Federal Court  Cour fédérale

Date: 20140715

Docket: IMM-12490-12

Citation: 2014 FC 700

Ottawa, Ontario, July 15, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROSA VIRGINIA SERVELLON MELENDEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated October 31, 2012 [Decision], which

refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss. 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 30-year-old citizen of El Salvador, who came to Canada on August 17, 2010, after unsuccessfully attempting to claim refugee protection in the United States [US]. She claims that she and her family have suffered threats, extortion, violence and murder at the hands of criminal gang members (Maras) over the course of the past two decades, and that she will be in danger from these same Maras if she returns to El Salvador now.

[3] The Applicant's problems with the Maras began in 1993. Members of the Mara Salvatrucha [MS] gang tried to extort money from the Applicant's father, and when he refused to pay, they killed him. The Applicant's uncle was also shot during this incident and he reported it to police, but while they promised to investigate, he did not hear from them again. The Applicant's mother opened a convenience store in the family home, but in 1995 the same MS members began to extort her as well. She could only pay them part of what they demanded, and in 1996 they came to the house and took all of her money and some goods from the store. The threats and extortion continued. In 1998, the Applicant's mother sold what she had and fled to the US, where she remains on a renewable temporary work permit, leaving the Applicant and her five siblings with their grandmother in a rural area. The Maras found them there and continued to make demands for money. They threatened to kidnap or kill the Applicant.

[4] The Applicant says she called the police "about three times" regarding these threats. The first time they thought it was a joke, and the other times they told her she had to come to their office to make a report. The Applicant says she was too afraid and did not go to make a report.

[5] The demands from the Maras continued to increase. On one occasion, they forced their way into the house and demanded $5,000 USD – a much larger amount than before – as they knew the Applicant's mother was now in the US. Her brother started to shout, attracting the neighbours, and the Maras left. Approximately three months later, in 1999, the Maras again accosted the Applicant while she was leaving the house. They demanded money and took some jewellery. The Applicant ran to the bus. She says she never reported this incident as she was afraid they would take vengeance.

[6] In 2003, the Applicant went to the US with her mother's help and applied for refugee status at the border. After she left El Salvador, the Maras tried to rape her sister, but left when a bus came along. Her sister left for the US in 2004, and her brother Tito left in 2006, because of the continued extortion demands of the Maras. In August 2005, an uncle who had just started a business was attacked with a knife by the Maras and almost died. The Applicant says it was the same Maras, and they asked her uncle about her and her family and when they were coming back. Her uncle reported this incident and two young people were arrested and detained for three months.

[7] The Applicant says her brother Tito and a cousin were deported from the US to El Salvador in early 2012. The cousin opened a restaurant business and was attacked and killed at

that business on July 7, 2012. The Applicant says the employees who were there have told her the Maras asked about her. Tito is moving from place to place around the country, and three other brothers continue to live with their grandmother, without a business or a job.

[8] The Applicant's refugee claim in the US was denied in July 2009, and her appeal was denied in August 2010, and the Applicant received a deportation order. Afraid to go back to El Salvador, the Applicant crossed into Canada at Windsor, Ontario in August 2010 with the help of Freedom House, and filed for refugee protection.

DECISION UNDER REVIEW

[9] The RPD found that the determinative issues in the claim were nexus, credibility, generalized risk and state protection. The RPD concluded that the Applicant's fears were not linked to one of the five Convention refugee grounds, that the risk she faces in El Salvador is a generalized one, and that, in the alternative, she had failed to rebut the presumption of state protection with clear and convincing evidence.

[10] With respect to nexus, the Board rejected the Applicant's submission that she was a member of a "particular social group" for the purposes of s. 96 of the Act, as a member of a family who had rejected demands from gang members, or as a young female who did not have the protection of her father. The RPD found that the family faced threats from criminal gang members, and that this had no nexus to the Convention refugee definition. As such, the Applicant

was not a member of a particular social group, but rather a victim of crime, and her claim was to be considered under s. 97(1) of the Act.

[11] The RPD had some credibility concerns regarding why the Applicant did not go and report the extortion demands to the police, but was prepared to accept for the purposes of the Decision that MS gang members had threatened her family with extortion. The Board proceeded to consider whether the risk the Applicant faced was a generalized risk, and whether there was adequate state protection for her in El Salvador.

[12] The RPD found that the risk the Applicant faced was a risk faced generally by others in El Salvador, and therefore, by virtue of s. 97(1)(b)(ii) of the Act, protection could not be extended to her. It found that, according to the country documents, extortion is a crime commonly committed by criminal gang members in El Salvador, and is accompanied by other widespread crimes such as robbery, murder and kidnapping. The problem of extortion is widespread, and affects those who are perceived to have or do have wealth:

> [T]he risk to life in El Salvador relating to extortion faced by the claimant is a wide-spread common risk generally faced by others in the country. The fact that the claimant was actually personally targeted by criminals for extortion does not mean her risk was, or would be upon a return to El Salvador, not a generalized risk…

[13] The Board reviewed some of the jurisprudence of this Court and the Federal Court of Appeal dealing with generalized risk, and concluded as follows:

> The documentary evidence suggests that this type of extortion covers almost any age, gender, type of employment and, that the primary criteria apparently is whether or not the criminals, rightly or wrongly, believe their target might have some money. The fact that an identified person would face retaliation if they stopped

> complying with the demands of the criminals still does not remove the risk from the exception if it is one faced generally by others according to this cited case law. As extortion by gangs and criminal and the risks associated with non-payment is a risk many other citizens also face in El Salvador, the panel finds that the risk faced by this claimant is a generalized one.

