

Federal Court



Cour fédérale

**Date: 20120807**

**Docket: IMM-8293-11**

**Citation: 2012 FC 973**

**Ottawa, Ontario, August 7, 2012**

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

**BETWEEN:**

**NEKISHA KATDIJAH SAMUEL  
(A.K.A. NEKISHA KATDIJA SAMUEL)**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application by Ms. Nekisha Katdijah Samuel (Ms. Samuel), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision of the Immigration and refugee Board (the Board), rendered on October 26,

2011, wherein the Board concluded that Ms. Samuel is neither a Convention refugee nor a person in need of protection as contemplated by section 96 and subsection 97(1) of the *IRPA*.

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

## **II. Facts**

[3] Ms. Samuel is a citizen of St. Vincent and the Grenadines.

[4] On January 27, 2007, Ms. Samuel witnessed the murder of her brother, Kenford Samuel, at the hands of members of the Cuban Family Gang because of his long standing feud with that criminal organization.

[5] In June of 2007, a trial was held. Ian Blackett, a member of the Cuban Family Gang, was accused of murdering Kenford Samuel. Ms. Samuel testified at Ian Blackett's trial. Blackett was acquitted and subsequently deported to Grenada.

[6] After the trial, two of Kenford Samuel's friends were shot by an unidentified gunman.

[7] Ms. Samuel was provided with police protection during the trial. However, she was left unprotected after the trial. She subsequently experienced multiple incidents of harassment, verbal abuse and death threats from members of the Cuban Family Gang.

[8] She sought police protection on several occasions and informed the authorities of the threats. Notwithstanding her attempts to seek assistance from the authorities, Ms. Samuel allegedly continued to face incidents of harassment and death threats in St. Vincent until she fled to Canada.

[9] She arrived in Canada in December 2010 and filed a refugee claim in February 2011.

[10] In its decision, the Board found that Ms. Samuel's fear was not based on her gender. It also found that even though she was personally targeted by the Cuban Family Gang, on a number of occasions, the basis of the alleged risk is one that is generalized throughout St. Vincent. It further determined that Ms. Samuel had not rebutted the presumption of state protection with clear and convincing evidence. Consequently, the Board concluded that Ms. Samuel was not a Convention refugee or a person in need of protection.

### III. Legislation

[11] Sections 96 and 97 of the *IRPA* provide as follows:

Convention refugee	Définition de « réfugié »
<p><b>96.</b> 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,</p> <p>(a) is outside each of their countries of nationality and is unable or, by reason of</p>	<p><b>96.</b> 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 :</p> <p>a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du</p>

that fear, unwilling to avail themselves of the protection of each of those countries; or

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 treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

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

(ii) elle y est exposée en tout lieu de ce pays

every part of that country and is not faced generally by other individuals in or from that country,

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

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

alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

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

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

Person in need of protection

Personne à protéger

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

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

#### **IV. Issues and standard of review**

##### **A. Issues**

- 1. *Did the Board err in determining that Ms. Samuel's fear of the Cuban Family Gang had no nexus to section 96 of the IRPA?***

2. *Did the Board err in finding that the risk faced by Ms. Samuel at the hand of the Cuban Family Gang is one that is generalized in St. Vincent?*
  
3. *Did the Board err in determining that Ms. Samuel had not rebutted the presumption of the availability of adequate state protection in St. Vincent?*

**B. Standard of review**

[12] In *Soimin v Canada (Minister of Citizenship and Immigration)*, 2009 FC 218 at para 8, the Court held that the issue of determining whether an Applicant is part of a particular social group, based on gender allegations, is a question of mixed fact and law that is reviewable on the standard of reasonableness.

[13] The issue of assessing whether a person faces a generalized risk or not is also reviewable on a standard of reasonableness (see *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] FCJ No 415 [*Prophète I*]).

[14] Questions regarding the adequacy of state protection ought to be reviewed equally under a standard of reasonableness (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 157 ACWS (3d) 153 at para 38).

