Immigration and
Refugee Board of Canada
Immigration Division

Commission de l'immigration
et du statut de réfugié du Canada
Section de l'immigration

ID File No. / N° de dossier de la SI: B1-00154-C
Client ID No. / N° ID client: XXXXX XXXXX

Reasons and Decision – Motifs et décision

Between	The Minister of Public Safety and Emergency Preparedness Le ministre de la Sécurité publique et de la Protection civile	**Entre**
And		**et**
Person(s) Concerned	**XXXXX XXXXX**	**Intéressé(e)(s)**
Date(s) of Hearing	September 13 and October 13, 2011	**Date(s) de l'audience**
Place of Hearing	Vancouver, BC/Calgary, AB	**Lieu de l'audience**
Date of Decision	January 6, 2012	**Date de la décision**
Panel	L. King	**Tribunal**
Counsel for the Minister	P. Stathakos	**Conseil du ministre**
Counsel for the Person(s) Concerned	B. Harsanyi Barrister & Solicitor	**Conseil(s) pour l'intéressé(e) / les intéressé(e)(s)**

Reasons for Decision

INTRODUCTION

[1] The Minister of Public Safety (the Minister) alleges that **XXXXX XXXXX** is inadmissible under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act* (the IRPA), for being a member of a criminal organization:

> **37.** (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for
>
> (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;

[2] Specifically, the Minister alleges that **XXXXX XXXXX** was a member of the Sinaloa Cartel in Mexico, and the Sinaloa Cartel is a criminal organization. Alternatively, the Minister submits that **XXXXX XXXXX** engaged in activities that were part of the Sinaloa Cartel's pattern of criminal activity.

BACKGROUND

[3] **XXXXX XXXXX** is a citizen of Mexico. He has come to Canada to make a refugee claim. He completed a Claim for Refugee Protection in Canada on June 16, 2009, and a Personal Information Form (PIF) on July 20, 2009. In his PIF **XXXXX XXXXX** wrote that he had been recruited to sell drugs by the Pacific Cartel in the city of **XXXXX XXXXX**.

[4] **XXXXX XXXXX** wrote that he had been using drugs, primarily crystal meth, since he was about **XXXXX** years old. In **XXXXX** 2005 he was **XXXXX** years old and finishing his **XXXXX XXXXX** in **XXXXX**. He had been buying his drugs at a house on **XXXXX** and one

day the drug dealers there decided to recruit him to sell drugs. They beat him and gave him a small amount of drugs. The next day they came to the house where he lived with his mother. They told his mother he was already a member of the Pacific Cartel, and that if she talked to anyone about it they would kill her and **XXXXX XXXXX**.

[5] After that day the drug dealers would pick him up from his house every day and take him to the house on **XXXXX XXXXX**, where his job was to prepare the doses of crystal and cocaine and sell them to customers who came to the **XXXXX XXXXX** house. The drug dealers would take him home to his mother's house every night.

[6] **XXXXX XXXXX** wrote:

> That's how it was for one year and six months: they picked me up from my house, took me to sell drugs and then they took me back to my house, always threatening to kill me and my family if I talked to anybody or if I asked the authorities for help.

[7] **XXXXX XXXXX** testified at the hearing that he was using crystal meth daily. The drug dealers did not pay him for his work, but gave him whatever drugs he wanted. The boss of the house was a man named **XXXXX**, and he brought the drugs to the house and paid off the authorities. There were three members of the Pacific Cartel who oversaw the daily operations of the house, **XXXXX XXXXX**.

[8] **XXXXX XXXXX** testified that about two months after he started working at the house the drug dealers gave him tattoos. He did not have a choice about being tattooed, only about whether his **XXXXX** or his **XXXXX** would be tattooed. **XXXXX XXXXX** chose his **XXXXX**. He testified that during the time he was working in the house the drug dealers would routinely beat him, so out of fear he would do what they asked of him including submitting to being tattooed.

[9] **XXXXX XXXXX** testified that **XXXXX** had sent him to pay protection money to the police a few times. He would take between **XXXXX** and **XXXXX** pesos a week to the **XXXXX** of the **XXXXX XXXXX** of **XXXXX XXXXX**.