[14] The RPD went on to consider the issue of state protection "in the alternative," looking at "whether or not there is adequate state protection in El Salvador, whether or not the claimant took all reasonable steps to avail herself of that protection and whether she has provided clear and convincing evidence of the state's inability to protect."

[15] The Board found that, "on a balance of probabilities, the claimant has not established that state protection is unavailable for her in El Salvador." It found there is a presumption that a state is capable of protecting its citizens, which a claimant must rebut with "clear and convincing" proof, and that the onus is on the claimant to approach the state for protection in situations where it might be reasonably forthcoming. The burden for a claimant to prove an absence of state protection is directly proportional to the level of democracy of the state, and "[i]n an established democracy, such as El Salvador, the claimant must do more than merely show that he or she went to see members of the police force, and that those efforts were unsuccessful."

[16] The Board found that the Applicant did not report the extortion demands or jewellery theft to the police at the police station as they had advised her to do. While she claimed that she was afraid to do so because the extortionists would know, the Board found that:

> A claimant cannot rebut the presumption of state protection in a functioning democracy by asserting only a subjective reluctance to engage the state. Doubting the effectiveness of the protection offered by the state when one has not really tested it does not rebut

> the existence of a presumption of state protection. The claimant did not go to the police because she was "afraid". The panel considers this to be unreasonable. In coming to this conclusion, the panel has considered the following documentary evidence and while it is acknowledged that the issue of criminal gang behaviour is prevalent, the panel considers the evidence to be persuasive that there is adequate state protection in El Salvador.

[17] The Board then reviewed some of the documentary evidence relating to state protection from criminal gangs in El Salvador, and drew the following conclusions:

> The panel recognizes that the documentary evidence is mixed but it does confirm that the state is taking serious efforts to combat gang violence and criminality and that those efforts are producing results…
>
> […]
>
> It is after considering this evidence and the particular circumstances of this claimant that the panel finds that were she to return to El Salvador today there are courses of action that would be reasonably available to her. The claimant has not established that if she chose to seek protection that it would not be reasonably forthcoming or that it would be objectively unreasonable for her to seek that protection.

ISSUES

[18] The Applicant states a number of issues in her submissions, but in my view the Respondent has more accurately stated what is at issue:

(a) Did the RPD err in finding that the risk faced by the Applicant had no nexus to a Convention refugee ground?

(b) Did the RPD err in finding that the risk faced by the Applicant is a generalized risk excluded from protection by 97(1)(b)(ii) of the Act?

(c) Did the RPD err in finding that the Applicant had failed to rebut the presumption that state protection is available to her in El Salvador?

STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[20] The Respondent argues that a standard of reasonableness applies when reviewing the RPD's conclusions regarding whether a claimant faces a generalized risk (*Paz Guifarro v Canada (Citizenship and Immigration)*, 2011 FC 182 [*Paz Guifarro*]), whether adequate state protection is available to the claimant (*Valdez Mendoza v Canada (Citizenship and Immigration)*, 2008 FC 387), and whether an applicant's fear of persecution has a nexus to a Convention ground of refugee protection (*Lozandier v Canada (Citizenship and Immigration)*, 2009 FC 770 at para 17). The Applicant disagrees regarding the standard of review applicable to the generalized risk finding, arguing that this is a question of legal interpretation to which a standard of correctness applies: *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 [*Portillo*]. The Respondent replies that the Court in *Portillo* declined to make a finding regarding the standard of review, as it was unnecessary to the decision.

[21] While I recognize there is mixed jurisprudence on this point, I think the preponderance of authority is that the RPD's interpretation and application of s. 97(1)(b) of the Act regarding whether a risk is a generalized risk is subject to review on a standard of reasonableness: see *Paz Guifarro*, above, at paras 18-19; *Lozano Navarro v Canada (Citizenship and Immigration)*, 2011 FC 768 at paras 15 and 16; *Garcia Vasquez v Canada (Citizenship and Immigration)*, 2011 FC 477 at paras 13 and 14; *Correa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 252 at para 19 [*Correa*]; contra *Chalita Gonzalez v Canada (Citizenship and Immigration)*, 2011 FC 1059 at para 29; *Innocent v Canada (Citizenship and Immigration)*, 2009 FC 1019 at para 37.

[22] More importantly, it is clear from a long and growing line of Supreme Court of Canada cases that there is a presumption that an administrative decision-maker's interpretation of its home statute or a closely-connected statute is a question of statutory interpretation that is entitled to deference on judicial review: *Dunsmuir*, above, at para 54; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]; *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at para 34; *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 34; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 18, 23 and 24; *Doré v Barreau du Québec*, 2012 SCC 12 at paras 46-47, 343 DLR (4th) 193; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 21-22 [*McLean*]. This presumption is not "set in stone" (*McLean*, above, at para 22; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para. 16), but the Court must have a principled

reason for departing from it, and none has been identified here. As such, in my view, each of the issues that arise here is reviewable on a standard of reasonableness.

