

Federal Court



Cour fédérale

**Date: 20110210**

**Docket: IMM-2779-10**

**Citation: 2011 FC 156**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, February 10, 2011**

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

**BETWEEN:**

**ANDRES ANTONIO MARTINEZ ZAPATA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision dated April 23, 2010, by the Immigration and Refugee Board, Refugee Protection Division (panel). In its decision, the panel ruled that the applicant was not a Convention refugee or a person in need of protection as defined in sections 96 and 97 of the Act.

Factual background

[2] The applicant, Andres Antonio Martinez Zapata, is a 26-year-old citizen of Colombia. His mother still lives in Colombia, and he has a brother in the United States and a sister in Canada.

[3] Mr. Martinez Zapata alleges that, in 1999, he started receiving phone calls from urban militia members of the National Liberation Army (ELN). The ELN is the second largest rebel group, after the FARC, involved in Colombian armed conflict. Mr. Martinez Zapata allegedly received these phone calls because they wanted him to join their cause.

[4] In April 2001, Mr. Martinez Zapata went to Spain and stayed there for one month. Upon his return to Colombia, his mother purportedly prepared a false passport for him. On June 6, 2001, Mr. Martinez Zapata left Colombia for Venezuela and then he went to the United States.

[5] Mr. Martinez Zapata stayed in the United States illegally for more than five years. He never claimed asylum in Venezuela or the United States.

[6] On November 3, 2007, Mr. Martinez Zapata flew from Atlanta to New York City. The next day, he drove from New York City to Canadian customs in Lacolle, Quebec, where he claimed refugee protection.

Impugned decision

[7] In its decision dated April 23, 2010, the panel rejected Mr. Martinez Zapata's refugee claim for two reasons. First, the panel found that Mr. Martinez Zapata and his account lacked credibility. Second, the panel determined that there was a lack of subjective fear.

[8] The panel noted that there were inconsistencies in the evidence. For example, the panel noticed deficiencies in Mr. Martinez Zapata's testimony as to the exact number of calls he allegedly received from the ELN.

[9] Furthermore, the panel took note of Mr. Martinez Zapata's testimony that his family tried to leave Colombia well before members of the ELN phoned him. The panel found that this fact undermined Mr. Martinez Zapata's credibility with respect to his fear of persecution.

[10] The panel also pointed out the incident involving Mr. Martinez Zapata's cousin. During his interview before a customs officer, Mr. Martinez Zapata said that his cousin had received several calls from members of the ELN and that one day, a grenade exploded in front of his house killing his mother and a child playing nearby. The panel found that during the hearing there were certain inconsistencies between what Mr. Martinez Zapata had said to the customs officer and his testimony before the panel. The panel also found that there was no evidence that could demonstrate that the grenade had been left in front of the house with the aim of punishing the cousin who had refused to join the ELN.

[11] With respect to Mr. Martinez Zapata's stay in Spain, the panel found it strange that he had not submitted a refugee claim. When questioned about this by the panel, Mr. Martinez Zapata provided various answers, including the fact that he purportedly lost his passport. These excuses led the panel to find that his testimony was not credible.

[12] When questioned on the reasons why he did not claim asylum while living in the United States, Mr. Martinez Zapata replied that he feared being returned to Colombia and that the process would be too long and difficult because of the fact that he had entered illegally. Quoting *Huerta v Canada (Minister of Employment and Immigration)* (FCA), [1993] FCJ No 271, 40 ACWS (3d) 487, which states that a delay in making a claim for refugee status is not a decisive factor in itself, the panel noted that in this case, substantial weight must be attributed to this factor. To this end, the panel noted that Mr. Martinez Zapata had had several opportunities to make a refugee claim: in Spain, in Venezuela and in the United States.

[13] On this point, the panel proceeded with its analysis by indicating that Mr. Martinez Zapata's credibility was undermined as the case law indicates that a failure to make a refugee claim in a country that is signatory to the Convention contradicts the allegations of an applicant with respect to his or her fear of persecution (see *Ilie v Canada (Minister of Citizenship and Immigration)* [1994] FCJ No 1758, 88 FTR 220, and *Assadi v Canada (Minister of Citizenship and Immigration)* [1997] FCJ No 331, 70 ACWS (3d) 892, at para 14). The panel therefore found that Mr. Martinez Zapata's failure to make a refugee claim undermines his credibility and demonstrates a lack of subjective fear that he would be persecuted in Colombia.

Relevant provisions

[14] Sections 96 and 97 of the *Immigration and Refugee Protection Act* read as follows:

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.

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

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.

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

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

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

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

(ii) the risk would be faced by the person in 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.

### Issue

[15] In this application for judicial review, the issue is whether the panel erred in finding a lack of subjective fear on the part of the applicant.

### Standard of review

[16] It is well established that questions of credibility, assessing the facts and weighing the evidence fall entirely within the jurisdiction of the administrative tribunal called upon to assess the allegation of a subjective fear by a refugee claimant (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35, at para 14), and it is not up to the Court to substitute its weighing of the evidence for that of the panel.

