

Between  
Carlos Eduardo Moreno Florian, plaintiff, and  
The Minister of Citizenship and Immigration, respondent

[2002] F.C.J. No. 322  
2002 FCT 231  
Court No. IMM-2159-01

**Federal Court of Canada - Trial Division  
Montréal, Quebec  
Tremblay-Lamer J.**

Heard: February 19, 2002.  
Judgment: March 1, 2002.  
(25 paras.)

*Aliens and immigration* □ *Disqualifications, crimes against humanity* □ *Appeals or judicial review, whether claim reasonable.*

Application by Florian for judicial review of a decision of the Immigration and Refugee Board that he was excluded from the definition of refugee because of crimes against humanity. Florian was a citizen of Peru. He stated that he was taken prisoner by the Shining Path and held for two years, during which he provided forced labour and took part in kidnapping operations. He was told he would be killed if he tried to escape. He managed to escape on his second attempt in 1998 and returned to his family, going into hiding at a farm. He arrived in Canada in 1999, and his family followed a few months later. His family was granted refugee status. The board found that he was excluded because he did not disassociate himself from the terrorist group at the earliest opportunity.

**HELD:** Application allowed. There was no doubt that the Shining Path committed crimes against humanity. However, it was not clear from the board's decision whether Florian had acted for them. If it did not believe that he was credible, it should have given reasons for its finding in clear and unmistakable terms. If it found him credible, it should have dealt with the question of compulsion.

**Statutes, Regulations and Rules Cited:**

Charter of the International Military Tribunal (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis), 82 U.N.T.S. 279, Article 6(c).

Immigration Act, R.S.C. 1985, c. I-2, s. 2(1).

United Nations Convention Relating to the Status of Refugees, Articles 1E, 1F, 1F(a).

**Counsel:**

Odette Desjardins, for the plaintiff.  
Sylviane Roy, for the respondent.

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REASONS FOR ORDER AND ORDER

1 **TREMBLAY-LAMER J.:** □ This is an application for judicial review from a decision of the Immigration and Refugee Board ("the tribunal") that the plaintiff is excluded from the scope of

the Convention pursuant to article 1F(a) of the United Nations Convention Relating to the Status of Refugees ("the Convention").

2 The principal plaintiff is a citizen of Peru. He alleged the following facts.

3 In late November 1996, when he was travelling in connection with his work, the plaintiff discovered that the boat on which he was travelling was carrying weapons and munitions. After making this discovery the plaintiff told his employer he intended to resign when he returned to Iquitos. He was then bound, placed in the hold and threatened with death if he tried to escape.

4 The plaintiff was then taken to an unknown location in the eastern jungle and realized that he was surrounded by members of the Shining Path.

5 He became a captive of the Shining Path and was forced to work 14 hours a day in agriculture and weapons maintenance. He also was subjected to military training for three to four months in the handling of automatic weapons, laying of mines and kidnapping and murder operations. Throughout this period the plaintiff was told that if he tried to escape he would be killed.

6 During his captivity the plaintiff was forced to participate in acts of kidnapping with Shining Path guerillas, and one day was made to dig a tomb to bury a native who had been killed.

7 After two years' captivity the plaintiff planned an escape with two natives who were also captives of the guerillas, but this escape failed.

8 In November 1998 the plaintiff managed to escape during a confrontation between the guerillas and the police.

9 The plaintiff went back to his family. He, his wife and his daughter hid in a farm 120 km from where they lived. Police protection proved to be unavailable for the plaintiff. The only alternative was international protection.

10 The plaintiff arrived in Canada on March 4, 1999 and claimed refugee status the same day. His wife and daughter arrived in Canada on October 30, 1999 and claimed protection from Canada the same day. The wife and daughter were admitted as Convention refugees on March 16, 2001.

11 The plaintiff was excluded from the scope of the Convention pursuant to article 1F(a) of the Convention. The tribunal found it strange that the plaintiff escaped when the police attacked the camp where he was being held, and he did not go to the first location where the forces of law and order existed. The tribunal concluded that although it had no reason to think the plaintiff joined the Shining Path of his own accord, it felt that he had not disassociated himself from the terrorist group at the first opportunity.

