

Federal Court



Cour fédérale

**Date: 20111014**

**Docket: IMM-2288-11**

**Citation: 2011 FC 1164**

**Vancouver, British Columbia, October 14, 2011**

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

**BETWEEN:**

**JESUS ERNESTO PONCE URIBE  
JUAN EDUARDO PONCE URIBE  
IVONE MONSIVAIS GONZALEZ  
JESUS EDUARDO PONCE MONSIVAIS  
IVONE ARELY PONCE MONSIVAIS**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The Ponce Uribe brothers operated a carwash within a warehouse where they also fabricated automotive cleaning products. Their business was situated in Guadalupe, Nuevo Leon, Mexico. A few months after opening the carwash, a customer, Poncho by name, came in for service. While cleaning his automobile, Juan Eduardo discovered numerous plastic wrap bundles of a white substance therein. Later Poncho and an associate returned to the carwash and said they were

members of the criminal organization known as Los Zetas and that the warehouse would be a useful place for storing their “toys”, meaning drugs and guns.

[2] If the brothers cooperated, they would be rewarded. If they refused, they would be punished. Poncho showed his gun and photographs he had taken of Jesus Ernesto’s wife and children. The brothers agreed to cooperate.

[3] They did not seek state protection because they feared that a report would come to the attention of the gang through corrupt police.

[4] When they were informed that Poncho would be bringing in a truck and two cars the following day, they abandoned the carwash and soon after came to Canada.

[5] The member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada found them to be credible. Nevertheless, he found, correctly, that as victims of crime, without more, they could not be considered refugees within the meaning of the United Nations Convention and section 96 of the *Immigration and Refugee Protection Act* (IRPA). The issue was whether they could be considered as persons in need of protection as defined by section 97(1)(b)(ii) of IRPA which reads:

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

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

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| subject them personally   | elle avait sa résidence habituelle, exposée :  |
| ...   | [...]  |
| (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if  | b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :   |
| ...   | [...]  |
| (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, |
| ...   | [...]  |

[6] 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.

[7] 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.

[8] 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.

[9] 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.

[10] 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.

[11] 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.

[12] On remand to the RPD, if it is determined that the risk is “personal”, then a more detailed analysis of state protection and the internal flight alternative should be carried out. Although the member referred to the influence of Los Zetas, there are other drug cartels. The country may be carved up geographically. One must ask whether the brothers would be pursued throughout the country and, indeed, if Los Zetas would have the will to bother to do so. While it may be that police protection might have been illusory in Guadalupe, Nuevo Leon, it does not necessary follow that state protection would not be available elsewhere, even if the brothers were pursued.

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that**

1. This application for judicial review is granted.
2. The decision of the RPD is quashed and the matter is remitted to another RPD member for reconsideration.
3. There is no serious question of general importance to certify.

“Sean Harrington”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2288-11

**STYLE OF CAUSE:** PONCE URIBE ET AL v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

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AND ORDER:** HARRINGTON J.

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