

Federal Court



Cour fédérale

**Date: 20110728**

**Docket: IMM-6845-10**

**Citation: 2011 FC 961**

**Ottawa, Ontario, July 28, 2011**

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

**BETWEEN:**

**ERROL THEOPHILE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 20 October 2010 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

## **BACKGROUND**

[2] The Applicant is a citizen of Dominica and a former member of the Dominica Labour Party (DLP). He alleges that, in his country of origin, he was persecuted for political reasons by thugs belonging to an opposition political party, the United Workers Party (UWP).

[3] The Applicant's involvement in politics began in 1980. He campaigned for Roosevelt Douglas and, after Douglas was elected Prime Minister, the Applicant assumed responsibility for the Prime Minister's personal security. After Douglas's death in 2000, the Applicant approached the new prime minister, Pierre Charles, who assisted in securing for the Applicant the position of Senior Mechanical Engineer with the Dominica Air and Seaport Authority. The Applicant, although an experienced mechanic, lacked the education credentials that would usually be required for this position. It was a patronage appointment, and the Applicant was very well-paid.

[4] The Applicant alleges that, in 2001, UWP thugs destroyed one of his vehicles and cut the brake lines of a second vehicle. As a result, the Applicant was in a car accident and was hospitalized for three months.

[5] He alleges that UWP thugs physically attacked him in 2006 when he and his friends were working on his newly constructed house. He was injured and required eight stitches. The Applicant suspects that these thugs were motivated by jealousy of the wealth that he enjoyed as a result of his position at the Air and Seaport Authority. He alleges that he was again attacked two months later by

“ruffians” who invaded his house, beat him and then abandoned him. He regained consciousness three days later and remained in hospital for six weeks.

[6] The Applicant alleges that UWP thugs attacked him again in 2007, this time with knives, and that he was hospitalized for nearly three weeks. The Applicant claims that he reported each of these incidents to the police but they did not process the complaints because the majority of senior officers had been appointed by the former UWP government.

[7] The Applicant fled Dominica in November 2007. He entered the United States on a visitor’s visa in February 2008. In time, his visa expired and he was detained until June 2008 when U.S. authorities ordered him to leave the country. He came to Canada and made his claim for refugee protection in July 2008.

[8] The Applicant appeared before the RPD on 16 September 2010. He was represented by counsel and no interpreter was present. The RPD determined that he was neither a Convention refugee under section 96 of the Act nor a person in need of protection under section 97 of the Act. This is the Decision under review.

## **DECISION UNDER REVIEW**

### **Well-foundedness**

[9] The RPD found that the Applicant’s subjective fear was not objectively well-founded because he had failed to establish continuity of risk. The Decision states:

The definition of Convention refugee or person in need of protection is “forward looking”. Where a claimant was subjected to persecution in the past it does not automatically lead to the conclusion that the claimant will necessarily endure persecution in the future. In order for past persecution to establish a valid basis for a prospective fear of persecution, there must be sufficient evidence to establish continuity of risk. [See *Mileva v Canada (Minister of Employment and Immigration)* (1991), 15 IMM LR (2d) 204, [1991] 3 FC 398 (FCA).]

[10] The Applicant has been outside Dominica for three years. He has adduced “no persuasive evidence” to indicate that UWP thugs are still actively looking for him or are planning to kill him if he returns to Dominica. In consequence of this failure to provide evidence of continuity of risk, the RPD found that the Applicant’s subjective fear of persecution was not well-founded.

#### **Review of the Documentary Evidence**

[11] The RPD reviewed the country conditions documentation concerning Dominica for the year 2009. The RPD noted that Dominica is a multiparty, parliamentary democracy. Observers from the Caribbean Community (CARICOM) and the Organization of American States (OAS) declared that the 2009 parliamentary election was both fair and transparent, despite allegations from the opposition and nongovernmental organizations that basic democratic principles were not upheld during the election. The prime minister’s office oversees the Dominica Police, which is the country’s security force. This force effectively carries out its duty to maintain public order. Police corruption is not a problem. Those who wish to lodge a complaint against the police have access to a formal procedure, and no cases of misconduct were filed during 2009. The RPD found that the preponderance of the documentary evidence did not support a finding that

low-level or high-level members or supporters of the DLP, who have been given plum appointments to government agencies as a result of political patronage, are being targeted by way of widespread or systematic attacks or violence at the hands of opposition thugs of the UWP.

