Date: 20100208

Ottawa, Ontario, February 8, 2010

PRESENT: The Honourable Mr. Justice Shore
(with the assistance of Robert Smith, Law Clerk)

BETWEEN:

ROMEO (MONTAGUE) and JULIET (CAPULET)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT
(For student teaching purposes)

I. Introduction

[1] "Romeo, Romeo, where art thou Romeo? In Canada, where my beloved Juliet and I have been granted refugee status. Please inform Mr. William Shakespeare that we are most well and grateful to Canada for its laws and jurisprudence which exemplify the state of the human condition."

II. Judicial Procedure

[2] This is an application for judicial review made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of two decisions of the Refugee Protection Division of the Immigration and Refugee Board (RPD), denying refugee protection for Mr. Romeo Montague and Ms. Juliet Capulet, under section 96 of the IRPA.

III. Decisions under Review

[3] At the tribunal level, Mr. Montague argued that he qualified for refugee protection under section 96 of the IRPA on the grounds that he is a member of a particular social group, namely, individuals who are the victims of blood feuds. The RPD denied his claim on the basis that there is no nexus between being the victim of a blood feud and being persecuted for reason of membership in a particular social group.

[4] Ms. Capulet was denied refugee status under section 96 for two reasons. First, the RPD held that she is seeking protection because of persecution based on her gender and gender is not a Convention ground and second, that she did not exhaust all potential avenues of gaining state protection in Verona before applying for refugee protection in Canada.

IV. Relevant Legislative Provisions

[5] Sections 96 and 97 of the IRPA state:

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	*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

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.

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 themself of the protection of that country,

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) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
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.

V. Standard of Review

[6] Each issue raised in these cases, whether a claimant fits under section 96 or 97 (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at para. 10), negative findings of credibility based on perceived implausibilities (*Perjaku v. Canada (Minister of Citizenship and*

Immigration), 2007 FC 496 at para. 16) and whether there was adequate state protection (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para. 38) in a claimant's country of origin are to be reviewed on a standard of reasonableness.

VI. Analysis

Why Mr. Montague is Not a Section 96 Refugee

[7] Mr. Montague submits the RPD erred in finding he did not have a well-founded fear of persecution on the Convention ground of membership in a particular social group. Mr. Montague submits a position paper from the United Nations High Commission for Refugees (UNHCR) entitled "UNHCR position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud" (UNHCR, Geneva: 17 March 2006) to support his argument.

[8] In that position paper, the UNHCR states that, subject to the circumstances of the particular case, blood feuds may be distinguishable from fear of common criminality or fear of organized crime (UNHCR at para. 7). With regard to whether victims of a blood feud are members of a particular social group for the purposes of the 1951 Refugee Convention, the report states the following:

> In blood feud cases, an individual is not attacked indiscriminately, but is rather targeted because he or she belongs to a particular family and on the basis of a long-established code. Compared to other cases in which a person may fear being ill-treated, or even killed, for instance, if they owe someone money or are targeted by the mafia, individuals fearing persecution in a blood feud scenario are not targeted because of their own actions but because of responsibilities viewed as having been incurred by their (living or dead) family members. They are thus not merely a victim

> of a private vendetta but also the victim of the code which regulates the blood feud tradition. (UNHCR at para. 14).

[9] The report also states that a family can fit the UNHCR's definition of a "particular social group" because "[a] family is a socially cognizable group in society and individuals are perceived by society on the basis of their family membership. Members of a family, whether through blood ties or through marriage and attendant kinship ties, meet the requirements of the definition by sharing a common characteristic which is innate and unchangeable" (UNHCR at para. 18). According to this report, the Montague family could be seen as a particular social group.

[10] Although this report is from the UN agency charged with refugee matters and the 1951 Refugee Convention is a UN document, international law and domestic law are not always congruent. Canadian jurisprudence states that persons who are wanted in a blood feud are <u>not</u> Convention refugees under section 96, because these persons are classified as being the victims of crime, not of persecution.

[11] In the case of *Zefi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636, 123 A.C.W.S. (3d) 739, Justice François Lemieux of the Federal Court held that the Refugee Convention is based around the defence of human rights and, as a consequence, "[r]evenge killing in a blood feud has nothing to do with the defence of human rights -- quite to the contrary, such killings constitute a violation of human rights. Families engaged in them do not form a particular social group for Convention purposes. Recognition of a social group on this basis would have the

anomalous result of according status to criminal activity, status because of what someone does rather than what someone is” (*Zefi* at para. 41).

[12] The Federal Court has extended this line of reasoning to cases where the refugee claimant is the victim of a blood feud started by his or her relatives or ancestors. In the case of *Hamaisa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 997, [2009] F.C.J. No. 1300 (QL), Justice David Near cited the reasoning in *Zefi* and expressly rejected the UNHCR position paper (*Hamaisa* at paras. 12-15).

[13] It is clear that Canadian law will not allow Mr. Montague to gain refugee protection pursuant to section 96 of the IRPA because he does not fit within the Canadian definition of a Convention ground. That being said, all hope is not lost for the lovesick Applicant, as the IRPA provides a second route to refugee status by way of section 97.

