Federal Court Cour fédérale

Date: 20250109

Docket: IMM-12398-23

Citation: 2025 FC 49

Ottawa, Ontario, January 9, 2025

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

HANI EL KHATIB
NATALY AL SHAMAA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Hani El Khatib [Principal Applicant] and his wife, Nataly Al Shamaa [Associate Applicant], seek judicial review of a Refugee Appeal Division [RAD] decision refusing their claim for asylum under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicants, citizens of Lebanon, base their judicial

review application on two grounds. First, they allege ineffective assistance from their former counsel (an immigration consultant). Second, they argue that the RAD breached procedural fairness in making new credibility findings without giving the Applicants an opportunity to respond.

[2] For the reasons set out below, I am satisfied that the Applicants have met the three-part test to establish ineffective assistance by their former counsel. First, former counsel was notified of the Applicants' allegations and had an opportunity to respond. Second, the Applicants have demonstrated that former counsel's conduct fell below the standard of reasonable professional judgment and assistance. Specifically, former counsel failed to challenge the Refugee Protection Division's [RPD] findings on appeal, instead making irrelevant submissions before the RAD. He also failed to advance the Principal Applicant's fear of risk for defecting from Lebanon's internal security forces.

[3] Third, the Applicants have established that former counsel's conduct resulted in a miscarriage of justice. The Supreme Court has made clear that miscarriages of justice may take different forms in the context of ineffective assistance of counsel: *R v Meer*, 2016 SCC 5 at para 3; *R v GDB*, 2000 SCC 22 at para 28 [*GDB*]. Ineffective assistance of counsel may call into question the reliability of the result of the adjudicative process, or may compromise the fairness of the adjudicative process itself. In the circumstances of this case, former counsel's failings deprived the Applicants of a full and fair opportunity to present their case.

[4] Given this determination, it is not necessary for me to consider the other issue raised by the Applicants.

II. Analysis

[5] I agree with my colleague Justice Norris that when an applicant raises the issue of ineffective assistance for the first time on judicial review, it does not engage a standard of review: *Brown v Canada (Citizenship and Immigration)*, 2024 FC 105 at para 16 [*Brown*]; *Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at para 31 [*Discua*].

A. *Allegations of ineffective assistance*

[6] Former counsel represented the Applicants before the RPD and the RAD. In this judicial review application, they raise three allegations of ineffective assistance, arguing that former counsel's conduct deprived them of their right to be heard. The first allegation relates to former counsel's representation before the RAD. More specifically, the Applicants allege that he failed to challenge the RPD's central findings on appeal, instead raising largely irrelevant issues.

[7] The second and third allegations concern former counsel's representation before the RPD. The Applicants allege that former counsel's office mistranslated the Principal Applicant's Basis of Claim [BOC] narrative, causing an adverse credibility finding. They also assert that former counsel acted negligently in advising the Principal Applicant not to raise his fear of criminal prosecution and imprisonment as a defector from Lebanon's internal security forces in his BOC. At the judicial review hearing, Applicants' current counsel advised that they would not pursue the

mistranslation allegation because the Applicants had confirmed during their RPD hearing that their BOC narratives were interpreted to them in their entirety.

[8] This Court has determined that former counsel's conduct in earlier proceedings is relevant in assessing claims of ineffective assistance: *Tasdemir v Canada (Citizenship and Immigration)*, 2024 FC 1340 at paras 54–57 [*Tasdemir*]; *Zakeri v Canada (Citizenship and Immigration)*, 2023 FC 421 at paras 20–22, 27–32 [*Zakeri*]; *Bisht v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1178 at paras 30, 32 [*Bisht*]. In *Tasdemir*, Justice Aylen found that the totality of former counsel's conduct was relevant because "one cannot unweave the incompetent conduct of [former counsel] on the application to reopen from his prior incompetent conduct dating back to the commencement of his retainer": *Tasdemir* at para 57. In *Zakeri*, the applicants argued that former counsel was negligent in his representation before both the RPD and the RAD. Justice Gascon agreed, finding that his incompetence had undermined their case from the start: *Zakeri* at para 27.

