Federal Court  Cour fédérale

**Date: 20190329**

**Docket: IMM-3262-17**

**Citation: 2019 FC 389**

**Ottawa, Ontario, March 29, 2019**

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

**BETWEEN:**

**BINGHONG QIU**
**GUILAN ZHU**
**ZHIHENG QIU**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Binghong Qiu (the Principal Applicant), his wife Guilan Zhu, and their son Zhiheng Qiu (the Applicants) are citizens of China. They came to Canada and sought protection as refugees. Their claim has taken a number of procedural twists and turns, which now brings them before this Court on an application for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) dated June 21, 2017, who refused

their claim. In order to understand this matter, it is necessary to first trace the procedural history of their claim in some detail.

## I. Background and Procedural History

[2] The Applicants' claim for refugee status was based on the following narrative. They say they had leased land in their village in China, on which they ran a farm. In March 2012, they were notified that the land was being expropriated. Others in their village received a similar notification. The Applicants were disappointed with the amount of compensation the government proposed to pay for the loss of their land and they shared their concerns with their neighbours. Some of the villagers expressed their dissatisfaction to local government officials, but they did not receive a response. When the demolition crew arrived at their village, the group, including the Applicants, formed a human chain to stop the work. Police and Public Security Bureau (PSB) officials were present, and there was some violence.

[3] The Principal Applicant claims that he was identified by security officials, but managed to escape. He, and his family, then went into hiding for three months. He was able to obtain a travel visa to the United States, and the Applicants fled China with the assistance of a smuggler. They came to Canada soon after landing in the U.S. and claimed refugee status three months after their arrival.

[4] The first RPD decision, issued on October 14, 2015, rejected their claim of refugee status. It is not necessary to review that decision in detail. The essential point is that the first RPD decision rests on three findings: (i) the Principal Applicant lacked credibility, and the narrative regarding the expropriation and effort to prevent the demolition, as well as the PSB summons

and their escape from China, all lacked plausibility; (ii) there was "no credible basis for this claim"; and (iii) the Applicants had not satisfied their burden to establish a nexus to a ground of persecution, since they faced prosecution under an ordinary law of general application in China rather than persecution on a Convention ground.

[5] The Applicants were granted leave to judicially review this decision, pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. On June 20, 2016, Justice Roger Hughes granted their application in part, finding that the RPD erred in making its determination that there was "no credible basis" for the claim. In the following passage of his decision (*Qiu v Canada (Citizenship and Immigration)*, 2016 FC 740 [*Qiu (FC)*]), Hughes J. comments on the impact of a "no credible basis" finding:

> [6] The principal issue in this case is whether, on the evidence, the RPD should have found that the claims "do not have a credible basis." A "no credible basis" finding has certain practical effects, one is that there can be no appeal to the Refugee Appeal Division (subsection 110(2)(c) of the *Immigration and Refugee Protection Act* (IRPA), SC 2001, c. 27 as amended) however, this does not preclude an application for leave to commence an application for judicial review of the RPD decision cannot [*sic*] be made directly to this Court as was done in the present case. Another effect that a "no credible basis" decision can have is that there is no automatic stay of removal that would otherwise have occurred were there an outstanding appeal to the RAD (IRPA Regulations, subsection 231(11)). Accordingly, this Court has set a high threshold before a "no credible basis" finding can be made (*Ramón Levario v Canada (Minister of Citizenship and Immigration)*, 2012 FC 314).

[6] Justice Hughes found that the RPD erred in giving more weight to certain of the documentation submitted by the Applicants. The RPD had discounted some of the documentation because it lacked security features commonly found on official documentation and fraudulent documents were easily obtained in China. However, the RPD did not comment on

a number of other documents presented in evidence which appeared to bear official stamps. Justice Hughes found at paragraph 5 that "[t]hese documents, if properly considered, could have some bearing on the credible basis of the Applicants' claim."