[12] The RPD also reviewed the Applicant's documentary evidence, making specific reference to the content of each of five news articles referred to by the Applicant. The RPD concluded with respect to four of the five articles that each one fails to establish that thugs of the UWP have instigated or carried out violence aimed at members or supporters of the DLP. The fifth article, which suggests that the UWP may have been behind death threats issued against high-ranking government officials, was deemed of "very little probative value" because it is seven years old and because it does not establish that, at present, UWP thugs are systematically threatening or harming supporters of the DLP. Therefore, in the RPD's view, none of the articles establish an objective basis for the Applicant's fear of persecution at the hands of UWP thugs.

### **Conclusion**

[13] In light of the foregoing analysis, the RPD found that the Applicant was not a Convention refugee. Further, there was insufficient evidence to establish on a balance of probabilities that, if the Applicant were to return to Dominica today, he would face a risk to life, a risk of torture or a risk of cruel and unusual treatment or punishment at the hands of UWP thugs. Consequently, the Applicant's claim under section 97 of the Act was also rejected.

## ISSUES

[14] The Applicant raises the following issues:

- i. Whether the RPD's factual findings were reasonable;
- ii. Whether the RPD erred by ignoring objective evidence of the Applicant's risk; and
- iii. Whether the RPD deprived the Applicant of procedural fairness by failing to conduct a separate analysis under section 97.

## STATUTORY PROVISIONS

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

### Convention refugee

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

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

*(b)* not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

### Définition de « réfugié »

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

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

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

**Person in need of protection**

**97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

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

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

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

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

**Personne à protéger**

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

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

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

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

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

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

(iv) 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**

(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.

**Personne à protéger**

(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.

**STANDARD OF REVIEW**

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[17] The first and second issues concern the RPD's fact finding and its treatment of the evidence. These are within the RPD's areas of expertise and, therefore, deserving of deference. They are reviewable on a standard of reasonableness. See *Dunsmuir*, above, at paragraphs 51 and 53; and *Ched v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1338 at paragraph 11.

[18] 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 paragraph



47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 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.”

[19] The third issue concerns the fair conduct of the hearing. Procedural fairness issues are reviewable on the correctness standard. See *Khosa*, above, at paragraph 43.

## **ARGUMENTS**

### **The Applicant**

#### **The RPD’s Factual Findings Were Unreasonable**

[20] In setting out the well-foundedness of the Applicant’s claim, the RPD stated that, because it had been three years since the Applicant was last attacked (2007-2010), he would not be at risk if he returned to Dominica. The Applicant submits that this finding is unreasonable. The Applicant has not been attacked in three years because he was not present in Dominica to be attacked. While he was living in Dominica, the Applicant was attacked twice in 2001 and, despite a five-year period of relative peace, he was attacked multiple times between 2006 and 2007. The RPD acted unreasonably in concluding that the risk has disappeared in the past three years when it previously resumed after five years. The Member did not address this point.

### **The RPD Ignored Objective Evidence of the Applicant's Risk**

[21] The Applicant contends that the RPD's analysis relies exclusively on country conditions documentation. There is no indication that the RPD considered the evidence that the Applicant suffered actual harm. The RPD also failed to reconcile the fact of this harm with its conclusion that the Applicant would face no risk if he were to return to Dominica.

[22] The Applicant submitted two reports concerning his injuries. The first was prepared by the doctor who treated him in Dominica. The second was prepared by a Canadian doctor who evaluated his injuries as well as photographs of the injuries and who opined that the injuries could have been incurred through the use of large knives. This evidence was clearly relevant to the Applicant's refugee claim. The more significant the evidence is to the claim, the greater the error when the tribunal fails to refer to it. See *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL). The Applicant contends that this is particularly true when addressing claimant-specific documents that speak to the harm suffered. And, as the RPD conducted no credibility assessment, the RPD's acceptance of the Applicant's testimony is presumed.

### **The RPD Was Required to Conduct a Separate Section 97 Analysis**

[23] The Applicant argues that, regardless of its finding under section 96, the RPD was required to consider the Applicant's risk to life or risk of cruel and unusual treatment under section 97. The RPD engaged in an improper analysis when it concluded that failure to make out a claim under

section 96 results in failure of the section 97 claim as well. The RPD failed to provide adequate reasons for dismissing the section 97 analysis.

