| Federal Court |  | Cour fédérale |
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**Date: 20100910**

**Docket: IMM-6499-09**

**Citation: 2010 FC 889**

**Ottawa, Ontario, September 10, 2010**

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

**BETWEEN:**

**LUZ MARINA CIFUENTES BONILLA**
**LEONARDO TORRES CASTRO**
**NICHOLL ALEJANDRA GUTIERREZ CIFUENTES**
**DANNA VALENTINA TORRES CIFUENTES and**
**LUISA FERNANDA GUTIERREZ CIFUENTES**

**Applicants**

**and**

**THE MINISTER OF**
**CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated November 19, 2009 concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 because the applicants submitted fraudulent documentation.

**FACTS**

**Background**

[2] The applicants are citizens of Colombia. Ms. Luz Marina Cifuentes Bonilla is the forty-four (44) year old applicant mother. She has three daughters who are also applicants in this matter, twenty (20) year old Luisa Fernanda GutieRrez Cifuentes, fifteen (15) year old Nicholl Alejandra Gutierrez Cifuentes, and ten (10) year old Danna Valentina Torres Cifuentes. The applicant's husband, forty-five (45) year old Leonardo Torres Castro is also an applicant in this matter. The applicants entered Canada on July 10, 2007 and immediately claimed refugee protection.

[3] The applicants lived in one of Bogota's poor neighbourhoods. The applicant mother was a community activist and a youth coordinator on behalf of the youth wing of the Colombian Liberal Party and organized activities for her neighbourhood's youth since 1996. Her neighbourhood, "El Rincon de Los Molinos", was a target for FARC recruiting and attacks because of the presence of a maximum security prison which held FARC members. In September and November 1999 the applicant received two threatening phone calls from FARC agents who accused her being a traitor and asked that she stop her political work. The applicant ignored that call and in December 1999 she accepted a position as a youth coordinator for the Community Action Board of her neighbourhood. The applicant's sister, who is not a party to these proceedings, accepted a similar position, but as a result of FARC intimidation she fled to Canada where she was accepted as a refugee on June 2, 2005.

[4] On December 22, 1999 the applicant mother received another threatening phone call from the FARC. The applicant mother contacted the police in January 2000 but they told her they could not assist her. On January 18, 2000 a school where the applicant mother held a meeting earlier in the day was attacked with grenades. The applicant mother continued to receive phone threats and consequently fled Colombia with a false Argentinean passport on October 31, 2000. The applicants claimed refugee protection in the U.S. on November 6, 2001. Their claim was rejected on March 9, 2007. The applicant's oldest daughter, Luisa, has since acquired Spanish residency through sponsorship on August 1, 2007. The applicant mother claimed refugee status on July 10, 2007 on behalf of all the applicants, including Luisa, who returned to Canada to attend her refugee hearing.

**Decision under review**

[5] On November 19, 2009 the RPD dismissed the refugee claim because the RPD could not authenticate two out of the three key supporting documents provided by the applicant mother. The RPD determined that the applicants submitted false documentation and were therefore not credible. The RPD further adjourned Luisa's refugee claim because she has the ability to flee to Spain where she is a permanent residence. The applicants do not challenge the adjournment of Luisa's claim specifically.

[6] At the hearing the applicants consented to have the following supporting documents authenticated by the RPD:

1. a letter dated February 8, 2005 from Mr. Jose Felix Montenegro confirming that the applicant mother worked with the Community Action Board;

2. a letter dated April 28, 2005 from Mr. Jaime Alzate confirming that the applicant was a Colombian Liberal Party member who had to flee Colombia because of the FARC; and
3. Medical records from Santa Clara Hospital for the applicant mother dated January 19, 2000.

The RPD agreed at the hearing at page 12 of the transcript to allow the applicants to make submissions or alternatively make a request to reopen the hearing after receipt of the RPD's research directorate's findings:

> MEMBER: …So we're going to adjourn. When we get our response back from our research people concerning verification of those three documents that'll be disclosed to your counsel, and counsel then, when you get that, depending on what it says, you can do a number of things; you can -- if you like what it says you can simply drop me a note and maybe give me some written submissions as to why their claim should be accepted and in that note you might include some thoughts as to why the oldest daughter should have her claim refused as opposed to have her excluded…
>
> <u>If you don't like the result I assume you'll ask that the hearing be reopened, a new date be set and that request will be granted.</u>
>
> [Emphasis added]

[7] The applicants received the research directorate's response on September 24, 2009 which indicated that only the Community Action Board letter was authenticated as genuine. The RPD

research directorate disclosed the responses it obtained in the course of its research which consisted of the following:

1. a letter dated July 2, 2009 confirming the applicant mother's activities in the Community Action Board;
2. a letter dated July 23, 2009 from the Santa Clara Hospital indicating that it has no records of the applicant mother; and
3. a letter dated July 6, 2009 from the General Secretary of the Colombian Liberal Party, but whose name was redacted, stating that neither the applicant mother, nor Mr. Jaime Alzate who purported to certify the applicant mother's membership, are listed as members in the Party's databases and furthermore stated that only persons in the Party authorized to authenticate memberships are Dr. Cesar Gavrial Trujillo, National Director of the Party, and the writer of the letter.