## V. Parties' submissions

### A. Ms. Samuel's submissions

[15] Ms. Samuel alleged belonging to the social group of “women in St-Vincent and the Grenadines who are subjected to death threats, reprisals, and violence as a result of witnessing a crime by members of a criminal organization” (see page 62 of the Certified Tribunal Record). In assessing whether Ms. Samuel belongs to a particular social group in St. Vincent, the Board had to consider the three prongs of the test set out in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [Ward]. However, Ms. Samuel claims the Board failed to apply the third part of the test. In finding that there was no nexus to a Convention ground, the Board misapplied the law, according to Ms. Samuel.

[16] Ms. Samuel also claims being personally targeted by members of the Cuban Family Gang, as evidenced by the threats and harassment she endured on numerous occasions in St Vincent. In its decision, the Board, according to her, wrongfully determined that since criminal gang violence is a risk generally faced by the population in St. Vincent, the risk she faced was a generalized one. A generalized risk does not automatically mean that the particular risk faced by a refugee claimant is one that is generally faced by the citizens of a country. The case at hand, according to Ms Samuel's counsel, contains similarities with the decision of this Court in *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365 [Pineda]. In *Pineda*, the Court concluded that, since the Applicant was subjected to repeated threats and attacks, he was subjected to a greater risk than the risk faced by the population at large. Ms. Samuel affirms that her particularized risk in St. Vincent

amounts to a greater risk. Consequently, the Board erred in concluding that she faced a generalized risk, in her country of origin, one that is shared by the population at large.

[17] As to the presumption of the availability of adequate state protection, Ms. Samuel argues that the Board ignored relevant and contradictory evidence, which, renders its conclusion unreasonable (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17). Documentary evidence was adduced before the Board to corroborate Ms. Samuel's position on her inability to obtain adequate protection from the authorities in St. Vincent, since she continued to be targeted by members of the Cuban Family Gang.

[18] For all these reasons, Ms. Samuel submits that the Board's decision warrants the Court's intervention.

#### **B. The Respondent's submissions**

[19] The Respondent argues that it is well established principle that being a victim of a crime does not, in itself, establish a link between a fear of persecution and a Convention ground (see *Asghar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 768 at para 24 [*Asghar*]). He refers to *Asghar*, where the Court wrote :

“...this evidence specifically indicates that these individuals are targeted by criminals who try to eliminate or silence them. As the Board concluded, and as the respondent submits, these are acts of vengeance, not persecution within the meaning of section 96 of the Act. The motives of these persecutors are criminal and are not covered by the Convention.”



[20] Therefore, according to the Respondent, the Board's finding is reasonable as the evidence adduced by Ms. Samuel clearly demonstrates that her fear related the Cuban Family Gang does not constitute persecution under section 96 of the *IRPA*.

[21] As for Ms. Samuel's membership in a particular social group, the Respondent contends that her definition of the particular social group proposed in this current application differs from the definition that was before the Board. The Board's decision must be reviewed by the Court using the social group as initially defined by Ms. Samuel, who referred to women in St Vincent.

[22] According to the Respondent, the Board's conclusion is reasonable. In applying *Ward* cited above, this Court has concluded in numerous decisions that "persons informing on criminal activity do not form a particular social group within the meaning of the Convention" (see the Respondent's memorandum at page 6). The Respondent also argues that the present case fails to meet the requirements of any of the three categories outlined in *Ward*, particularly the third category.

[23] Contrary to Ms. Samuel's assertion, Respondent alleges that the mere fact that an individual is specifically and personally targeted does not mean their risk is personalized (see *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182 at para 32; and *Rajo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1058 at paras 20 and 36; and *Flores Romero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 772 at paras 10-20). According to the Respondent, section 97 of the *IRPA* requires more than demonstrating that a refugee claimant was individually targeted.

[24] The Respondent underlines that the nature of the risk faced by Ms. Samuel is one that is generalized and is faced by others in St. Vincent. The Board's finding, in this regard, is reasonable.

[25] As to the issue of state protection, the Respondent submits that the documentary evidence adduced by Ms. Samuel is not sufficiently probative to overturn the Board's decision.

