Federal Court  Cour fédérale

**Date: 20120208**

**Docket: IMM-3692-11**

**Citation: 2012 FC 178**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, February 8, 2012**

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

**BETWEEN:**

**HOCINE FENEK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

### I. Introduction

[1] This is an application for judicial review submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of the decision by the Immigration and Refugee Board (IRB), dated April 4, 2011, that Hocine Fenek (Mr. Fenek) is not a

Convention refugee or a person in need of protection under section 96 and subsection 97(1) of the IRPA.

[2] For the following reasons, the application for judicial review is dismissed.

## II. Facts

[3] Mr. Fenek was born in and is a citizen of Algeria.

[4] Before he arrived in Canada, Mr. Fenek operated a restaurant in the Algiers area, 110 kilometres from his residence in Beni-Douala, in the Kabylie mountains of Tizi-Ouzou.

[5] On January 3, 2008, Mr. Fenek was returning home from work when armed men blocked the road and forced him to get out of his vehicle. They searched his truck, took his personal identification papers and took 30,000 DA from him.

[6] The men questioned him about his employment situation and succeeded in obtaining his telephone number. They also demanded that Mr. Fenek pay them 10,000 DA every two weeks.

[7] Mr. Fenek paid the amounts demanded for two months.

[8] In March 2008, the men called Mr. Fenek to a meeting at the "le 1er novembre" coffee shop to give him a mission. He decided, subsequently, to cancel his telephone line and fled to the home of his brother, who also operated a restaurant, but in downtown Algiers.

[9] Mr. Fenek left Algeria for Canada at the invitation of his sister. He arrived in Canada on May 2, 2008, and claimed refugee protection on October 6, 2008. In his Personal Information Form (PIF), completed on December 4, 2008, Mr. Fenek alleged that he was the subject of death threats for refusing to comply with the demands of a terrorist group.

[10] The IRB found that, even though Mr. Fenek made a credible refugee protection claim, he is not a Convention refugee or a person in need of protection.

[11] The IRB's decision specified that no evidence was submitted by Mr. Fenek to establish that section 96 applies in this case. The decision also indicated that Mr. Fenek does not face a personalized risk and that "[t]hroughout his testimony, the claimant failed, on a balance of probabilities, to satisfy the panel of a future risk, which is required to apply paragraph 97(1)(*b*) of the IRPA" (see paragraph 25 of the IRB decision).

## III. Legislation

[12] Section 96 and subsection 97(1) of the IRPA read as follows:

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| **Convention refugee** | **Définition de « réfugié »** |
| **96.** A Convention refugee is a | **96.** A qualité de réfugié au |

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,

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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*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.

*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.

**Person in need of protection**

**Personne à protéger**

**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

**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*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

*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*) to a risk to their life or to a risk of cruel and unusual

*b*) soit à une menace à sa vie ou au risque de

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| treatment or punishment if | traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (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. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |

## IV. Issue and applicable standard of review

### A. Issue

[13] This application for judicial review raises the following question:

- ***Did the IRB err by characterizing the risk Mr. Fenek faces in Algeria as generalized and by finding that he would not be subject to an unusual risk if he were to return to his country of origin?***

## B. Applicable standard of review

[14] This application for judicial review is assessed on the standard of reasonableness because "interpreting the exclusion of generalized risks of violence under subsection 97(1)(b) of IRPA [i]s an issue of application of law to the particular facts of a case" (see *Rodriguez Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029, paragraph 24 (*Perez*), and *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 (*Prophète*)).

[15] The IRB decision must therefore fall within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

## V. Position of the parties

## A. Position of the applicant

[16] Mr. Fenek points out that the IRB found that the risk he faced in Algeria is one that it characterizes as generalized and which is faced by an entire group of the Algerian population, in this case, merchants.

[17] Mr. Fenek argues that the IRB erred in fact and in law because it considered him as belonging to the group of Algerian merchants whereas he claims that he was a victim of terrorists.

[18] He also emphasizes that the IRB's analysis does not mention the personal and specific threat directed towards him, that is, his forced involvement in terrorist activities. Mr. Fenek claims that that risk has nothing to do with his occupation as a merchant.