[7] Having made these determinations, Hughes J. then stated the following:

> [8] In the present case, I am satisfied that the decision under review must be set aside at least so far as it makes a finding that the claims "do not have a credible basis." I do so because the lack of attention to the documents discussed previously herein indicates that, had the documents been properly considered, there "could" have been something to support a positive finding in favour of the Applicants.
>
> [9] In the absence of a "no credible basis" finding, the decision under review could have been appealed to the RAD with benefits to the Applicants of a statutory stay. I deliberately make no finding on the conclusions otherwise reached by the RPD that the claimants are not Convention refugees and are not persons in need of protection, whereby their claims were rejected. I wish to leave that as an open issue for the RAD to decide.
>
> [10] How best to craft a Judgment in this case is a concern. Justice Phelan of this Court endeavoured to find a way to do so in *Mahdi v Canada (Minister of Citizenship and Immigration)*[,] 2016 FC 218, where he provided for a thirty day stay of his decision so as to allow for an appeal to the RAD.
>
> [11] I propose something different. This is a judicial review which is governed by the *Federal Courts Act*, RSC 1985, c. F-7. Subsection 18.1(3)(b) of that *Act* provides that I can refer a matter back to the tribunal in question with such directions as may be appropriate.
>
> [12] Therefore, I will return the matter to the RPD with directions that that portion of the decision declaring that there is no credible basis for the claim be set aside and that an amended decision to that effect be issued bearing the date of the amendment. On that basis, the RPD would not need to conduct any further hearing and an appeal to the RAD would be possible.

[8] Following receipt of submissions on the issue, Hughes J. then certified the following question in brief Order and Reasons issued July 26, 2016 (*Qiu v Canada (Citizenship and Immigration)*, 2016 FC 875):

> Does the Federal Court have jurisdiction under paragraph 18.1(3)(b) of the *Federal Courts Act* to issue a direction requiring the Refugee Protection Division to remove from its decision a finding that there is no credible basis for a claim, thereby granting a right of appeal to the Refugee Appeal Division, which would otherwise be precluded by paragraph 110(2)(c) of the *Immigration and Refugee Protection Act*?

[9] On August 19, 2016, the IRB wrote to the parties asking for submissions "regarding how it should interpret and implement Justice Hughes' order." The IRB pointed out that the assumption of the parties and Hughes J. that the "no credible basis" finding had acted as a bar to prevent the Applicants from an appeal to the RAD appeared to be incorrect, in light of s. 167 of the *Economic Action Plan 2013 Act, No 1*, SC 2013, c 33 [*EAP No. 1*] and it being a "legacy claim." Section 167 states:

| **No Appeal to the Refugee Appeal Division** | **Aucun appel devant la Section d'appel des réfugiés** |
|---|---|
| **167** A decision made by the Refugee Protection Division under subsection 107(1) of the Immigration and Refugee Protection Act in respect of a claim for refugee protection that was referred to that Division after August 14, 2012 but before December 15, 2012 is not subject to appeal to the Refugee Appeal Division if the decision takes effect in accordance with the Refugee Protection Division Rules after the day on which this section comes into force. | **167** N'est pas susceptible d'appel devant la Section d'appel des réfugiés la décision de la Section de la protection des réfugiés, prise en application du paragraphe 107(1) de la Loi sur l'immigration et la protection des réfugiés, à l'égard de toute demande d'asile qui lui a été déférée après le 14 août 2012, mais avant le 15 décembre 2012, lorsque cette décision ne prend effet conformément aux Règles de la Section de la protection des réfugiés qu'après la date d'entrée en |

vigueur du présent article.

[10] Counsel for the Applicants replied, proposing that the RPD should simply amend its decision as directed by Hughes J., and remit the matter back so that they would be able to appeal to the RAD. This letter did not address the question about the effect of s. 167 of the *EAP No. 1*. Counsel for the Respondent replied, proposing that the RPD hold the matter in abeyance pending the outcome of the appeal, in light of the certified question. On September 15, 2016, the IRB confirmed that it would hold the matter in abeyance pending the outcome of the appeal.