[9] In my view, former counsel's conduct from the outset of his representation of the Applicants is relevant in this case. His advice not to raise the Principal Applicant's additional ground of risk ultimately dictated the manner in which the Applicants framed their claim, restricting it to their fear of the Associate Applicant's family. Procedural fairness objections cannot be made on judicial review "[w]here the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so": *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 26. This application, however, is the Applicants' first opportunity to raise this allegation as former counsel continued to represent them before the RAD.

As the Principal Applicant states, it was not until they retained their current counsel that they received advice that his fear of persecution as a defector should have also been put forward: Affidavit of Hani El Khatib affirmed November 9, 2023 at para 15 [Principal Applicant's affidavit]. Notably, the Respondent takes no issue with the Applicants raising this allegation on judicial review.

B. *The Applicants have established ineffective assistance by former counsel*

[10] A three-part test is applicable to allegations of ineffective assistance of counsel made in a judicial review application under the *IRPA*. First, as a prerequisite for the Court to consider the allegations, an applicant must establish that their former counsel was given notice of and had a reasonable opportunity to respond to the allegations. This procedure is set out in the *Protocol on Allegations against Authorized Representatives in Citizenship, Immigration and Refugee Cases before the Federal Court* [*Protocol*].

[11] Second, an applicant must demonstrate that former counsel's conduct was negligent or incompetent (the performance component). Finally, they must establish that their incompetence resulted in a miscarriage of justice (the prejudice component): *Uwa v Canada (Citizenship and Immigration)*, 2024 FC 1721 at para 9 [*Uwa*]; *Brown* at para 17; *Singh v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 743 at para 17 [*Singh*]; *Discua* at para 30.

[12] As set out below, I find that the Applicants have met their burden.

(1) Former counsel was provided notice

[13] The Court first adopted the *Protocol* in March 2014. It was subsequently updated and is presently set out in the Federal Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (last amended October 31, 2023). The *Protocol* applies to lawyers, notaries, paralegals, and immigration consultants.

[14] The purpose of the *Protocol* is two-fold: (i) to assist the Court in adjudicating applications that raise such allegations; and (ii) to ensure a procedurally fair process for all parties: *Protocol* at para 48. The *Protocol* provides for notice to former counsel and an opportunity to respond to the allegations at three junctures.

[15] First, before raising the issue in an application for leave and for judicial review, the applicant's lawyer must notify former counsel in writing, providing a concise summary of the allegations. In addition, the applicant must waive any applicable privilege and provide a copy of the *Protocol* to former counsel: *Protocol* at paras 49–51.

[16] Second, if the applicant decides to pursue the allegations, they must serve former counsel with the perfected application: *Protocol* at para 53. Third, the applicant's lawyer must provide former counsel a copy of the Court's order granting leave and setting the matter down for a hearing: *Protocol* at para 63.

[17] There is no dispute that in this case, former counsel received notice at all three stages and was given an opportunity to respond. Indeed, he replied with a two-page memorandum of argument after being served with the perfected application. Former counsel's office also advised that they had uploaded the memorandum to the Federal Court e-filing portal.

[18] At this stage, however, Applicants' current counsel failed to follow the *Protocol*. While former counsel indicated that he had filed the memorandum with the Court, this was nonetheless current counsel's obligation: *Protocol* at para 57. It was not until after leave had been granted that current counsel's office reviewed the Court's docket, realized that the memorandum was not listed, and filed it.

[19] This failure deprived the Court of former counsel's reply at the leave stage. However, this Court has adjudicated allegations of ineffective counsel even where an applicant has not fully complied with the *Protocol*: *Devi v Canada (Citizenship and Immigration)*, 2023 FC 328 at para 14; *Discua* at para 51; *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at para 26 [*Nik*]. The question is whether "the Court's fact-finding function [has] been prejudiced" by this failure: *Discua* at para 36.

[20] In the circumstances of this case, I am prepared to address the allegation of ineffective assistance on its merits. Considering former counsel's generic reply to the specific allegations and evidence adduced by the Applicants, I am satisfied that leave would have very likely been granted in any event. In addition to questioning former counsel's conduct, the Applicants also alleged that the RAD breached procedural fairness in making new credibility findings without giving them a

chance to respond. While former counsel's reply should have been filed at the leave stage, current counsel remedied their error well in advance of the judicial review hearing.

