Federal Court | Cour fédérale

Date: 20130723

Docket: IMM-5447-12

Citation: 2013 FC 809

Ottawa, Ontario, July 23, 2013

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

APARICIO DE JESUS ALEMAN AGUILAR (AKA APARICIO DE JES ALEMAN AGUILAR)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Aparicio de Jesus Aleman Aguilar, is seeking judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated May 8, 2012, in which the Board concluded that the Applicant was not a Convention refugee nor a person in need of protection under sections 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA). This application is brought pursuant to section 72 of the IRPA.

Background

[2] The Applicant was born and raised in the village of El Chilamate in El Salvador where he worked as a farmer.

[3] In 2009, the Applicant travelled to Texistepeque to find work because there was a high demand for labour in that town. The Applicant stayed with his aunt who warned him about tattooed men that were members of the Maras Salvatrucha gang (Maras). She told him to never talk or associate with these men because they were dangerous.

[4] On December 27, 2009, the Applicant was returning home from work when a tattooed man approached him and asked him for money. The Applicant gave him $1.75 and walked away without incident.

[5] On December 30, 2009, the same tattooed man approached the Applicant, again asking for money. The Applicant informed the man that he had no money and walked away. Before he reached his aunt's house another tattooed man approached him, also asking for money. The Applicant repeated that he did not have any money. Both men then asked him if he belonged to another gang. The Applicant told them that he did not belong to any gang, they in turn said that he should join their gang and that the first thing he had to do was get a tattoo with the initials MS. The Applicant was afraid because he knew how dangerous the gang was so he told them that he would need time to reflect on this decision and took his leave. Three men came to his aunt's house that night looking for him but his aunt told them he was asleep.

[6] The Applicant decided it was not safe and that he would return to his village. However, on December 31, 2009, the tattooed men ambushed him when he was walking to the bus station. The three men insisted that the Applicant was a member of the opposing gang "Mara 18". An altercation took place in which the Applicant found himself on the ground fighting with one of the men. The Applicant struck the man on the head with a rock and managed to escape while the other two were focused on the injured individual. While the Applicant was running away, he heard the men shouting that they would find him and that they would kill him and his family.

[7] On January 10, 2010, the three men came looking for the Applicant in his home village of El Chilamate. They had gone to his aunt's house and threatened to kill her if she did not disclose the Applicant's whereabouts, she told the men the name of his village, but nothing more. The villagers would not give the men any information and they did not find the Applicant.

[8] On January 25, 2010, the three gang members returned to the village of El Chilamate in search of the Applicant, they were armed. Warned by his cousin, the Applicant hid in the woods while the men looked through the villagers' homes for the Applicant. They threatened to return until they got revenge for what the Applicant had done to their friend.

[9] On February 8, 2010, the Applicant received money from his brother and fled to Canada arriving on March 18, 2010 and claiming refugee protection. On May 8, 2012, the Board denied the Applicant's claim and on June 6, 2012, the Applicant sought judicial review of the Board's decision (the Decision). This is the review of that Decision.

Decision Under Review

[10] The Board found that the Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the IRPA. The determinative issues were nexus and generalized risk.

[11] On the issue of nexus, the Board determined that the Applicant was targeted by the Maras for the purpose of recruitment, as was its *modus operandi*. The Board stated that Salvadorians who oppose gangs, whether by refusing to join, by leaving a gang, by not complying with gangs' demands, or by betraying the gang, may face violent retribution and referenced the US Department of State Report, El Salvador, item 7.5, in that regard. The Board further stated that victims of crimes or vendettas generally fail to establish a link between their fear of persecution and one of the Convention grounds. The Board found that the Applicant's fears were not linked to race, nationality, religion, real or imputed political opinion or membership in a particular social group and, therefore, that he had failed to establish a nexus to the Convention definition. His section 96 claim for convention refugee status failed on that basis.