12 The plaintiff maintained that he was a captive and so had no personal choice about participating in acts of persecution. When he was taken to participate in operations he could not refuse to go except at the risk of his life. He never subscribed to the objectives of the Shining Path guerillas.

13 The definition of "Convention refugee" contained in s. 2(1) of the Immigration Act, R.S.C. 1995, c. I-2 ("the Act"), excludes persons falling within the scope of article 1E and 1F of the Convention.

14 In the case at bar, the plaintiff was excluded in accordance with art. 1F(a) of the Convention. Article 1F(a) reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes ...

\* \* \*

F. Les dispositions de cette Convention ne seront pas applicables aux personnes dont on aura des raisons sérieuses de penser:

a) qu'elles ont commis un crime contre la paix, un crime de guerre ou un crime contre l'humanité, au sens des instruments internationaux élaborés pour prévoir des dispositions relatives à ces crimes ...

15 The standard of evidence contained in the phrase "serious reasons for considering" is well below that required in criminal law ("beyond all reasonable doubt") or civil law ("on a balance of probabilities") (Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298 (C.A.)).

16 As Linden J.A. indicated in Sivakumar v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 433 (C.A.), this standard requires something more than suspicion or conjecture but something less than proof on a balance of probabilities. However, I note that because of the serious consequences for the parties concerned, the exclusion clauses must be given a limiting interpretation (Moreno, supra).

17 In R. v. Finta, [1994] 1 S.C.R. 701, at 814, Cory J. defined the concept of a crime against humanity in the following way:

What distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race.

18 More recently, in Sumaida v. Canada (Minister of Citizenship and Immigration), [2000] 3 F.C. 66, at 73, the Court of Appeal relied on the definition adopted by the Charter of the International Military Tribunal (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis) [82 U.N.T.S. 279], in article 6(c), which is worded as follows:

Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.

19 In the case at bar there is no doubt, in view of the savage conduct of the group, that the Shining Path is covered by article 1F(a).

20 However, did the plaintiff act for the Shining Path? The reasons for the tribunal's decision are not clear on this point.

21 On the one hand, the tribunal recognized that the plaintiff was compelled to join the Shining Path. However, the tribunal appeared to doubt the credibility of the plaintiff's testimony and, for that reason, considered that the plaintiff had knowingly minimized the degree of his participation in the Shining Path's actions. The plaintiff admitted having taken part, though on a limited scale, in the Shining Path's activities. What he denied was having done so willingly.

22 If the tribunal did not believe the plaintiff's story was credible, it should have given reasons in support of its finding in clear and unmistakable terms (Moreno, supra, at 315). The tribunal did not do this.

23 Further, the tribunal appeared to conclude that regardless of the plaintiff's complicity, he had been guilty of a crime against humanity as he had personally committed the physical act constituting a crime against humanity (Sivakumar, supra, at para. 5). Once again, the tribunal did not take into account the fact that the plaintiff was made prisoner, that he alleged he was threatened with death if he escaped and that in spite of everything he tried to escape at the first possible opportunity. In such a case, if it finds him credible the tribunal should deal with the question of compulsion.

24 I note that in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.), the Federal Court of Appeal cited the following passage from James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), at p. 218, regarding the defence of coercion:

Second, it is possible to invoke [as a defence] coercion, state of necessity, or force majeure. Essentially, this exception recognizes the absence of intent where an individual is motivated to perpetrate the act in question only in order to avoid grave and imminent peril. The danger must be such that "a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong". Moreover, the predicament must not be of the making or consistent with the will of the person seeking to invoke the exception. Most important, the harm inflicted must not be in excess of that which would otherwise have been directed at the person alleging coercion. [Footnotes omitted.]

25 For these reasons, the application for judicial review is allowed. The case is referred back to a panel of different members for re-hearing.

Certified true translation: Suzanne M. Gauthier, C. Tr., LL.L.