[23] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of 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 law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[24] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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,	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) 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	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

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.

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.

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 themself 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

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

standards, and	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.

ARGUMENT

Applicant

Nexus to a Convention refugee ground

[25] On the issue of nexus, the Applicant says the jurisprudence establishes that membership in a family can constitute membership in a social group for the purposes of refugee protection: *Ndegwa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 847 at para 9 [*Ndegwa*]; *Al-Busaidy v Canada (Minister of Employment and Immigration)* (1992), 139 NR 208 [*Al-Busaidy*]. She also argues that the RPD failed to provide any reasons why she had not established a nexus as a young female, which was specifically argued at the hearing.

Generalized risk finding

[26] The Applicant argues that the RPD's interpretation of s. 97(1)(b) on the issue of generalized risk was both incorrect and unreasonable, and in particular the Board's finding that "the fact that the claimant was actually personally targeted by criminals for extortion does not mean that her risk was, or would be upon a return to El Salvador, not a general risk." The Applicant says the two parts of this statement simply cannot coexist: if an individual is

personally targeted, then the risk they face is no longer general. Thus, the RPD acted unreasonably in applying the generalized risk exception to her when it had accepted that she had been personally targeted: *Tomlinson v Canada (Citizenship and Immigration)*, 2012 FC 822 [*Tomlinson*]; *Portillo*, above; *Kaaker v Canada (Citizenship and Immigration)*, 2012 FC 1401; *Petrona Quintanilla De Rivas v Canada (Minister of Citizenship and Immigration)*, IMM-4180-11, March 20, 2012 (FC).

[27] The Applicant argues that it is unreasonable to turn a particularized risk into a generalized one simply because others would be subject to the same risk. The fact that others may be subjected to the same particularized risk does not change the nature of the risk faced by the Applicant: *Hernandez Lopez v Canada (Citizenship and Immigration)*, 2013 FC 592. She quotes *Balcorta Olvera v Canada (Citizenship and Immigration)*, 2012 FC 1048 at para 40, where Justice Shore followed Justice Gleason's reasoning from *Portillo*, above:

> [40] … Firstly, it is problematic to accept that a person who has been specifically targeted faces a risk that is faced generally by other individuals. The risk of an individual who is being targeted is qualitatively different from the risk of an individual who has a strong likelihood of being targeted. As such, the former cannot be faced generally...

[28] If the Board's finding is correct, the Applicant argues, it is unlikely that there would ever be a situation in which s. 97(1) would provide protection for crime-related risks, contrary to the Court's direction in *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143 [*Vaquerano Lovato*] that:

> [14] As noted in *Vivero*, section 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.

[29] The Applicant says the RPD in this case misunderstood the requirements of s. 97(1), and erred by focusing on the reasons for the persecution, which are not at issue under s. 97(1). The mere existence of personalized risk should be enough to secure protection under that provision. The issue is not why the Applicant was targeted, but how she was targeted.

[30] The Applicant argues that the issue of whether a risk is generalized is not determined by the fact that the Maras target the population generally, but by the fact that she was personally targeted. The Board had a duty to carry out an individual inquiry regarding her forward-looking risk, and failed to do so: *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 [*Prophète FCA*]; *Martinez Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 [*Martinez Pineda*]; *Vaquerano Lovato*, above. The generalized risk exclusion should apply only in extreme situations such as a general disaster, the Applicant argues, and is therefore not applicable here: *Surajnarain v Canada (Citizenship and Immigration)*, 2008 FC 1165.

[31] The Applicant says that an applicant who has been specifically targeted and subjected to repeated threats and attacks is subjected to a greater risk than that faced by the population in general and is entitled to s. 97 protection: *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2011 FC 62; *Martinez Pineda*, above. The same is true of persons specifically and personally targeted for death by a gang in circumstances where others generally are not:

Guerrero v Canada (Citizenship and Immigration), 2011 FC 1210; *Ponce Uribe v Canada (Citizenship and Immigration)*, 2011 FC 1164.

[32] In this case, the Applicant submits, the RPD misstated the nature of her risk. The Maras' persecution against her started not because she was perceived to be wealthy, but because her father resisted the Maras' demands and was killed. The Maras specifically targeted the family, and continued to do so even after the Applicant's mother sold all she had, left the country and moved her children to a rural area, and after the family ceased to be "wealthy." The Board's failure to address the specific nature of the threat she faced led it to wrongly conflate that risk with one faced generally in El Salvador: *Portillo*, above; *Arevalo Pineda v Canada (Citizenship and Immigration)*, 2012 FC 493; *Martinez De La Cruz v Canada (Citizenship and Immigration)*, 2013 FC 1068 [*Martinez De La Cruz*].

State protection finding

[33] The Applicant argues that the RPD's conclusion that she had not rebutted the presumption of state protection was also unreasonable.