[11] On April 25, 2017, the Federal Court of Appeal (FCA) heard the submissions of the parties on the certified question. The FCA dismissed the appeal (*Canada (Citizenship and Immigration) v Qiu*, 2017 FCA 84 [*Qiu (FCA)*]), because it found that the question should not have been certified.

[12] The FCA ruled that the RPD decision had rejected the Applicants' claims on the basis of three findings: (i) the principal claimant's testimony was not credible; (ii) there was "no credible basis" for the claim; and (iii) even if the claims were found to be credible, the claimants had failed to establish a nexus between the peril they claimed to face and a Convention ground.

[13] The following key passages from the FCA decision set the framework for my decision:

> [3] In our view, the determinative issue on this appeal is whether the Federal Court properly exercised its discretion to certify the question.
>
> [4] It is well-settled law that a question should be certified only if it is a serious question of general importance which will be dispositive of an appeal (*Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89, 318 N.R. 365, at paragraph 11; *Varela v. Canada (Minister of Citizenship and Immigration)*[,] 2009 FCA 145, [2010] 1 F.C.R. 129, at paragraph 28).

> [5] The respondents did not challenge in the Federal Court the finding of the Refugee Protection Division that they had failed to establish a nexus between the peril claimed and a Convention ground. The reasons of the Federal Court do not impugn the finding with respect to nexus. Indeed, the Federal Court deliberately made no finding on the issue (reasons, at paragraph 9).
>
> [6] In this circumstance the Federal Court erred in law in certifying a question that was not dispositive of the appeal. Irrespective of the findings of credibility and no credible basis, the claims to status as Convention refugees were bound to fail as a result of the unchallenged determination that the respondents failed to establish a nexus to a Convention ground.
>
> [7] Subsection 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27, provides that an appeal lies to this Court from the Federal Court only where a serious question of general importance has been stated. In consequence, where there is no serious question of general importance, the condition precedent to a right of appeal has not been met and the appeal should be dismissed on that ground (*Varela*, at paragraph 43).
>
> [8] It follows that the appeal will be dismissed.

[14] The legal effect of the FCA decision is a key question in this application, but before considering the arguments on that point, it is necessary to complete the review of the procedural history.

[15] On April 28, 2017, following the release of the FCA decision, counsel for the Applicant wrote to the IRB to advise that the decision had been issued, and to propose next steps. The Applicants argued that the FCA decision turned on the finding that the judge had erred in certifying a question that was not dispositive of the matter. They submitted that the finding of Hughes J. that the matter should be remitted back to the RPD for re-determination was not disturbed by the FCA. The Applicants acknowledged that because of s. 167 of the *EAP No. 1* they no longer had a right to have their case heard at the RAD, and thus the direction of

Hughes J. in that regard was “no longer relevant.” In essence, the Applicants submitted that the IRB should disregard the irrelevant part of the order of Hughes J. and simply send the matter back to a different member of the RPD for redetermination, because Hughes J. clearly intended to overturn the decision.

[16] On May 3, 2017, counsel for the Respondent wrote to the IRB, indicating that in their view the matter was settled and no further hearing was required. The FCA had found that although Hughes J. set aside the no credible basis finding, he did not reverse the other findings of the RPD. The letter states: “The Court of Appeal found that this necessarily means that the RPD’s other findings, specifically nexus, still stand…. No further redetermination is required and the RPD’s original decision, minus the “no credible basis” finding, is now the final decision in this matter.”

[17] On May 5, 2017, counsel for the Applicant replied to the Respondent’s letter, arguing that the FCA findings regarding the nexus issue were *obiter dictum*, and therefore not binding. The FCA did not issue any other directions or orders, it simply dismissed the appeal. Justice Hughes had quashed the RPD decision and sent it back. The Applicant contended that the jurisprudence is clear that Hughes J. could send the decision back for redetermination on the “no credible basis” error alone, and he did not need to make any other findings.