(2) Former counsel's conduct fell below the requisite standard

[21] To succeed at this stage, an applicant must establish that counsel's conduct fell below the standard of reasonable professional judgment and assistance: *GDB* at para 27. In addition, allegations must be specific and clearly supported by the evidence: *Discua* at para 53, citing *Shirwa v Canada (Minister of Employment and Immigration)*, 1993 CanLII 17477 (FC), [1994] 2 FC 51 at 58 [*Shirwa*]. Counsel benefit from a strong presumption that their performance falls within the wide range of acceptable professional conduct.

[22] The Respondent makes two general arguments that are without merit. First, the Respondent asserts that the Applicants failed to tender any expert evidence on an immigration consultant's standard of care. They rely on *Vassell-Samuel v Canada (Citizenship and Immigration)*, 2013 FC 995 for the proposition that immigration consultants cannot be held to the same competencies as a lawyer. I do not agree. The preponderance of this Court's jurisprudence supports that, despite not having the same training as lawyers, immigration consultants are held to the same standard of competency: *Bisht* at para 28; *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 10; *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at para 61; *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 at para 10.

[23] Second, the Respondent notes that there is "no evidence that the Applicants have filed any regulatory complaint regarding their former consultant's actions": Respondent's Further

Memorandum of Argument at para 35. This is irrelevant. The jurisprudence is clear that a regulatory complaint is not a necessary condition for a finding of ineffective assistance: *Bisht* at para 26; *Nik* at para 24; *Kandiah v Canada (Citizenship and Immigration)*, 2021 FC 1388 at para 49 [*Kandiah*]; *Basharat v Canada (Citizenship and Immigration)*, 2015 FC 559 at paras 14–20.

[24] The Applicants have established that former counsel's conduct fell below the expected standard. In response to the Applicants' allegations, former counsel filed a two-page memorandum. He chose not to file any affidavit evidence nor to seek leave to intervene in the proceedings, at either the leave stage or once leave was granted, as permitted by the *Protocol*: *Protocol* at paras 56, 58, 63. As a result, there is no evidence on the record from former counsel, only legal submissions. In my view, former counsel's response is wholly insufficient to rebut the Applicants' clear and specific allegations of incompetence. His response is couched in generalities and relies on bald assertions of strategy.

(a) *Former counsel's response failed to address the Applicants' allegations*

[25] The Applicants claim that the Associate Applicant's Druze family was targeting them because she had converted to Sunni Islam to marry the Principal Applicant. The RPD determined that this claim lacked an objective basis because: (i) after returning to Lebanon from Canada, the Associate Applicant lived in the same general area for four years despite having moved houses multiple times; (ii) the family made verbal threats but did not physically attack the Applicants; and (iii) the objective evidence did not indicate that discrimination against Druze converts in mixed marriages rises to the level of persecution. Ultimately, the RPD found that the Associate Applicant's family was not an active threat to the Applicants, and thus the danger was not serious

enough to warrant protection. The RPD further found that in returning to Lebanon, the Associate Applicant had re-availed. As a result, it drew a negative inference regarding her credibility and subjective fear.

[26] The Applicants allege that former counsel failed to address the RPD's findings that needed to be overturned on appeal. In particular, they argue that he made no arguments in his RAD submissions regarding the lack of objective risk and failed to refer to the objective evidence of similarly situated women. The RAD expressly noted that the Applicants only made general arguments, and had "not pointed to where or how the RPD erred" in finding that they did not face a risk of persecution based on their mixed marriage: Reasons and Decision of the Refugee Appeal Division dated September 5, 2023 at para 32 [RAD Decision].

[27] The Applicants further contend that the RPD made a veiled internal flight alternative [IFA] finding without addressing the second prong of the IFA test. Former counsel did not raise these errors on appeal. In addition, while the Applicants acknowledge that former counsel addressed the issue of re-availment, they argue that he neglected to advance the key reason why the Associate Applicant returned to Lebanon: that proximity to her grandmother was necessary to claim her inheritance.