[34] Applicants need not risk their lives in seeking state protection merely to demonstrate its ineffectiveness, the Applicant argues: *Gonsalves v Canada (Citizenship and Immigration)*, 2008 FC 844 at para 16; *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724; *Oliveros Rubiano v Canada (Citizenship and Immigration)*, 2011 FC 106; *Katwaru v Canada (Citizenship and Immigration)*, 2007 FC 612. In this case, the Applicant made several attempts to contact the police, and they did not take her seriously, but merely requested her to go to the police station

personally. The Applicant says the police clearly demonstrated an unwillingness to make any attempt to investigate, which makes the RPD's conclusion unreasonable: *Kraitman et al v Canada (Secretary of State)* (1994), 81 FTR 64, 27 Imm LR (2d) 283 (FCTD).

[35] The Applicant notes that the test for state protection is adequacy (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 [*Flores Carrillo*]). Efforts in themselves are not sufficient; the tribunal must give an "indication of the effectiveness of the protection mechanisms": *Ralda Gomez v Canada (Citizenship and Immigration)*, 2010 FC 1041 at para 28. In other words, "serious and genuine efforts" is not the test: *Lopez v Canada (Citizenship and Immigration)*, 2010 FC 1176 at para 8 [*Lopez 2010*]. Those efforts must have "actually translated into adequate state protection": *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634 at para 75 [*Jaroslav*]; *Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598 at para 39; *Lopez 2010*, above, at para 8. An assessment of adequacy includes determining whether, in practice, the remedies available are useful: *Hernandez v Canada (Citizenship and Immigration)*, 2007 FC 1211; *Vigueras Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359.

[36] The Applicant also argues that the RPD applied the wrong test for the adequacy of state protection, focusing mainly on efforts that the government is making to combat the Maras. Evidence of improvement in the country does not fully address the particular situation of the Applicant, and does not specifically answer the question of whether a person targeted by the Maras would have adequate state protection in El Salvador. The RPD failed to examine state protection from the viewpoint of the specific risk faced by the Applicant, and therefore its

analysis was unreasonable: *Avila Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 1291; *Martinez Gonzalez v Canada (Citizenship and Immigration)*, 2013 FC 898. It also failed to address how the efforts El Salvador is making to combat the Maras are translating into adequate state protection: *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364.

[37] The Applicant says she provided extensive documentary evidence demonstrating that victims of the Maras cannot obtain adequate state protection, and that the state's anti-gang efforts are not translating into adequate protection. She says the Board's own National Documentation Package for El Salvador shows the same. The portions quoted by the Board show that the "law to protect victims and witnesses needs to be modified to adequately protect victims," and that protection is only offered "at the trial stage" for those who come forward to make complaints about the Maras.

Respondent

[38] The Respondent argues that the Board's findings on generalized risk and state protection were both reasonable, and that each was sufficient on its own to dispose of the claim.

Nexus to a Convention refugee ground

[39] The Respondent argues that an individual who is a victim of crime or a personal vendetta cannot generally establish a link between their fear of persecution and the grounds of refugee protection (*Kang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1128; *Desir v Canada (Citizenship and Immigration)*, 2011 FC 225), and that the Board's finding that the Applicant was a victim of crime and did not establish a nexus to the s. 96 grounds was

reasonable. The cases cited by the Applicant on this point – *Ndegwa* and *Al-Busaidy*, above – can both be distinguished, the Respondent argues. The applicants' family members in those cases were targeted based on the s. 96 grounds of gender and nationality respectively, and the applicants were found to have a nexus based on membership in the family of a person who feared persecution on Convention grounds. In the present case, the risk to the Applicant's family was one of extortion and criminality that had no connection to a s. 96 ground. Furthermore, the Applicant's own evidence was that she feared she would be targeted for extortion on return to El Salvador due to her perceived wealth after living abroad.

Generalized risk finding

[40] The Respondent says that the test under s. 97 of the Act is conjunctive: an applicant must establish both that she faces a personalized risk and that the risk is not faced generally by other individuals in or from that country. This means that the risk cannot be faced by a significant subset of the population: *Paz Guifarro*, above, at para 32; *Baires Sanchez v Canada (Citizenship and Immigration)*, 2011 FC 993 at para 27 [*Baires Sanchez*].

[41] The Applicant does not contest the finding that extortion by the MS and related violence are risks generally faced by others in El Salvador, but argues that the generalized risk exception does not apply because she was personally targeted. The Respondent says this is an attempt to reduce the conjunctive test to a single element, which has been rejected by this Court. For example, the Court in *Paz Guifarro* upheld the Board's decision, which accepted that the applicant was subjected personally to risk, but rejected the claim since extortion was a widespread risk for all citizens in Honduras: *Paz Guifarro*, above, at para 32; see also *Fernandez*

Ramirez v Canada (Citizenship and Immigration), 2012 FC 69 [*Fernandez Ramirez*]; *Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 11; *Wilson v Canada (Citizenship and Immigration)*, 2013 FC 103 [*Wilson*]. These cases make it clear that personal targeting is not enough to take the Applicant outside of the generalized risk exception. She also had to show that the risk she faced was not shared by a large sub-group of the population: *Baires Sanchez*, above. Instead, her evidence was that anyone perceived to have wealth was at risk of extortion in El Salvador.

[42] The argument that the Board misstated the nature of the Applicant's risk reflects a selective review of the reasons and the evidence. The Board noted that the Applicant's father was targeted because he refused to accede to the demands of the MS, but found that this did not remove the risk from the generalized risk exception, since "extortion by gangs and criminals and the risk associated with non-payment is a risk many other citizens also face in El Salvador." The Applicant's own evidence showed that her family was targeted because individual family members were perceived to have money, and she testified that she would be targeted by the Maras upon her return due to her perceived wealth when returning from abroad. These are generalized risks in El Salvador as shown by the documentary evidence and the Applicant's own evidence, the Respondent argues. The risk to the Applicant did not cease to be generalized because her family was targeted for failing to comply with the demands of the MS, nor because she herself was targeted: *Paz Guifarro*, above; *Chavez Fraire v Canada (Citizenship and Immigration)*, 2011 FC 763; *Wilson*, above.

State protection finding

[43] The Respondent argues that the Board's finding on state protection was reasonable in light of the documentary evidence and the Applicant's own failure to approach the state for protection.

[44] The Applicant's submission that the police were unwilling to help her is unsupported by the record. She stated that she telephoned the police three times, and was asked to come to the station to make a formal report. She failed to do so, and there is no evidence that she asked the police to come to her home and they refused. The Board considered the Applicant's explanation for her failure to make a formal report – that she was afraid to go to the police station – and found it to be unreasonable. At best, it showed a subjective reluctance to engage the state, and more is required to rebut the presumption of state protection: *Kim v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126. The Respondent says the Board also considered the country condition documentation and found that this evidence did not rebut the presumption of state protection.

[45] The argument that the RPD applied the wrong test by focusing on the efforts of the state to address gang violence is without merit for two reasons. First, it is an attempt to reverse the onus on the question of state protection. It was not for the Board to question whether the laws and programs discussed in the country documents had in fact been implemented. Rather, it was for the Applicant to show that, in spite of these laws and programs, state protection was inadequate, which she failed to do: *Flores Carillo*, above; *Camacho v Canada (Citizenship and*

Immigration), 2007 FC 830. Second, the reasons show that the Board considered both the existence of laws and their implementation. The documentary evidence quoted by the Board discussed the successful capture and arrest of many members of the MS, and there were reports of a significant reduction in criminal activity by the Maras and other gangs as a result of the deployment of soldiers to assist the police. In the case of the attack on the Applicant's uncle, the RPD noted that the assault was reported to police and two individuals were arrested. Thus, the finding that the Applicant failed to rebut the presumption of state protection was reasonable.

ANALYSIS

[46] The Applicant seeks refugee protection against the widespread extortion and gang violence that exists in El Salvador. This is entirely understandable, but refugee protection is not available for all risks that a claimant might face in their home country. While acknowledging the problems in El Salvador, the Board found that the Applicant did not face s.96 persecution or s.97 risk.

[47] The Applicant says that the Board failed to address her nexus argument that she was a young female who did not have the protection of her father. The issue is dealt with in paragraph 8 of the Decision:

> In her PIF evidence, the claimant bases her fear of persecution pursuant to section 96 of the *Immigration and Refugee Protection Act* on her membership in a particular social group. In submissions, counsel suggested that the nexus to section 96 was the claimant's family, specifically a family who had rejected orders from gang members, or, failing that, a young female who did not have the protection of her father. The panel respectfully disagrees with this as the perpetrators of the acts against the claimant (and her family)

> are illegal gang members, identified as possible Mara. As the panel concludes that what the family faced did not have a nexus to the definition, then so to, the claimant cannot be a member of a particular social group, namely that of family. The panel finds that the claimant is indeed a victim of crime with no established link to a Convention refugee ground under section 96 of the *Immigration and Refugee Protection Act*. Therefore, the claim is being considered pursuant to the subsection 97(1) of the *Immigration and Refugee Protection Act* based on the claimant's PIF and oral evidence and her alleged risk to life or a risk of cruel and unusual treatment of punishment or a danger of torture.
>
> [footnote omitted]

[48] The Board specifically mentions the young female without the protection of her father ground for nexus, and rejects it for the reasons given. The risks that the Applicant faces are not linked to her identity as an unprotected woman. The Applicant did raise sexual violence in her narrative, but it is clear from the record and the Board's reasons that there was no convincing basis for saying that she was targeted by the Maras because she was an unprotected female. The evidence did suggest that members of her family have been consistently targeted and this is why the Board concludes that "what the family faced did not have a nexus to the definition" so that "the claimant cannot be a member of a particular social group, namely that of family."

[49] The evidence shows that different family members have been targeted but, in my view, the evidence suggests that, in each case, they have been targeted because they are perceived to have wealth. I do not think the Board's findings on this issue can be said to be unreasonable or that the Board failed to consider the Applicant's nexus claims.

[50] On generalized risk, the Applicant feels that the Board failed to address the specific degree and kind of targeting that she faced and, in particular, the fact that Maras persist in

looking for her and asking about her even while she is out of the country. She says that the issue is the degree of the hunt for her and its persistence, and that motive is not the issue; it is rather the degree of targeting.

Recent case law on generalized risk

[51] In *Correa*, above, I identified two errors of reasoning that risk emptying s. 97 of any protection for the victims of criminal gangs, contrary to the Court of Appeal's direction in *Prophète FCA*, above. The first results from treating the threats and violence described by applicants as personal targeting - often reprisals for failure to comply with gang demands - as merely an "extension of" or "consequential harm" arising from the generalized risk of extortion experienced by large segments of the population, such as those perceived as having wealth: see *Correa*, above, at para 53. The second results from over-extending the valid observation made in *Gabriel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1170 that "a generalized risk could be one experienced by a subset of a nation's population": *Correa*, above, at para 64.

[52] It is the first of these two errors that is most relevant here. The problem with treating an escalation of threats and violence resulting from the refusal of gang demands as merely an "extension of," or "consequential harm" arising from, the generalized risk of extortion is that it erases all distinctions based on the degree or proximity of the risk. This was explained in *Correa* as follows:

> [54] The Court appeared to give some credence to this view when it stated in *Romero v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 772 [*Romero*] that:
>
> > [18] Counsel, creatively, argues that the fact that the applicant sought to resist the extortion by

> reporting it to the police makes him unique, or brings him within a unique or discreet sub-group of the general population and hence within subsection 97(1)(b)(ii). In my view, the risk or threat of reprisal cannot be parsed or severed from the demand for payment. The act of criminality is established on the demand of payment and implicit or explicit threat of reprisal for failure to pay. The fact that the threat is implemented or the victim reports the extortion does not bring them outside of the operative words of subsection 97(1)(b)(ii), namely whether the threat they face is generalized.
>
> [Emphasis added]

[55] In my view, this analysis from *Romero*, above, has been superseded by subsequent cases, including some very incisive analysis by Justice Rennie himself (see *Vivero*, *Lovato*, *Marroquin*, all above), and no longer represents a valid approach for this Court or the RPD to follow.

[56] The problem with this approach lies in assigning too much importance to the initial reasons for the threat. In doing so, it seems to improperly import elements of the s. 96 test into the s. 97 context. Under s. 96, the reason one is targeted is at the heart of the analysis, because of the requirement to establish a nexus to Convention grounds of protection. Under s. 97, by contrast, it has very little relevance at all. Someone may be initially targeted for extortion because he/she is a shopkeeper, but that is irrelevant to the risk faced now and in the future except to the extent that it provides clues to the nature and extent of the threat objectively considered. It does not matter what personal characteristic of the victim prompted the perpetrator to target them (e.g. youth, perceived wealth or ownership of a business) or what motivates the perpetrator to target anyone in the first place (e.g. increasing wealth through extortion or acquiring "drug mules" through forced recruitment).

[57] The analysis under s. 97 is objective and forward looking. We should not be concerned with what is in the mind of the perpetrator, except to the degree it assists with that analysis. It may well play a role in that sense: if a gang always kills those who report them to police, it will be quite relevant to a risk analysis that this is the "reason" the gang is currently targeting an applicant. However, it seems to me that it is completely inappropriate to refer to the motivation of the perpetrator to box the victim into a category of persons subject to a "generalized risk," such that

> subsequent or "consequential" harms cannot "remove them from the exception." There is no "consequential"or "resulting" risk under s. 97, there is only risk, objectively and prospectively considered. The question is not whether others with similar characteristics could find themselves in the Applicant's position; it is whether others "generally" are in that position now.

[53] Other members of the Court have also emphasized that it is an error to conflate the reason for the risk (or the reason an individual was targeted) with the risk itself: see *Vaquerano Lovato*, above, at para 13; *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at para 29; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at para 29 [*Guerrero*].

[54] Contrary to the "consequential risk" logic, both the nature and the degree of risk must be considered in determining whether the applicant in any given case faces the same risk experienced by a broad segment of the population in their country of origin: *Marroquin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1114 at para 11; and *Martinez De La Cruz*, above, at para 41; *Correa*, above, at para 61. As Justice Mactavish explained in *Tomlinson*, above, at para 18:

> The Board further erred in stating that what mattered was whether the risk faced by Mr. Tomlinson was "a type of risk that is also faced by a generality of others in Jamaica..." <u>The question for determination was not just the type of risk faced but also the degree of risk.</u> As in *Portillo*, the Board erred in conflating a highly individualized risk faced by Mr. Tomlinson with a generalized risk of criminality faced by others in Jamaica.
>
> [Emphasis added]

[55] Justice Zinn employed similar reasoning in *Guerrero*, above, at para 34, in drawing a distinction between a heightened risk of random or indiscriminate violence (because of perceived wealth in that case), which may still be a generalized risk, and personal targeting that gives rise to a risk not faced generally by others:

> [34] I do not accept that protection under the Act is limited in the manner submitted by the respondent. This is not to say that persons who face the same or even a heightened risk as others face of random or indiscriminate violence from gangs are eligible for protection. However, 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.

Did the Board err in its generalized risk analysis?

[56] The RPD's reasons in the present case show that it never really engaged with the question of whether the pattern of attacks and targeting experienced by the Applicant and her family meant that she faced a risk different from the general risk of extortion. On the contrary, while acknowledging the "general credibility" of her allegations (para 11), and accepting that she was personally targeted (para 13), or at least "believes she has been personally targeted" (para 18), the only risk considered by the Board is the general risk of extortion faced by those who are perceived to have money.