[24] In *Anthonimuthu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 141 at paragraphs 51-52, Justice Yves de Montigny stated:

The Applicant also contends that the Refugee Division erred in not assessing her claim under section 97 of the IRPA, taking it for granted that she must fail on the grounds of a risk to like [*sic*] or to a risk of cruel and unusual treatment or punishment and danger to torture if she could not establish a well-founded fear of persecution. This Court has repeated on a number of occasions that the analysis under section 97 is different from the analysis required under section 96 and that claims made under both sections therefore warrant separate treatment. The Court said, in *Bouaouni*, *supra*, at paragraph 41:

It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founder [*sic*] fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate.

The only circumstance in which the Refugee Division may dispense with a separate section 97 analysis is when there is absolutely no evidence that could support a claim that a person is in need of protection: *Soleimanian*, 2004 CF 1660, at paragraph 22. [emphasis added]

Further, in *Vaval v Canada (Minister of Citizenship and Immigration)*, 2007 FC 160 at paragraph 12, Justice Simon Noël stated that he was in “complete agreement” with Justice de Montigny’s observations, adding:

It seems to me that the RPD assumed that its analysis of section 96 of the IRPA automatically applied to section 97. These are separate issues of law that must be treated differently. This was not the case in the analysis of section 97 of the IRPA.

[25] The Applicant argues that the RPD was asked to consider the section 97 claim, which includes an assessment of his injuries and the risk of incurring further injuries if he were to return to Dominica. The Applicant was personally targeted; this was not a case of generalized risk. Moreover, he reported these attacks to the police, who routinely lost any record of the complaint. If the RPD accepted the objective evidence that the Applicant was injured but rejected his claim that the injuries were the result of persecution for political reasons, then other risks needed to be evaluated under section 97. In failing to carry out the section 97 analysis, the RPD made a reviewable error.

### **The Respondent**

#### **The Factual Findings Were Supported By the Evidence**

[26] Contrary to the Applicant’s suggestion, the RPD did not state that, because it had been three years since he was last attacked, the Applicant would not be at risk if returned to Dominica. Rather, the RPD found that the Applicant failed to provide evidence that his past persecution establishes “continuity of risk.” The Applicant has adduced no evidence that he is being actively sought by UWP thugs or that they are planning to kill him in the event that he returns to Dominica.

[27] The Applicant also errs in stating that there was evidence before the RPD to corroborate his testimony that political patronage can lead to violent retaliation. Quite the opposite is true. This is demonstrated in the RPD's careful review of the five articles submitted by the Applicant and its findings that they do not support the Applicant's claim.

[28] The RPD is entitled to prefer documentary evidence to that of the Applicant, even where it has found the Applicant to be credible. The RPD weighed the evidence and came to a reasonable Decision. The Applicant simply disagrees with the outcome, which provides no grounds for the intervention of the Court.

#### **The RPD's Decision Was Reasonable**

[29] The Respondent submits that the RPD did not ignore the Applicant's medical evidence. While the RPD did not make specific mention of it, it did mention the alleged incidents that caused the Applicant's injuries as well as the Applicant's allegations against the UWP thugs.

[30] This medical evidence concerned incidents that had occurred in the past. The RPD clearly stated that the analysis under sections 96 and 97 was "forward looking." The medical evidence did not demonstrate that the Applicant is currently in need of protection. Indeed, the Applicant adduced no evidence to show that UWP thugs have been actively looking for him or are planning to kill him if he returns to Dominica. Furthermore, while the RPD made no adverse credibility finding, it did find that there was no persuasive evidence to suggest that DLP supporters who had been given "plum" patronage appointments to government agencies were targeted or systemically attacked by

opposition thugs of the UWP. In the absence of continuity of risk, the RPD reasonably found that the claim had not been established. The need for the RPD to refer in its reasons to medical reports depends on the quality of that evidence and its importance to the claim. Since the RPD was not persuaded that the Applicant was targeted by UWP thugs as a result of his patronage appointment, this evidence was not central to the Applicant's claim.

[31] In contrast, the country conditions documentation, which did not support the Applicant's claims, was of primary relevance. The RPD acted reasonably in preferring it to the Applicant's evidence, even if it found the Applicant to be trustworthy and credible.

[32] Finally, the RPD is presumed to have taken all of the evidence into consideration whether or not it indicates having done so in its reasons, unless the contrary is shown. See *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL).