[12] On the issue of generalized risk, the Board examined the evidence as to whether or not the Applicant would face a risk to his life or a risk of cruel and unusual treatment or punishment as outlined in subsection 97(1)(b) of the IRPA.

[13] The Board found that even though the Maras had specifically targeted the Applicant, this did not remove him from the generalized risk category because every young person in El Salvador

faced a similar risk. The Board stated that in order to succeed under section 97 of the IRPA, the risk must be personal or individualized and, likely to occur on a balance of probabilities. In addition, the risk would be faced by that person in every part of the country and would not be faced generally by other individuals in or from that country.

[14] The Board accepted that the Applicant was subjected personally to a risk to life under section 97 of the IRPA. Members of the Maras targeted him for the purposes of recruitment and in an attempt to get him to assist them with carrying out their criminal activities. The Board found that the Applicant was a victim of attempted recruitment but that this is a crime that is widespread in El Salvador and not specific to the Applicant. The Board found that the evidence showed that the Applicant's fears arose out of his refusal to join the Maras.

[15] The Board recognized that it must conduct an individualized inquiry when analyzing the issue of generalized risk and consider a claimant's specific circumstances. It stated that consequential harm experienced by persons who are targeted by criminal elements does not necessarily mean that their risk is personalized/not generalized.

[16] The Board concluded that the Applicant was a victim of attempted recruitment by the Maras and that the threats to the Applicant occurred as a result of his refusal to join the gang. However, that the risk to his life was exempted pursuant to subsection 97(1)(b)(ii) of the IRPA, as his fear of the Maras and the risk to his life are risks faced generally by other young people in El Salvador.

Issues

[17] The Applicant submits that there are two issues, to which I would add the issue of the applicable standard of review:

i. What is the standard of review?

ii. Did the Board err in ignoring or misconstruing the evidence?

iii. Did the Board err in determining that the Applicant faced a generalized risk to his life should he return to El Salvador?

Analysis

Standard of Review

[18] A standard of review analysis need not be conducted in every instance. Where the standard of review applicable to a particular question before the court is well settled by prior jurisprudence, the reviewing court may adopt that standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57).

[19] Prior jurisprudence has established that where an issue involves the Board's weighing of evidence including misconstruing or ignoring evidence, the standard of review is reasonableness (*Rodriguez Ramirez v Canada (Citizenship and Immigration)*, 2013 FC 261, [2013] FCJ No 283 (QL) [*Rodriguez*] at para 34; *Roberts v Canada (Minister of Citizenship and Immigration)*, 2013 FC 298, [2013] FCJ No 325 (QL) [*Roberts*] at paras 13-14; *Flores v Canada (Minister of Citizenship and Immigration)*, 2011 FC 359, [2011] FCJ No 445 (QL) at para 26).

[20] The applicable standard of review for the second issue, determining whether an applicant faces a generalized risk, is also reasonableness as it is a question of mixed fact and law *(Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476, [2012] FCJ No 1579 (QL) [*Malvaez*] at para 10; *Pineda v Canada (Minister of Citizenship and Immigration)*, 2012 FC 493, [2012] FCJ No 520 (QL) [*Pineda*] at para 5; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] FCJ No 270 (QL) [*Acosta*] at paras 9-11; *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678, [2012] FCJ No 670 (QL) [*Portillo*] at para 18, unless the issue is one of interpreting section 97 in which case the standard may be correctness).

[21] The Court's role is not to reweigh the evidence or to substitute its own opinion, but rather to ensure that the Board's decision fits with the principles of justification, transparency and intelligibility, and falls within the range of "possible, acceptable outcomes" (*Dunsmuir*, above, at paras 47, 53; *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at para 59; *Vasquez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 477, [2011] FCJ No 595 (QL) [*Vasquez*] at para 14).

Did the Board err in ignoring or misconstruing the evidence?