[8] On October 30, 2009 the applicants wrote to the RPD submitting that the negative responses to the RPD research directorate inquiries listed the incorrect cedula (ID numbers) number of the applicant mother while the positive response listed the correct one. The applicant submitted a letter from Mr. Jose Noe Rios Munroz, Secretary General of the Colombian Liberal Party, dated October 23, 2009 which stated that the letter dated July 6, 2009 was a result of a mistake in the cedula number. The applicant submitted a letter dated October 6, 2009 from the Santa Clara hospital and an affidavit from a legal assistant which indicated that health records in Colombia are by law required to be kept for a minimum of 5 years in the hospital and a further 15 years at the central registry. The applicants made the following procedural request at page 2 of the submissions:

> …It is submitted that if the panel is satisfied by the evidence now before it, a decision can be rendered in accordance with the indications made by the presiding member upon adjournment of the proceedings. If, however, the panel is unable to make a decision on the evidence before it, the claimants hereby request a resumption of the proceedings in order to answer any unresolved questions.

[9] The RPD rendered its decision without reopening the hearing on November 19, 2009. The RPD noted the applicants' submissions but rejected the explanation with respect to the incorrect cedula numbers at paragraphs 16-18:

> ¶16 Counsel submits that both the Liberal Party letter and the Hospital report contain an incorrect cedula number and that subsequent correspondence from the two agencies now verify claimant's participation and medical history.
>
> ¶17 In response, I note the cedula number is incorrect on both verified documents, however, it is the same incorrect cedula number on both.
>
> ¶18 That would mean that the Liberal Party and the Hospital both independent of each other, not only recorded an incorrect number but the same incorrect number. This I find to be implausible.

[10] The RPD assigned no weight to the new letter from the Colombian Liberal Party dated October 23, 2010 because it was authored by a person other then Dr. Cesar Gavrial Trujillo or the author of the July 6, 2009 letter. The RPD determined that the original letter from the Colombian Liberal Party was fraudulent and that the second letter could not advance the refugee claim because the applicants were no longer credible having had submitted fraudulent supporting documents. The RPD determined that the association with the Colombian Liberal Party was the core of the

applicants' refugee claim. Since that aspect of the claim was tainted by fraud, the RPD dismissed the refugee claim in its entirety.

**LEGISLATION**

[11] Section 96 of IRPA grants protection to Convention refugees:

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| 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 of each of those countries; or | *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*) 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. | *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. |

[12] Section 97 of IRPA grants protection to certain categories of persons:

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| 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, | 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 |

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| their country of former habitual residence, would subject them personally | pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : |
| (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or | *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<br>(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,<br>(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,<br>(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and<br>(iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :<br>(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,<br>(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,<br>(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,<br>(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |

[13] Subsection 100(4) of IRPA requires the applicants to submit documentation which the RPD requires:

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| 100(4) The burden of proving that a claim is eligible to be referred to the Refugee Protection Division rests on | 100(4) La preuve de la recevabilité incombe au demandeur, qui doit répondre véridiquement aux questions |

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| the claimant, who must answer truthfully all questions put to them. If the claim is referred, the claimant must produce all documents and information as required by the rules of the Board. | qui lui sont posées et fournir à la section, si le cas lui est déféré, les renseignements et documents prévus par les règles de la Commission. |

[14] Rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228, requires the applicants to supply acceptable documents to the RPD or explain why they were not provided:

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| 7. The claimant must provide acceptable documents establishing identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they were not provided and what steps were taken to obtain them. | **7.** Le demandeur d'asile transmet à la Section des documents acceptables pour établir son identité et les autres éléments de sa demande. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour s'en procurer.. |

**ISSUE**

[15] The applicants raise the following issues:

1. Did the RPD deny the applicants natural justice by:

    a. Failing to provide the applicants with the opportunity to present their case;
    b. Failing to provide the applicants with the opportunity to respond to evidence introduced post hearing;
    c. Misleading the applicants and their counsel about their opportunity for a resumption of proceedings, and then disregarding their request for a resumption; and
    d. Ignoring relevant evidence and providing inadequate reasons for decision?

2. Did the RPD commit a legal error by failing to consider all of the grounds on which the applicants' persecution was based?

[16] It is not necessary to address the second issue because of the Court's conclusion with respect to the first issue.

