

Federal Court



Cour fédérale

**Date: 20150409**

**Docket: IMM-7164-14**

**Citation: 2015 FC 434**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Montréal, Quebec, April 9, 2015**

**Present: The Honourable Mr. Justice Shore**

**BETWEEN:**

**JUNIOR ENRIQUE MIRANDA MEJIA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Preliminary**

[S]ection 97 must not be interpreted in a manner that strips it of any content or meaning. If any risk created by “criminal activity” is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country.

Because the Board failed to properly undertake this inquiry in this case, the decision must be set aside.

(As explained by Justice Donald J. Rennie in *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 at para 14 (*Lovato*))

## II. Introduction

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) against a decision of the Refugee Protection Division (RPD) refusing the applicant's refugee claim under sections 96 and 97 of the IRPA.

## III. Facts

[2] The applicant is a merchant and citizen of Honduras.

[3] Since February 2015, the applicant operated a cell phone repair store in the city of Sigualtepeque, Honduras.

[4] Between March 10 and 22, 2014, the applicant was a victim of death threats and extortion of a [TRANSLATION] "war tax" by members of the Maras 18.

[5] On March 21, 2014, the applicant discussed with merchants from his neighbourhood so as to form an association to resist the Maras 18. As a result of these discussions, the applicant presented himself at the police station accompanied by another member of the merchants' association, so as to file a complaint against the Maras 18.

[6] On April 9, 2014, a group of the Maras 18 went to the applicant's store looking to kill him. The applicant was not there at the time.

[7] Fearing for his life, the applicant left Honduras on April 20, 2014, and presented a refugee claim at the Canada-USA border on July 3, 2014.

[8] A hearing was held before the RPD on September 3, 2014.

#### IV. Decision under review

[9] In a decision dated September 19, 2014, the RPD found that the applicant is not a "person in need of protection" under subparagraph 97(1)(b)(ii) of the IRPA because of the lack of credibility and the generalized nature of risk to which he is exposed.

##### A. *Applicant's credibility*

[10] The RPD agreed that the applicant operated a cell phone repair store between February 2014 and April 2014 and that he was a victim of extortion on three occasions by the Maras 18 between March 10 and 22, 2014.

[11] However, the RPD rejected the applicant's claim that he would be exposed to a personalized risk provided in section 97 of the IRPA for creating a merchants' association against the Maras 18.

[12] Specifically, the RPD determined that:

[TRANSLATION]

As the applicant was confronted with questions, he invented answers and dug himself deeper into contradictions. The panel does not believe that the Maras 18 came to get him on April 9, 2014, because they became aware that he had proposed to create an association to bring together merchants against the Maras 18 by seeking out police protection.

(RPD's decision at para 13)

B. *Generalized risk*

[13] The RPD determined that the applicant was personally exposed to a prospective risk of extortion. Moreover, the RPD found that it was a generalized risk, which is similar to the same risk as that to which Honduran merchants are generally exposed.

V. Statutory provisions

[14] The following sections of the IRPA apply to the determination of the applicant's refugee status:

**Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that

**Définition de « réfugié »**

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themselves of the protection of each of those countries; or (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

**Person in need of protection**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

**Personne à protéger**

**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

## VI. Issues

[15] This application presents the following issues:

- a) Are the RPD's credibility findings reasonable?
- b) Are the RPD's findings on generalized risk reasonable?

## VII. Parties' arguments

### A. *Applicant's arguments*

[16] The applicant argued that the RPD made unreasonable findings by conducting a microscopic examination of issues peripheral to the applicant's refugee claim (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ 444; *Papaskiri v Canada (Minister of Citizenship and Immigration)*, 2004 FC 69 at paras 31-33).

[17] According to the applicant, the RPD's findings are not supported by the evidence in the record. In particular, the RPD erred in finding that the applicant provided contradictory testimony regarding the creation of a merchants' association against the Maras 18.

[18] Then, the applicant claimed that it is unreasonable for the RPD to agree, on the one hand, that the applicant was personally targeted by the Maras 18 as a merchant and to conclude, on the other hand, that the risk he is exposed to is a generalized risk.

[19] Further, the applicant alleges that the RPD neglected to consider the impact of his opposition to the Maras 18 in light of the documentary evidence, which shows that the members of the Maras 18 retaliate violently against those who dispute their authority.

[20] Finally, the applicant argued that the personal threat to the applicant's life was not reasonably assessed by the RPD.

B. *Respondent's arguments*

[21] First, the respondent argued that the RPD's finding that the applicant is not credible with respect to his alleged prospective risk is reasonable, given the contradictions in the applicant's evidence.

[22] Furthermore, the respondent claims that it was open to the RPD not to accept the explanations provided by the applicant in his testimony.

[23] Then, the respondent argued that it is well established that individuals who fear being the victims of extortion are not Convention refugees. It was reasonable for the RPD to find that the risk alleged by the applicant, i.e. that he was threatened, attacked and extorted by criminalized groups, is part of the generalized risk to which most citizens of Honduras are exposed and specifically business owners or merchants.

#### VIII. Standard of review

[24] It is well-established case law that issues relating to credibility, and those relating to generalized risk, are questions of fact or questions of mixed fact and law, which are reviewable on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-50 (*Dunsmuir*); *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 (*Khosa*); *Pineda v Canada (Minister of Citizenship and Immigration)*, 2012 FC 493 at para 5; *Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 at para 28) (*Olvera*).

[25] Therefore, the Court must limit its review of the RPD's decision to "justification, transparency and intelligibility within the decision-making process and also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above at para 47).

#### IX. Analysis

A. *Are the RPD's credibility findings reasonable?*



[26] The assessment of the applicant's credibility is at the heart of the RPD's jurisdiction, who is in the best position to weigh the testimony and the evidence, as a whole (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ 732). From this perspective, it is not the role of this Court to substitute its opinion for the RPD's credibility findings (*Chen v Canada (Minister of Citizenship and Immigration)*, 2005 FC 767 at para 24; *Khosa*, above at para 59).

[27] Then, the minor or secondary inconsistencies in the applicant's evidence should not induce the RPD to find that the applicant had a general lack of credibility if the documentary evidence confirms the plausibility of his story (*R.K.L. v Canada (Minister of Citizenship and Immigration)*, [2003] FCJ 162 at para 13 (*R.K.L.*)).

[28] In this case, the RPD found that the applicant is not credible with respect to his fear of personally being the target of retaliation by the Maras 18 for attempting to form a merchants' association (RPD's decision at para 6 to 13).

[29] First, the RPD rejects the applicant's testimony relating to the date of formation and the composition of the merchants' association. According to the RPD, the applicant testified inconsistently with respect to the exact time when the decision to form the association and file a complaint with the police was made. Furthermore, the RPD seems to draw a negative inference from the fact that ultimately, four of the merchants never showed up to accompany the applicant to file a complaint with the police.

[30] Second, the RPD raised doubts as to the circumstances surrounding the complaint filed with the police by the applicant. In particular, the RPD observed that, initially, the applicant claimed that he did not file a complaint with the police for the reason that the person in charge was absent but that, further, the applicant indicated at question 2(c) of his Claim for Refugee Protection Form (CRPF) that he did not complain of the extortion against him, because the police was not able to protect him.

[31] These findings led the RPD to conclude that the applicant was inventing answers as he was confronted with questions, thus undermining his credibility.

[32] Following a careful reading of the file brought before the RPD and the transcript of the hearing, the Court noted that the RPD's negative findings on the applicant's credibility are problematic in some ways.

[33] From the transcript of the hearing before the RPD, it emerges that the applicant provided explanations addressing each of the deficiencies and inconsistencies perceived by the RPD. In particular, the applicant testified the following:

- Following discussions with other merchants from his neighbourhood on the threats and the extortion against him by the Maras 18, he attempted to form a merchants' association;
- He testified that he alone was explicitly targeted by the Maras 18 in the group, but that he had nevertheless succeeded in convincing the other merchants to unite since they were all at risk of being threatened by the Maras 18;

- In the beginning, five or six merchants were ready to commit with the applicant. Their objective was to go to the police station together three days later to report the Maras 18. The applicant explained that the merchants were afraid and that, in the end, when the time came for the association to meet, it was only the applicant and another merchant who came to the police station to file a report;
- The applicant explained that once he came to the police station, the police officer refused to accept his report since the person in charge was absent and that it was for that reason that he indicated at question 2(c) of his CRPF that he did not file a complaint with the police and that the police was not able to protect him;
- In response to this same question, the applicant also indicated that his friend Eleyo was killed by members of the Maras 18 after his report to the police.