[28] Rather than address any of these RPD findings, former counsel advanced irrelevant arguments before the RAD. For example, he argued that the RPD had ignored the Immigration and Refugee Board Chairperson's Guideline 8 (procedures with respect to vulnerable persons). However, as noted by the RAD, there was nothing in the record nor in the Applicants' arguments

indicating that Guideline 8 applied, or indicating that the RPD was not responsive to the Applicants' needs: RAD Decision at paras 12–16.

[29] In addition, former counsel argued that the RPD had wasted time on minor issues at the hearing. The RAD concluded that this argument was meritless, as the Applicants did not specify what minor issues preoccupied the RPD: RAD Decision at para 17. Finally, former counsel argued that the RPD had erred in assessing demeanour. However, the RAD dismissed this outright because the RPD did not discuss, let alone make any inferences based on, the Applicants' demeanour: RAD Decision at para 18.

[30] Former counsel did not offer any substantive justification for his RAD submissions in response to the Applicants' specific critiques. He simply made the following two broad statements:

> Our office contends that the RAD memorandum submitted was meticulously prepared, addressing pertinent issues raised in the Refugee Protection Division's (RPD) reasons. While the Applicants allege that crucial errors were not challenged, we assert that each point requiring scrutiny was adequately covered, and any oversight is not indicative of negligence.
>
> The accusation of negligence in performance is strongly denied. Our team possesses extensive knowledge of refugee laws, and the submission were carefully crafted. The alleged failure to raise important arguments is refuted, as our submissions were comprehensive and aligned with the legal strategies appropriate for the case.

[31] This Court has held that counsel's failure to address the determinative issues on appeal satisfies the performance component of the ineffective assistance test: *Uwa* at para 24, *Singh* at para 28; *Tesema v Canada (Citizenship and Immigration)*, 2022 FC 1240 at para 20; *Kandiah* at para 59; *Tapia Fernandez v Canada (Citizenship and Immigration)*, 2020 FC 889 at para 43;

Rendon Segovia v Canada (Citizenship and Immigration), 2020 FC 99 at paras 21, 25 [*Rendon Segovia*]. Indeed, Justice Diner characterized this failure as "pure incompetence", particularly where the tribunal points out the lack of submissions in its decision: *Rendon Segovia* at para 25. In this case, the RAD noted former counsel's silence on the RPD's determinative findings: RAD Decision at paras 19, 21, 32.

[32] Having reviewed former counsel's RAD submissions, I agree that they fall well below the standard of reasonable professional assistance. Instead of making submissions about the RPD's key issues, the majority of his arguments concern irrelevant points, which the RAD dismissed as such.

(b) *Bald assertions of strategy are insufficient*

[33] There is no dispute that former counsel advised the Applicants not to raise the Principal Applicant's distinct ground of risk: his fear of criminal prosecution and imprisonment for deserting Lebanon's internal security forces. The Principal Applicant's evidence is that when he did not return to Lebanon in April 2022, internal security officials searched for him and questioned his father about his whereabouts: Principal Applicant's affidavit at para 8. The Applicants also submitted objective evidence about the penalties for desertion, as well as the harsh conditions in Lebanese jails: Principal Applicant's affidavit at para 9.

[34] The Applicants assert that former counsel's advice was negligent because "this ground of risk is in no way inconsistent with the fear of [the Associate Applicant's] family": Applicants'

Further Memorandum of Fact and Law at para 109. In his response, former counsel does not explain his advice. Rather, he simply asserts that his advice to not pursue this ground was strategic:

> Our advice regarding the grounds of risk was based on careful consideration of the case's specific circumstances. The decision not to include certain grounds was strategic, aiming to present a focused and compelling case. This decision was made after thorough consultation and in the best interest of the Applicants.
>
> [Emphasis added]

[35] Reviewing courts should avoid second-guessing counsel's strategic choices: *Discua* at para 53. That said, counsel cannot simply rest on mere assertions of strategy. While there may be instances where a former counsel's strategic decision clearly falls within the bounds of reasonable professional judgment, this is not the case here. It is unclear how raising this distinct ground of risk would detract from the Applicants' claim.