<u>The Structure and Purpose of Section 97</u>

[14] In the case of *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, 387 N.R. 149, the Federal Court of Appeal held that “[u]nlike section 96 of the Act, section 97 is meant to afford protection to an individual whose claim "is not predicated on the individual demonstrating that he or she is [at risk] ... for any of the enumerated grounds of section 96"” (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 F.C.R. 239 at paragraph 33)” (*Prophète* at para. 6). What the FCA is saying is that this section does not consider “persecution”, but is instead concerned with other forms of “risk” to the claimant.

[15] In the case of *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, 360 N.R. 344, the Federal Court of Appeal held that "a determination of whether a claimant is in need of protection requires an objective assessment of risk, rather than a subjective evaluation of the claimant's concerns. Evidence of past persecution may be a relevant factor in assessing whether or not a claimant would be at risk of harm if returned to his or her country, but it is not determinative of the matter. Subsection 97(1) is an objective test to be administered in the context of a *present* or *prospective* risk for the claimant" (*Sanchez* at para. 15).

[16] In answering the certified question in that appeal, the court stated that it could not develop an exhaustive list of the factors to be taken into account when assessing whether a person is in need of protection (*Sanchez* at para. 20).

[17] In the case of *Odetoyinbo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 501, [2009] F.C.J. No. 614 (QL), Justice Martineau stated the following regarding the relationship between sections 96 and 97:

> **[7]** It is well settled that an adverse credibility finding, though it may be conclusive of a refugee claim under section 96 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the Act), is not necessarily conclusive of a claim under subsection 97(1). The reason for this is that the evidence necessary to establish a claim under section 97 differs from that required under section 96 (*Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C. J. No. 506). When considering section 97, the Board must decide whether the claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97(1)(*a*) and (*b*) of the Act (*Bouaouni v. Canada (Minister of Citizenship and Immigration*), 2003 FC 1211, [2003] F.C.J. No. 1540). Further, there are objective and subjective components to section 96, which is not the case for paragraph 97(1)(*a*): a person relying on this paragraph must show on a balance of probabilities that he or she is more likely than not to be persecuted (*Chan v. Canada (Minister of Employment and Immigration),*

> [1995] 3 S.C.R. 593, [1995] S.C.J. No. 78; *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] F.C.J. No. 1). (Emphasis added).

[18] The standard of proof to be met under paragraph 97(1)(*b*) is the same as that for section 96, a balance of probabilities (*Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, 137 A.C.W.S. (3d) 604 at para. 12; *Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 F.C.R. 239). Although the two tests share a standard of proof, the factors to be considered are different. The court in *Kandiah* explained as follows:

> [18] …a claim under section 97 of the Act 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. There may well be instances where a refugee claimant, whose identity is not disputed, is found to not to have a valid basis for his alleged 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 subjective fear determination, which may be determinative of a refugee claim under section 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 of the Act differ from those required under section 96 of the Act where a well-founded fear of persecution tied 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 separately. 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. (Emphasis added)

Subparagraph 97(1)(*b*)(i)

[19] Subparagraph 97(1)(*b*)(i) states that a claimant will be granted refugee protection if he or she is unable or, because of the risk, unwilling to avail themselves of the protection of their country of nationality. This section requires the RPD to perform an analysis of the availability of state protection in the country of origin. In the case of *Avila v. Canada (Minister of Citizenship and*

Immigration), 2006 FC 359, Justice Luc J. Martineau clearly summarized the state of the law respecting state protection:

> [27] In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96(*a*) and (*b*) and subparagraph 97(1)(*b*)(i) of the Act). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).
>
> [28] No state which professes democratic values or asserts its respect for human rights can guarantee the protection of each of its nationals at all times. Therefore, it will not suffice for the applicant to show that his government was not always able to protect persons in his position (*Villafranca, supra*, at paragraph 7). Nonetheless, though government protection does not have to be perfect, some protection must exist the minimum level of which does not have to be determined by the Court. The Board may in the circumstances determine that the protection provided by the state is adequate, with reference to standards defined in international instruments, and what the citizens of a democratic country may legitimately expect in such cases. In my opinion, this is a question of fact which does not have to be answered in absolute terms. Each case is *sui generis*. For example, in the case of Mexico, one must look not only at the protection existing at the federal level, but also at the state level. Before examining the question of protection, the Board must of course be clear as to the nature of the fear of persecution or risk alleged by the applicant. When, as in this case, the applicant fears the persecution of a person who is not an agent of the state, the Board must *inter alia* examine the motivation of the persecuting agent and his ability to go after the applicant locally or throughout the country, which may raise the question of the existence of internal refuge and its reasonableness (at least in connection with the analysis conducted under section 96 of the Act).
>
> [29] Accordingly, when the government is not the persecuting agent, and even when it is a democratic state, it is still open to an applicant to adduce evidence showing clearly and convincingly that it is unable or does not really wish to protect its nationals in certain types of situation: see *Annan v. Canada (Minister of Citizenship and Immigration*, [1995] 3 F.C. 25 (F.C.T.D.); *Cuffy v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1316 (F.C.T.D.) (QL); *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 (F.C.T.D.) (QL); *M.D.H.D. v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 446 (F.C.T.D.) (QL). It should be borne in mind that most

countries might be prepared to try to provide protection, although an objective assessment could establish that they are not in fact able to do so in practice. Further, the fact that the applicant must place his life at risk in seeking ineffective state protection, simply in order to establish such ineffectiveness, seems to be contrary to the purpose of international protection (*Ward, supra*, at paragraph 48).

