Immigration and Refugee Board of Canada
Immigration Appeal Division

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

IAD File No. / N° de dossier de la SAI : VB0-04891

Client ID no. / N° ID client : XXXXX

Amended
Reasons and Decision – Motifs et décision

MINISTER'S APPEAL

Appellant(s)	The Minister of Public Safety and Emergency Preparedness	**Appelant(e)(s)**
Respondent	Ronald Antonio CASTELLON VIERA	**Intimé(e)**
Date(s) of Hearing	N/A	**Date(s) de l'audience**
Place of Hearing	**In Chambers**	**Lieu de l'audience**
Date of Decision	2 November 2011 (signed originally) 24 November 2011 (amended date)	**Date de la décision**
Panel	**Douglas Cochran**	**Tribunal**
Counsel for the Respondent(s)	Gabriel Chand Barrister and Solicitor	**Conseil(s) de l'appelant(e) / des appelant(e)(s)**
Designated Representative(s)	N/A	**Représentant(e)(s) Désigné(e)(s)**
Counsel for the Minister	**Kevin Boothroyd**	**Conseil du ministre**

Canada

REASONS FOR DECISION

[1] Ronald Antonio CASTELLON VIERA (the "respondent") was the subject of an admissibility hearing where the Minister of Public Safety and Emergency Preparedness (the "Minister") sought a determination that he was inadmissible to Canada on grounds of organized criminality, pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act* (the "*Act*"). [1]

> **37.** (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for
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> *(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] The member in the Immigration Division (the "ID") determined that Mr. Castellon Viera was not inadmissible on the grounds of organized criminality and the Minister appeals that determination to the Immigration Appeal Division (the "IAD").

BACKGROUND

[3] Ronald Antonio Castellon Viera was born in El Salvador in July, 1984 and came to Canada in February 2010 seeking Convention refugee status. The Minister issued a report pursuant to subsection 44(1) of the *Act* which brought the respondent before the ID. The respondent acknowledged to immigration authorities that he was a member of the Mara Salvatrucha, referred to as "MS" or "MS-13". The issues summarized by the member in the ID are as follows;

[1] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

1. Is the Mara Salvatrucha ("the MS, or MS-13") a criminal organization?
2. Was Mr. Castellon a member of Mara Salvatrucha?
3. Does the Federal Court of Appeal's *Poshteh* decision create an exception for Mr. Castellon despite his admitted membership in the Mara Salvatrucha?

[4] These are, in essence, the same issues before the IAD in this Minister's appeal, although some issues regarding standard of proof have arisen in submissions, which I will deal with below. In this *de novo* appeal, no new evidence was presented, as counsel was content to rely on the evidence that was before the member in the ID and present written argument on this evidence.

STANDARD OF PROOF

[5] Paragraph 37(1)(a) of the *Act* clearly establishes that the standard of proof regarding whether the respondent is a member of a criminal organization is "reasonable grounds to believe". In other words, on all of the evidence before the tribunal are there reasonable grounds to believe that the respondent is a member of a criminal organization, pursuant to paragraph 37(1)(a) of the *Act*? There is, however, some disagreement between the respondent and the Minister regarding what standard of proof to apply at this *de novo* hearing. With respect, counsel for the respondent, at a number of points in his submissions, confuses the evidentiary test in a *de novo* hearing with that in a judicial review. This leads counsel to suggest that the test requires the Minister to prove that the ID decision is wrong "on a balance of probabilities". In addition, respondent's counsel submits that the IAD must determine whether the ID erred in its determination and "accord significant deference" to the ID decision. This reasoning is incorrect, arising from a conclusion that the IAD is a reviewing court. It is not. The citation by respondent's counsel, from Mr. Justice O'Keefe's decision in *Valle Lopes*[2] misses the point, since that case deals with a judicial review and thus the comments about "significant deference" are entirely appropriate to a judicial review but not to a *de novo* hearing.

[2] *Valle Lopes* v. *Canada* (MCI), 2010 FC 403.

[6] The fundamental principle that lies at the heart of a *de novo* hearing in the IAD is that the panel is not bound by the reasoning of the decision maker or the decision being appealed from. While evidence before the original decision maker will be before the IAD, the IAD owes no deference to findings of fact or the reasoning of the original decision maker. The panel in the IAD is required to reach its own findings of fact and apply its own reasoning to the facts before it. Thus, the issue before the IAD is, based on all the evidence before the panel, are there reasonable grounds to believe that the respondent is inadmissible as a member of a criminal organization pursuant to paragraph 37(1)(a) of the *Act*. Section 33 of the *Act* states as follows;

> **33.** The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

[7] As all the facts pertinent to findings under section 37 of the *Act* are to be determined on a reasonable grounds to believe standard, then the determination of membership, including the applicability of the defence of duress, are to be arrived at by application of that same standard.

ARGUMENT

[8] As pointed out in submissions from Minister's counsel, the respondent acknowledges that he is a foreign national, that MS/MS-13 is a criminal organization within the meaning of paragraph 37(1)(a) of the *Act* and that the respondent was a member of MS/MS-13.

[9] The member in the ID described MS/MS-13 as follows,

> It has been described by experts as the "largest criminal network in the Americas," and comprises "well-structured criminal groups" engaging in extortion, kidnapping, car theft, robbery, murder, and trafficking in drugs, persons, and arms.[3] Its numerous local cliques coordinate trafficking and violence across international borders.[4] The gang's basic structure and activities are the same in El Salvador as in the United States and other countries.[5] Its membership is estimated in the tens of thousands.[6]

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3 Record at page 172.
4 Record at pages 166, 169, 170, 172-173, 204 and 212.
5 Record at pages 212 and 217.
6 Record at page 192.

[10] Neither the Minister nor the respondent took issue with this characterization of the criminal organization.

[11] What remains is to determine whether, based on the *Poshteh* reasoning, the respondent ought not to be considered to have been a member of MS/MS-13, based on his age and understanding at the time of his involvement with this group. The respondent argues that he did not have the "requisite legal capacity" at the time he joined MS/MS-13 and "was under duress to remain in the MS-13 if and when he formed the requisite legal capacity". The following comments from *Poshteh* are particularly germane.

> [51] For purposes of determining membership in a terrorist organization by a minor, the requisite knowledge or mental capacity should be viewed on a continuum. Just as there would be a presumption against the requisite knowledge or mental capacity in the case of young children, there would be a presumption that the closer the minor is to eighteen years of age, the greater will be the likelihood that the minor possesses the requisite knowledge or mental capacity.

[12] And further,

> [53] I would agree with Mr. Poshteh that it would be very difficult for a minor to argue that he should not be found to be a member if he had been directly involved in violent activities or had held a leadership role in the terrorist organization. However, lesser involvement may still result in a finding of membership. It is not necessarily the nature of the involvement with the terrorist organization that will determine the issue, although those considerations may be relevant. Rather, matters such as knowledge or mental capacity are the types of considerations to be taken into account in deciding whether a determination of membership in a terrorist organization in the case of a minor is to be different than in the case of an adult.

[13] In analyzing the facts before the panel in relation to the above reasoning, I find that there is no distinction to be made from the fact that section 34 of the *Act* deals with membership in a terrorist organization and section 37, which is before me, deals with membership in a criminal organization. The reasoning with regard to requisite legal capacity is equally applicable to both sections.

FACTS

[14] There are a number of sources of information before me regarding the age that the respondent was when he joined MS/MS-13 and when he left. Some of the information is documentary, some testimonial and some inferential. In the interview with Enforcement Officer Bielawska, which took place on February 9, 2010, the respondent states;

> Yeah, but I was, I was like thirteen years old, it was a long time ago, but it was not a prison, I was a gangster, I started when you know when I was ten, nine years old and I get out when I was like 17.

