

Federal Court



Cour fédérale

**Date: 20230607**

**Docket: IMM-4393-22**

**Citation: 2023 FC 803**

**Toronto, Ontario, June 7, 2023**

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

**BETWEEN:**

**LIDD MILDRED AMOROCHO SANABRIA  
SANTIAGO ALVAREZ AMOROCHO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**Overview**

[1] This is an application for judicial review of a decision of the Refugee Protection Division [RPD], dated April 20, 2022 [the Decision]. In the Decision, the RPD found that the Applicants are neither Convention refugees nor are persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is dismissed, because the Applicants have not come to the Court with clean hands.

### **Background**

[3] The Principal Applicant, Lidd Mildred Amorocho Sanabria [PA], and her minor son are citizens of Colombia. They claim fear of the PA's ex-boyfriend who is alleged to be a violent man and a member of a guerilla front in Colombia who had been planning to kidnap the Applicants for their forced recruitment.

[4] The Applicants left Colombia for the United States on September 28, 2018, and subsequently entered Canada, where they have relatives, on October 12, 2018, and claimed refugee protection at the border.

[5] Subject to one adverse finding, the RPD found the Applicants generally credible. However, the RPD also found that the Applicants had a viable internal flight alternative [IFA] in the city of Tunja, Colombia and therefore concluded that they were neither Convention refugees nor persons in need of protection under IRPA.

[6] On May 11, 2022, the Applicants filed the within application for leave and for judicial review [ALJR] of the RPD's Decision. They were subsequently scheduled for removal on November 20, 2022, and filed a motion to stay their removal pending adjudication of this application. On November 10, 2022, Justice Pamel dismissed their motion. While the Applicants

met with Canada Border Services Agency officials on November 18, 2022, in connection with their upcoming removal, they failed to appear for removal as scheduled on November 20, 2022, and warrants were issued for their arrest.

[7] It appears from the Court file that the Applicants are not presently represented by counsel. On March 8, 2023, Justice McDonald issued an order granting leave in this application and scheduled the hearing for June 6, 2023 [Leave Order]. On April 28, 2023, counsel who filed their ALJR and subsequently their Application Record [Former Counsel] served and filed notice that she was no longer representing the Applicants.

[8] On June 1, 2023, in preparation for the upcoming hearing, the Court's Registry wrote to Former Counsel and the Respondent's counsel, seeking confirmation as to who would be attending the hearing on behalf of the parties. Former Counsel responded on June 2, 2023 that, as she was no longer counsel in this case, she would not be appearing for the Applicants. She also provided an email address at which the Applicants could be reached. The Registry wrote to the Applicants by email at that address on June 2, 2023, seeking advice whether they would be self-represented or whether counsel would be acting on their behalf. On June 2, 2023, the Registry received the following emailed response:

Good evening

Thank you for reaching out to us. We appreciate your communication. However, we would like to inform you that we currently do not have legal representation due to financial constraints. Consequently, we feel unequipped to effectively represent ourselves in this matter, as we lack the necessary expertise.

We understand the importance of our case and recognize the need for proper legal representation. Given our circumstances, we kindly request assistance in navigating the legal process or guidance on how to proceed in the absence of legal counsel. Any support or resources you could provide would be greatly appreciated.

Thank you for your understanding and cooperation.

[9] On June 5, 2023, the Registry responded to this email by providing links to resources on the Court's website, related to self-representation and finding legal assistance. I note that the June 2023 email communications between the Registry, counsel, and the Applicants reference in their subject line the scheduled time and date for the hearing of this application.

[10] On June 6, 2023, the Registry attempted to follow up with the Applicants, both by email and through a phone number for the Applicants that Former Counsel had provided. The phone number was disconnected, and the Registry received no response to its email.

[11] Neither the Applicants nor any counsel acting on their behalf appeared at the hearing. The Respondent's counsel argued that the Court should proceed to hold the hearing, notwithstanding the absence of the Applicants, under the authority of Rule 38 of the *Federal Courts Rules*, SOR/98-106 [Rules], which provides that, where a party fails to appear at a hearing, the Court may proceed in the absence of the party if the Court is satisfied that notice of the hearing was given to that party in accordance with the Rules.

[12] Following receipt of the Respondent's counsel's arguments, the Court found that the Applicants had notice of the hearing, both pursuant to the Leave Order that was issued to Former

Counsel prior to her withdrawal and pursuant to the June 2023 email correspondence between the Court's Registry and the Applicants. Taking into account the fact that, even if the Applicants were in the process of seeking legal counsel, they could have attended the hearing in person to explain this and request an adjournment, but had not done so, the Court concluded that it was appropriate to proceed with the hearing.

### **Issues and Standard of Review**

[13] Based on the written submissions of the parties (including a clean hands argument raised in the Respondent's Further Memorandum of Argument based on the fact that the Applicants did not appear for the removal scheduled for November 20, 2022), and the Respondent's oral arguments at the hearing based on the Applicant's failure to appear for the hearing, the Court has been presented with the following three issues:

- A. Should this application be dismissed, because it has been abandoned by the Applicants?
- B. In the alternative, should this application be dismissed due to the Applicants' lack of clean hands?
- C. If the Court declines to dismiss the application under first two issues and is prepared to adjudicate the application on its merits:
  - i. Did the RPD err in its assessment of the Applicants' credibility?
  - ii. Did the RPD err in its IFA analysis?

[14] The parties agree (and I concur) that the standard of review applicable to the issues related to the merits of the application is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

### **Analysis**

[15] The Respondent's first argument is that, based on the Applicants' failure to appear at the hearing of this application, the Court should conclude that the Applicants are not interested in advancing their position and have abandoned the application. The Respondent's counsel explained that, in the brief period available to him to research principles surrounding abandonment, he was unable to identify much jurisprudential guidance. As will be explained below, my conclusion is that the Court should dismiss this application based on the Respondent's clean hands argument. As such, and in the absence of any significant guidance on the principles surrounding abandonment, I decline to make a finding on the abandonment issue.

[16] In his recent decision in *Akinwumi v Canada (Citizenship and Immigration)*, 2022 FC 1599 [*Akinwumi*], Justice Zinn considered a clean hands argument in circumstances comparable to those in the case at hand. *Akinwumi* involved an application for judicial review of the applicants' negative pre-removal risk assessment decisions. Like in the case at hand, the applicants in *Akinwumi* were scheduled for removal, they unsuccessfully sought stays, they then failed to appear for removal, and warrants were issued for their arrest. The respondent argued that the Court should dismiss their applications for judicial review, because they were seeking from the Court an equitable discretionary remedy but were doing so with unclean hands.

[17] In considering this argument, Justice Zinn relied (at paragraph 10) on *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*], in which the Federal Court of Appeal identified the principal factors to be considered before dismissing an application for judicial review based on unclean hands (see *Thanabalasingham* at para 10):

In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[18] I recognize that the allegations of risk considered in the Decision under review are serious. However, having considered the parties' respective written representations on the merits of the application, I am not satisfied that the Applicants have raised a strong case. I also agree with the Respondent that it is unseemly for the Applicants to seek relief from the Court in this matter after failing to respect the outcome of their stay motion in this same matter. I concur with Justice Zinn's comments in *Akinwumi* that deterrence of similar misconduct by others is an important consideration, as the strength of Canada's immigration system depends on adherence to the law. Condoning misconduct sends the wrong message to those who respect and observe the law even when their claims have been unsuccessful (at para 14).

[19] Accordingly, my Judgment will dismiss this application, because the Applicants have not come to the Court with clean hands. No question has been raised for certification for appeal, and none will be stated.



**JUDGMENT IN IMM-4393-22**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"

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Judge

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

**DOCKET:** IMM-4393-22

**STYLE OF CAUSE:** LIDD MILDRED AMOROCHO SANABRIA  
SANTIAGO ALVAREZ AMOROCHO v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 6, 2023

**JUDGMENT AND REASONS:** SOUTHCOTT J.

**DATED:** JUNE 7, 2023

**APPEARANCES:**

Charles Jubenville

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada

FOR THE RESPONDENT