[30] At the same time, *Kadenko, supra*, indicates that it cannot be automatically found that a state is unable to protect one of its nationals when he has sought police protection and certain police officers refused to intervene to help him. Once it is established that a country (in that case Israel) has judicial and political institutions capable of protecting its nationals, from the refusal of certain police officers to intervene, it cannot by *ipso facto* inferred that the state is unable to do so. It is on this account that the Federal Court of Appeal mentioned *obiter* that the burden of proof on the claimant is to some extent directly proportional to the "degree of democracy" of the national's country. The degree of democracy is not necessarily the same from one country to another. Therefore, it would be an error of law to adopt a "systemic" approach as to the protection offered to the nationals of a given country. This is what is likely to happen when the reasons for dismissal given by the Board are too general and may apply equally to another country or another claimant (*Renteria et al. v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 160).

[31] Whether the issue be the best interest of the democratic state in question and of civil society in general, or the individual interest of the victim or perpetrator of an alleged criminal offence, the payment of a monetary or other benefit of any kind to a police or law officer is illegal. Of course, if corruption is widespread it may ultimately lead to undermining the trust individuals may have in government institutions, including the judicial system. As the Supreme Court has noted, "democracy in any real sense of the word cannot exist without the rule of law" (*Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at paragraph 67). Due process of law and equality before the law are the vital strength of any democracy and create a legitimate expectation in individuals that the state will do what is necessary to go after criminals and bring them to justice, and if necessary to stamp out corruption. The independence and impartiality of the judiciary and its components are not negotiable. These are fundamental values in any country which claims to be a true democracy. Therefore, the degree to which a state tolerates corruption in the political or judicial apparatus correspondingly diminishes its degree of democracy. That being said, I do not have to decide here whether the documentary evidence established, as the applicant vigorously claimed, such a degree of corruption that it can be said it was not unreasonable in the circumstances for the applicant not to approach the police of his country before seeking international protection. Due to its special expertise and its knowledge of the general conditions prevailing in a given country, the Board is in a much better position than this Court to answer such a question. Nevertheless, the Court must still be able to understand the Board's reasoning.

[32] Here is the rub: the main flaw of the impugned decision results from a complete lack of analysis of the applicant's personal situation. It is not sufficient for the Board to indicate

in its decision that it considered all the documentary evidence. A mere reference in the decision to the National Document Package on Mexico, which contains an impressive number of documents, is not sufficient in the circumstances. The Board's hasty findings and its many omissions in terms of evidence make its decision unreasonable in the circumstances. Further, because of the laconic nature of the reasons for dismissal contained in the decision, it cannot stand up to somewhat probing examination. For example, although the Board held that section 96 of the Act did not apply in the case at bar, it is not clear from reading its reasons that it actually analyzed the personal risk the applicant would face if he were returned to Mexico in terms of each of the specific tests and of the burden of proof applicable under section 97 of the Act: see *Li, supra*; *Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, [2005] F.C.J. No. 275 (F.C.) (QL).

[33] In assessing the applicant's personal situation, as his credibility was not questioned in the impugned decision, we must accept the particular facts leading to his departure from Mexico (*Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302, at paragraph 5 (F.C.A.)). Therefore, the Board could not simply state that if the claimant's appeal to the police were made in vain, he could have appealed to the CNDH and the CEDH, two organizations concerned with human rights. It is not the role of those organizations to protect the victims of criminal offences; that is the duty of the police: see *Balogh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 809, at paragraph 44, [2002] F.C.J. No. 1080 (F.C.T.D.) (QL); *N.K. v. Canada (Solicitor General)* (1995), 107 F.T.R. 25, at paragraphs 44-45 (F.C.T.D.).

…

[35] The Board's role was to make findings of fact and arrive at a reasonable finding based on the evidence, even if conflicting. In this case, it is clear that the Board completely disregarded relevant evidence. The Board cannot, without giving reasonable grounds, ignore or dismiss the content of a document dealing expressly with state protection in a given region (*Renteria et al., supra*). For example, the document *Mexico: State Protection (December 2003 - March 2005), supra*, though it was filed at the hearing, was not mentioned in the decision. This document, which originates with the Board's Research Directorate, presents an overall and quite detailed view of the protective machinery available in Mexico and its dubious effectiveness. Taken in isolation, certain passages from the document appear to show that there is some desire by the present government to improve the situation, while other passages suggest that protective measures are ineffective, at least in certain cases. The same applies to a host of other relevant documents which were part of the National Documentation Package on Mexico that were not considered by the Board. It is clear that in the instant case the Board undertook a superficial, if not highly selective, analysis of the documentary evidence. (Emphasis added).

[20] It is clear from the evidence that Mr. Montague cannot avail himself of the protection of the Veronese government (as he has been banished for killing Tybalt) and that even if he could, that protection would be ineffective, as the following passages indicate:

> Rebellious subjects, enemies to peace,
> Profaners of this neighbour-stained steel,--
> Will they not hear? What, ho! you men, you beasts,
> That quench the fire of your pernicious rage
> With purple fountains issuing from your veins,
> On pain of torture, from those bloody hands
>
> Throw your mistemper'd weapons to the ground,
> And hear the sentence of your moved prince.
> **Three civil brawls, bred of an airy word,**
> **By thee, old Capulet, and Montague,**
> **Have thrice disturb'd the quiet of our streets,**
> And made Verona's ancient citizens
>
> Cast by their grave beseeming ornaments,
> To wield old partisans, in hands as old,
> Canker'd with peace, to part your canker'd hate:
> If ever you disturb our streets again,
> Your lives shall pay the forfeit of the peace.
> For this time, all the rest depart away:
> You Capulet; shall go along with me:
> And, Montague, come you this afternoon,
> To know our further pleasure in this case,
> To old Free-town, our common judgment-place.
> Once more, on pain of death, all men depart. (Act I, Scene I)