## VI. Analysis

### 1. *Did the Board err in determining that Ms. Samuel's fear of the Cuban Family Gang had no grounds under section 96 of the IRPA?*

[26] In *Asghar*, cited above, at paras 14, 25 and 26, the Court mentioned the following:

[14] The notion of particular social group must be assessed while keeping in mind that it is part of the "general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative": *Ward v Canada (Attorney General)*, [1993] 2 SCR 689. The Supreme Court of Canada identified three potential categories of social groups in *Ward, supra*:

(1) Groups defined by an innate, unchangeable characteristic;

(2) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association;

(3) Groups associated by a former voluntary status, unalterable due to its historical permanence.

...

[25] Case law from this Court has consistently established that the fear of reprisals motivated by vengeance and being a victim of a

criminal act are not equivalent to a persecution ground under section 96: *Rawji v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 1773, online: QL; *Mason v Canada (Secretary of State)*, [1995] FCJ No 815, online : QL; *Mousavi-Samani v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1267, online: QL; *Montchak v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 111, online: QL; *Klinko v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327. Victims of criminal acts therefore do not belong to a particular social group.

[26] In light of the categories identifying social groups in *Ward, supra*, I disagree with the applicant and do not find that the Board erred in deciding that his father, a Pakistani police officer who was called to testify as a prosecution witness, was not persecuted within the meaning of section 96 of the Act, since he was not a member of an identifiable social group.

[27] The Board wrote the following in paragraph 9 of its decision:

“In his written submissions, counsel proposed a putative social group for the claimant with a number of word additions which narrow it from ‘women in St. Vincent and the Grenadines’ that he suggests might still allow the claimant to fall within the particular social group ground of the Convention refugee definition. Unfortunately for the claimant, however, all of counsel’s word additions beyond ‘women in St. Vincent and the Grenadines’ refer to patently non-innate and changeable characteristics. His proposed particular group therefore runs afoul of the innate and unchangeable characteristic rule regarding particular social groups set out in *Ward* and therefore cannot be legally entertained.”

[28] The Respondent argues that the Board adequately considered the three categories in *Ward*. He underlines that Ms. Samuel proposed a different definition in her record from what she suggested before the Board. She wrote, in her record, that she belonged in the particular social group of “individuals in St. Vincent who are subjected to death threats, reprisals, and violence as a result of witnessing a crime by members of a criminal organization” (see page 5 of the Applicant further memorandum of argument). However, Ms. Samuel proposed the following definition before

the Board: “women in St. Vincent and the Grenadines who are subjected to death threats, reprisals, and violence as a result of witnessing a crime by members of a criminal organization” (see page 62 of the Certified Tribunal Record). In *Bekker v Canada*, 2004 FCA 186 at para 11, the Court of Appeal wrote the following:

“Judicial review proceedings are limited in scope. They are not trial de novo proceedings whereby determination of new issues can be made on the basis of freshly adduced evidence. As Rothstein J.A. said in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 FC 135, at paragraph 15, “the essential purpose of judicial review is the review of decisions” and, I would add, to merely ascertain their legality: see also *Offshore Logistics Inc. v. Intl. Longshoremen's Assoc.* 269 (2000), 257 NR 338 (FCA). This is the reason why, barring exceptional circumstances such as bias or jurisdictional questions, which may not appear on the record, the reviewing Court is bound by and limited to the record that was before the judge or the Board. Fairness to the parties and the court or tribunal under review dictates such a limitation. Thus, the very nature of the judicial review proceeding, in itself, precludes a granting of the applicant's request. In addition, there are other reasons, just as compelling, to refuse the applicant's request.”

[29] In the present case, the Court is bound by the record that was before the Board and cannot review the decision using Ms. Samuel's amended proposition.

[30] In addition, Ms. Samuel contends that the Board failed to apply the third part of the test in *Ward*, that is, “former voluntary status, unalterable due to its historic permanence”. In *Ward* cited above, at para 70, the Supreme Court stated the following:

“The meaning assigned to “particular social group” in the Act should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, *supra*, *Cheung*, *supra*, and *Matter of Acosta*, *supra*, provide a good working rule to achieve this result. They identify three possible categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.”