### **The Section 97 Analysis Was Adequate**

[33] As part of its section 96 analysis, the RPD engaged in a detailed review of the country conditions documentation as well as the Applicant's own documentary evidence. It was reasonable for the RPD to conclude, based on the same reasons, that there was insufficient evidence to establish on a balance of probabilities that the Applicant was objectively at risk in Dominica.

[34] In *Balakumar v Canada (Minister of Citizenship and Immigration)*, 2008 FC 20 at paragraph 13, Justice Michael Phelan of this Court stated:

It is not necessary that there be a rigid bright line between the s. 96 and s. 97 considerations. A finding that the objective element of s. 96 had not been met could, depending on the circumstances, dispose of the s. 97 issue as well. However, the rejection of the subjective element of s. 96 does not entitle the Board to ignore the objective element of fear particularly in respect of s. 97. The form in which that consideration occurs is not one which the Court should direct -- what is important is that it be done and appear to be done.

[35] Therefore, it was reasonable for the RPD to find that for the same reasons it articulated in its section 96 analysis—which took into account the subjective and objective evidence—that there was insufficient evidence to support a section 97 finding of risk to the Applicant.

[36] Notably, the Applicant obtained his patronage position by appealing directly to the Prime Minister of Dominica, Pierre Charles. As the RPD noted, the Prime Minister's office oversees the Dominica Police. Yet despite this, the Applicant did not seek the assistance of the Prime Minister when he became concerned that the police were not investigating his complaints. The Respondent submits that the Applicant did not exhaust all avenues in order to obtain the protection that he is now seeking. See *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraphs 46, 56-57.

### **The Applicant's Reply**

[37] The Applicant argues that it was unreasonable for the RPD to expect the Applicant to adduce evidence that UWP thugs are still looking for him. In a country as small as Dominica, with a

population of 72,500 people, it is reasonably inferred that people who are interested in the Applicant, such as the UWP thugs, would know that the Applicant has left the country.

[38] In light of convincing objective evidence—namely, medical evidence attesting to the Applicant’s injuries, the failure of the authorities to address his repeated complaints and the failure of the police to protect him—the Applicant contends that the RPD cannot simply rely on the country conditions documentation to find that his life is not at risk in Dominica. It must provide some insight as to why it believes that, despite objective evidence to the contrary, the Applicant would be safe there.

[39] The Applicant further argues that the Respondent cannot buttress the Decision of the RPD by arguing that the Applicant could have turned to the prime minister for assistance when none was forthcoming from the police. The point is addressed nowhere in the Decision. That said, Pierre Charles is no longer the prime minister, and the Applicant can no longer rely on his former friends in the DLP because he has fallen out of favour with the party.

[40] Finally, the Applicant submits that the RPD should not have required the Applicant to provide proof of systematic violence perpetrated by UWP thugs against DLP supporters who have received patronage appointments. Proof of systemic violence should not be required. It is too specific. This unreasonably high threshold places too onerous a burden on the Applicant.



## **The Respondent's Further Memorandum**

[41] The Respondent posits that the Applicant has not provided convincing evidence that the attacks he suffered were not perpetrated by unknown assailants rather than by UWP thugs. The Applicant himself acknowledged that political patronage is the norm in Dominica; the Applicant's appointment to the Seaport Authority would not come as a surprise to many. The RPD reasonably concluded that the Applicant's assertions that he was being targeted because of his political affiliations and high-paying position were not persuasive.

[42] The Applicant himself admitted in his submissions that it was his perceived wealth that made him a target. Now that the Applicant no longer has wealth and a patronage position, it is reasonable to assume that he will no longer be targeted. This provides further support for the RPD's finding that there is no continuity of risk.

## **ANALYSIS**

[43] As the Decision makes clear, the determinative issue under section 96 of the Act was

whether the claimant's subjective fear is objectively well-founded, or put another way, whether there is a serious possibility that the claimant will be persecuted by thugs belonging to the UWP by reason of one of the five enumerated Convention grounds should he return to Dominica.

[44] This section 96 claim was rejected because the Applicant failed to provide sufficient evidence to establish forward-looking continuity of risk:

Therefore, I find that the claimant's fear of persecution at the hands of thugs belonging to the opposition party, the UWP, should he return to Dominica, is not well-founded because he does not face a serious possibility of persecution in the future should he return there.