[19] According to Mr. Fenek, the finding by the IRB that he is a member of a subset of the Algerian population facing a generalized risk is not supported by the evidence in the record. Mr. Fenek alleges that the reasoning by Madam Justice Bédard at paragraph 12 of *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 622, as follows, applies in this case:

> [12] In this case, the risk claimed by the applicant is clearly related to his fear of retaliation for his refusal to join a street gang. Yet, the evidence on file does not deal with the forced recruitment of young people practised by street gangs. Given that the risk alleged by the applicant was clearly related to his fear of retaliation for his refusal to join a street gang, the Board could not, in the absence of evidence, conclude that the risk faced by the applicant was generalized. The documentary evidence dealing with the number of young people who are street gang members and the factors that push them to join a gang was not relevant in supporting a finding of generalized risk related to forced recruitment or the fear of retaliation for refusing to join.

[20] He maintains that the facts in this case differ from those in *Perez*, above, *Prophète*, above, and *Arias v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1029, in which the IRB's findings with respect to the existence of a generalized risk are based on concrete evidence.

[21] Mr. Fenek also makes an argument with respect to his psychiatric condition (see Exhibits P-3 and P-4 at pages 97 to 116 of the IRB record). He contends that his problems arose from the events he experienced in Algeria.

[22] The IRB found that Mr. Fenek did not succeed in establishing, on a balance of probabilities, that he would face a risk of persecution if he were to return to Algeria. The IRB formed the basis for its conclusion by writing that "[t]he claimant testified that, since he left, none of his family members have been assaulted by [terrorists] . . . and, furthermore, his business had been rented to someone and that he has not heard anything about that person" (see paragraph 21 of the IRB decision).

[23] However, Mr. Fenek submits that the lack of news concerning the rental of his former business confirms that the threat he faced in Algeria was not a generalized one.

[24] Furthermore, he claims that the IRB failed to consider the fact that one of his brothers had to sell his own restaurant to flee the terrorists. Mr. Fenek refers the Court to page 39 of the hearing transcript. He stated the following therein: [TRANSLATION] "My twin brother who left for the Sahara, we think he is in danger. He left for the South because of this."

[25] Mr. Fenek also alleges that the IRB did not consider that an individual known by the Fenek family was killed by a group of terrorists. Mr. Fenek states that the danger is very real and that the IRB cannot disregard the fact that the terrorists in question can make inquiries with their associates to find him if he were to return to Algeria.

[26] Finally, Mr. Fenek claims that he could possibly suffer reprisals at the hands of the Algerian authorities because the amounts paid could have been used for terrorist activities.

**B. Position of the respondent**

[27] The respondent acknowledges the fact that Mr. Fenek does not challenge the finding in the IRB decision regarding the application of section 96 of the IRPA. That finding is reasonable (see *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraph 26).

[28] The respondent primarily argues that the IRB's analysis of Mr. Fenek's claim in accordance with subsection 97(1) of the IRPA is reasonable in this case because it relied on the evidence submitted by Mr. Fenek.

[29] According to the respondent, the finding by the IRB that Mr. Fenek did not establish a future risk should he return to Algeria was reasonable (see paragraph 20 of the IRB decision) because it relied on, among other things, the following statement by the principal person: "none of his family members have been assaulted by these individuals and, furthermore, his business had been rented to someone and that he has not heard anything about that person" (see paragraph 21 of the IRB decision).

[30] The respondent also points out that a good portion of Mr. Fenek's arguments, that is, paragraphs 40, 42, 43 and 45 of the Applicant's Memorandum, constitute new facts that were not submitted into evidence before the IRB. However, it has been clearly established in the case law in

this Court that, in an application for judicial review of an administrative decision in accordance with section 18.1 of the *Federal Courts Act*, RSC (1985), c F-7, the Court can only consider the evidence that was before the decision-maker, in this case the IRB (see *Lalonde v Canada (Revenue Agency)*, 2008 FC 183 at paragraph 66; *Nyoka v Canada (Minister of Citizenship and Immigration)*, 2008 FC 568; *Jakhu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 159 at paragraph 18; *Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6 at paragraph 20; *Vong v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1480 at paragraphs 35, 36 and 38; *Alabadleh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 716 at paragraph 6; *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 (FCA)).