[31] Ms. Samuel argues that, since she testified against members of the Cuban Family Gang and could possibly testify against other members in the future, the very nature of her duty, as a witness, is unalterable due to its historical permanence.

[32] In *Zhu v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1026 at para 8, the Court held that in “Applying *Ward*, this Court has concluded in the past that persons informing on criminal activity do not form a particular social group within the meaning of the Convention. See, for example: *Serrano v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 570 (TD) [*Serrano*]; *Suarez v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1036 (TD); *Mason v Canada (Secretary of State)*, [1995] FCJ 815 (TD)”. Citizens who have witnessed a crime must testify. This does not qualify them as members of a particular social group (see *Serrano* mentioned above). For this reason, the Court concludes that the Board’s finding, with respect to the first issue, is reasonable.

**2. Did the Board err in finding that the risk faced by Ms. Samuel at the hands of the Cuban Family Gang is one that is generalized in St. Vincent?**

[33] In *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 at para 7 [*Prophète II*], the Court of appeal stated that “the examination of a claim under subsection 97(1) of the [IRPA] 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 (CanLII), 2007 FCA 99 at paragraph 15)”.

[34] In its decision, the Board noted that “while I acknowledge the fact that the Cuban Family Gang has specifically and personally targeted the claimant on a number of occasions, I still find, considering this matter within the entire context of the testimony and the country documents, that the basic genesis and nature of the risk to the claimant is one that nevertheless arose out of, and therefore is, a type of generalized risk: generalized gang violence in Saint Vincent” (see paragraph 10 of the Board’s decision). Contrary to what the Board states in its decision, the fact that Ms. Samuel was specifically targeted by members of the Cuban Family Gang is relevant. The criterion for the assessment of a generalized risk is an individualized inquiry based on the evidence adduced by the claimant.

[35] It was recognized that Ms. Samuel was targeted, on several occasions, in relation with her brother’s long-standing feud with members of the Cuban Family Gang. She was targeted once more because she witnessed her brother’s murder. Further to her testimony in the criminal trial involving

a member of the Cuban Family Gang, she was threatened again on several occasions after she received police protection.

[36] The Board made no credibility findings and appeared to have accepted Ms. Samuel's testimony as being truthful. The evidence adduced before the Board shows that Ms. Samuel was targeted, on several occasions and over a lengthy period of time. In the particular circumstances of this case, the Board's conclusion in regards of Ms. Samuel's particularized risk is unreasonable.

**3. *Did the Board err in determining that Ms. Samuel had not rebutted the presumption of the availability of adequate state protection in St. Vincent?***

[37] The Board did not err in determining that Ms. Samuel had not rebutted the presumption of the availability of adequate state protection in St. Vincent.

[38] In *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 38, the Federal Court of Appeal answered the certified question as follows:

“A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.”

[39] The evidence adduced must not only be clear and convincing but it must also support the basis of the refugee claim. Most of the documentary evidence adduced by Ms. Samuel concerns gender-based persecution, which is not applicable in the present case. As for the alleged police inaction, the facts of the case demonstrate that Ms. Samuel received police protection while she testified in the criminal prosecution. On several instances, after her testimony, the police responded to her complaints. Ms. Samuel failed to rebut the presumption of the availability of adequate state protection in St. Vincent.

[40] The Court underlines that it is well established that a finding of adequate state protection is fatal to claims under both sections 96 and 97 of the Act. Consequently, the Board's decision must stand (see *Macias v Canada (Minister of Citizenship and Immigration)* 2010 FC 598 at para 14).

## **VII. Conclusion**

[41] Ms. Samuel failed to rebut the presumption of the availability of adequate state protection in St. Vincent. For this reason alone, this application for judicial review is dismissed.



**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is dismissed; and
2. There is no question of general importance to certify.

"André F.J. Scott"

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Judge

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

**DOCKET:** IMM-8293-11

**STYLE OF CAUSE:** NEKISHA KATDIJAH SAMUEL  
(A.K.A. NEKISHA KATDIJA SAMUEL)  
and  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 25, 2012

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** August 7, 2012

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