[21] The power of the feud of these families appears to overwhelm the Prince’s authority. In Act III, Scene I, Tybalt of the Capulets kills Benvolio of the Montagues and is then killed by Romeo in self-defense. Even if the Prince had the power to stop the violence between these families, it is clear that Romeo cannot avail himself of the protection of Verona on account of his banishment by the Prince for killing Tybalt. Our courts have determined that he is innocent of the crime, as he acted in

self-defense, but our jurisprudence is not retroactively binding on the city-states of Renaissance Italy.

Subparagraph 97(1)(*b*)(ii): generalized risk faced in every part of the country and is not faced generally by other individuals in or from that country

[22] In the case of *Palacios v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 816, at paragraphs 9 and 10, the Federal Court held that the Applicant bears the burden of proving there is no internal flight alternative. The Applicant must prove, on a balance of probabilities, that there is a risk to him everywhere in his country of origin:

> [10] Therefore, the refugee claimant must demonstrate that it would be unreasonable for him or her to seek refuge in a different part of the country:
>
> > [8] ... For an IFA to be unreasonable, conditions must exist that would jeopardize the life and safety of a claimant if travelling or temporarily relocating to that area. The absence of relatives in the IFA is not relevant unless it affects the claimant's safety. (*Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.)).
>
> (*Parras Camargo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 472, [2006] F.C.J. No. 601 (QL).)

[23] We can extrapolate that Romeo is at risk everywhere because in Act III, Scene V Romeo flees to Mantua and Lady Capulet swears to hunt him there:

> **We will have vengeance for it, fear thou not:**
> **Then weep no more. I'll send to one in Mantua,**
> **Where that same banish'd runagate doth live,**
> **Shall give him such an unaccustom'd dram,**
> **That he shall soon keep Tybalt company:**
> And then, I hope, thou wilt be satisfied.

[24] Mr. Montague must also show that the risk to his life is not faced generally by other individuals from his country. In the case of *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, affirmed 2009 FCA 31, 387 N.R. 149, the Federal Court held the following regarding generalized risk in Haiti:

> [16] The test under s. 97 of the Act is distinct from the test under section 96. As Rouleau J. noted in *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 808, [2004] F.C.J. No. 995 (QL), at para. 21, s. 97 "requires the Board to apply a different criterion pertaining to the issue of whether the applicant's removal may or may not expose him personally to the risks and dangers referred to in paragraphs 97(1)(*a*) and (*b*) of the Act" and must be assessed with reference to the personal situation of the applicant. Moreover, he indicated that the "assessment of the applicant's fear must be made in concreto, and not from an abstract and general perspective" (at para. 22).
>
> [17] Accordingly, documentary evidence which illustrates the systematic and generalized violation of human rights in a given country will not be sufficient to ground a section 97 claim absent proof that might link this general documentary evidence to the applicant's specific circumstances (*Ould v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 83, [2007] F.C.J. No. 103 (QL), at para. 21; *Jarada v. Canada (Minster of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL), at para. 28; *Ahmad, supra*, at para. 22).
>
> [18] **The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general"**. Under these circumstances, the Court may be faced with applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.
>
> [19] **Recently, the term "generally" was interpreted in a manner that may include *segments* of the larger population, as well as *all* residents or citizens of a given country**. In *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, [2005] F.C.J. No. 1792 (QL). In that case, the applicant asserted that if he and his young Canadian born son were returned to Colombia it would constitute indirect cruel and unusual treatment/punishment because of the psychological stress that he would experience as a parent worrying about his child's welfare in that country. At paras, 24 and 26 Snider J. stated:

> [24] It seems to me that common sense must determine the meaning of s. 97(1)(*b*)(ii) [...]
>
> [26] Further, I can see nothing in s. 97(1)(*b*)(ii) that requires the Board to interpret "generally" as applying to all citizens. The word "generally" is commonly used to mean "prevalent" or "wide-spread". Parliament deliberately chose to include the word "generally" in s. 97(1)(*b*)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene. [Emphasis added]

Snider J. concluded that the Board had not erred in its determination given that the risk described by the applicant was one faced by all Colombians who have or will have children.

[20] Recently in *Cius, supra*, Justice Michel Beaudry, dealt with an individual situated similarly to the present applicant: a Haitian man who alleged a fear of, among other things, armed gangs in Haiti who target Haitians who have been abroad, foreigners, and anyone who they perceive to have wealth.

[21] In his analysis of the claim, Beaudry J. noted, at para. 18, that the applicant was the subject of general violence, which was the fallout of criminal activity and that "[as] a group, people who are perceived to be wealthy are not marginalized in Haiti; rather they are more frequent targets of criminal activity." Further, at para. 23, in the context of the s. 97 analysis, Beaudry J. asserted:
It is my opinion that the Board did not err by determining that the applicant did not face a particularized risk upon his return. [...] However, as discussed above, the risk faced by the applicant is generalized. The risk of violence is one which every person in Haiti faces. The documentary evidence submitted in support of this case indicates that there is a serious risk to the personal safety of all in Haiti. The United Nations High Commissioner for Refugees (UNHCR) has recommended the suspension of forced returns to Haiti.