[57] The Board observed at para 12 that "Extortion is a crime commonly committed by criminal gang members in El Salvador." especially members of MS and M18, and that "The problem of extortion is widespread and affects those people who are perceived to have or do have wealth."

[58] At para 13, the Board observed that "the risk to life in El Salvador relating to extortion faced by the claimant is a wide-spread common risk generally faced by others in the country," and that "The fact that the claimant was actually personally targeted by criminals for extortion does not mean her risk was, or would be upon a return to El Salvador, not a generalized risk."

[59] The Board observed at para 14 that "The fact that the victim of generalized violence has an identity and that their identity is or becomes known to the perpetrator does not mean that they are not a victim of generalized violence." Among other cases, the RPD pointed to the Court's decision in *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029 as being applicable to the current circumstances. The Board described that case as finding that "the risk of violence and crime is a generalized risk faced by individuals perceived to have money," and even if the applicant in that case "was more at risk because he was a small business owner or a member of a particular economic sector, it still did not transform a generalized risk of criminal violence into a personal one" (Decision at para 15).

[60] The Board went on to find that (Decision at para 17):

> [17] The documentary evidence suggests that this type of extortion covers almost any age, gender, type of employment and, that the primary criteria apparently is whether or not the criminals, rightly or wrongly, believe their target might have some money. The fact that an identified person would face retaliation if they stopped complying with the demands of the criminals still does not remove the risk from the exception if it is one faced generally by others according to this cited case law. As extortion by gangs and criminals and the risks associated with non-payment is a risk many other citizens also face in El Salvador, the panel finds that the risk faced by this claimant is a generalized one.

[61] While stating that it was "cognizant of the direction provided by Mr. Justice Zinn in Guerrero," the Board does not discuss the implications of that case for the present one. Rather, it simply falls back on an assertion that the risk of extortion is faced by all who are perceived to have money, and appears to view any increased risk due to personal targeting as simply flowing from the "*modus operandi*" employed by the gangs in carrying out extortion:

> [18] The panel, however, is also cognizant of the direction provided by Mr. Justice Zinn in *Guerrero*. The panel accepts that the claimant believes she has been personally targeted for extortion demands. The documentary evidence supports that the risk of this criminal activity, if the claimant was to return to El Salvador, might well continue. As previously noted, the documentary evidence, even through a general reading, speaks to the criminal element targeting anyone who they perceive might be wealthy. The *modus operandi* is that the demand for money is made and if the victim does not provide payment the severity of the gang's threats will increase to try and force compliance to their demands. This risk, however, based on the extent to which is appears to be widespread throughout El Salvador, falls within the generalized exception of the *Immigration and Refugee protection Act*.

[62] In my view, this analysis treats the increased risk faced by the Applicant as a result of personal targeting as simply "consequential harm" or "resulting risk" flowing from the initial extortion demands coupled with the *modus operandi* employed by the gangs, which was one of the errors identified in *Correa*, above. The Board never seriously considers whether, in fact, the Applicant faces the same risk as others who are perceived to be wealthy, or whether she faces a different risk because of the pattern of personal targeting. The Board equated the Applicant's risk to the risk of extortion faced generally by those perceived to have money in El Salvador, and found (quite reasonably) that the latter was a risk faced generally by others in that country.

[63] In sum, the reasons reveal that the Board was not cognizant of the need to consider both the nature and the degree of risk faced by the Applicant if she were to return to El Salvador, in light of the pattern of attacks and targeting experienced by her and her family.

[64] This is similar to the error observed by Justice de Montigny in *Martinez De La Cruz*, above, where he emphasized that the inquiry into individual circumstances required under s.97(1)(b)(ii) must be sensitive to the pattern of events and the connections between them. In that case, the applicants believed they were initially targeted because of their perceived wealth, but the situation evolved after they refused the gang's demands and reported them to police. Justice de Montigny found that the Board failed to consider or take a firm position on how the events described by the applicants were connected, and therefore mischaracterized the risk they faced:

> [40] It may well be that no single incident would be sufficient on its own to ground a risk under section 97 of IRPA. At the same time, it is not at all clear that when they are considered as a whole and as a chain of events, they can be characterized as another instance of criminality and violence. In many respects, this case bears many similarities with many instances where the Board casually concluded that the Applicants merely experienced general criminality and violence despite having been repeatedly assaulted, threatened, stalked and intimidated: see, for example, *Portillo*; *Guerrero v. Canada (MCI)*, 2011 FC 1210; *Pineda v. Canada (MCI)*, 2012 FC 493; *Zacarias v. Canada (MCI)*, 2011 FC 62; *Tobias Gomez v. Canada (MCI)*, 2011 FC 1093. While the Member understood the facts of the claim before her in a general sense, she did not address the true nature of the risk faced by the Applicants. This is a fatal error...
>
> [41] As a result of this error, the Member could not properly compare the risk faced by the Applicants to that faced by the general population or a significant group thereof in the country to determine whether the risks are of the same nature and degree. If, as the Applicants claim, the risk they face is not simply to be susceptible of being targeted to work for the Zetas or to be extorted because they are perceived as successful businesspeople, but rather a fear of retaliation for defying the Zetas and even reporting them to the police, then that risk is not of the same significance than the

> risk to which the general population or a significant group of that population is exposed.
>
> [Emphasis added]

[65] In my view, a similar error occurred in the present case, amounting to a failure to conduct the individualized inquiry mandated by *Prophète FCA*, above.

