

Federal Court



Cour fédérale

**Date: 20101005**

**Docket: IMM-454-10**

**Citation: 2010 FC 993**

**Ottawa, Ontario, October 5, 2010**

**PRESENT: THE CHIEF JUSTICE**

**BETWEEN:**

**SEBASTIAN VELASCO MORENO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] In my view, a negative determination of the Refugee Protection Division which turns on the issue of state protection must be scrutinized with particular care where the member chooses to make no credibility finding concerning the applicant's allegations of a subjective fear.

[2] In the absence of a negative credibility assessment, the applicant's testimony is deemed to have been accepted by the member.

[3] However, the judge sitting in judicial review must be satisfied that the applicant's allegations, usually in the personal information form and the transcript of the refugee hearing, were treated as true by the decision-maker.

[4] Only then can a proper review be made of the member's state protection analysis. The state protection issue should not be a means of avoiding a clear determination concerning the subjective fear of persecution.

[5] In this case, I am satisfied that the member made a "veiled credibility finding", a term used by the applicant's counsel to highlight the inconsistency between the facts deemed to be true and the state protection conclusion. The case law has recognized the notion of disguised credibility findings.

[6] In *Zokai v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1581 at paragraph 13, stated:

... the essence of the decision is that the applicant's story and professed fears are given no weight, effectively rejecting the applicant's evidence as not credible, even though no specific reference is made to credibility as an issue.

[7] Similarly, when Justice Layden-Stevenson was a member of the Federal Court, she concluded in *Medina v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 728 at paragraph 10, that the member made an "elusive negative credibility finding", falling short of the requirement to justify credibility determinations in clear and unmistakable terms: *Hilo v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 228 (C.A.) (QL).

[8] Also, in *D.J.D.G v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 765 at paragraph 21, Justice Mandamin decided that an immigration officer's veiled credibility finding contributed to a reviewable error.

[9] The applicant, a senior high school student who intended to pursue university studies in Bogota, Colombia, his country of citizenship, asserted that he was forcibly interviewed at gun point by two persons identifying themselves as members of FARC. His personal information form, which detailed his story, read in part as follows:

I kept walking towards my building. The men grabbed me, one by each arm. They tried to take me to the park that is two blocks away but I refused. One of them showed me his gun so I stopped resisting. I knew they might shoot me. It was getting dark. While walking to the park they were talking among themselves about "the boss" using code language. I did not understand much because I was so scared. They kept talking about the boss.

At one point in a dark corner of the park, they told me to sit down. No one was around. They told me they were from the FARC and that I had been chosen to work for them because of my education and that I could help them fight against the army. They told that one of the activities that I could help with would be assisting the injured and protecting the base. They said they would tell me the rest once I was working for the FARC.

They said that now that I knew what I would be doing with them, they would meet me in one month (March 4) at my house to start working. One of the men pulled his gun out and pointed it at me. They said that now that I knew they were the FARC that I shouldn't call anyone or tell anyone about this.

I was very scared. I ran home. I was thinking that I would not be able to do anything because I could call the police and I could not tell my mom because she is so sick. I knew that the police say that unless you are injured you are fine. Besides, the FARC will kill you if you say anything.

[10] The applicant's counsel, Ms. Leigh Salsberg, was concerned with the veiled credibility issue as early as the refugee hearing itself:

**COUNSEL FOR CLAIMANT:** ... you are not questioning the credibility of what happened to him in Colombia?

**MEMBER:** In a way, I am. I'm saying are his actions in the United States consistent with someone who has had that experience. If your question is, did I find any inconsistencies, omissions in his evidence concerning being approached by the FARC in their effort to recruit, the answer to that would be no. But the objective documentary evidence may not be in support of the FARC being able to recruit as openly as he has indicated and the fact that he isn't aware of persons similar to himself being kidnapped or forced recruitment. And I'm also not – to be honest, I've not read a report such as that.

**COUNSEL FOR CLAIMANT:** So your question of possibility of whether this happened or just a clear statement of –

**MEMBER:** Is it supported by the objective documentary evidence. But that's not – that's not the point of the real issue. The real issue is state protection.

[11] Coincidental with the member's equivocal approach to the applicant's version, and perhaps on account of it, his state protection analysis is generalized with little regard for the applicant's personal circumstances. There is little, if any, analysis whether there is protection for individuals such as the applicant who have been targeted by the FARC. Here, according to the applicant's version, he was recruited at gun point and threatened if he disclosed the incident. This version contradicts the member's conclusion that young students in Bogota are not harmed for refusing to follow the FARC's demands.

[12] The member's veiled credibility finding infected his state protection analysis. By assuming that the FARC does not target and harm individuals in Bogota, the member failed to consider state

protection from the perspective of this applicant who asserted that he was targeted and threatened by the FARC. If the member did not believe the applicant, he was required to state so clearly.

[13] The member was required to deal with the veracity of the persecution alleged by the applicant prior to the state protection analysis: *Jimenez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 727 at paragraph 4. His failure to do so, together with his failure to explain his doubts concerning the applicant's credibility in clear and unmistakable terms, constitutes a reviewable error of law.

[14] Neither party suggests the certification of a serious question and none will be certified.

**ORDER**

**THIS COURT ORDERS that** this application for judicial review be allowed. The determination by the Refugee Protection Division of January 5, 2010 is set aside and the matter is referred for re-determination by a differently constituted panel.

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"Allan Lutfy"  
Chief Justice

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

**DOCKET:** IMM-454-10

**STYLE OF CAUSE:** SEBASTIAN VELASCO MORENO v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** September 20, 2010

**REASONS FOR ORDER  
AND ORDER:** LUTFY, C.J.

**DATED:** October 5, 2010

**APPEARANCES:**

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