[22] In the recent case of *Carias v Canada (Minister of Citizenship and Immigration)*, 2007 FC 602, [2007] F.C.J. No. 817 (QL), at paras. 23 and 25, O'Keefe J. concluded that the applicants faced a generalized risk of economic crime which was experienced by many other Hondurans, including those perceived as wealthy. In that particular case, the Board accepted that the applicants had been the victims of violence, however, O'Keefe J. dismissed the application indicating, at para. 25, that "[t]he applicants are members of a large group of people who may be targeted for economic crimes in Honduras on basis of their perceived wealth." Further, he held that "[g]iven the wording of subparagraph 97(1)(b)(ii) of the IRPA, the applicants had to satisfy the Board that

> they would be personally subjected to a risk that was not generally faced by others in Honduras."
>
> [23] **Based on the recent jurisprudence of this Court, I am of the view that the applicant does not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms of criminality is general and felt by all Haitians. While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence**. (Bolding added, underlining in original).

[25] In this case, it is clear that the risk to Mr. Montague's life is specifically targeted at him and is not felt by the population generally.

Subparagraph 97(*b*)(iii): the risk is not inherent or incidental to lawful sanctions

[26] In his book *Immigration Law and Practice*, 2nd ed. (Looseleaf, Markham, LexisNexis: December 2009), Lorne Waldman writes that this requirement "would exclude persons who are at risk of detention as a result of punishment after due process. However… punishments meted out as a result of a judicial process could still be cruel and unusual if they are grossly disproportionate to the offence" (Waldman at section 8.40).

[27] In the case of *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540, [1993] F.C.J. No. 584 (C.A.), the Federal Court of Appeal held that ordinary laws of general application may be persecutory, for the purposes of section 96, and stated the following:

> [17] Recent decisions of this Court carry us further. In *Padilla v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 1 (F.C.A.), where the Board found that the claimant had deserted from the El Salvadoran army by reason of conscientious objection, but nevertheless held (presumably because of the existence of an ordinary law of general application) that his fear was of prosecution rather than persecution, the Court reversed, because the Board had taken a foreshortened view, in terms of the letter of the law. In *Cheung v.*

> *Canada (Minister of Employment & Immigration)*, [1993] 2 F.C. 314 (C.A.), where the Board held against the existence of a well-founded fear of forced sterilization under China's one-child policy, because that policy amounted to a law of general application whose clear objective was not persecution but general population control, this Court again refused to accept that the mere invocation of an ordinary law of general application negatived the possibility of persecution by the government.
>
> [18] After this review of the law, I now venture to set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:
>
> [19] (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
>
> [20] (2) But the neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
>
> [21] (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
>
> [22] (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

[28] In the context of section 97, Waldman writes that “the trier of fact will have to determine whether a punishment meted out after due process is grossly disproportionate” to the offence (Waldman at section 8.40).

[29] In this case the risk to Romeo’s life does not come from lawful sanctions, as the punishment for killing Tybalt was banishment, not death at the hands of the Capulets.

<u>Subparagraph 97(*b*)(iv): the risk is not caused by the inability of the country to provide adequate health or medical care</u>

[30] This is an exclusionary provision designed to keep the focus of the inquiry on risk to the claimant and to ensure that the analysis does not sway into the realm of examining the public policy choices of the country of origin. In the case of *Covarrubias v. Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2006 FCA 365, [2007] 3 F.C.R. 169, the Federal Court of Appeal described the law as follows:

> [31] Having considered the parties' arguments and the limited authorities, I am of the view that the provision in issue is meant to be broadly interpreted, so that only in rare cases would the onus on the applicant be met. <u>The applicant must establish, on the balance of probabilities, not only that there is a personalized risk to his or her life, but that this was not caused by the inability of his or her country to provide adequate health care. Proof of a negative is required, that is, that the country is not unable to furnish medical care that is adequate for this applicant. This is no easy task and the language and the history of the provision show that it was not meant to be</u>.
>
> [32] The ability of the different countries of the world to provide adequate health care varies dramatically. Some might contend that even countries such as Canada, the United Kingdom and the United States, though financially able, are not providing "adequate" health care to some of their people. These countries might respond that they are "unable" to provide more care, given their other financial obligations. Some might disagree and argue that these countries would, if they altered their priorities, be able to provide more. Whether this reluctance to provide more means that a country is unable to provide more is not a task that courts can easily assess, except in cases such as the denial of health care on persecutorial grounds or other similar bases. This will be a difficult evidentiary hurdle to overcome.
>
> [33] Let me expand on my reasons for this view. "Inability" is defined in the *Oxford English Dictionary* as the "condition of being unable; want of ability, physical, mental or moral; lack of power, capacity, or means." The dictionary meaning does not assist very much except to show that inability has a broad meaning including not only financial capacity, but vague terms such as mental and moral ability.
>
> [34] The legislative history furnishes some guidance. In the clause-by-clause analysis of Bill C-11 (later enacted as the IRPA) it provides as an explanatory note to section 97:

> Cases where a person faces a risk due to lack of adequate health or medical care can be more appropriately assessed through other means in the Act and are excluded from this definition. Lack of appropriate health or medical care are not grounds for granting refugee protection under the Act.