[18] On June 21, 2017, the RPD issued its amended decision. This decision was amended in accordance with the direction issued by Hughes J.; the decision is identical to the one previously issued by another member on October 14, 2015, except that the references to “no credible basis” were stuck out. This decision ends by stating: “The claim is therefore rejected…”

[19] This is the decision that is the subject of this application for judicial review.

## II. Issues and Standard of Review

[20] The parties presented starkly different arguments regarding the issues in this case. The Respondent argues that there is only one issue:

A. Does *res judicata* apply to prevent the Applicants from re-litigating their refugee claim or the issue of nexus?

[21] The Applicant argued that there are three issues:

B. Did the RPD commit a reviewable error by failing to reconsider the claim once it was remitted back by the Federal Court?
C. Did the RPD commit a reviewable error in the credibility assessment?
D. Did the RPD commit a reviewable error in finding there was no nexus to the Convention refugee definition?

[22] I find that it is necessary to determine whether the matter is *res judicata* before considering any other issues. If the doctrine applies, the original decision of the RPD stands and the application for judicial review must be dismissed. If the doctrine does not apply, then it is appropriate to consider the other issues raised by the Applicant.

[23] The issue of *res judicata* was not addressed by the RPD, and therefore the standard of review analysis has no application. Determining whether the doctrine applies is a question of law: *David M Gottlieb Professional Corporation v Nahal*, 2012 ABCA 88 at para 9; also see Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (LexisNexis, 2015) at 16

[*Lange*]. The other issues raised by the Applicant are subject to review on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

## III. Analysis

### A. *Does* res judicata *apply to prevent the Applicants from re-litigating all or part of their claim?*

[24] The Respondent's argument that this matter is *res judicata* rests on the following propositions:

- The RPD made three key determinations in its original decision: (i) the Principal Applicant lacked credibility; (ii) there was no credible basis for the claim; and (iii) the Applicants had not met their burden of establishing a nexus between the treatment they feared if they were returned to China and a Convention ground for finding refugee status;
- The Applicants did not seek judicial review in regard to all three grounds; they focused their challenge to the original RPD decision on the "no credible basis" finding;
- The Federal Court quashed the decision in regard to the "no credible basis" finding, but did not quash it on the other grounds;
- The FCA expressly found that the judge was wrong to certify a question which was not dispositive of the case, since the certified question dealt only with the "no credible basis" finding, and the Order issued by Hughes J. did not quash the decision in respect of the other findings;
- The FCA found that the certified question was not dispositive of the case. It stated at paragraph 6: "Irrespective of the findings of credibility and no credible basis, the claims

> to status as Convention refugees were bound to fail as a result of the unchallenged determination that the respondents failed to establish a nexus to a Convention ground."

[25] The essence of the Respondent's argument is that the Applicants did not challenge the original decision on the nexus issue, and since Hughes J. did not overturn the decision on that issue, the RPD's original decision to reject the Applicants' refugee claim stands and is final. It is subject to the legal doctrine of *res judicata*. The Applicants argue that the comments of the FCA were merely *obiter dicta* and therefore are not binding, thus the doctrine of *res judicata* has no application in this case.

[26] The modern law on the doctrine of *res judicata* in Canada has been set by a series of Supreme Court of Canada decisions, including: *Angle v Minister of National Revenue*, [1975] 2 SCR 248 [*Angle*]; *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460 [*Danyluk*]; and *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 [*Penner*].

