violence is a fact specific assessment. The Applicant cites cases where judicial review was allowed when protection had been initially denied on the basis of generalized risk, but those cases need to be considered on their specific facts. The case law is clear that refugee claimants must still have a personalized reason to find that their risk does not amount to generalized risk. In *Palomo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1163 at paragraphs 19-22:

Although such cases as *Martinez Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365, [2000] FCJ No 501 (QL) and *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, [2011] FCJ No 144 (QL) appear to assist Ms. Jimenez Palamo, in both cases judicial review was granted because the applicant's personal circumstances were not considered. As Mr. Justice Simon Noël said at paragraph 17 of *Aguilar Zacarias*, above:

> 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 is not enough to be wealthy (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] FCJ No 415 (QL), appeal dismissed, 2009 FCA 31, [2009] FCJ No 143 (QL), or to be a shopkeeper, or a fare collector on a bus (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] FCJ No 270 (QL)).

As Madam Justice Tremblay-Lamer held in *Prophète*, above, the Court is faced with an individual who may have a personalized risk, but one that is shared by many others. The fact that a specific number of individuals may be targeted more frequently than others does not mean that the risk is not faced generally within the meaning of section 97.

I adopt the following words of Mr. Justice Crampton in *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, [2011] FCJ No 222 (QL), where he said 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.

[60] The Respondent says that the RPD considered the Applicant's personal situation and concluded that he was in the same position as many others. This was a reasonable conclusion based on the facts and documentary evidence. The RPD's interpretation of the law is consistent with the jurisprudence; this Court has repeatedly found perceived wealth to be insufficient to support a claim under section 97 (see *Guifarro*, above; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331; *Kanga v Canada (Minister of Citizenship and Immigration)*, 2012 FC 482; *Ayala v Canada (Minister of Citizenship and Immigration)*, 2012 FC 183). The Respondent submits that this is a generalized risk, albeit perhaps a heightened one.

[61] Further, the existence of an opposing view in the documentary evidence is not enough to conclude that the RPD's Decision is unreasonable (*Conkova v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 300 (TD)). The Applicant is merely arguing that alternative inferences should have been made, and this is not sufficient to justify allowing judicial review where the standard of review is reasonableness (*Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at paragraph 11).

[62] The Applicant also takes issue with the RPD's failure to mention Dr. Chernik's and Prof. Brittain's reports on Colombia, but the RPD is assumed to have taken all the evidence into consideration whether or not it is specifically referred to in the Decision (*Florea v Canada (Minister*

of Employment and Immigration), [1993] FCJ No 598 (CA)). The fact that the Reasons do not summarize all the evidence is not a reviewable error (*Hassan v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 946 (CA)). This was recently reaffirmed by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

The Applicant's Reply

[63] The Applicant reiterates his argument that the RPD erred by not finding a nexus to a Convention ground based on imputed political opinion, and that the RPD ignored documentary evidence stating that the FARC imputes a contrary political opinion to those who do not accede to their extortion demands.

[64] The Applicant further submits that none of the cases relied upon by the Respondent involved evidence before the Board on imputed political opinion such as the Applicant's. These cases can be distinguished because the Applicant specifically drew the RPD's attention to this documentary evidence in his written submissions. The RPD ignored this evidence, and this renders the Decision unreasonable.

ANALYSIS

[65] In my view, the RPD committed a fundamental material error in this case that requires the matter to be returned for consideration.

[66] In considering nexus, the RPD confined itself to looking at the evidence as to why the Applicant was approached and extorted by the FARC. The FARC approached and threatened the

Applicant because it wanted medications and then money. There was no evidence of any political involvement by the Applicant in opposition to the FARC, so it was entirely reasonable for the RPD to conclude that "the reliable and probative evidence suggests the FARC was extorting the claimant merely because they were aware that he was a business owner and had a perceived ability to pay their demands."

[67] However, the Applicant's fear was not that, if returned to Colombia, he would be extorted by the FARC. His fear was that, if returned to Colombia, he would be killed or otherwise harmed by FARC because he had resisted FARC's previous attempts at extortion.

[68] In this regard, there was clear evidence before the RPD, in the form of a UNHCR report from 2005 to the following effect:

> Irregular armed actors often kidnap and/or extort persons deemed to hold an opposing political opinion. They also use kidnapping and extortion to finance political/military objectives, targeting anyone seen as a possible source of funds, regardless of the victim's social status or political activity. Due to the significance of the income derived from ransom and extortion to fund political-military activities, refusal or inability to pay is viewed as an act or indication of political opposition, resulting in persecution and violence. This is reflected in letters written by the irregular armed groups demanding payment of a "war tax" (the so-called "*vacuna*") and a threat to mark victims as a military target upon failure or refusal to pay. [Emphasis added]

[69] This report was specifically drawn to the RPD's attention and the Applicant's counsel made submissions on point and asked that the RPD consider perceived political opinion as a nexus ground. There is no dispute that the Applicant had no actual political opinion.

[70] This issue and this evidence are not addressed in the Decision. They should have been. The UNHCR report directly contradicts the RPD's conclusion on the absence of a political nexus. See

Cepeda, above. This means that the RPD failed to fully consider political nexus and persecution under section 96 of the Act and moved directly to section 97 considerations. The RPD had an obligation to consider this issue and the evidence to support it and its failure to do so has resulted in an unreasonable Decision.

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

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The decision is quashed and the 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-8790-12
STYLE OF CAUSE:	**DARLEY ALBERTO SANTANILLA BONILLA; CLAUDIA PATRICIA ARANGO PANTOJA; NICOLAS SANTANILLA ARANGO; CAMILA SANTANILLA ARANGO** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	April 9, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	June 14, 2013

APPEARANCES:

Jack Davis	**APPLICANTS**
Suran Bhattacharyya	**RESPONDENT**

SOLICITORS OF RECORD:

Davis & Grice Barristers and Solicitors Toronto, Ontario	**APPLICANTS**
William F. Pentney Deputy Attorney General of Canada	**RESPONDENT**