> [35] A country's political decision not to provide a certain level of health care does not necessarily mean that the country is "unwilling" to provide that health care to its nationals. To interpret the exclusion as the appellants suggest would oblige a PRRA officer to engage in an unseemly analysis of another state's medical system in relation to its fiscal capacity and current political priorities. It would effectively require a finding that another country's public policy decision not to provide a certain level of health care is inadequate by Canadian standards. (Emphasis added).

[31] In this case, we have evidence that there is risk to the Applicant in spite of the adequate health services available to him (the record shows there was a very able apothecary in the nearby city of Mantua).

RPD's Implausibility Finding

[32] The RPD found Mr. Montague to lack credibility on the grounds that they believed it was implausible for two prominent families to fight one another for so long.

[33] The law relating to findings of implausibility was aptly summarized in the case of *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776:

> [6] The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the Maldonado principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal often substitutes its own version of events without evidence to support its conclusions.

[7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]

[8] In *Leung v. M.E.I.* (1994), 81 F.T.R. 303 (T.D.), Associate Chief Justice Jerome stated at page 307:

> [14] ...Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
>
> [15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility...

[9] In *Bains v. M.E.I.* (1993), 63 F.T.R. 312 (T.D.) at 314, Mr. Justice Cullen quashed a decision of the tribunal after concluding that it erred because its plausibility findings were made without referring to the documentary evidence, and because they were made based on Canadian paradigms:

> [4] ... However, in making a finding of what was plausible or implausible the Refugee Division made no reference to the documentary evidence filed in support of the applicant, namely the Amnesty International reports. According to the reports, the events described by the applicant were not an unusual occurrence and constant harassment of members or former members of Akali Dal was the norm, not the exception. Therefore, in my view, the failure to comment on the evidence filed, either in a negative or positive

> manner, seriously weakened the Refugee Division's decision and conclusions. Further, the applicant's contention is wholly consistent with the documentary evidence filed and is probably the only source of evidence sustaining the applicant's case; or is the only clue to determining if the applicant's evidence is plausible. This documentary evidence was the only gauge available regarding the conduct of authorities in Indian vis-à-vis Sikhs and the reports referred to these occurrences as "routine".
>
> [5] Moreover, the events as described by the applicant may have seemed implausible and therefore not credible to the Refugee Division, but as counsel for the applicant points out "Canadian paradigms do not apply in India". Torture, unhappily, is real, as is exploitation and revenge, often resulting in killings. (Emphasis added).

[34] In cases of vendetta or long-held blood feuds, it is imperative that we empathize with all of the parties in the narrative, the claimant and the members of the families involved. By "empathize" we do not mean "sympathize," but instead, we mean see the world out of their eyes with their cultural upbringing and their value systems. Then, when we have perfected that empathy, must we determine whether a person acted in an implausible manner.

<u>Juliet: Honour-killings and gender-related persecution</u>

[35] In Act II, Scene IV, Juliet and Romeo are secretly married by Friar Laurence:

> **JULIET**
> Good even to my ghostly confessor.
> **FRIAR LAURENCE**
> Romeo shall thank thee, daughter, for us both.
> **JULIET**
> As much to him, else is his thanks too much.
> **ROMEO**
> Ah, Juliet, if the measure of thy joy
> Be heap'd like mine and that thy skill be more
> To blazon it, then sweeten with thy breath
> This neighbour air, and let rich music's tongue

Unfold the imagined happiness that both
Receive in either by this dear encounter.
JULIET
Conceit, more rich in matter than in words,
Brags of his substance, not of ornament:
They are but beggars that can count their worth;
But my true love is grown to such excess
I cannot sum up sum of half my wealth.
FRIAR LAURENCE
Come, come with me, and we will make short work;
For, by your leaves, you shall not stay alone
Till holy church incorporate two in one.

[36] It is clear from Act III, Scene IV that Juliet's marriage is against her family's wishes, as they have chosen Paris as her husband:

CAPULET
God's bread! it makes me mad:
Day, night, hour, tide, time, work, play,
Alone, in company, still my care hath been
To have her match'd: and having now provided
A gentleman of noble parentage,
Of fair demesnes, youthful, and nobly train'd,
Stuff'd, as they say, with honourable parts,
Proportion'd as one's thought would wish a man;
And then to have a wretched puling fool,
A whining mammet, in her fortune's tender,
To answer 'I'll not wed; I cannot love,
I am too young; I pray you, pardon me.'
But, as you will not wed, I'll pardon you:
Graze where you will you shall not house with me:
Look to't, think on't, I do not use to jest.
Thursday is near; lay hand on heart, advise:
An you be mine, I'll give you to my friend;
And you be not, hang, beg, starve, die in
the streets,
For, by my soul, I'll ne'er acknowledge thee,
Nor what is mine shall never do thee good:
Trust to't, bethink you; I'll not be forsworn.

[37] At this point, we will ask Shakespeare's permission (or beg his forgiveness) and change Juliet's situation slightly. What if it had become known that Juliet and Romeo had secretly married and that Juliet had no intention of marrying Paris? What if the Capulet family saw this as such an affront that Juliet would then become the target of an honour killing?

Gender-Related Persecution under section 96

[38] Referring back to the definition of Convention refugee in section 96, it is apparent that "gender" is not a discrete ground for claiming refugee status. When dealing with female refugee claimants the Immigration and Refugee Board should apply *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 13, 1996). The introduction to those guidelines states that:

> … gender-related persecution is a **form** of persecution which can and should be assessed by the Refugee Division panel hearing the claim. Where a woman claims to have a gender-related fear of persecution, the central issue is thus the need to determine the **linkage** between gender, the feared persecution and one or more of the definition grounds.