[36] Furthermore, the jurisprudence is clear that decision-makers must assess all grounds of risk invoked to determine whether they cumulatively amount to a serious possibility of persecution: *Smith v Canada (Citizenship and Immigration)*, 2024 FC 1236 at para 32; *Kundukhashvili v Canada (Citizenship and Immigration)*, 2022 FC 1081 at paras 50–52; *Rodriguez Ramos v Canada (Citizenship and Immigration)*, 2022 FC 41 at para 21; *Djubok v Canada (Citizenship and Immigration)*, 2014 FC 497 at paras 18–19.

[37] In the circumstances, it was incumbent on former counsel to explain his strategy. Indeed, the *Protocol* requires that applicants waive any privilege attached to the former representation: *Protocol* at para 51. This enables former counsel to disclose any privileged information necessary to explain their strategic advice. Despite notification, former counsel chose not to seek leave to

intervene and file evidence in response to the Applicants' allegations. While there is no requirement that former counsel respond to allegations of incompetence, if they fail to do so or respond with generalities, as in this case, they make that choice at their own peril.

[38] In the absence of any evidence from former counsel explaining his advice, I am unable to find that he exercised reasonable professional judgment in advising the Applicants not to raise this additional ground of risk. Given the Principal Applicant's evidence about his fear of imprisonment for desertion, and the objective evidence filed in support, I agree that former counsel's advice not to raise this ground satisfies the performance component of the ineffective assistance test.

(3) Former counsel's conduct resulted in a miscarriage of justice

[39] The prejudice component of the test is concerned with whether a miscarriage of justice resulted from former counsel's conduct. In *GDB*, the Supreme Court held that miscarriages of justice may take many forms in the context of ineffective assistance of counsel. They identified two examples: (i) where counsel's conduct may have resulted in procedural unfairness; and (ii) where the reliability of the trial's result may have been compromised: *GDB* at para 28.

[40] Since *GDB*, these two examples have emerged in appellate criminal jurisprudence as two prejudice branches: (i) the trial fairness branch; and (ii) the unreliable verdict branch: *R v Clarke*, 2024 ABCA 346 at para 26; *Ratt c R*, 2024 QCCA 463 at paras 25–26; *R v Lundle*, 2023 ABCA 11 at para 14; *R v White*, 2023 NLCA 28 at para 13; *R v Brick*, 2023 SKCA 107 at para 53; *R v McDonald*, 2022 ONCA 574 at paras 52–53, 69 [*McDonald*]; *R v Fiorilli*, 2021 ONCA 461 at para 54 [*Fiorilli*]; *R v KKM*, 2020 ONCA 736 at para 55 [*KKM*].

[41] Each branch is distinct and operates differently: *Fiorilli* at para 58. Significantly, under the trial fairness branch, it is not necessary to determine whether the result would have been different absent the ineffective assistance of counsel: *McDonald* at para 69; *R v Mehl*, 2021 BCCA 264 at para 143 [*Mehl*]; *KKM* at para 91; *R v Baharloo*, 2017 ONCA 362 at para 30. Rather, this branch is concerned with whether former counsel's conduct undermined the actual fairness of the trial, or the appearance of trial fairness: *McDonald* at paras 55–56; *Fiorilli* at paras 55–57.

[42] As the British Columbia Court of Appeal recognized, there may be overlap in some cases: "these analytical routes [cannot] always be neatly compartmentalized." It may be that former counsel's conduct not only undermines the fairness of the trial, but that "the same act or omission will work to undermine the reliability of the verdict": *Mehl* at para 140. However, it still stands that the impact of former counsel's conduct on the reliability of the result and the fairness of the adjudicative process are assessed differently, and should be considered in their own right.

