

**Date: 20091013**

**Docket: IMM-1069-09**

**Citation: 2009 FC 1024**

**Ottawa, Ontario, October 13, 2009**

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

**BETWEEN:**

**ZYMRYTE CUNI  
and TIGRAN CUNI**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] June 28, 2008 is a day that Zymryte Cuni will never forget. That is the day she last saw her husband. That was the day she and her infant son Tigran arrived in Canada. They filed a refugee claim. Her husband was supposed to join them but was detained in England and never made it here. Relying on misinformation, she withdrew their claim for refugee protection in an attempt to reunite with her husband. However, she could not leave Canada because she had no travel documents. She

attempted to reinstate their claim. Her application was rejected by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. This is a judicial review of that decision.

### **THE FACTS**

[2] The Applicant and her husband come from Kosovo, a part of the former Republic of Yugoslavia which declared its independence in 2008.

[3] The family was flying to Toronto via London. They kept apart as Ms. Cuni and their son were flying on false German passports. It is not known what papers her husband was using. In any event, he was turned back in London and is said to be in hiding in Albania.

[4] Ms. Cuni's evidence, which was before the RPD, and which in no way has been contradicted, is that it took her some time to trace her husband. She wanted to be reunited with him.

[5] She went to the RPD's office in Toronto and was informed that in order to leave the country she had to withdraw her refugee claim. She did so. Perhaps she thought that she would then be removed from Canada and that the Canadian authorities would arrange travel documents for her. However there has been no effort on the authorities' part to remove her. The record contains no information as to what efforts she has made to obtain travel documents with Canada's aid, or directly from Kosovo, or the United Nations.

[6] Realizing she was not then in a position to join her husband she sought to have her refugee claim reinstated. It was only at this juncture that she obtained the benefit of legal counsel.

### **THE LAW**

[7] This case is governed by Rule 53 of the *Refugee Protection Division Rules* which provides that the division “must allow the application if it is established that there was a failure to observe a principle of natural justice or if it is otherwise in the interests of justice to allow the application.”

[8] The essence of the decision of the RPD is that “the arguments advanced by counsel on the Application do not disclose any breach of natural justice. The claimants withdrew their claims voluntarily. The fact that the claimants did not have a hearing in these circumstances does not amount to a breach of natural justice. In this regard, the merits of the claims, which have not been tested, are not relevant.”

[9] The information given to Ms. Cuni by someone at the RPD office on Victoria Street in Toronto was incorrect. She did not need to withdraw her refugee claim in order to leave the country. Her problem is that without proper travel documents no airline will accept her. Had she had a valid passport, she could have left the country without notifying the RPD, which in due course would have come to the conclusion that she had abandoned her claim.

[10] The RPD has missed the point. She was misled by the RPD and it is in the interests of justice that this matter be sent back for re-determination and re-instatement.

[11] It matters not that the person at the desk at the Victoria Street office was undoubtedly acting in good faith and was not in a position of authority. How was Ms. Cuni to know that? The operating procedures manuals clearly state an Applicant is usually acting under the belief that she is dealing with the Government.

[12] There are few cases on point. The two cited by the Respondent turn on their own facts and are not helpful (*Sathasivam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 438 and *Ohanyan v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1078).

[13] It is a fact of life that each of us deals with bureaucrats almost on a daily basis, and that we rely on the information provided. Sometimes, as in this case, we are provided with incorrect information upon which we act. In *MacKenzie v. Canada (Attorney General)* 2007 FC 481, 2007 FCJ No 645, 311 FTR 157 I had occasion to refer to negligent misrepresentation.

[14] The decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465, which has its following in Canada, stands for the proposition that a negligent, though honest, misrepresentation may give rise to an action in damages for financial loss, quite apart from any contractual or fiduciary relationship, as the law will impose a duty of care when one seeks information from another who is possessed of a special skill, trusts that person to exercise due care, and that person knew or should have known that reliance was being placed on that skill and judgment. Although this is not an action in damages the same fundamental principle holds true.

[15] The relationship between one whom at the time was more or less stateless and the government of the place in which she finds herself is, or should be, special. In *Lloyds Bank v. Bundy*, [1975] 1 Q.B. 326, Sir Eric Sachs discussed special relationships, more particularly confidential relationships, which may arise in unusual and widely differing sets of circumstances. He had thought it neither feasible nor desirable to attempt to draw demarcation lines around that relation. He said at page 341:

:Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.

[...]

Confidentiality, a relatively little used word, is being here adopted, albeit with some hesitation, to avoid the possible confusion that can arise through referring to “confidence.” Reliance on advice can in many circumstances be said to import that type of confidence which only results in a common law duty to take care—a duty which may co-exist with but is not coterminous with that of fiduciary care.

[16] Ms. Cuni relied on the advice she was given. She had reason to believe that the information was correct, and she acted upon it to her detriment. It is in the interests of justice that someone not be led astray because of faulty advice given by an employee of the RPD.

[17] Although not before me, may I say that the human issue here, as opposed to the legal one, is family reunification. If Ms. Cuni would prefer to join her husband in Albania or wherever, should

help not be forthcoming? If she leaves Canada she is now on notice she is abandoning her refugee claim.

**ORDER**

**THIS COURT ORDERS that** the application for judicial review is granted. The matter is referred back to another decision maker to be dealt with in accordance with the reasons given. There is no question of general importance to certify.

“Sean Harrington”

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Judge

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

**DOCKET:** IMM-1069-09

**STYLE OF CAUSE:** ZYMRYTE CUNI and TIGRAN CUNI v. THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 6, 2009

**REASONS FOR ORDER:** HARRINGTON J.

**DATED:** October 13, 2009

**APPEARANCES:**

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