[39] In short, although a woman cannot be a Convention refugee due to persecution related to "gender," the RPD must show sensitivity and understanding when dealing with types of persecution faced by women.

[40] The *Guidelines* group women refugee claimants into four general categories. In the context of honour killings targeted at women the following passage is relevant:

> **Women who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin.** Such laws and practices, by singling out

> women and placing them in a more vulnerable position than men, may create conditions for the existence of a **gender-defined social group**. <u>The religious precepts, social traditions or cultural norms which women may be accused of violating can range from choosing their own spouses instead of accepting an arranged marriage</u>, to such matters as the wearing of make-up, the visibility or length of hair, or the type of clothing a woman chooses to wear. (Emphasis in original) (underlining added).

[41] With regard to Juliet gaining refugee status as a member of a "particular social group," the Supreme Court in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, defined that ground in the following terms:

> [70] 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 <u>gender</u>, 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. (Emphasis added).

[42] The *Guidelines* apply these three categories to the context of gender-related persecution by stating:

> 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.

> **Depending on the basis of the claim, women refugee claimants may belong to a group defined in any of these categories.**

[43] In the case of *Vidhani v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 60, the Federal Court quashed a decision of the old CRDD on the grounds that it had failed to "analyze persecution in light of her membership in a particular social group of women who are forced into marriage without their consent" (*Vidhani* at para. 17). Juliet falls within this group of persons as, in our scenario, she may be subjected to extreme violence if she disobeys her father and does not marry Paris.

[44] It is important to note that women may face persecution on more grounds than membership in a social group. For instance, the *Guidelines* state that female claimants may claim status on the ground of political opinion:

> A woman who opposes institutionalized discrimination against women, or expresses views of independence from male social/cultural dominance in her society, may be found to fear persecution by reason of her **actual political opinion or a political opinion imputed to her (i.e. she is perceived by the agent of persecution to be expressing politically antagonistic views)** . Two considerations are of paramount importance when interpreting the notion of "political opinion":
>
> 1. In a society where women are "assigned" a **subordinate status** and the authority exercised by men over women results in a general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.
>
> 2. The **political nature** of oppression of women in the context of religious laws and rituals should be recognized. Where tenets of the governing religion in a given country require certain kinds of behaviour exclusively from women, contrary behaviour may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.

[45] Now that Juliet's potential Convention grounds have been identified, we must see that the *Guidelines* lay out the test to be applied in the following terms:

> **The real issues are whether the [sexual] violence -- experienced or feared -- is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection.**

[46] The *Guidelines* lay out the analysis to be performed by the RPD in the following terms:

> **C. EVIDENTIARY MATTERS**
>
> When an assessment of a woman's claim of gender-related fear of persecution is made, <u>the evidence must show that what the claimant genuinely fears is persecution for a Convention reason as distinguished from random violence or random criminal activity perpetrated against her as an individual.</u> <u>The central factor in such an assessment is, of course, the claimant's particular circumstances in relation to both the general human rights record of her country of origin and the experiences of other similarly situated women.</u>

[47] Applying these guidelines to the present case, we can see that the general human rights record of Renaissance Italy was poor, especially with regard to the rights of women.

<u>Failure to Seek State Protection</u>

[48] We must also be cognizant of the fact that Juliet has not sought the protection of the Veronese authorities before making her refugee claim in Canada. In the case of *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, the Federal Court of Appeal made the following summary of the law of refugee protection:

> [41] In evaluating the appellants' claims, the starting point must be the direction from the Supreme Court of Canada that refugee protection is meant to be a form of surrogate protection to be invoked only in those situations where the refugee claimant has unsuccessfully sought the protections of his home state. In *Canada*

(Attorney General) v. Ward, [1993] 2 S.C.R. 689 at page 709 ("*Ward*"), La Forest J., speaking for the Court, explained this concept as follows:

> At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. [Emphasis added.]

[42] The appellants say they fear persecution if returned to the United States. However, to successfully claim refugee status, they must also establish that they have an objective basis for that fear: *Ward* at page 723. In determining whether refugee claimants have an objective basis for their fear of persecution, the first step in the analysis is to assess whether they can be protected from the alleged persecution by their home state. As the Supreme Court of Canada explained in *Ward* at page 722, "[i]t is clear that the lynch-pin of the analysis is the state's inability to protect: it is a crucial element in determining whether the claimant's fear is well-founded." [Emphasis in original.] Where sufficient state protection is available, claimants will be unable to establish that their fear of persecution is objectively well-founded and therefore will not be entitled to refugee status. It is only where state protection is not available that the court moves to the second stage, wherein it considers whether the conduct alleged to be persecutory can provide an objective basis for the fear of persecution. If indeed the illegality of the war is relevant, it is at this second stage that the court would consider it. However, because I have determined that the appellants are unable to satisfy the first stage of the analysis, that is, that the United States is incapable of protecting them, it is unnecessary to consider the issues arising in the second stage, including the relevance of the legality of the Iraq war.

[43] In *Ward*, the Supreme Court explained at page 725 that in refugee law, there is a presumption of state protection:

> ...nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

> [44] To rebut the presumption, the Court stated that "clear and convincing confirmation of a state's inability to protect must be provided": *Ward* at page 724.