[34] The RPD is obligated to consider the explanations provided by the applicant which are not obviously implausible and to provide reasons “in clear and unmistakable terms” so as to reject these explanations with respect to the whole of the evidence before it (*R.K.L.*, above at para 9 and 20; *Hilo v Canada (Minister of Citizenship and Immigration)*, (1991), 130 NR 236 (FCA) at para 9; *Ullah c Canada (Minister of Citizenship and Immigration)*, 2005 FC 1018 at para 17; *Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ 442).

[35] With respect to its reasons, the RPD did not support in clear and precise terms the basis of its rejection of the explanations provided by the applicant. Furthermore, the Court is of the view that the RPD’s credibility findings are not anchored in the evidence in the record.

B. *Generalized risk*

[36] For the purposes of the analysis under section 97 of the IRPA, the applicant must establish that he is personally exposed to a risk that those living in the applicant's same country of origin or ordinary residence are not generally exposed to, independent of the fact that this personalized risk is shared by many (*Loyo de Xicara v Canada (Minister of Citizenship and Immigration)*, 2013 FC 593 at para 14; *Flores c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 CF 201 at para 10).

[37] Case law establishes a two-step analysis for the interpretation of paragraph 97(1)(b) of the IRPA. First, the RPD must characterize and describe the nature of the risk to which the applicant was exposed, then compare the nature and seriousness of the risk with that which a significant part of the population of the country is exposed. If the applicant's risk is distinct, he will then have the right to claim the protection of section 97 of the IRPA (*Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at para 41 (*Portillo*)).

[38] According to the RPD file, the risk alleged by the applicant is the prospective risk of retaliation and threats to his life to which he is exposed because of the knowledge of the Maras 18 of the applicant's attempt to form a merchants' association in March 2014. At the hearing, the applicant testified that he was the only one among the merchants in the association who had been threatened and extorted, which places him plausibly outside the generalized risk to which are exposed the other merchants in his neighbourhood (RPD transcript, Tribunal Record, at p 210).

[39] Moreover, in its reasons, the RPD characterized the risk to which the applicant is personally exposed as the risk of falling victim to extortion. This characterization led the RPD to find that the applicant is exposed to a generalized risk, similarly encountered by other Honduran merchants, thus excluding him from the definition of “person in need of protection” under paragraph 97(1)(b)(ii).

[40] Therefore, while recognizing that the RPD’s characterization of risk implicitly flows from previous credibility findings, the Court finds that the heart of the applicant’s characterization of risk and of his claim are not reasonably analyzed by the RPD. In coming to a finding of generalized nature of risk feared by the applicant, the RPD unduly minimized the nature of the risk to which the refugee claimant was exposed.

[41] According to case law, an individual who has been expressly targeted cannot then be considered to be exposed to a general risk (*Olvera* at para 40).

[42] In this case, there is an incongruity between the recognition by the RPD of the personalized nature of the risk experienced by the applicant and the conclusion that it is a generalized risk.

[43] In this respect, the Court adopted the reasoning adopted by Justice Donald J. Rennie and by Justice Mary J. L. Gleason in the *Portillo* decision at para 42:

[42] For example, in *Lovato*, Justice Rennie set aside the RPD’s decision for being unreasonable because the RPD inappropriately characterized the nature of the risk faced by the claimant as the risk of gang violence. On the facts, the applicant and his family

members were victims of extortion by the MS, one of his uncles had been killed by them, and the applicant received threats that his family would be killed should he fall short in making the extortion payments. Justice Rennie noted at para 13 that the evidence demonstrated that “the MS was specifically targeting the applicant to an extent beyond that experienced by the population at large.” He continued at para 14:

[S]ection 97 must not be interpreted in a manner that strips it of any content or meaning. If any risk created by “criminal activity” is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country. Because the Board failed to properly undertake this inquiry in this case, the decision must be set aside.

[Emphasis added.]

[44] While recognizing that in case law the term “generally” may apply to a sub-group of the population (such as Honduran merchants), the Court adopts the reasoning made by Justice Gleason in *Portillo*:

It is simply untenable for the two statements of the Board to coexist: if an individual is subject to a *personal* risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general. If the Board’s reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks.

(*Portillo*, above at para 36; see also: *Martinez Granados v Canada (Minister of Citizenship and Immigration)*, 2014 FC 752 at para 6)

[45] As expressed by Justice Russell Zinn in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at para 34: “where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met”.

[46] The tension between a personalized risk and a generalized risk was also expressed by Justice James Russell in *Correa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 252 at para 46:

While a full consensus has yet to emerge, I think that there is now a preponderance of authority from this Court that personal targeting, at least in many instances, distinguishes an individualized risk from a generalized risk, resulting in protection under s. 97(1)(b). Since “personal targeting” is not a precise term, and each case has its own unique facts, it may still be the case that “in some cases, personal targeting can ground protection, and in some it cannot” (*Rodriguez*, above, quoted with approval in *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1543 [*Pineda* (2012)]. However, in my view there is an emerging consensus that it is not permissible to dismiss personal targeting as “merely an extension of,” “implicit in” or “consequential harm resulting from” a generalized risk. That is the main error committed by the RPD in this case, and it makes the Decision unreasonable.

[Emphasis added.]

[47] Section 97 must not be interpreted in a manner that strips it of any content or meaning (*Lovato*, above at para 14; *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at para 138).

[48] The Court found that with respect to its analysis under section 97 of the IRPA, the RPD did not reasonably weigh the evidence in support of the applicant’s claim that he would be

perceived by the Maras 18 as a threat to their authority for having created the merchants' association.

[49] The *Response to Information Requests* HND104464.FE, contained in the RPD's national documentation package (NDP) (March 24, 2014), described the risk of retribution experienced by those who are perceived by Maras 18 as threats to their authority, including the merchants:

Agence France-Presse (AFP) reports that, following the imposition of a curfew by the maras in an area of Tegucigalpa, there were no complaints regarding threats from maras, and that the chief of police stated that "people may be keeping quiet out of fear" (4 Feb. 2013). La Prensa quotes a carrier from San Pedro Sula who stated that [translation] "we are not filing reports because we do not know if the person whom we will report is an extortionist or a murderer" (La Prensa 7 May 2013). La Prensa also refers to the case of a merchant who was allegedly murdered by the maras less than 24 hours after reporting that he had been a victim of extortion (ibid.). The merchant's family stated that the gangs returned a few days after the funeral for the purposes of extortion, after having threatened to kill them (ibid.).

[Emphasis added.]

(Honduras: Areas where gangs operate (2012-June 2013), Research Directorate, Immigration and Refugee Board of Canada, Ottawa, June 18, 2013, Tribunal Record at p 131)

[50] Furthermore, the *Response to Information Requests* under HND103940.E of the NDP describes the retribution by the members of the Maras toward those who they consider are challenging their authority:

According to an article published by Agence France-Presse (AFP), the maras have divided Honduran cities into [translation] "zones or 'territories'" that are then disputed between M-18 and MS-13 (12 June 2011). Gutiérrez Rivera, writing in the *Bulletin of Latin American Research* in 2010, says that, in disputes over territory (also known as *rifa del barrio*), gangs "exercise and test territorial authority upon others," usually with violence, and retaliate to



perceived challenges to their authority (2010, 499). She explained that these territorial disputes are largely associated with the collection of [translation] “resources,” such as the “war tax” on public transportation providers, kidnappings, threats and theft (25 Jan. 2012) from individuals and businesses (Wilkinson 2010, 393). For example, Juan J. Fogelbach, a researcher at the US Office of Refugee, Asylum, and International Operations, indicates that, in recent years, there has been an increase in the burning of buses and the killing of bus drivers (2011, 438). He notes that the violence has been reported to be the means by which gangs “compel bus owners to make extortion payments” (Fogelbach 2011, 438). Additionally, Gutiérrez Rivera points out that gangs use violence to “impose local order” or “street level politics” (2010, 495).

[Emphasis added.]

*(Honduras: Areas of operation of Mara Salvatrucha (MS-13) and Mara 18 (M-18) (also known as the 18th Street gang) in Honduras, Research Directorate, Immigration and Refugee Board of Canada, Ottawa, February 3, 2012, Tribunal Record at p 131)*

X. Conclusion

[51] In light of the above, the Court finds that the RPD’s decision that the applicant is not a person in need of protection is unreasonable.

[52] The application is allowed and the matter is referred back to a differently constituted panel for a new hearing.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that this application for judicial review is allowed and that the file is referred back for re-determination by a differently constituted panel. No question is certified.

“Michel M.J. Shore”

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Judge

Certified true translation  
Catherine Jones, Translator

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

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