[31] The respondent argues, in contrast to Mr. Fenek, that the IRB considered the fact that the Fenek family knew someone who was killed by a group of terrorists but correctly found that this fact does not prove that the risk alleged by Mr. Fenek is personalized.

[32] The respondent states that it is settled case law that it is up to claimants to establish that they have a well founded fear; this analysis must be carried out prospectively (see *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at paragraphs 119-120 and 148-151; *Llorens Farfan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 123 at paragraph 13; *Zeng v Canada (Minister of Citizenship and Immigration)*, 2009 FC 466 at paragraph 31).

[33] It appears, in particular from the wording in subparagraph 97(1)(*b)*(ii) of the IRPA, that personalized risk is an essential element of any claim based on that provision. The jurisprudence of

this Court (see *Prophète*, above, at paragraphs 7 and 10 and *Innocent v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1019 at paragraphs 66-68) confirms this.

[34] In this case, the IRB analyzed Mr. Fenek's fear that was based on his refusal to comply with the demands of a terrorist group in Algeria. The respondent emphasizes that the IRB found that that was a generalized risk no different from that which merchants or even the entire Algerian population face. The respondent emphasizes that Mr. Fenek himself testified that "all merchants could be targeted, like his brother's friend was, to obtain what these individuals needed" (see paragraph 23 of the IRB decision).

[35] The respondent agrees with the remarks of the Court in *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345. In that decision, the Court emphasized the following at paragraph 39: " . . . 'a generalized risk could be one experienced by a subset of a nation's population thus, membership in that category is not sufficient to personalize the risk'. In this case, the applicant could not personalize his risk beyond membership to the subgroup of young men who are recruited to become members of gangs in Honduras" (the respondent also cites *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at paragraphs 13-16 and *Carias v Canada (Minister of Citizenship and Immigration)*, 2007 FC 602).

[36] The respondent also maintains that Mr. Fenek was targeted only because of his status as a restaurateur.

[37] Alternatively, the respondent argues that there is still a general terrorist threat in Algeria. Thus, even if Mr. Fenek is targeted, there is still a generalized risk that the entire Algerian population must face.

[38] Regarding Mr. Fenek's allegations that he suffers from psychological problems, the IRB considered this, but correctly found that this evidence did not affect the outcome of the decision.

## VI. Analysis

- ***Did the IRB err by characterizing the risk Mr. Fenek faces in Algeria as generalized and by finding that he would not be subject to an unusual risk if he were to return to his country of origin?***

[39] The Court notes the soundness of the IRB's analysis by virtue of section 96 of the IRPA and acknowledges the fact that Mr. Fenek does not challenge this.

[40] It is clearly established that, when subparagraph 97(1)*b*)(i) applies, "[t]he examination of a claim under [this subparagraph] of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant 'in the context of a *present* or *prospective* risk' for him (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15)" (see *Prophète*, above, at paragraph 7).

[41] Furthermore, in *Vickram v Canada (Minister of Citizenship and Immigration)*, 2007 FC 457 at paragraph 16, "[after] [h]aving found that Mr. Vickram's fear had no nexus to the Convention and that he was at no greater risk of criminal activity than the general population, there was no need for the Board to determine whether the state could nevertheless protect him." Thus, the Court must only determine whether the IRB properly applied subsection 97(1) of the IRPA pursuant to *Prophète* and whether it reasonably found that Mr. Fenek is not personally at risk of persecution by the said terrorists in Algeria.

[42] At paragraph 23 of its decision, the IRB wrote the following:

> The fact that the claimant was personally targeted in this ransom demand does not necessarily mean that the risk to which the claimant was subjected is personal or is different from the risk faced by other Algerian citizens, within the meaning of 97(1) of the IRPA. This does not mean that other merchants or former merchants like him would not be subjected to this risk. (See paragraph 23 of the IRB decision.)