[27] The policy rationale for the doctrine of *res judicata* was stated succinctly by the Supreme Court of Canada in *Penner*, at para 28:

> Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of their prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative scheme. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[28] The doctrine that is relevant to this matter is issue estoppel. The test for issue estoppel was summarized in *Penner*:

> [92] The three preconditions for the operation of issue estoppel were set out by Dickson J. in *Angle v. Minister of National*

> *Revenue*, [1975] 2 S.C.R. 248: (1) whether the same question has been decided; (2) whether the judicial decision which is said to create the estoppel is final; and (3) whether the parties to the decision or their privies were the same in both proceedings (p. 254).
>
> [93] However, as this Court recognized in *Danyluk*, courts retain a residual discretion not to apply issue estoppel in an individual case. Thus, in that case, this Court set out a two-step test for the application of issue estoppel:
>
> > The first step is to determine whether the moving party . . . has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle, supra*. If successful, the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied . . . . [Emphasis in original; citations omitted; para. 33.]

[29] The doctrine of *res judicata* applies in relation to proceedings before administrative tribunals like the RPD, as well as to courts (*Penner*). It has been applied in a variety of circumstances in cases involving immigration and refugee matters (see, for example: *Canada (Employment and Immigration) v Chung*, [1993] 2 FC 42 (FCA) [*Chung*]; *Shaju v Canada (Citizenship and Immigration)* (1995), 97 FTR 313, [1995] FCJ No 972 (QL) (TD); *Raman v Canada (Citizenship and Immigration)* (1995), 100 FTR 67, [1995] FCJ No 1125 (QL) (TD); *Yamani v Canada (Citizenship and Immigration)*, 2003 FCA 482 [*Yamani*]; F. Nouri, "Application of the Res Judicata Doctrine in Canadian Refugee Cases" (2000) 8 Imm LR (3d) 178).

[30] The first question, therefore, is whether the preconditions to the application of issue estoppel have been met in the case at hand. Two of the three preconditions present little difficulty. It is clear that the same issues arise in both proceedings, since both involve a claim of refugee status, and one of the issues in both is whether the Applicants have established a nexus to

a Convention ground. The third element is also met, since the same parties are involved in both proceedings. The core of the issue before me is whether the original RPD decision on the issue of nexus was, indeed, final.

[31] The Respondent argues that the RPD's decision should be treated as final because the Applicant did not challenge the nexus finding in its first judicial review, and the Order of Hughes J. did not specifically quash that finding. Furthermore, the FCA expressly found that the question was not properly certified on the basis that it was not dispositive of the appeal because the nexus ground was not challenged; therefore, that finding stood as a separate basis for the refusal of refugee status. For these reasons, the Respondent submits that the RPD decision should be treated as final, and that it was an error for the RPD to issue a new decision, edited in accordance with the decision of Hughes J.

[32] The Applicants argue that the comments of the FCA were merely *obiter* and that, in any event, they were made in error since the nexus finding was challenged before Hughes J. in the original application for judicial review. The clear intention of Hughes J. was to quash the original RPD decision and to remit it back so that it could be reconsidered on appeal to the RAD. The fact that the Applicants could not, in fact, bring an appeal to the RAD, should not undermine or negate the intention of Hughes J., which was to have the issue of the documentary evidence in support of the refugee claim reconsidered. Justice Hughes expressly did not rule on the question of nexus because he wanted to leave that for the RAD to consider. The Applicants argue that Hughes J. clearly intended to allow them to have the original RPD decision reconsidered. The doctrine of *res judicata* should not be used to prevent that from happening in the circumstances of this case.

[33] This is an unusual case, and it has been noted that the doctrine of *res judicata* is often easier to state than it is to apply: see *Lange* at p 4. I will first examine some basic guiding principles and then consider the specific legal impact of the determinations of Hughes J. and of the FCA in this case.

[34] The doctrine of *res judicata* is a judge-made body of law which seeks to further two policy considerations:

> The doctrine of *res judicata* is a cornerstone of the justice system in Canada. The foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause. [*Lange*, p 4]

[35] The desire for finality and a concern for the proper use of limited judicial resources finds its parallel in the provisions of *IRPA*, which require applicants to obtain leave prior to pursuing an application for judicial review (s. 72(1)) and places limits on an applicant's right of appeal to the Federal Court of Appeal to cases where the trial judge has certified a question of general importance (s. 74(d)). These are "two 'gatekeeper' provisions… Given the statutory stay that flows automatically from access to the courts, these provisions are designed to ensure that applications that have no merit are dealt with in a timely manner" (*Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at para 27 [*Varela*]). The requirement for a certified question "fits within a larger scheme designed to ensure that a claimant's right to seek the intervention of the courts is not invoked lightly, and that such intervention, when justified, is timely" (*Varela*, para 23).