[45] A summary of the RPD's findings on this point appears at paragraphs 7 and 8 of the

Decision:

The claimant has been outside of Dominica for three years. He left Dominica and went to St. Thomas in November 2007. The claimant testified that if he were to return to Dominica that opposition thugs of the UWP would kill him. I find that there is no persuasive evidence to indicate that any opposition thugs belonging to the UWP have been actively looking for him or are planning to kill him in the event that he returns to Dominica.

Furthermore, based upon my review of the preponderance of the documentary evidence, I find that there is no persuasive evidence to suggest that low-level or high-level members or supporters of the DLP, who have been given plum appointments to government agencies as a result of political patronage, are being targeted by way of widespread or systematic attacks or violence at the hands of opposition thugs of the UWP.

[46] The RPD does not comment on the credibility of the Applicant. Presumably, then, the RPD was satisfied that the Applicant himself is convinced that the people who have attacked him over the years are thugs belonging to the UWP. However, the RPD does not accept that the Applicant has adduced sufficient objective evidence to satisfy the RPD, on a balance of probabilities, that his belief is well-founded.

[47] This finding is not unreasonable. The Applicant's belief that the agents of persecution are UWP thugs seems based largely on speculation because, in every one of these violent encounters, the attackers failed to identify themselves.

[48] At the RPD hearing, the Applicant stated that, in 2001, his car was damaged by unknown vandals. The RPD asked him, if he did not see who damaged the car, why he believed that the vandalism was tied to the UWP. The Applicant replied: “Nobody else could do it sir.” (See Certified Tribunal Record [CTR], page 189.) He explained that, prior to getting the job at the Seaport Authority, he was very well-liked; this changed when he accepted his patronage appointment.

[49] The Applicant testified at the hearing that, also in 2001, the brake lines on his second vehicle were cut and, in consequence, he crashed his car and was badly injured. The RPD asked him: “Do you know who did it?” The Applicant replied: “No sir.” (See CTR, page 198.)

[50] The Applicant testified that he was attacked by a “gang” of seven people in 2007 while he and his friends were working on his newly constructed house. He could not identify the attackers; he had never seen them before and they said nothing to him. (See CTR, page 203.)

[51] Finally, the Applicant testified that, in 2007, he was attacked by a gang of people with knives. These people said that they wanted to “finish [him] off” and that he needed to quit his job at the Seaport Authority. (See CTR, page 207.)

[52] Following each incident, the Applicant made multiple reports to the police, who said that they were investigating. The Applicant testified that he did not know if the police actually investigated or not. (See CTR, page 210.)

[53] The RPD dedicates paragraphs 8-12 of the Decision to an analysis of the country conditions, finding that Dominica is a democracy with free and fair elections, a functioning police force that maintains public order and a formal complaints procedure to evaluate complaints regarding the conduct of its officers.

[54] The RPD reviewed five articles submitted into evidence by the Applicant and gave detailed reasons for finding that none of them supported his claim that supporters of the DLP who have accepted patronage appointments to government agencies are being targeted by way of widespread or systematic attacks or violence at the hands of opposition thugs of the UWP.

[55] In my view, there is nothing about the RPD's assessment of the evidence or its findings on this point that can be said to fall outside the range of reasonableness posited in *Dunsmuir*.

[56] The Applicant also complains that the RPD ignored objective evidence of risk found in two reports he submitted regarding his injuries, one from a Canadian doctor and one from a doctor in Dominica. There is nothing, however, in these reports that supports the case for forward-looking risk based upon a Convention ground. The reports did not need to be specifically referenced under the section 96 analysis because they do not contradict the RPD's general conclusion that there was no persuasive evidence to suggest that supporters of the DLP who had been given "plum" appointments through political patronage were being targeted or subjected to systemic attacks or violence at the hands of opposition thugs who support the UWP.

[57] As the Respondent points out, this Court has held that the need for the RPD to refer in its reasons to medical reports, filed in evidence, will depend on the quality of that evidence and the extent to which it is material to the claim. Since the RPD was not persuaded by the evidence that the Applicant was targeted by the UWP thugs as a result of his “plum” government job with the Dominica Seaport Authority, it follows that this evidence was not central to the Applicant’s claim. Rather, the country documentary evidence, which did not support the Applicant’s claims, was of primary relevance. This documentary evidence was reasonably relied upon by the RPD in rejecting the Applicant’s speculative assertions, even though the RPD found the Applicant trustworthy and credible.