Applicant's Position

[22] The Applicant submits that the Board made no adverse credibility findings and accepted that the Applicant had been personally subjected to a risk to his life under section 97 of the IRPA. The Board's description of the Applicant's fight with the Maras as a rock throwing incident is not in

accord with the evidence nor is its finding that the reason the Applicant was specifically targeted by the Maras was for the purpose of gang recruitment.

[23] The Applicant submits that the evidence was clear that he was engaged in a physical altercation with the Maras during which he struck one of the men on the head with a rock with such force that the man was rendered unconscious and there was profuse bleeding. The other two Maras believed that the Applicant had killed one of their members. They threatened to kill the Applicant and his family for what he had done. They later came to his home where they repeated that they wanted revenge.

[24] The Applicant submits that the Board misconstrued or ignored this evidence which contradicted its conclusions (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425; *Obot v Canada (Minister of Citizenship and Immigration)*, 2012 FC 208) and, as a result, did not consider his specific circumstances and erred in concluding that he faced a generalized risk.

Respondent's Position

[25] The Respondent does not specifically address this issue, but rather focuses on the issue of nexus and the fact that a person will only be considered a Convention refugee if there is a nexus to one of the five Convention grounds. Fearing criminal elements does not fall within one of the five Convention grounds unless there is a nexus to one of the five grounds (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*] at p 747; *Mehrabani v Canada (Minister of Citizenship and*

Immigration), (April 3, 1998) IMM-1798-97 (FCTD); *Garcia v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 362).

[26] The Respondent states that not all criminal acts, including extortion and threats of harms such as were made in this case by the Maras, can be considered acts of persecution and that several decisions of this Court have held that victims of criminal activity do not constitute a particular social group. Therefore, a person's fear of persecution by criminals cannot be the basis of a valid refugee claim. (*Ward*, above at p 689; *Mason v Canada (Secretary of State)*, [1995] FCJ No 815 TD (QL); *Calero v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1159 (TD) (QL); *Suarez v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1036 (TD) (QL); *Valderrama v Canada (Minister of Citizenship and Immigration)*, (1998) 153 FTR 135, (1998), 45 Imm LR (2d) 173; *Karpounin v Canada (Minister of Employment and Immigration)*, 92 FTR 219).

[27] The Respondent concludes that as the Applicant has presented no persuasive argument to rebut the Board's finding on nexus, there is no reason to disturb the Board's finding.

[28] As stated by Justice Gleason in *Andrade v Canada* (*Minister of Citizenship and Immigration)*, 2012 FC 1490, [2012] FCJ No 1594 (QL) [*Andrade*] at paras 8-9, arguments that the Board has failed to analyze a key portion of the evidence are regularly advanced in judicial reviews of immigration matters. However, that the failure to consider specific evidence must be viewed in context and will lead to a decision's being overturned only where the non-mentioned evidence is

critical, contradicts the tribunal's conclusion and the reviewing court determines that its omission means that the tribunal did not have regard to the material before it.

[29] The Court also owes deference to the Board's evaluation of the evidence. A decision-maker is presumed to have considered all the evidence before it (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (CA). However, while a decision-maker is not required to mention every piece of evidence before it, the more important a piece of evidence that goes unmentioned, the more willing a court may be to infer from the silence that the decision-maker made an erroneous finding of fact without regard to the evidence (*Cepeda-Gutierrez*, above, at paras 15-17).

[30] In addition, while the Board is presumed to have considered the complete record, its decisions cannot stand where it has misconstrued the evidence before it and bases its decision on that erroneous factual finding (*Sun v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1154, [2012] FCJ No 1223 (QL) [*Sun*] at paras 7-10; *Luzi v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1179, [2003] FCJ No 1492 (QL) [*Luzi*] at para 31).