[36] Two elements of the doctrine of *res judicata* are of particular significance in this case: (i) whether the same question has been decided (here, the nexus issue), and (ii) whether the decision was final.

[37] In regard to the first element, the causes of action in this case are statutory in nature (*Yamani*, para 12). In *Danyluk*, Justice Ian Binnie observed that: "A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgement of the court…" (para 54). He continued: "The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that 'issue' in the prior proceeding."

[38] The question of whether a refugee claimant has established a nexus to a ground under the Convention is integral to the determination of the claim. A finding on that core question was made in the original RPD decision. The issue would necessarily arise in the second hearing before the RPD. There is no doubt that the same question has been determined by the RPD.

[39] In regard to the second element, the doctrine of *res judicata* only applies if the original decision is "final." The following definition of what constitutes a final decision is set out in *Lange*, at pp 92-93:

> A judge's decision is final when the judge is *functus officio*. A final decision for the purposes of issue estoppel is a decision which conclusively determines the question between the parties. In *Apotex Inc. v Canada* [*(Attorney General)*, [1997] 1 FC 518 (TD)] MacKay J. defined "final" for the purpose of issue estoppel. MacKay J. stated:
>
> > It was a final order in the sense that it was subject to variation only upon a successful appeal, and the

> Court of Appeal declined to vary that order. It was not an order this Court could vary directly, or one it would affect indirectly by issue of a contradictory order in similar circumstances.
>
> The test of finality for issue estoppel, therefore, is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding.

[40] It has been found that a decision that became "final" because of procedural matters, such as failure to meet the filing deadlines, rather than on substantive grounds, will not necessarily bar a further proceeding on the same matter (*Chung*, p 58). Similarly, if an issue was not directly considered by the court hearing the original matter the issue will not be *res judicata* (*Angle*, p 257).

[41] The question before me, therefore, is whether the original RPD decision in regard to the nexus issue must be treated as "final," since it was not quashed by Hughes J., nor reversed by the FCA. This turns on the legal effect of the FCA's decision, and on the legal effect of the decision of Hughes J.

[42] The FCA has consistently held that where a question is not properly certified in accordance with the tests set out in the jurisprudence, the condition precedent to a right of appeal has not been met and the appeal should be dismissed on that ground (*Varela*, para 43). In a more recent decision, the FCA ruled that "the certified question is not sufficient to give this Court jurisdiction to decide the appeal, which must therefore be dismissed" (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 53).

[43] In the case at bar, the FCA dismissed the appeal because it found that the question was not properly certified. The key passage in this regard is: "where there is no serious question of general importance, the condition precedent to a right of appeal has not been met and the appeal should be dismissed on that ground (*Varela*, at paragraph 43)" (*Qiu (FCA)*, para 7).

[44] The FCA found that the question was not properly certified because it concluded that the question was not dispositive of the appeal. The FCA stated expressly: "the [Applicants'] claims to status as Convention refugees were bound to fail as a result of the unchallenged determination that the respondents failed to establish a nexus to a Convention ground" (*Qiu (FCA)*, para 6. Emphasis added).

[45] The Applicants submit that this was merely *obiter* which should not have the legal effect of barring the RPD from reconsidering the claim, in light of the clear intention of Hughes J. to overturn the decision. In this regard, it is worth recalling the words of Binnie J. in *R v Henry*, 2005 SCC 76 at paragraph 57:

> … All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding"… The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity….