[49] Although Juliet has not followed the dictates of *Ward* by exhausting all possible avenues of protection in her own country, the court in *Avila*, above, aptly stated that:

> [29] … It should be borne in mind that most countries might be prepared to try to provide protection, although an objective assessment could establish that they are not in fact able to do so in practice. Further, the fact that the applicant must place his life at risk in seeking ineffective state protection, simply in order to establish such ineffectiveness, seems to be contrary to the purpose of international protection (*Ward, supra*, at paragraph 48).

[50] The *Guidelines* deal with the problems of seeking ineffective state protection in the following manner:

> Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution**.** <u>If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.</u> (Emphasis added).

[51] In addition, the Federal Court has determined that in order for state protection to be adequate, it must be effective at an operational level. As Justice Roger Hughes in the case of *Wisdom-Hall v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 685, explains:

> [8] The Board member erred in concluding that test to be applied was one requiring only a view of the laws in place and the expectations that they might be adequate rather than addressing the realities as to what was happening here and now. In order for adequate state protection to exist, a government must have both the will and the capacity to implement effectively its legislation and programmes. The correct approach to the issue was carefully set out by Shore J. in *Streanga v. Canada (MCI)*, [2007] F.C.J. No. 1082, 2007 FC 792 at paragraphs 14 to 19:

[14] Public pronouncements and public awareness, as well as services for women who have already been victimized, do not amount to state protection. In light of the evidence of the serious inadequacies of the Romanian police (particularly concerning the amount of corruption in the police force) in combating and preventing human trafficking, the PRRA Officer's reliance on the standard of "serious measures" is wrong.

[15] The Applicant submits that the PRRA Officer has erred in viewing the legal test as one of "serious measures". The Federal Court in *Elcock v. Canada (MCI)*, [1999] F.C.J. No. 1438 (T.D.) (QL), at paragraph 15, established, that for adequate state protection to exist, a government must have both the will and the capacity to effectively implement its legislation and programs:

> Ability of a state must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[16] In *Mitchell v. Canada (MCI)*, [2006] F.C.J. No. 185, 2006 FC 133, the Federal Court determined that the evaluation of state protection involves evaluating a state's "real capacity" to protect its citizens. The Court noted that it is an error to look to a state's good intentions and initiatives, if the real capacity of the state to protect women from violence was still inadequate.

[17] In *Garcia v. Canada (MCI)*, [2007] F.C.J. No. 118, 2007 FC 79, the Federal Court held that a state's "serious efforts" to protect women from the harm of domestic violence are not met by simply undertaking good faith initiatives. The court stated at paragraph 14:

> It cannot be said that a state is making "serious efforts" to protect women, merely by making due diligence preparations to do so, such as conducting commissions of inquiry into the reality of violence against women, the creation of ombudspersons to take women's complaints of police failure, or gender equality education seminars for police officers. Such efforts are not evidence of effective state protection which must be understood as the current ability of a state to protect women...

Garcia elaborates on the meaning of "serious efforts" at paragraph 16:

> ... the test for "serious efforts" will only be met where it is established that the force's capability and expertise is developed well enough to make a credible, earnest attempt to do so, from both the perspective of the woman involved, and the concerned community. The same test applies to the help that a woman might be expected to receive at the complaint counter at a local police station. That is, are the police capable of accepting and acting on her complaint in a credible and earnest manner? Indeed, in my opinion, this is the test that should not only be applied to a state's "serious efforts" to protect women, but should be accepted as the appropriate test with respect to all protection contexts.

[18] Justice La Forest stated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 724 that "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

[19] Evidence of improvement and progress by the state is not evidence that the current response amounts to adequate, effective protection. As held in the Federal Court decision of *Balogh v. Canada (MCI)*, [2002] F.C.J. No. 1080 (QL) at paragraph 37, a state's willingness to provide protection is not enough:
I am of the view that the tribunal erred when it suggested a willingness to address the situation...can be equated to adequate state protection.

[9] In the Board's decision here, there is no examination of the evidence as to how, as a practical matter today, the state of Jamaica can effectively protect women such as the Applicant against persons who threaten to kill her such as Andre who was deported in Jamaica because the Applicant had the courage to report him to the police in Canada.

[52] As has been stated in Romeo's judicial review, the evidence recorded in *Romeo and Juliet* speaks volumes about the inability of the authorities to stop the feud between the Capulets and the

Montagues. Therefore, it was objectively unreasonable for Juliet to risk her life simply to demonstrate the ineffectiveness of state protection.

VII. Conclusion

[53] On the basis of the above reasons, these judicial reviews will be allowed with the requested relief of certiorari granted. These decisions are therefore quashed and returned to the RPD to be reconsidered by differently constituted panels.

[54] The fact that cases similar to the ones seen above come before the Federal Court with frightening regularity is a tragedy greater than that of *Romeo and Juliet*. I have chosen to use *Romeo and Juliet* as a template to explain certain nuances in the Canadian immigration system to you because you are all familiar with this tale of the power of love to overcome generations of hatred. Unfortunately, as we all know, this tale ends in tragedy. What I have attempted to demonstrate is that the tools to avert this tragedy exist in the Canadian immigration system. What is needed is for all of us, the people who implement and watch over that system, to be aware of its subtleties and to apply its rules with empathy, diligence and understanding for the fragility of the human condition.