**STANDARD OF REVIEW**

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[18] Questions of credibility concern determinations of fact and mixed fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* credibility findings are to be reviewed on a standard of reasonableness. Recent case law has reaffirmed that the standard of review for determining whether the applicant is credible is reasonableness: *Mejia v. Canada (MCI)*, 2009 FC 354, per Justice Russell at para. 29; *Syvyryn v. Canada (MCI*), 2009 FC 1027, 84 Imm. L.R. (3d) 316, per Justice Snider at para. 3; and my decision in *Perea v. Canada (MCI)*, 2009 FC 1173 at para. 23. The standard of review to be applied to issues of breach of natural justice is correctness: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 (QL) at para. 46; *Olson v. Canada (MPSEP)*, 2007 FC 458, [2007] F.C.J. No. 631 (QL), per Justice O'Keefe at para. 27.

[19] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making

process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra*, at paragraph 47; *Khosa*, *supra*, at para. 59.

**ANALYSIS**

**Issue No. 1: Did the RPD deny the applicants natural justice?**

[20] The applicants submits that the RPD denied the applicants natural justice for the following reasons:

1. the applicants were denied their opportunity to present their case;
2. the RPD denied the applicants an opportunity to respond to new evidence;
3. the tribunal misled the applicants and their counsel; and
4. the tribunal failed to consider all relevant evidence.

[21] The RPD's practice for authenticating supporting documentation after the hearing has been concluded was reviewed in *Szylar v. Canada (MEI)* (1994), 79 F.T.R. 47, per Justice Denault where he held at paragraph 6 that the RPD can request its documents centre to verify facts and documents provided that it reopens the hearing subsequently:

> ¶6 I believe that the tribunal acted within the limits of the hearing in that, while decision was reserved, relying on a piece of evidence (A-6) which led it to doubt the relevance of the document, it had the authority to "do anything necessary to provide a full and proper hearing" under section 67(2) of the Act. Since it had not yet ruled on the claim, the Refugee Division was not functus officio and had the authority to exercise the powers given to it by the Act "provided it did so properly by giving the respondent, an opportunity to be heard at the reconvened hearing" (SALINAS v. CANADA, [1992] 3 F.C. 247 at 253). In LAWAL, the section 28

> application was allowed because after the tribunal had itself gathered evidence it did not order that the hearing be reopened. This is not the case here. After obtaining the additional evidence, the tribunal held a new hearing, but it did not accept the applicant's objections and rejected his claim.

[22] Justice Denault's decision was followed in *Afzal v. Canada (MCI)*, [2000] 4 F.C. 708, 192 F.T.R. 40, per Justice Lemiuex at paragraph 43. Justice Lemiuex allowed the application before him because in that case the RPD pulled the applicant into a debate concerning Pakistani law and required him to rebut a response received from the RPD's documents centre without reconvening the hearing. The failure to reconvene a hearing and the dismissal of the refugee claim on the basis of the new evidence obtained from the RPD's documentation centre amounted to a breach of rules of natural justice according to Justice Lemiuex.

[23] The requirement for reconvening of the hearing can be waived: *Albert v. Canada (MCI)* (2000), 180 F.T.R. 231, per Justice Rouleau at para. 33. Failure to reconvene the hearing will not amount to a breach of natural justice if there is no unfairness such that the new hearing would not have made a difference in the assessment of the evidence: *Albert*, *supra*, at para. 37

[24] In this case the applicants did not waive the requirement for a reconvened hearing. The Court has no doubt that the applicants clearly stated that they reserved their right to a new hearing if the RPD was of the view that their documentary evidence was false and hence their refugee claim will determined to be not credible. Furthermore, the applicants contest the RPD's finding that they submitted false documentation.

[25] Furthermore, the RPD explicitly agreed to reconvene the hearing in the event the credibility of the applicants would become an issue because their supporting documentation could not be authenticated. The RPD provided no reasons in its decisions for departing from its explicit promise to the applicants that their hearing would be reopened if their documentation was not authenticated by the RPDs documents centre. The documents in question were determined to be central to the applicants refugee claim. In my view it was incumbent upon the RPD to allow the applicants an opportunity to address in an oral hearing the inconsistencies and authenticity of their supporting documentation.

[26] The failure to reconvene the hearing, contrary to the RPD's promise during the hearing and the applicants' subsequent written request, constitutes a breach of natural justice. Since a breach of natural justice has been to have occurred, it is not necessary to address the second issue and the application for judicial review will be allowed.

[27] The Court notes that the incorrect 8 digit cedula number is only incorrect with respect to one of the eight digits, and this could be a "typographical error" which could explain to the Board why the initial response was that these documents are fraudulent.

**CERTIFIED QUESTION**

[28] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

The application for judicial review is allowed. The matter is remitted back for redetermination by a different panel.

"Michael A. Kelen"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6499-09 |
| **STYLE OF CAUSE:** | *Luz Marina Cifuentes Bonilla et al v. The Minister of Citizenship and Immigration* |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | August 25, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KELEN J. |
| **DATED:** | September 10, 2010 |

**APPEARANCES:**

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| Mr. Michael Brodzky | FOR THE APPLICANTS |
| Ms. Margherita Braccio | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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