[46] It is not necessary to determine whether the comments of the FCA are, in fact, properly considered to be *obiter*. I find that the decision of the FCA on the certified question rests entirely on their finding that the nexus issue had not been challenged by the Applicants, and that therefore the original RPD decision on that issue had not been overturned by Hughes J. There is

simply no other way to interpret the FCA decision, and – at a minimum – this finding was obviously "intended for guidance" and "should be accepted as authoritative" (see, by way of contrast, the discussion in *Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48).

[47] The Applicants also argue that the FCA erred in finding that they had not challenged the nexus finding in the original RPD decision. I reject this argument. The Applicants' application for judicial review of the original RPD decision was focused almost exclusively on the "no credible basis" finding. Although the recital of the facts does mention the nexus finding, it is not listed as an issue nor are submissions filed in regard to this question (in contrast to the application and materials filed in the case at bar). The FCA was not mistaken when it found that the nexus finding was not challenged.

[48] Furthermore, Hughes J. stated explicitly that he was not disturbing the other findings of the RPD: "I deliberately make no finding on the conclusions otherwise reached by the RPD that the claimants are not Convention refugees and are not persons in need of protection, whereby their claims were rejected. I wish to leave that as an open issue for the RAD to decide" (*Qiu (FC)*, para 9).

[49] The legally operative part of the decision is the order issued by the judge. In this case, that is styled as the "Judgment," which states:

> 1. That part of the decision of the Refugee Protection Division under review in which it was determined that the Applicants' claims do not have a credible basis, is set aside;
>
> 2. The matter is returned to the Refugee Protection Division with a direction that an amended decision be issued, dated as of the date of that issue, wherein the finding of no credible basis, is removed…

[50] The plain meaning of the words used is not that Hughes J. was overturning the decision in its entirety and remitting the matter back for reconsideration. Rather, the only aspect of the RPD decision that is set aside is the finding regarding the "no credible basis" finding. The reason for doing so is explained in the decision – Hughes J. intended to allow the Applicants to pursue their case through an appeal to the RAD. This was based on a shared misunderstanding of the law as it applied to the facts of the case. That intention – and that misunderstanding – does not, however, alter the legal impact of the judgment issued by Hughes J.

[51] I therefore find that the nexus finding in the original RPD decision is a final decision that is subject to *res judicata*, in the sense that all of the pre-conditions to the application of the doctrine apply in this case. The only remaining question on this issue is whether the residual discretion not to apply the doctrine should be applied in this case.

[52] In *Danyluk*, Binnie J. emphasized that the application of *res judicata* is not a mechanical exercise. It involves a two-step process: (i) has the moving party established the pre-conditions to the application of the doctrine; and if so, (ii) "the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied…" (para 33, emphasis in the original). In the context where the doctrine arises because of a prior court decision, "such a discretion must be very limited in application" (para 62, citing *GM (Canada) v Naken*, [1983] 1 SCR 72). Justice Binnie noted at paragraph 67 that "[t]he objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." In that case, Binnie J. found that the application of the doctrine would work an injustice, because the party whose claim would be barred had received neither notice of the prior proceeding, nor an opportunity to respond.

[53] In the more recent case of *Penner*, the majority of the Supreme Court put the emphasis on considerations of fairness:

> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

[54] The fairness considerations were described by Justice Louise Arbour in *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [*Toronto*]:

> 53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

[55] In exercising this discretion, I am to be guided by one overarching consideration: “is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?” (*Danyluk*, para 63, citing *Schweneke v Ontario* (2000), 47 OR (3d) 97 (CA)).

[56] In *Danyluk*, *Penner*, and *Toronto*, the Supreme Court was dealing with situations where the prior proceeding was before an administrative tribunal, and the claim was raised to prevent an issue from being dealt with in a court proceeding. That is somewhat different than the situation here. The original decision here was issued by the RPD. It was subject to judicial review, on a limited basis, and was overturned on a limited basis. The FCA ruled that the nexus finding in the original decision had not been challenged or overturned by Hughes J.