[43] The IRB relied on *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331 (*Prophète* (first instance)), upheld by the Federal Court of Appeal. In that case, Madam Justice Tremblay-Lamer cited the remarks of Madam Justice Snider in *Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459 at paragraph 26, which specifies the following: " . . . I can see nothing in s. 97(1)(b)(ii) that requires the Board to interpret 'generally' as applying to all citizens. The word 'generally' is commonly used to mean 'prevalent' or 'widespread'". She also wrote the following: "Parliament . . . chose to include the word 'generally' in s. 97(1)(*b*)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition" (see paragraph 19 of *Prophète* (first instance)).

[44] Therefore, the IRB correctly found, in our opinion, that Mr. Fenek was targeted by the terrorists in his capacity as restaurateur, thus being a member of the merchant class in Algeria. He therefore cannot avail himself under subparagraph 97(1)(*b)*(ii) of the IRPA. Mr. Fenek faces a generalized risk that extends to all merchants in Algeria.

[45] The IRB also believed that Mr. Fenek did not establish a future risk on a balance of probabilities should he return to Algeria. It wrote the following:

> [21] The claimant testified that, since he left, none of his family members have been assaulted by these individuals and, furthermore, his business had been rented to someone and that he has not heard anything about that person.
>
> [22] The [IRB] wanted to know why these individuals would still be searching for him should he return to his country. The claimant testified that it was because he was more of a target for refusing to cooperate. (See paragraphs 21 and 22 of the IRB decision.)

[46] A close reading of the decision and the hearing transcript dated March 10, 2011, leads us to find that the IRB's decision that Mr. Fenek belonged to the subset of Algerian merchants and that he would not be personally subjected to a risk of torture or to a risk to his life or to a risk of cruel and unusual treatment or punishment if he were to return to his country of origin is reasonable and falls within the range of possible outcomes. The IRB relied on, among other things, the fact that "[t]he claimant himself stated that all merchants could be targeted, like his brother's friend was, to obtain what [the terrorists] needed" (see paragraph 23 of the IRB decision).

[47] The Court rejects Mr. Fenek's position that it [TRANSLATION] "is important to differentiate this situation from situations where bandits and criminals show up at businesses or approach merchants demanding that they pay money because of their specific status as merchants" (see

paragraph 31 of the Applicant's Supplemental Memorandum). The circumstances that led to the extortion acts differ but still arise from the fact that Mr. Fenek belongs to the merchant group. Thus, the systematic nature of the extortion acts towards Mr. Fenek demonstrates that he was not threatened randomly.

[48] Even if Mr. Fenek's twin brother knew a merchant who was killed by terrorists, that fact does not justify that all Algerian merchants are at risk.

[49] In *Guiffaro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, Chief Justice Crampton clearly established the Court's current approach to claims under subparagraph 97(1)(*b)*(ii) of the IRPA. Justice Crampton wrote the following:

> [33] Given the frequency with which claims such as those that were advanced in the case at bar continue to be made under s. 97, I find it necessary to underscore that is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of paragraph 97(1)(b)(ii) of the IRPA where (i) such targeting in the claimant's home country occurred or is likely to occur because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons, and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. In my view, a subgroup of such persons numbering in the thousands would be sufficiently large as to render the risk they face widespread or prevalent in their home country, and therefore "general" within the meaning of paragraph 97(1)(b)(ii), even though that subgroup may only constitute a small percentage of the general population in that country. (See paragraph 33 of Guiffaro.)

[50] In this case, the evidence before the IRB demonstrates, unquestionably, that Mr. Fenek is a member of the Algerian merchants, which clearly justifies the IRB's finding.

## VII. Conclusion

[51] The IRB decision concerning the issue of Mr. Fenek's generalized risk in Algeria is reasonable in this case. The application for judicial review is therefore dismissed.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that**

1. The application for judicial review is dismissed; and

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

Certified true translation
Janine Anderson, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-3692-11 |
| **STYLE OF CAUSE:** | HOCINE FENEK<br>v<br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | January 9, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SCOTT J. |
| **DATED:** | February 8, 2012 |

**APPEARANCES:**

| | |
|---|---|
| Mélanie Calisto Azevedo | **FOR THE APPLICANT** |
| Yaël Levy | **FOR THE RESPONDENT** |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Mélanie Calisto Azevedo<br>Montréal, Quebec | **FOR THE APPLICANT** |
| Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Montréal, Quebec | **FOR THE RESPONDENT** |