[10] There was no dispute at the hearing that the Pacific Cartel, also known as the Sinaloa Cartel, is a criminal organization as defined under paragraph 37(1)(a) of the IRPA. The documents submitted by both the Minister and **XXXXX XXXXX** provide ample evidence that the Sinaloa Cartel meets all the criteria of a criminal organization.

[11] The Minister submitted that **XXXXX XXXXX** was either a member of the organization, or engaged in activity that was part of the organization's pattern of activity.

[12] **XXXXX XXXXX** submitted that he is not inadmissible under paragraph 37(1)(a) of the IRPA because his involvement with the Sinaloa Cartel was involuntary. He argues that due to his diminished mental capacity arising from his drug addiction, as well as his lack of voluntary involvement, he cannot be considered to be a member of the organization. He submits that the defence of duress applies in his case.

ISSUE

[13] The sole issue to be resolved is whether the defence of duress excuses **XXXXX XXXXX** from the application of paragraph 37(1)(a).

DECISION

[14] The defence of duress does not save **XXXXX XXXXX** from the application of paragraph 37(1)(a). He is inadmissible for having engaged in the drug dealing activities of the Sinaloa Cartel, a drug trafficking criminal organization in Mexico.

ANALYSIS

[15] **XXXXX XXXXX** argues that the defence of duress as defined in the *Rome Statute of the International Criminal Court* (the Rome Statute) applies in his case. He also refers to the definitions of duress in the *Oberlander*[1] and *Ramirez*[2] cases.

[16] I note that the Rome Statute implements the International Criminal Court with respect to crimes against humanity, war crimes and genocide. Mr. Oberlander and Mr. Ramirez were alleged to have been complicit in war crimes or crimes against humanity.

[17] The Sinaloa Cartel does not commit war crimes or crimes against humanity. It is a drug trafficking organization. **XXXXX XXXXX** participation consisted of the ordinary crime of drug dealing. It is not clear to me why the Rome Statute would apply in this situation.

[18] However, the current case law does blend the criminal defence of duress with the defence defined in the Rome Statute that relates to international crimes, without any explanation that I can discern. I have reviewed the cases provided to me by the parties to determine what test of duress appropriately applies with respect to criminal organizations under paragraph 37(1)(a) of the IRPA.

[19] In the *Maan*[3] case the Court wrote:

> Reliance on the defence of duress is subject to specific conditions as set out by Chief Justice Lamer, at paragraph 62 in *R*. v. *Hibbert*, [1995] 2 R.C.S. 973, (followed in *R*. v. *Latimer*, [2001] 1 R.C.S. 3, 2001, CSC 1, at paragraphs 32 and 33 and also in *R*. V. *Ruzic*, [2001] 1 R.C.S. 687, 2001 CSC 24, at paragraph 96), which states as follows:
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> > […]Furthermore, I believe that the internal logic of the excuse-based defence, which has theoretical underpinnings directly analogous to those that support the defence of necessity (as set out

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[1] *Oberlander* v. *Canada (Attorney General)*, 2009 FCA 330
[2] *Ramirez* v. *Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, (C.A.)
[3] *Canada (Citizenship and Immigration)* v. *Mann*, 2001 FC 583

> in Perka, supra), suggests that the question of whether or not a safe haven of escape existed is to be determined according to an objective standard. When considering the perceptions of a
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> "reasonable person," however, the personal circumstance of the accused are relevant and important, and should be taken into account.

> In order to rely on the defence of duress, a person must prove that (1) there exists an urgent situation of clear and imminent peril, (2) compliance with the law is demonstrably impossible, and (3) the harm inflicted is less than the harm sought to be avoided. (*R*. v. *Perka*, [1984] 2 S.C.R. 232 at p. 248 ff.; *Latimer*, above at paragraphs 28 to 31). The burden of proof lies on the party relying on the defence of duress and it is then up to the Crown to disprove duress. (*Ruzic* above at paragraph 71).
>
> The same principles apply with respect to exclusion and the defence of duress in immigration matters (*Ramirez* v. *Minister of Employment and Immigration*), [1992] 2 F.C. 306, 327 and 328 (C.A); *Kathiravel* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 882 (QL), 2003 CFPI 680, at paragraphs 45 to 47.)

[20] The *Perka* case involved drug traffickers who were transporting marijuana on a boat from Colombia to Alaska. They had engine trouble and were caught in a storm and came ashore in British Columbia rather than risk capsizing. They were charged with importing narcotics and invoked the defence of necessity. The Supreme Court of Canada discussed in that case, and in the *Hibbert* case, the relationship between the defence of necessity and that of duress. The Court concluded the only difference between the two was that necessity relates to a danger caused by forces of nature or emergency situations and duress relates to a danger created by the threats of another person.

[21] In the *Perka* case the Court concluded that the defence of necessity had three elements: the situation must be urgent or the peril imminent, there must be no reasonable legal alternative open to the accused, and the harm inflicted must be less than the harm sought to be avoided. The Court also defined the second element as requiring that compliance with the law be demonstrably impossible.

[22] In the *Hibbert* case, Mr. Hibbert was forced at gunpoint by Mr. Bailey to lure a mutual acquaintance, Mr. Cohen, to a location where Mr. Bailey could shoot Mr. Cohen. In that case the Court confirmed that the defence of duress consisted of three elements and found the second element requiring “compliance with the law to be demonstrably impossible,” to be analogous to “having no legal way out,” or “no safe avenue of escape.”

[23] The Court concluded that with respect to the second element:

> The question of whether a "safe avenue of escape" was open to an accused who pleads duress should be assessed on an objective basis, the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused.

[24] In the *Ruzic* case, the Court confirmed the three element of duress were; a clear and imminent threat of physical harm or death, the absence of any reasonable alternative to breaking the law, and proportionality between the harm inflicted and the harm avoided. Ms. Ruzic had been charged with importing heroin to Canada. She invoked the defence of duress, claiming that a man in her home country had threatened to harm her mother if she did not bring the heroin to Canada for him. The Court confirmed that whether a safe avenue of escape existed was to be determined on an objective/subjective analysis. Furthermore, in the criminal context the accused must raise the defence and introduce some evidence of it, and then the Crown must disprove duress beyond a reasonable doubt.

[25] In the *Maan* case above, which was an immigration case, the Court cited the above criminal cases and referred to the *Ramirez* and *Kathiravel* cases, which were immigration cases. In the *Ramirez* case, Mr. Ramirez had been a member of the military forces in El Salvador and had been in charge of prisoners who were tortured. He was accused of being complicit in war crimes or crimes against humanity. The test for duress in that case was cited as requiring the following three elements: grave and imminent peril; the predicament must not be of the making or consistent with the will of the person seeking to invoke the exception; and, the harm inflicted must not be in excess of that which would otherwise have been directed at the person.

[26] In the *Kathiravel* case, Mr. Kathiravel was a Tamil who had been captured by the Sri Lankan army, tortured, and required to identify members of the Liberation Tamil Tigers of

Eelam. The people he identified were then subjected to torture. He was excluded from refugee protection for committing crimes against humanity. In this case the Court cited the test for duress from the *Ramirez* case.

[27] In the *Maan* case, the Minister accused Mr. Maan of committing a serious non-political crime for a terrorist organization. Mr. Maan had transported drugs on five occasions after the Babbar Khalsa threatened to kill him and his family. The Refugee Protection Division did not exclude him from refugee protection, finding he had acted under duress. In upholding the Division's decision, the Federal Court equated the Convention refugee issue of an internal flight alternative with the criminal element of duress that requires there be no safe avenue of escape.

[28] The Rome Statute defines duress as "resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided."

[29] The Rome Statute also confirms that the threat may either be made by other persons, or constituted by other circumstances beyond that person's control. Thus it appears the intention is to provide defences that are analogous to those of necessity and duress in the criminal law.

[30] The defence of duress as it is defined in the Rome Statute is essentially the same as the common law defence of duress available in Canadian criminal cases. Relying on both definitions, I conclude that the three necessary elements for the defence to be made out under paragraph 37(1)(a) are: an imminent threat of death or serious bodily harm; that the person acts necessarily and reasonably to avoid the threat; and, that the person causes no greater harm than that sought to be avoided.

[31] I consider that the second element, that the person acts necessarily and reasonably to avoid the threat, is synonymous with the Courts' references to "having no legal way out," or no "safe avenue of escape."

[32] The facts in this case do not meet the first or second elements of duress. The Court has confirmed in the *Belalcazar*[4] case, that the elements of the legal test of duress are conjunctive; each of the elements must be met. Stated differently, the failure to satisfy any one of the elements will be fatal, and upon finding that any element has not been satisfied, the tribunal is not obliged to address the remaining elements.

[33] With respect to the facts of this case, the first and second elements of duress blend together. While the threat of death or physical peril was present when the drug dealers first came to **XXXXX XXXXX** home and beat him and threatened to kill his mother, over the next 1 ½ years the threat ceased to be imminent. Although the drug dealers continued to beat **XXXXX XXXXX**, he was not held under their control 24 hours a day. He went home to his mother's house almost every night.

[34] It was during the times that he was not in the presence of or under the control of the drug dealers that he had a safe avenue of escape, or a legal way out. I consider that **XXXXX XXXXX** had a legal way out considered from both an objective and a subjective standpoint.

[35] **XXXXX XXXXX** has claimed that his drug addiction caused him to have diminished capacity, but he has not provided any evidence that he was forced to take the drugs. Put another way, **XXXXX XXXXX** was voluntarily using the drugs that were given to him. His evidence is that in return for working at the house he had access to whatever drugs he wanted.

[36] Objectively, and as has been shown in his case, when he went into rehabilitation and stopped taking drugs, he was able to escape from the drug dealers. **XXXXX XXXXX** testified that after he had been working at the house for about 18 months there was a police raid. He and **XXXXX** were arrested. **XXXXX XXXXX** was questioned by the police and he told them everything he knew. The police then took him to another house and **XXXXX XXXXX** arrived and started to beat him and tell him they were going to kill him for talking to the police. The stabbed him and cut him with a machete. The next day **XXXXX XXXXX** overdosed on crystal meth.

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[4] Belalcazar v. Canada (M.C.I.), 2011 FC 1013

[37] When **XXXXX XXXXX** regained consciousness he was in a rehabilitation centre. The staff told him that he had been taken there by someone who threw him from a truck and took off. **XXXXX XXXXX** called his mother and she transferred him to another rehabilitation centre where he registered under an alias so that the members of the cartel would not be able to find him. His mother moved to **XXXXX**, **XXXXX**. After three months of rehabilitation **XXXXX XXXXX** moved to another city and got a job. He has remained drug-free ever since.

[38] **XXXXX XXXXX** was able to avoid the members of the cartel for the next two years until he went back to **XXXXX**. He was in his old neighbourhood when one of the members of the cartel recognized him and started shooting at him. **XXXXX XXXXX** left the country and came to Canada the next day.

[39] His experience during the two years he avoided **XXXXX** provide objective evidence of a safe avenue of escape.

[40] Subjectively, **XXXXX XXXXX** had been made aware of an avenue of escape by his mother. As he testified, approximately a year after he started working in the drug house his mother obtained a visa to the U.S. She tried to convince **XXXXX XXXXX** to leave **XXXXX** and go with her to the U.S. **XXXXX XXXXX** wrote in his PIF:

> As I said, my relationship with my mother was quite conflicted. She didn't know what to do either, because she also feared the Cartel and she knew how powerful it was. She resigned herself to having me working for them. She even obtained her US visa, hoping that we could go to the US one day so as to escape from all these problems, but the fact that I couldn't stop using drugs discouraged her.[5]

[41] I conclude that, while **XXXXX XXXXX** may have initially been under duress to start working in the drug house, he remained working in the drug house long after he had a legitimate way out, primarily because of his addiction to drugs and the access to drugs that working at the house provided him. There was a safe avenue of escape or legitimate way out for him planned by his mother that he did not take.

[42] While the facts of the case do not indicate that **XXXXX XXXXX** became a member of the Sinaloa cartel, the fact that he worked in one of their drug houses packaging and selling drugs

[5] Exh. C1, p. 31

for 1 ½ years brings him within the second part of the definition under paragraph 37(1)(a) of the IRPA, that is, that he engaged in the activities of the criminal organization.

NOTICE OF DECISION

[43] The Sinaloa Cartel was and is a criminal organization in Mexico. I find **XXXXX XXXXX** engaged in criminal activities that supported the activities of the Sinaloa Cartel. He was not under duress for the entire 18 months that he engaged in these activities. I am issuing a Deportation Order as mandated by Regulation 229(1)(a). The Order is attached to these reasons.

L. King

January 6, 2012

Judicial review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.