[43] Indeed, the Ontario Court of Appeal has emphasized the importance of examining counsel's conduct through the lens of both branches:

> […] this court's obligation to quash convictions which are the product of a miscarriage of justice requires that it consider the impact of counsel's incompetence on both the reliability of the result, and the fairness of the process by which that result was achieved. A reliable verdict may still be the product of a miscarriage of justice if the process through which that verdict was reached was unfair.
>
> [Emphasis added]
>
> *R v Joanisse*, 1995 CanLII 3507 (ON CA) at 43

[44] This reasoning is equally applicable in the context of immigration proceedings, such as refugee protection cases, given the potential for significant impact and harm for the claimants. As the Supreme Court has held, greater procedural protections are required where the potential consequences for those affected are severe: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 133; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 25.

[45] This Court's immigration jurisprudence has largely focussed on the impact of former counsel's conduct on the reliability of the result in determining whether a miscarriage of justice resulted. Within that context, some decisions have referred to procedural fairness concepts such as the loss of a full and fair hearing, or the right to be heard: *Singh* at paras 39, 41; *Zakeri* at para 34; *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 at paras 89, 100 [*Satkunanathan*]. In those cases, however, the impact of counsel's conduct on the fairness of the adjudicative process was not considered as a stand-alone ground.

[46] Relying on *GDB*, Chief Justice Crampton has determined that a miscarriage of justice may manifest in different ways: "procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form": *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at para 38; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36. More recently, in *Discua*, Justice Norris considered whether former counsel's conduct compromised the reliability of the RPD decision, as well as the fairness of the hearing. After assessing each separately, he concluded that counsel's conduct resulted in a miscarriage of justice on both grounds: *Discua* at paras 76–78.

[47] Based on the foregoing, the reliability of the result and the fairness of the adjudicative process are two distinct forms or branches of miscarriage of justice that should be evaluated in their own right. In the circumstances of this case, I find that former counsel's incompetence resulted in a miscarriage of justice by compromising the fairness of the adjudicative process.

(a) *Reliability of the result*

[48] To establish that former counsel's conduct compromised the reliability of the result, an applicant must demonstrate a reasonable probability that, but for said conduct, the result would have been different: *Uwa* at para 17; *Singh* at para 29; *Discua* at para 76; *Bisht* at para 24; *Satkunanathan* at para 96. A "reasonable probability" is described as one that "lies somewhere between a mere possibility and a likelihood": *Singh* at para 38; *Discua* at para 76; *Satkunanathan* at para 96.

[49] In determining that a different result would have been reasonably probable, this Court has relied on comments by the decision-maker identifying submissions that were not made on key issues and their specific impact on the decision: *Singh* at paras 33–37; *Kandiah* at paras 60–63; *Rendon Segovia* at paras 31–32. In those cases, the Court determined that the decision-maker's comments made "clear" the probability of a different result: *Singh* at para 33; *Kandiah* at para 60; *Rendon Segovia* at para 32.

[50] In *Singh*, for example, Justice Gascon concluded as follows:

> [33] The Decision itself makes it clear that [former counsel's] failure to adduce relevant evidence on employment and substance abuse treatment in India and to respond to the Minister's new

> evidence on those two fronts was the main defect of Mr. Singh's case before the RAD (*Kandiah* at para 60). In fact, as pointed out by counsel for Mr. Singh at the hearing, the RAD repeatedly referred, in its reasons, to Mr. Singh's failure to respond to the Minister's submissions.

[51] The Applicants argue that, in this case, the RAD made analogous remarks. I disagree. In contrast to the decisions cited above, here the RAD made only general references to the lack of submissions on the RPD's credibility and objective basis findings:

(i) "The Appellants have not made any specific arguments regarding this finding other than the general arguments discussed above": RAD Decision at para 19.

(ii) "The Appellants have not argued against this finding": RAD Decision at para 21.

(iii) "On this point, I note that the Appellants make general arguments but have not pointed to where or how the RPD erred in this case": RAD Decision at para 32.

[52] In my view, these statements are insufficient to ground a determination that there is a reasonable probability the RAD would have decided differently had former counsel addressed these issues. In this case, the Applicants' allegation concerning former counsel's lack of relevant submissions before the RAD is more appropriately considered through the lens of adjudicative fairness, rather than the reliability of the result.