[57] The Respondent claims that this finding is now *res judicata* and seeks to prevent consideration of the merits on the application for judicial review of the second RPD decision. The Applicants argue that it would be unfair to them to apply the doctrine, because Hughes J. obviously found the original decision to be lacking.

[58] The Applicants' claim that the operation of the doctrine would work an injustice rests on the following propositions: (i) Hughes J. intended to reverse the original RPD decision; (ii) he did not do so because he believed (as did the parties) that by reversing only the "no credible basis" claim, the matter could be returned to the RPD and the Applicants would have a right to appeal to the RAD; and (iii) Hughes J. states explicitly that he is not addressing these other issues precisely because he wanted to leave it to the RAD. The fact that Hughes J. limited his decision because of a shared misunderstanding of the appeal rights to the RAD should not now be held against the Applicants.

[59] Although I can appreciate that the Applicants may find it harsh that their claim is now barred because it is *res judicata*, I am not persuaded that this case falls within the exceptional circumstances where considerations of justice weigh in favour of refusing to apply the doctrine. The Applicants had a full and fair hearing before the RPD of their claim; no question has been

raised about the fairness of the original hearing. The Applicants were full participants in that process and were represented by counsel before the RPD. The Applicants made their case and the issue of whether they had established a nexus to a Convention ground was clearly raised, and equally clearly dealt with in the original RPD decision. They brought an application for judicial review of that decision and were represented by counsel in doing so.

[60] For reasons which can, perhaps, be understood in the context of the procedural history outlined above, their counsel did not challenge the nexus finding in the judicial review, focussing instead on the "no credible basis" aspect of the decision. The FCA has found that this finding stands as a bar to their consideration of a certified question, because it is final and dispositive of their claim.

[61] The key difficulty with the Applicants' argument on this point is that they did not challenge the nexus finding in their judicial review of the first RPD decision. Justice Hughes did not deal with it, in part because it was not put in issue before him.

[62] The doctrine of *res judicata* has been found to apply in respect of questions of fact or issues of law that were raised, or which could have been raised, at first instance: *Town of Grandview v Doering*, [1976] 2 SCR 621; *Bernier v Bernier* (1989), 70 OR (2d) 372 (CA); *Procter & Gamble Pharmaceuticals Canada, Inc v Canada (Minister of Health)*, 2003 FCA 467 at para 24; *Apotex Inc v Merck & Co*, 2002 FCA 210 at para 28; *Lubrizol Corp v Imperial Oil Ltd*, [1996] 3 FC 40 (CA) at para 16.

[63] Here, the nexus issue was not raised as a separate ground of judicial review in the challenge to the first decision and Hughes J. did not reverse that decision in relation to that issue.

The FCA found that this was the end of the matter – the original finding dismissing the Applicants' refugee claim was, in that sense, final.

[64] This does not fall within the exceptional category of special circumstances which warrant the exercise of my discretion not to apply the doctrine (see *Lange*, p 230).

## IV. Conclusion

[65] For these reasons, the application for judicial review is dismissed. Although the RPD should not have issued its second decision in the form that it did, in substance nothing turns on this. The Applicants' claim for refugee status was dismissed by the RPD in its most recent decision. That decision is now final and binding.

[66] In view of my finding on the question of *res judicata*, it is neither necessary nor appropriate to deal with the other issues raised by the Applicants.

[67] No question of general importance was raised by the parties, and I find, in the most unusual circumstances of this matter, that none arises.

**JUDGMENT in IMM-3262-17**

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

"William F. Pentney"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-3262-17 |
| **STYLE OF CAUSE:** | BINGHONG QIU, GUILAN ZHU, ZHIHENG QIU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 11, 2018 |
| **JUDGMENT AND REASONS:** | PENTNEY J. |
| **DATED:** | MARCH 29, 2019 |

**APPEARANCES:**

| | |
|---|---|
| Phillip J.L. Trotter | FOR THE APPLICANTS |
| Christopher Crighton | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Phillip J.L. Trotter<br>Barrister and Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |