

Federal Court



Cour fédérale

**Date: 20110617**

**Docket: IMM-7240-10**

**Citation: 2011 FC 705**

**Ottawa, Ontario, June 17, 2011**

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

**BETWEEN:**

**JOSE ANIBAL DIAZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a negative decision of the Immigration and Refugee Board (the Board) rendered on November 18, 2010, where it determined that the applicant is not a Convention refugee and is not a person in need of protection.

[2] For the reasons that follow, the judicial review application shall be allowed.

## **Facts**

[3] The applicant fled El Salvador in 1993 to the United States due to ongoing victimization of the populace by gangs. He came to Canada in November 2008 and filed for asylum and also he wanted to get his 16-year-old son out of El Salvador but the latter was murdered by gang members on October 24, 2009 before the applicant's refugee claim was heard.

[4] The applicant believes that if returned to El Salvador, he will become the target of the same gangs who have been victimizing his family. His fear is that they will either seek to extort him or they will assume he will want to avenge the death of his son and will pre-empt this by killing him.

## **The Board's decision**

[5] The Board found that the applicant testified in a straightforward manner, there were no serious or relevant inconsistencies or contradictions between his testimony and the evidence. His testimony was authentic, compelling and the Board was satisfied that he gave reliable and trustworthy evidence.

[6] The determinative issue, however, was whether or not there was a nexus to a Convention ground.

[7] The Board concluded that the applicant did not fear gangs on the basis of his nationality, race, religion, or political opinion. The Board also considered whether the applicant might be a part of a social group by virtue of his being a 'family member of those who resist gang recruitment'. However, the Board found that victimization alone cannot form the basis of membership in a

particular social group. Although it was noted that ‘the family’ has been recognized as a particular social group in certain cases, for this to apply, it must be found that the original persecuted person was targeted for a Convention ground. The Board found that this did not apply in the case of the applicant.

[8] The Board member relied upon the analysis in *Bojaj, Edmond v Canada (Minister of Citizenship and Immigration)*, 9 Imm LR (3d) 299, 194 FTR 315, confirmed in *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, 123 ACWS. (3d) 739 where the Court found that victims of families in blood feuds fearing retaliation and murder are not members of a particular social group as their fear is based on criminality, which does not constitute fear of persecution based on a Convention ground (*Larenas v Canada (Minister of Citizenship and Immigration)*, 2006 FC 159, *Vickram v Canada (Minister of Citizenship and Immigration)*, 2007 FC 457, 157 ACWS (3d) 609). Mr. Diaz’ situation was analogous to these cases.

[9] Having found that there was no nexus to a Convention ground, the Board went on to analyse the applicant’s case under section 97 of the Act.

[10] The Board considered the applicant’s risk to extortion but found that this was a generalized risk faced by the rest of the population (*Sherman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 702, and *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213).

[11] The Board went on to consider the risk faced by returnees from abroad perceived as wealthy in a violent country, but found that this risk is also faced generally by other individuals in the country, as the risk of all forms of criminality is felt by most (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, 78 Imm LR (3d) 163, 387 NR 149). In fact, the specific situation in the context of a Salvadorans perceived as wealthy was also considered in *Ventura De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845, and the Court came to the same conclusion as in *Prophète*. The Board further noted that this line of cases applies not only to extortion, but to all crime, including the fear that the gang who killed the applicant's son will murder him as well.

[12] The Board recognized that the applicant faces a risk in El Salvador. However, the Board found that this risk was not personalized but rather general that it is shared by most other Salvadorans.

### **Issues**

[13] The applicant submits numerous issues but the Court is of the opinion that only one is sufficient to dispose of this matter:

- Did the Board err in determining that the applicant did not face a personal risk pursuant to section 97 of IRPA?

**Standard of review**

[14] The above-mentioned issue concerns the Board's analysis of the evidence. As such, the factual findings should be given significant deference and be reviewed on the standard of reasonableness (*Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9).

***Did the Board err in determining that the applicant did not face a personal risk pursuant to section 97 of IRPA?***

[15] The applicant submits that the Board had no doubt that the applicant faced a risk in El Salvador (decision, para 15) but found that the risk was not personalized as it was shared by most other Salvadorans. Later on at para 19 the Board wrote "... While you may be specifically targeted, you would be the victim of the general and horrific crime problem in El Salvador. Your risk is no greater or different from most other residents there and your case is therefore not distinguished". The applicant argues that where there is specific targeting there is personalized risk and relies on *Martinez Pineda v Canada (Citizenship and Immigration)*, 2007 FC 365. Therefore, the Board's decision cannot stand because the conclusion is not justifiable and is contradictory to its findings that the applicant may be specifically targeted in El Salvador.

[16] The respondent, on the other hand, alleges that under section 97 of the Act, it is the applicant that has the burden of demonstrating that he personally faces a risk to his life or a risk of cruel and unusual treatment or punishment if returned to El Salvador.

[17] He underscores that the Board carefully weighed and assessed the objective country conditions evidence in El Salvador and noted that gang violence was widespread and pervasive and that no one was immune. Therefore, the Board did not err in finding that the applicant had failed to establish that the risk he faced was a personalized risk rather than a generalized one.

[18] The Court does not agree with the proposition advanced by the respondent. In the case at bar, the applicant has been found credible, his evidence trustworthy and reliable. The Board accepted at para 15 that the applicant was at risk and at para 19 that he was specifically targeted. There are no explanations for these findings. Is it because of the applicant's son's murder that gang members would kill him fearing that he would avenge his death? Or because the applicant's allegations were found credible? When an applicant's credibility is not in question, the Board has the duty to fully analyze and appreciate the personalized risk faced by that applicant in order to render a complete analysis of his claim for asylum under section 97 of IRPA, *Zacarias v Canada (Minister of Citizenship and Immigration)* 2011 FC 62 para 17.

[19] The Board's conclusion that the applicant is at no greater risk than other Salvadorans cannot be justified when it already accepted that he was at risk and specifically targeted. This outcome is outside the range of acceptable ones as qualified in *Dunsmuir* at para 47.

[20] The Court's intervention is warranted. No question for certification was proposed and none arise.

**JUDGMENT**

**THIS COURT ORDERS that:**

1. The application is allowed. The matter is referred back for redetermination by a newly constituted Board.
2. No question is certified.

“Michel Beaudry”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-7240-10

**STYLE OF CAUSE:** Jose Anibal Diaz  
And The Minister of Citizenship and Immigration

**PLACE OF HEARING:** Calgary

**DATE OF HEARING:** June 15, 2011

**REASONS FOR JUDGMENT:** BEAUDRY J.

**DATED:** June 17, 2011

**APPEARANCES:**

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