[53] With respect to the Principal Applicant's additional ground of risk, he appears to have a valid claim to advance based on his fear of imprisonment for defection. However, it would be pure speculation for the Court to conclude that there is a reasonable probability that a refugee claim

would have succeeded on this ground. Rather, as explained below, former counsel's failure to advance this ground of risk resulted in a miscarriage of justice because it deprived the Applicants of a full and fair opportunity to have the totality of their claim assessed.

(b) *Fairness of the adjudicative process*

[54] In criminal proceedings, courts have identified different types of conduct that may compromise, in fact or in appearance, the fairness of a trial. This includes where former counsel failed to include their client in a fundamental decision, failed to comply with instructions, and failed to provide effective advice on critical decisions such as the mode of trial or whether to testify: *McDonald* at paras 55–56; *Mehl* at paras 143–144; *Fiorilli* at para 56. The burden of proof under this branch depends on what is alleged.

[55] Where it is alleged that former counsel prevented the accused from making a fundamental decision or failed to provide effective advice on the matter, "more than the loss of choice" must be demonstrated: *R v White*, 2022 SCC 7 at para 7 [*White*]. An accused must show "subjective prejudice", namely that there was a "reasonable possibility" that they would have acted differently had they been given the choice or received competent advice: *White* at para 8.

[56] The threshold for establishing a miscarriage of justice based on the appearance of unfairness is high. The defect must be "so serious that it shakes public confidence in the administration of justice": *White* at para 9, citing *R v Davey*, 2012 SCC 75 at para 51, quoting *R v Wolkins*, 2005 NSCA 2 at para 89.

[57] In the circumstances of this case, I find that former counsel's failure to make any relevant submissions before the RAD compromised the actual fairness of the adjudicative process. As set out above, former counsel failed to identify any errors in the RPD decision, instead addressing irrelevant issues such as demeanour and the treatment of vulnerable claimants. Significantly, the RAD noted the lack of submissions on key issues and the focus on these irrelevant matters.

[58] I agree with the Applicants that former counsel's conduct impaired their "right to be heard" and "effectively deprived [them of] their right to appeal": Applicants' Post-Hearing Submissions dated December 16, 2024 at para 6. Because of former counsel's ineffective representation, the Applicants were "unable to fully demonstrate [their] case before the tribunal": *Shirwa* at 62.

[59] In addition, former counsel's failure to provide effective and competent advice to the Applicants when they inquired about raising the Principal Applicant's additional ground of risk resulted in a miscarriage of justice. An asylum seeker's ground of risk is foundational to their claim. Here, based on former counsel's incompetent advice, the Applicants restricted their claim to their fear of the Associate Applicant's family. Former counsel's advice materially weakened the Applicants' case from the outset by depriving them of the opportunity to present the entirety of their claim.

[60] The Applicants have also established subjective prejudice, demonstrating that they would have raised the Principal Applicant's additional ground in their BOC narrative but for former counsel's advice. Notably, former counsel does not dispute that they wanted to include this ground

in their refugee claim. Further, the Applicants have provided objective evidence that supports this is an arguable ground to advance.

[61] For these reasons, I find that former counsel's conduct undermined the Applicants' right to a full and fair adjudicative process. This amounts to a miscarriage of justice that demands a new hearing.

III. Conclusion

[62] The application for judicial review is granted because the Applicants have demonstrated ineffective assistance by former counsel. The matter is remitted to the RAD for redetermination by a different panel.

[63] The RAD will provide the Applicants the opportunity to file a new notice of appeal, evidence, and submissions so that they may address all relevant issues, including the Principal Applicant's additional ground of risk. While it is ultimately up to the RAD to perform its own analysis under subsection 110(4) of the *IRPA*, it would appear that due to former counsel's incompetence, the Applicants could not reasonably have been expected to present evidence regarding this ground of risk earlier.

[64] The parties did not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-12398-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Refugee Appeal Division dated September 5, 2023, is set aside and the matter is remitted for redetermination by a differently constituted panel.

3. The RAD will provide the Applicants with the opportunity to file a new notice of appeal, evidence, and submissions.

4. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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