[31] As Justice Gleason states in *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319, [2012] FCJ No 369 (QL) [*Rahal*] at para 33:

> [33] The wording of section 18.1(4)(d) requires that the impugned finding must meet three criteria for relief to be granted: first, it must be truly or palpably erroneous; second, it must be made capriciously, perversely or without regard to the evidence; and, finally, the tribunal's decision must be based on the erroneous finding (*Rohm & Haas Canada Ltd. v. Canada (Anti-Dumping Tribunal)* (1978), 22 N.R. 175, [1978] F.C.J. No. 522 (Fed. C.A.) at para 5 [*Rohm & Haas]; Buttar v. Canada (Minister of*

> *Citizenship & Immigration)*, 2006 FC 1281 (F.C.) at para 12, [2006] F.C.J. No. 1607 (F.C.)). Thus, findings that are inconsequential or that amount to obiter cannot provide a basis for review.

[32] Thus, where the Board has misconstrued evidence to the point that it can be said to have made its decision "without regard to the evidence", its decision will be found to be unreasonable.

[33] In this case, the Applicant points to a very specific piece of evidence that it submits was ignored or misconstrued by the Board. This is the violent altercation that took place between the Applicant and the Maras. The Board describes the incident and the Maras's response to it as follows:

> [3] […] An altercation took place, in which one the perpetrators was injured, when the claimant threw a rock at him. Since their attention was on the injured individual, the claimant was able to escape.
>
> [4] On January 10, 2010 three males came looking for the claimant in El Chilamate. He was also informed that they had threatened to kill his aunt if she did not divulge his whereabouts. She provided the name of the village but not a specific address. On January 25, 2010, the three gang members returned to the village. They threatened revenge for what he had done to their friend.

[34] The Board then finds that the Applicant does not have a personalized risk because there is a generalized risk to any young man resisting recruitment into the Maras. The Board concluded:

> [28] I find that the claimant was a victim of attempted recruitment by the Maras and the threats to the claimant occurred as a result of his refusal to join the gang. Unfortunately, this behaviour, on the part of the Maras, is part of their *modus operandi*. Given this documentary evidence, this is what you would expect from individuals resisting recruitment from the Maras and their reactions to the claimant's objections. In accordance with the documentary evidence, the risk faced by the claimant, as a result of being the target

> of attempted recruitment, is faced generally by many young people in El Salvador […]

[35] In my view, the Board overlooked or misconstrued the evidence concerning the actual physical altercation between the Applicant and the Maras, its significance and effect.

[36] The Applicant's Personal Information Form describes the fight:

> [22] Once we were on the ground we fought. I tried hard to pin him down but as I was about to free myself the other two got there and started kicking me. At that moment I thought of my family and thought I was going to die. Without thinking of the consequences I grabbed a rock and hit the guy that was on the ground in the head. He was knocked out unconscious and was bleeding profusely.
>
> [23] The other guys started screaming that I had killed him. Their attention was on their friend so I pushed away and ran as fast as I could. My feet started bleeding because I had no shoes on. I could hear them yelling and threatening me that they were going to find me anywhere I hid and they would kill me and everyone in my family.

[37] Later, when he had returned to his village:

> [30] I escaped into the woods and stayed at the cousin's house in Agua Fria. Later that evening my father came to Agua Fria and told me that the three guys looked through everyone's homes for me but could not find me. They threatened to return until they got revenge for what I did to their friend.

[38] The transcript of the hearing before the Board contains a similar description by the Applicant of the events and concluded:

> […] and as I was running I was hearing them screaming in the background, so wherever I would be hiding they would come and get me and they were going to take vengeance or reprisals for what I did to him.

[39] When asked if he could reside safely in El Salvador, he stated that he could not because the Maras would find him. When asked how they would do this, he responded:

> […] in any place in the country where I would hide they would have their members or their companions who would locate me. And even more because of what I did to them, that actually I had hit one of them.

[40] In the absence of an adverse credibility finding, the Board had no reason to doubt the Applicant's evidence. That evidence established that the Applicant, a young man, was initially approached by the Maras asking for money followed by an attempt to recruit him as a member. It also established the occurrence of a subsequent physical altercation and the reaction of the Maras, being to vow revenge for the injury the Applicant had inflicted on one of their own.

[41] Given this, I find that the Board misconstrued or misapprehended the Applicant's evidence concerning the fight, minimizing the event itself by describing it as a stone throwing incident, and ignored the evidence that his life was threatened because of the injury he inflicted on the Maras member during that fight. The failure to appreciate and analyze this significant evidence, and the resultant change in the nature of the risk to life faced by the Applicant, resulted in an erroneous finding of fact made without regard to the evidence. It further resulted in an unreasonable finding as to the personalized risk to which the Applicant was exposed, which is discussed below (see *Sun*, *Luzi*, and *Rahal*, above; and *Coitinho v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, [2004] FCJ No 1269 (QL)).

Did the Board err in determining that the Applicant faced a generalized risk to his life should he return to El Salvador?

Applicant's Submissions

[42] The Applicant points to paragraphs 22, 25 and 28 of the Decision, where the Board accepted that the Applicant was subjected personally to a risk to life under section 97 of the IRPA, yet dismissed the case as one of generalized risk because it viewed the reasons for that risk as one of "attempted recruitment". The Applicant submits that the Board applied the wrong approach in law to its analysis and also failed to recognize that the reason for the Applicant's risk is a revenge for having harmed a Maras member.

[43] The Applicant submits that merely because an applicant is subject to a generalized risk does not mean that they are not also exposed to a personal risk (*Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 [*Pineda*] at paras 13-15, 17).

[44] Further, that consideration of an application under subsection 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. In addition, the fact that the risk to an applicant arises from criminal activity does not, in and of itself, foreclose the possibility of protection under section 97 (*Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 [*Lovato*] at paras 7-11).

[45] The Applicant refers to *Gomez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1093 [*Gomez*] at para 38, as being factually similar. There, Justice O'Reilly held that while the claimants therein were originally subjected to threats that are widespread and prevalent in

El Salvador, subsequent events showed that the claimants were specifically targeted after they defied a gang.

[46] The Applicant also relies on *Portillo*, above, where Justice Gleason proposed a framework for the analysis required under section 97 of the IRPA, and also held at para 36:

> [36] […] 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. […]

[47] To support his argument that the Board misinterpreted section 97 as exempting protection to claimants who have been specifically and personally targeted for violence and other serious risks to life because of belonging to a subgroup, the Applicant similarly relies on *Tomlinson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 822, [2012] FCJ No 955 (QL) [*Tomlinson*] which endorsed the Court's reasoning in *Portillo* and in *Malvaez*, above. At para 16 of *Malvaez*, above, Justice Martineau states the following:

> [16] Recent case law suggests that it unreasonable to decide that a claimant was specifically targeted, yet then go on to conclude that there is a lack of personalized risk due to the widespread natures of that same risk in the claimant's country. […]

[48] The Applicant submits that the evidence demonstrates that his fear arose as a result of him striking a member with the rock, and the gang members of the Maras subsequently coming to his aunt's home, threatening her, and then searching for him in his village on two occasions seeking revenge.

[49] The Applicant submits that the Board failed to carry out the first step in the required analysis under section 97 of the IRPA, as stated in *Portillo* and *Lovato*, above, to appropriately determine the nature of the risk he faced. This led to the Board conflating the risk faced by the Applicant with that faced by all people in El Salvador, being the risk of gang recruitment, threats and assault. The Board erroneously concluded that the risk faced by the Applicant was the same as the risk faced generally by other individuals in El Salvador. However, the Applicant was specifically targeted and was subject to a greater risk than the risk faced by the population general.

[50] By misapprehending the evidence, the Board did not consider the Applicant's specific circumstances and therefore erred in concluding that the Applicant faced only a generalized risk. The Decision was therefore unreasonable.

Respondent's Submissions

[51] The Respondent submits that the Board properly found that the Applicant's risk was not personalized. Applicants are required to demonstrate that they face a unique risk pursuant to section 97 of the IRPA. Subsection 97(1)(b)(ii) of the IRPA explicitly states that the risk must be faced in every part of the country and must not be faced generally by other individuals in or from that country.

[52] The Respondent relies on *Innocent v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1019 [*Innocent*], for the premise that the analysis under this provision of the IRPA requires a comparison between the individualized risk faced by the applicant and the prevailing country conditions (*Vickram v Canada (Minister of Citizenship and Immigration)*, 2007 FC 457; *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331; *Rodriguez Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029 [*Rodriguez*]).

[53] The Respondent submits that in keeping with *Innocent*, above, the Board did not err by failing to find that the Applicant's risk became personalized when the Maras targeted him for a vendetta after he resisted recruitment, struggled and hit a member of the gang, and fled.

[54] The Respondent further submits that the Board's finding is wholly consistent with that of Justice Gauthier in *Acosta*, above, where the Court held the following at para 16:

> [16] […] It is no more unreasonable to find that a particular group that is targeted, be it bus fare collectors or other victims of extortion and who do not pay, faces generalized violence than to reach the same conclusion in respect of well known wealthy business men in Haiti who were clearly found to be at a heightened risk of facing violence prevalent in that country.

[55] The Respondent also submits that the Board's reasoning is consistent with that of Justice Zinn in *De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845 [*De Parada*] at paras 22-23. At para 22, Justice Zinn found "that an increased risk experienced by a subcategory of the population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency."

[56] The Respondent refers to para 33 of *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182 [*Guifarro*], where Justice Crampton (as he then was) held:

> [33] […] it is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of program 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 claimants' 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.

[57] The Respondent also relies on *Trigueros Ayala v Canada (Minister of Citizenship and Immigration)*, 2012 FC 183 where Justice Hughes states the following at para 8:

> [8] […] Where a portion, not necessarily a majority, of the population is subjected to threats of extortion and violence, the evidence must demonstrate that the Applicants have experiences something that is beyond what has been experience by the population that is otherwise subjected to such threats.

[58] Relying on *Guifarro*, above, at paras 6, 20-34, the Respondent concludes that it was not an error for the Board to find that the Applicant's risk was one shared by a sub-group of the population (all young people in El Salvador in this case) that is sufficiently large that the risk can be reasonably characterized as being widespread or prevalent in that country - and that this is so even where that sub-group may be specifically targeted for vendetta like the Applicant.

[59] The Respondent submits that there is no evidence to suggest that the Applicant experienced something beyond what has been experienced by the Salvadorian population in general, particularly youth grappling with gang recruitment.

Analysis

[60] As has been recognized in previous cases (for example in *Portillo*, above, at paras 37-39 and *Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048, [2012] FCJ No 1128 (QL) [*Olvera*] at para 37) and as demonstrated by the parties' submissions, there are two branches of decisions in this Court which consider whether or not persons specifically targeted by criminal gangs face a generalized risk as defined in subsection 97(1)(b)(ii) of the IRPA.

[61] The decisions in the first branch have declined to uphold Board decisions where the applicant was found to be specifically and personally targeted by gang violence, and therefore facing a particular risk of harm, yet the Board still concluded that the Applicant was excluded from protection by subsection 97(1)(b)(ii) because the risk was not personalized but was widespread and generally faced by others in that country (see for example *Pineda*, *Lovato*, *Gomez*, *Vasquez*, *Roberts* at para 60, all above, and *Barrios Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403, [2011] FCJ No 525 (QL) [*Barrios Pineda*]; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, [2011] FCJ No 1477 (QL); *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, [2011] FCJ No 144 (QL); *Kaaker v Canada (Minister of Citizenship and Immigration);* 2012 FC 1401, [2012] FCJ No 1512 (QL); *Ramirez v Canada (Minister of Citizenship and Immigration),* 2013 FC 261, [2013] FCJ No 283 (QL); *Hernandez Lopez v Canada (Minister of Citizenship and Immigration),* 2013 FC 592, [2013] FCJ No 614 (QL)).

[62] Decisions in the second branch have upheld Board decisions where it was determined that an increased risk of gang violence experienced by an applicant falling within a subcategory of the

population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency, or where the subgroup is of a size that one can say that the risk posed to those persons is wide-spread or prevalent and therefore generalized (*De Parada*, above, at para 22). That is, while they may have a risk that is more personal than most, it is still general as it is experienced by a subset of the population (see for example *Rodriguez*, *Guifarro, De Parada* at para 22, all above; and *Rajo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1058, [2011] FCJ No 1277 (QL); *Palomo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1163, [2011] FCJ No 1430 (QL); *Wilson v Canada (Minister of Citizenship and Immigration)*, 2013 FC 103, [2013] FCJ No (QL)).

[63] In my view, the facts of this case are such that it more closely aligns with the first branch of these decisions.

[64] Here, while the Board explicitly accepted that the Applicant was subjected personally to a risk to life under section 97, it went on to find that the Maras targeted him for the purpose of recruitment, which is a risk faced generally by all young people in El Salvador. As I have stated above, this was an unreasonable factual finding given the evidence in the record that the Maras were ultimately targeting the Applicant based on revenge, not recruitment. This conclusion also caused the Board to err in its characterization of the nature of the risk faced by the Applicant.

[65] This is a similar fact situation as in *Pineda*, above. There the applicant was a young man from El Salvador who claimed to have been targeted for recruitment then threatened by the Maras

over a period of months. As in this case, the Board did not make any unfavourable credibility findings. Justice de Montigny stated the following at para 15:

> [15] 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.

[66] This view was recently restated by Justice Gleason in *Portillo*, above. There the applicant was again a young man from El Salvador who was targeted, threatened and assaulted by the Maras. The Board rejected his refugee claim holding that neither section 96 or 97 of the IRPA applied to his situation. In its section 97 analysis, the Board determined that the applicant had been identified personally as a target by the Maras yet still concluded that the risk he faced was generalized because gang related crime is rampant in El Salvador. As in this case, the Board found that protection was not available to the claimant because section 97 excluded from the definition of a "person in need of protection" those who face risks that would be faced "generally by other individuals in or from that country."

[67] In *Portillo*, above, Justice Gleason held the following at para 36:

> [36] As noted, in my view, the interpretation given by the RPD to section 97 of the 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 risk cruel and unusual treatment or punishment, then the 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 in the present case. The RPD's interpretation would this largely strip section 97 of the Act of any content or meaning.

[68] This view was adopted in *Olvera*, above, at para 40 and in *Tomlinson*, above. In *Tomlinson*, the Board accepted that the applicant had been specifically and personally targeted because his brother was a police officer who had arrested gang members but, nevertheless, went on to conclude that the risk he faced in Jamaica was generalized within the meaning of subsection 97(1)(b)(ii) of the IRPA. Justice Mactavish found that this interpretation was both incorrect and unreasonable. She noted the following at para 19:

> [19] That is, Mr. Tomlinson does not just fear a criminal gang in Jamaica because he lives there or because he works as a shopkeeper in that country. That would be a generalized risk faced by a substantial portion of the population. Indeed, the risk that Mr. Tomlinson faces is not the same risk that existed before his brother began arresting members of the Ambrook Lane Clan gang. *Prior to* the arrests, Mr. Tomlinson may have been at risk of extortion or violence like many other shopkeepers in Jamaica. However, unlike the general population, Mr. Tomlinson is now at significantly heightened risk as a result of having been, to quote the Board, "specifically and personally targeted by the gang."

[69] Similarly, in this case, prior to the fight which caused the Maras to vow revenge for the injury that the Applicant in self defence inflicted upon one of its members, he, like all young persons in El Salvador was likely subject to a generalized risk of recruitment and violence at the hands of the Maras. However, the nature of that risk changed as a result of that incident. In my view, the evidence on the record shows that the risk, as a result of that event, became personalized.