[58] As regards the assessment of section 97 risk, Justice Edmond Blanchard of this Court, in *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at paragraphs 41-42, reviewed in detail what is required for a proper section 97 analysis. He observed:

A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the Board must assess the applicant's claim objectively, the analysis must still be individualized. I am satisfied that this interpretation is not only consistent with the United Nations CAT decisions considered above, but is also supported by the wording of paragraph 97(1)(a) of the Act, which refers to persons, “...whose removal ... would subject them personally...”. There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded [sic] fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as

separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act. Arguably, the Board may also be required to apply a different standard of proof, which is an issue that I will leave for another day, since it was not argued on this application. Whether a Board properly considered both claims is a matter to be determined in the circumstances of each individual case bearing in mind the different elements required to establish each claim.

In the present case the Board found important omissions, contradictions and implausibilities in the applicant's evidence, which led it to conclude that the applicant's story was not credible. I have already determined that these findings were open to the Board. The Board specifically disbelieved the applicant's allegation of arrest, detention and torture by the police forces and provided detailed reasons for its findings. Further, the Board showed an appreciation of the country conditions in Tunisia and specifically considered, in its reasons, the country documentation before it. There is no evidence to suggest that the Board failed to consider evidence before it or that it misapprehended any aspect of the evidence. Apart from the evidence that the Board found to be not credible, there was no other evidence before the board in the country documentation, or elsewhere, that could have led the Board to conclude that the applicant was a person in need of protection. I find that the Board did err in failing to specifically analyse the s. 97 claim. However, in the circumstances of this case and in the exercise of my discretion, I also find that the error is not material to the result. I find that the Board's conclusion, that the applicant was not a "person in need of protection" under paragraphs 97(1)(a) and (b) of the Act, was open to it on the evidence. [emphasis added]

[59] In *Balakumar*, above, at paragraph 13, Justice Phelan of this Court stated that

[I]t is not necessary that there be a rigid bright line between the s. 96 and s. 97 considerations. A finding that the objective element of s. 96 had not been met could, depending on the circumstances, dispose of the s. 97 issue as well. However, the rejection of the subjective element of s. 96 does not entitle the Board to ignore the objective element of fear particularly in respect of s. 97. The form in which that consideration occurs is not one which the Court should direct -- what is important is that it be done and appear to be done. [emphasis added]

[60] The Applicant says that, for the section 97 analysis, the RPD could not simply rely upon its section 96 analysis and should have dealt with the evidence that showed that the Applicant had been attacked and hospitalized on multiple occasions. This evidence was not deemed unreliable or lacking in credibility. While the country documentation did not establish that his injuries were caused by political retaliation, the injuries nevertheless occurred and suggest that his life is in danger if he is returned to Dominica.

[61] The RPD's reasons for rejecting the section 96 claim are that "there is no persuasive evidence to indicate that any opposition thugs belonging to the UWP have been actively looking for him or are planning to kill him in the event that he returns to Dominica."

[62] The Respondent argues that, in paragraph 14 of the Decision, the RPD is simply referring to its reasons regarding the absence of evidence for a continuity of risk. I think the answer to this argument is found in paragraph 14 of the Decision itself which specifically says that the section 97 risk referred to is "a risk to life, a risk of torture, or a risk of cruel and unusual treatment or punishment at the hands of thugs of the opposition party, the United Workers Party (UWP), should he return to Dominica today." The incidents related by the Applicant, and the medical evidence (none of which was questioned by the RPD), suggest some kind of targeting of the Applicant and strenuous attempts to kill him. The RPD never tells us why it was not appropriate to assess these factors under section 97 apart from the political connection, which is only relevant to its section 96 analysis.

[63] The RPD cannot rely upon this reasoning to reject the Applicant's section 97 claim. This is because no political motivation is required for section 97 risk and there is no need to connect that risk to a section 96 Convention ground. Hence, the same reasoning cannot be used to reject the Applicant's section 97 claim. In this case the error could well be highly material to the result when the Applicant's own evidence and the medical evidence are not challenged by the RPD. For this reason I think the Decision should be returned for reconsideration in accordance with these reasons.

[64] Counsel agree that 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 returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

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Judge

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

**DOCKET:** IMM-6845-10

**STYLE OF CAUSE:** ERROL THEOPHILE

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**PLACE OF HEARING:** Toronto, Ontario

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

**REASONS FOR JUDGMENT  
AND JUDGMENT** **Russell J.**

**DATED:** July 28, 2011

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