[15] On March 12, 2010, the respondent was interviewed by Officer Hindson, at which point he stated;

> Well, I told you I started when I was 11, 11, 12 year and i can – I can – I don't – I actually don't really remember how old I was when I got out but it was before 16 because I was – I was counting when I – when I get to – to the – how do you say – to the rehabilitation centre and it was before that because I graduated, I finished the high school when I was 18. So it was – it was before, and I spend like – like, three years or two year and a half in the rehabilitation centre.[7]

[16] In his Personal Information Form ("PIF") the respondent wrote, "(w)hen I was between the ages of 10 and 11 I was jumped in by members of the Mara Salvatrucha in San Miguel, San Miguel, El Salvador". Further on in the PIF, the respondent states, "(t)hat day, I think I was already 11 years old already, I went to see the maras and I told them that I wanted to get "jumped in".[8] I obviously didn't understand what I was doing and what the consequences were. I decided it out of desperation."

[17] Mr. Torres Gavilia, who was involved with the "Minors' Protection Institute" in El Salvador testified that he was involved with the respondent between 1997 and 2000, which would have meant that the respondent was between approximately 13 and 16 years old when he was at the "rehabilitation centre". Mr. Torres Gavilia, who was no longer with the institute at the time that he testified, later stated that the respondent told them he left MS/MS-13 when he was between 10 and 11 years old. To further add confusion the overall testimony, Mr. Torres Gavilia

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7 Record at page 262.
8 Record at page 331.

later testified that the respondent sought help from the institute when he was between 15 and 16 years old.[9] For some reason neither counsel clarified this contradiction and at this hearing neither counsel sought to provide further evidence to resolve this discrepancy.

[18] In his decision, Member Rempel concludes;

> I am satisfied that Mr. Castellon's membership in the MS began when he was younger than 12, and ended in his mid-teens, well before he reached the age of majority.[10]

[19] Based on all of the evidence before me it is not possible to make a precise determination of the age when the respondent joined MS/MS-13 and when he left. I agree that the evidence establishes the respondent's membership in this organization commenced before age 12 and find that it ended before the respondent became an adult but not necessarily "well before", given the respondent's acknowledgment to Enforcement Officer Bielawska that he got out when he was "like 17".

[20] I turn to the respondent's activities when he was a member of MS/MS-13. Minister's counsel notes that the respondent was involved in a range of criminal activity as a member of MS/MS-13;

> First and foremost, the respondent participated in the criminal activity of the MS-13. He spray-painted gang images.[11] He transported quantities of cocaine.[12] He robbed people and businesses of their belongings and money while armed with a knife.[13] While the respondent was doing these crimes he wore the gang's colours and identifying clothing, and his victims were able to identify his gang membership because of his tattoos.[14]
>
> The respondent also witnessed the gang committing the most serious crimes. He saw at least two people murdered by fellow MS-13 members.[15] He was also present at meetings where he heard other gang members planning and discussing murders.[16]

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9 Record at page 49.
10 Record at page 10.
11 Record at page 131.
12 Record at page 120.
13 Record at pages 112 and 115.
14 Record at pages 108, 117 and 131.
15 Record at page 118.
16 Record at page 121.

[21] The respondent argues that he did not have the legal capacity to form the intent to join MS/MS-13, that he may never have had the legal capacity to form the intent to participate in MS/MS-13 activities and if and when he did have the legal capacity he was under duress to remain within MS/MS-13. Minister's counsel argues variously that the defense of duress is not available to the respondent and if it is, an objective standard must be applied to the assessment of whether the respondent remained a member of MS/MS-13, due to duress.

> .....the best the respondent can argue is that he joined voluntarily but remained under duress, and even this concept has been rejected by the Federal Court. In *Arica* the Court ruled:
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> The law relating to duress is found in *Ramirez* [17]
>
> Second, it is possible to invoke [as a defence] coercion, state of necessity, or force majure. Essentially, this exception recognizes the absence of intent where the individual is motivated to perpetuate the act in question only in order to avoid grave and imminent peril. The danger must be such that a "reasonable man would apprehend that he was in **such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong**". Moreover, the predicament must not be on the making or consistent with the will of the person seeking to invoke the exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion. [emphasis added]

[22] I accept that the test for duress is objective but that does not mean that the actions of every person in every circumstance will be measured using the same yardstick. In assessing what a reasonable person would do in a particular circumstance, it is necessary to consider what a person of similar age, intelligence and experience would do in the circumstances. Thus, while there may be reasonable grounds to believe the respondent was a member of MS/MS-13 beginning at age 10, 11 or 12, the respondent's membership must be assessed based on his youth, lack of broad life experience and the presence of some very negative life experiences. In assessing whether the respondent had the requisite mental capacity during the time that he was a member of MS/MS-13, according to in *Poshteh* I must take into account that when he joined he was very young, was frequently fending for himself on the street and had experienced substantial physical and sexual abuse. I find that when the respondent joined MS/MS-13, whether it was at age ten or even at age 12, he did not have the requisite mental capacity to form the intent to join this criminal organization.

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[17] *Ramirez* [(1992) F.C. J. 109] at paragraph 40.

[23] In considering whether the respondent had the requisite mental capacity during the time that he was a member of MS/MS-13, I must consider both the activities that he engaged in over the time that he was a member of this organization and his circumstances overall. In relation to activities, the Minister has pointed out that the respondent spray-painted gang images, transported quantities of cocaine and robbed people and businesses of their belongings and money while armed with a knife. While he was committing these crimes he wore the gang's colors and identifying clothing and his victims were able to identify his gang membership because of his tattoos. With regard to the respondent's circumstances I note that he continued in school for much of the time that he was involved with MS/MS-13;

> Q: But when you were with the gang were you going to school?
> A: No, well yes I was in the school but I quit for a few years.
>
> Q: What year did you go up to school till you quit, what year?
> A: I was like in Noveno, yeah Noveno.
>
> Q: How old, sorry?
> A: No I was in grade, in grade Noveno, it mean the ninth grade.
>
> Q: You were in the ninth grade, so how old were you?
> A: I do not remember.
>
> Q: 12, 13, 14?
> A: I was like 16.
>
> Q: 16
> A: Maybe 15, 16.
>
> Q: So from 10-15 you were still going to school while you were with the gang?
> A: Yeah.
>
> Q: So every day you would go to school.
> A: Yeah.
>
> Q: Ever tell your teachers you were in the gang?
> A: yeah.
>
> Q: And what would they say?
> A: nothing.[18]

[18] Record at page 140.

[24] The respondent also testified that he told his teachers that he needed help and they offered no alternatives to gang membership.

> Did you ever tell your teachers that you wanted to leave the gang that you wanted some help? Did you ever ask for help?
>
> Yes I remember I did that. I don't know how many times. They really don't care. They don't listen to you.
>
> Well, are you saying that you did ask for help from these teachers?
>
> Not help in the sense that I would tell them "help me", but I expressed that I needed help.[19]

[25] I find the respondent's evidence about his ongoing attendance at school and his efforts to obtain help from the school in order to leave the gang life, to be implausible. This evidence must also be considered in relation to the testimony of two other witnesses, who testified before the ID. Dr. Al Valdez testified;

> Q The other and last specific area I want to concentrate is with respect to members who have decided to no longer continue in the organization, in the gang. Now, in your experience and knowledge, what would one expect the behavior to be or – of somebody who wishes to no longer be part of this organization, has renounced his or her membership in the organization?
>
> A I typically see two avenues of behaviors. There are some gang members who get jumped out. This is a ritual of beating that they go through to leave the gang. And those individuals oftentimes stay within the gang neighborhood and live without fear of retaliation or victimization of the gang they left.
>
> The second most common avenue of leaving gangs is when a gang member simply leaves the gang. That person sometimes will have tattoos removed, will not associate with gang members –[20]

[19] Record at page 65.
[20] Record at page 32.

[26] Mr. Torres Gavilia also testified at the ID. He was involved with the respondent through his employment with the "Minors' Protection Institute" where the respondent was a resident for a number of years. He testified;

> Q Thank you, sir. My question is whether Ronald had any attack or he was assaulted by any member from the Mara Salvatrucha while he was at the institute.....
>
> A I was saying that during the period that Ronald was at the institute, there wasn't any assault or aggression towards him. After he left the gang and he was admitted to the institute, he – they had respect for him. He was respected for the decision he had made. [21]