[17] Furthermore, this Court stated in *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] FCJ No 270, that deference must be given to the decisions of administrative tribunals when these decisions are based on the application of sections 96 and 97 of the Act because this is a question of mixed fact and law.

### Analysis

[18] Mr. Martinez Zapata's counsel submitted that the panel completely undermined his credibility for no apparent reason. To support her claims, she cited *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, [1979] FCJ No 248, which states that when an applicant swears that certain facts are true, there is a presumption that they are true unless there is a valid reason to doubt their truthfulness.

[19] In fact, the applicant is asking this Court to reweigh the evidence submitted. The case law is consistent that the onus of demonstrating that the panel erred in its assessment of the evidence is on the applicant and judicial review does not permit the Court to re-assess the evidence (see *Zrig v Canada (Minister of Citizenship and Immigration)* (C.A.), 2003 FCA 178, [2003] FCJ No 565).

[20] The Court is of the opinion that, in this case, this was not a negative inference drawn from a mere error of fact. Contrary to the applicant's claims, the panel drew a negative inference from the contradictory explanations put forward by the applicant.

[21] In *Gilgorri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 559, [2006] FCJ No 701, at paras 23 to 26, Justice Shore reiterated the principles of law and a range of case law that state that a claimant has the burden of establishing both the subjective and objective element of his or her fear:

[23] Further, the Board made a negative finding with respect to the conduct of Mr. Modernell Gilgorri and his family, which was incompatible with the conduct of persons having a well-founded fear of persecution. The Board points out that they left Uruguay for Canada via 12 South American, Central American and North American countries. They did not claim protection from any of these countries.

[24] In *Ilie v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1758 (QL), at paragraph 2, Mr. Justice Andrew MacKay states the following:

The basis of that conclusion was that his conduct subsequent to leaving Romania in July 1992 was inconsistent with a fear of persecution and his delay in claiming refugee status until he arrived in Canada in February 1993 negated a well-founded fear of persecution.



[25] Similarly, in *Assadi v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 331 (QL), at paragraph 14, Mr. Justice Max Teitelbaum states as follows:

. . . Failure to immediately seek protection can impugn the claimant's credibility, including his or her testimony about events in his country of origin . . .

[26] In *Leul v. Canada (Secretary of State)*, [1994] F.C.J. No. 833 (QL), at paragraphs 7 and 12, Mr. Justice Francis Muldoon writes the following:

. . . One might observe that he passed through Amsterdam and that The Netherlands is a convention refugee signatory, but apparently he did not think to claim refugee status there.

. . .

. . . Just as I would not wish to send back to his country a person who stood in jeopardy of a reasonable chance of persecution, so I just do not wish to leave in Canada a person who isn't entitled to be here; a person who passed through a country which was a signatory to the convention and did not think to claim refugee status there.

[22] In this case, the applicant pointed out that the panel relied on details and not a direct contradiction to draw an adverse inference. However, the Court deems that it was not unreasonable for the panel to find that Mr. Martinez Zapata's explanations were insufficient in justifying his inaction to claim refugee protection in the three countries that are signatories to the Convention (Spain, Venezuela and the United States), where he stayed before coming to Canada. More specifically, the applicant stayed in the United States as an adult from 2001 to 2007 without seeking asylum there. It was reasonable for the panel to find that, especially in light of this fact, the applicant's conduct was inconsistent with that of a person truly fearing a return to his or her country of origin. This in itself demonstrates a lack of subjective fear (*Caicedo v Canada (Minister of*

*Citizenship and Immigration*), 2010 FC 1092, [2010] FCJ No 1365; *Garcia v Canada (Minister of Citizenship and Immigration)*, 2010 FC 847, [2010] FCJ No 1051).

[23] In light of the above-mentioned jurisprudential principles and the facts of this case, the Court is of the opinion that it was not unreasonable for the panel to find that Mr. Martinez Zapata's explanations and conduct were inconsistent with the conduct of a person fearing for his or her life.

[24] For all of these reasons, the Court is of the opinion that the panel's decision is not unreasonable. The panel's decision is a possible and acceptable outcome (*Dunsmuir*). Consequently, this Court's intervention is not warranted. The application for judicial review will be dismissed. No question will be certified.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** this application for judicial review be dismissed. No question is certified.

“Richard Boivin”

---

Judge

Certified true translation  
Janine Anderson, Translator

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

**DOCKET:** IMM-2779-10

**STYLE OF CAUSE:** ANDRES ANTONIO MARTINEZ ZAPATA  
v. THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 27, 2011

**REASONS FOR JUDGMENT:** BOIVIN J.

**DATED:** February 10, 2011

**APPEARANCES:**

Geneviève Apollon

FOR THE APPLICANT

Isabelle Brochu  
Julien Beauchamps-Laliberté

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Étude légale  
Montréal, Quebec

FOR THE APPLICANT

Myles J. Kirvan  
Deputy Attorney General of Canada

FOR THE RESPONDENT