[70] I also note *Marroquin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1114, [2012] FCJ No 1198 (QL), in which Justice Rennie addressed the event that gave rise to the risk and, having done so, held that it was unreasonable for the Board to find that the Applicant faced a generalized risk. Justice Rennie stated the following at paras 11-13:

> [11] I find that the Board's analysis of whether the applicants faced a generalized risk was unreasonable and the decision must be set aside. As this Court has consistently held: *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678; *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, *Alvarez Castaneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 724, *Barrios Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403, and *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, that the mere fact that the persecutory conduct is also criminal conduct which may also be prevalent in a country does not end the analysis of a claim under section 97. The Board must consider whether the applicants faced a risk that was different in degree than that faced by other individuals in El Salvador.
>
> [12] The applicants' testimony was found credible, and thus all the allegations were accepted. The Board therefore accepted that the applicant reported the theft of his truck to the *police*, that the Mara 13 became aware of this fact, and that the applicants fled El Salvador because they feared retaliation by the gang. This is the precise kind of factual scenario which may go beyond a generalized risk, as in the cases listed above.
>
> [13] The Board focused on the fact that theft is a common problem in El Salvador, but as the applicants submit, it was not the theft itself that gave rise to their risk. Rather, the applicant was at risk because he reported the theft to the police and therefore became a target of the Mara 13. The decision will be set aside, therefore, for failing to assess the claim in accordance with the applicable legal principle.

[71] In *Gomez*, above, Justice O'Reilly set aside a decision of the RPD in circumstances where the claimants were victims of extortion, threatened kidnapping and assault. He stated the following at para 38:

> [38] […] The applicants were originally subjected to threats that are widespread and prevalent in El Salvador. However, subsequent events showed that the applicants were specifically targeted after they defied the gang. The gang threatened to kidnap [one of the applicant's] wife and daughter, and appear determined to collect the applicants' outstanding "debt" of $40,000. The risk to the applicants has gone beyond general threats and assaults. The gang has targeted them personally.

[72] In other words, given the applicants specific circumstances, the nature of the risk they faced had changed (see also *Vasquez* and *Barrios Pineda*, above) and become personal rather than generalized.

[73] In *Portillo*, above, at para 40, Justice Gleason reviewed relevant jurisprudence regarding the analysis required in section 97 and stated the following:

> [40] In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the "... decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the Board's characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.

> [41] The next required step in the analysis under section 97 of IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree. If the risk is not the same, then the claimant will be entitled to protection under section 97 of IRPA […]

[73] In my view, in this case, the Board mischaracterized the risk faced by the Applicant as a general risk of targeting for recruitment. While the risk may have started out as such, the Board failed to appreciate that the nature of the risk faced by the Applicant changed. It dismissed the fight as a rock throwing event and miscomprehended its consequences. It unreasonably and incorrectly found that the risk to the Applicant remained generalized when the evidence clearly demonstrated that the reason for the risk did not, as the Board found, arise in connection with the generalized risk of recruitment, but rather from the injury to the Maras member that the Applicant had inflicted in self defence and the Maras's vow of vengeance for that injury. The Applicant was then personally targeted for retaliation and his fear arose as a result of that risk.

[74] For these reasons, I cannot accept the Respondent's submission that there is no evidence to suggest that the Applicant experienced something beyond what has been experienced by the Salvadorian population in general, particularly youth grappling with gang recruitment.

[75] Based on the foregoing, the Board's determination that the Applicant is not a person in need of protection under section 97 of the IRPA is set aside.

[76] The matter is remitted to the Board for redetermination by a differently constituted panel of the Board. No question for certification was submitted by counsel and none arises

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the Board's decision is set aside and the matter is remitted to the Board for redetermination by a differently constituted panel of the Board. No question for certification was submitted by counsel and none arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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