[27] This evidence contradicts the testimony of the respondent. While it is possible that these witnesses are in error and the respondent's evidence is reliable, each of these witnesses are more impartial than the respondent and have nothing to gain from their testimony. The respondent is not a reliable witness in terms of ages of his membership in MS/MS-13. The issue of whether he had been threatened and assaulted, like testimony about his age of joining and leaving the gang is important to determination of membership and duress. I do not accept the Minister's position that the fact that he was not killed is proof that he "did not face imminent death", because that proposition means that duress is only available to persons who have been killed. The respondent was not attacked with the ferocity and finality of those persons he described as being killed for attempting to leave MS/MS-13. This is more consistent with the evidence of the two other witnesses on this matter, than the respondent's. The respondent's lack of reliability as a witness combined with the contradictory evidence on the issue of whether he could safely leave MS/MS-13 undermines his overall credibility, as a witness.

[28] The respondent continued to have contact with his grandmother, who he acknowledged did not approve of gang membership, as well as some contact with his siblings. According to his evidence, the respondent got out of MS/MS-13 when he heard of the "rehabilitation centre", which he attended for a number of years. He testified that he heard about the rehabilitation centre from a shopkeeper who showed him a newspaper notice about the centre. The respondent

[21] Record at page 44.

was able to join the rehabilitation centre, although his evidence was that membership in MS/MS-13 was for life and if a person leaves the gang, they are targeted for killing. In interviews with Canada Border Services agents the respondent provided some examples of persons who were killed when they left the gang[22] and of threats made against him when he did eventually leave.[23] He also acknowledged that he was staying with his grandmother for periods of days during the time of his MS/MS-13 membership and that he continued to return to the gang, due to his drug addiction.[24]

[29] Considering the range of activities that the respondent was involved in over the years that he was a member of MS/MS-13, the evidence before me establishes that he had the requisite mental capacity to form the intent to be a member of this criminal organization before he left MS/MS-13, at age 15 or 16 years. I conclude on the evidence before me that the respondent did remain a member of MS/MS-13 for a significant period after having the requisite mental capacity. On the evidence before me, the only circumstance that would negative that intent is if the respondent remained in MS/MS-13 under duress. There are reasonable grounds to believe that the respondent had the mental capacity to be a member of MS/MS-13 for a significant period of time prior to leaving the gang. While he took the opportunity to leave when the information about the rehabilitation institute fell into his lap, the evidence does not support the proposition that he took reasonable efforts to investigate exit options, after he had the mental capacity and before approaching the "Minors' Protection Institute". Considering all of the evidence before me, including the testimony of the other witnesses on the issue of the respondent's ability to leave MS/MS-13 and issues of credibility and reliability of his evidence, there are not reasonable grounds to believe that a reasonable person of the respondent's age, intelligence and experience "would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong".[25] Having determined that the respondent has not made out the test for duress based on lack of proof of "imminent physical peril" I need not address the other components of duress. As per *Belalcazar*.[26]

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22 Record at page 118.
23 Record at page 122.
24 *Ibid*.
25 *Arica* v. *Canada* (Solicitor General) 2005 FC 907.
26 *Belalcazar* v. *Minister of Public Safety and Emergency Preparedness,* 2011 FC1013.

> [19] With respect to the elements of the legal test of duress, I agree with the Respondent that the three main elements of the test are conjunctive (see *Oberlander v Canada (Attorney General)*, 2009 FCA 330, 83 Imm LR (3d) 1, at paras 25-36; *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 89 DLR (4th) 173, at para 40; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, 252 DLR (4th) 316, at para 52; see also Article 31(1)(d) of the *Rome Statute*, in particular the word "and" between the first and second elements of the test). In brief, each of those elements must be met to satisfy the defence of duress. Stated differently, the failure to satisfy any one of those elements will be fatal, and upon finding that any element has not been satisfied, the Board will not be obliged to proceed to address the remaining elements.

[30] Having considered all the evidence before me, the respondent is a person described in paragraph 37(1)(a) of the *Act* and the Minister's appeal is allowed.

NOTICE OF DECISION

The appeal is allowed. The decision of the Immigration Division is set aside. A deportation order is made against the respondent, Ronald Antonio CASTELLON VIERA.

(signed) **"Douglas Cochran"**

Douglas Cochran

24 November 2011

date

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.