State Protection

[66] The Board found it to be unreasonable that the Applicant did not go to the police station to file a report (as requested when she called to report the threats) because she was afraid. However, this failure to approach the state for protection only matters if adequate protection would have been reasonably forthcoming in the circumstances.

[67] The very pervasiveness of violent crime at the hands of MS and M18, cited by the Board as evidence that the risk faced by the Applicant is a generalized risk, is an indication that adequate state protection may not be available for those targeted by these gangs. The Board observes earlier in its reasons (at para 12) that:

> Extortion is a crime commonly committed by criminal gang members in El Salvador according to the documents. This crime is accompanied by other widespread crimes that they perpetuate in the country, such as robbery, murder and kidnapping. There are further numerous references to the fact that the MS and M18 are the largest gangs in the country and are involved not only in killing, robbery and kidnapping but in extortion and dealing drugs… The problem of extortion is widespread and affects those people who are perceived to have or do have wealth.

[68] Was there evidence that adequate state protection is available to persons specifically targeted by MS? The Board acknowledged that the documentary evidence was "mixed," but found that "the state is taking serious efforts to combat gang violence and criminality and that those efforts are producing results." The Board then quoted extensive passages from Responses to Information Requests (RIRs) from the Board's Research Directorate. One of these included the observation that:

> According to the [U.S. Overseas Security Advisory Council], the [Salvadoran National Civil Police (Policía Nacional Civil)] still needs to improve in order to function as an effective organization that can protect the public (US 20 Apr. 2010). Among other things, the techniques for routine patrols and efforts to suppress crime and gangs are ineffective (ibid.). According to the OSAC, equipment shortages limit the ability of police officers to respond effectively to crime (ibid.).
>
> [RIRs, SLV103445.FE (3 June 2010)]

[69] The same RIR cites a deployment of 6,500 soldiers to work with police "to fight delinquency in the country," but in terms of results, it says only that "Additional information on the outcome of the police and army intervention could not be found among the sources consulted by the Research Directorate."

[70] A victim and witness protection program was described in the same RIR as providing "good results," but also as having "legal deficiencies," lacking "human resources to help protect victims and witnesses" and needing "to be modified to adequately protect victims." The RIR also stated that victims of extortion are offered protection "only at the trial stage."

[71] A later RIR also quoted by the Board (RIRs, SLV103773.E (13 July 2011)) discusses a new anti-gang law and cites news reports that "President Funes has initiated a number of measures to combat crime in El Salvador, including the deployment of the army to assist the National Civil Police." The Attorney General's office indicated that the results of the anti-gang legislation would "not come very fast" and "instead of conducting large-scale raids, they would [translation] 'concentrate on exhaustive investigations.'" The RIR discusses a number of arrests of gang members, including MS members, and then observes:

> *Voces*, a digital news source based in San Salvador, reports the Defence Minister as stating that the deployment of 3,000 soldiers in the 29 high-crime areas has [translation] "helped to reduce the criminal activities of maras and gangs by 70 percent" (Voces 7 Jan. 2011). Elsalvador.com also notes that since the army began monitoring the streets on 6 November 2009, homicide rates in the 20 most violent municipalities has started to decrease [translation] "considerably" (Elsalvador.com 26 Feb. 2011). However, [translation] "[t]he military presence in these places forced the exodus of the gangs to areas that did not have problems with maras or even a lot of crime" (ibid.).

[72] The document then goes on to discuss proposals and future initiatives not yet undertaken.

[73] This evidence supports the Board's observation that "the state is taking serious efforts to combat gang violence and criminality," but of course that is not the test for state protection. Nor is the issue whether those efforts "are producing results" in terms of arrests and prosecutions. The question is whether they have translated into adequate protection on the ground for persons in the Applicant's circumstances: *Jaroslav*, above, at para 75; *Lopez 2010*, above, at para 8.

[74] The RPD did not provide an analysis of the evidence quoted, but simply concluded:

> [25] It is after considering this evidence and the particular circumstances of this claimant that the panel finds that were she to return to El Salvador today there are courses of action that would be reasonably available to her. The claimant has not established that if she chose to seek protection that it would not be reasonably forthcoming or that it would be objectively unreasonable for her to seek that protection.

[75] In my view, this is an unreasonable conclusion that is not supported by the evidence quoted by the Board.

[76] The question is whether adequate state protection would have been available, or would in the future be available, for someone in the Applicant's circumstances, who is being specifically targeted by the MS. The only evidence directly on that point cited by the Board indicates that the national police force "still needs to improve in order to function as an effective organization that can protect the public," and that a witness protection program, while delivering some positive results, had insufficient resources to adequately protect victims and provided protection to victims of extortion only during trials.

[77] This evidence contradicts the Board's conclusion, and makes that conclusion unreasonable.

[78] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is referred back for reconsideration by a different Board Member.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alla Kikinova	FOR THE APPLICANT
Rachel Hepburn Craig	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michael Loebach Barrister and Solicitor London, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT