Federal Court Cour fédérale

Date: 20250722

Docket: IMM-1679-23

Citation: 2025 FC 1314

Toronto, Ontario, July 22, 2025

PRESENT: The Honourable Justice Battista

BETWEEN:

VINCENT REAGAN ONWUBIKO
ADAOBI ROSALINDA CHELSEA ONWUBIKO ONWUBIKO
MUDLENE NGOZI ONWUBIKO
VINCENT MICHAEL ONWUBIKO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

UGOCHUKWU JOHNPAUL UDOGU

Intervener

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are Nigerian citizens who also obtained citizenship in Mexico. They argue that the decision made by the Refugee Appeal Division (RAD) should be set aside based on their former counsel's incompetence and because the RAD's decision is not justified, transparent, or intelligible.

[2] For the reasons that follow, the application is granted based on the decision's unreasonableness and the breach of fairness resulting from the incompetence of the Applicants' former counsel.

II. Background

[3] The adult Applicants and their son are Nigerian citizens who moved to Mexico in 2008 and acquired Mexican citizenship in 2015. The youngest Applicant acquired Mexican citizenship through her birth in Mexico in 2009.

[4] In December 2016, the Applicants fled from Mexico to Nigeria based on their fears of the Sinaloa cartel. They fled to Canada from Nigeria in October 2019 and made refugee claims based on the Principal Applicant's alleged bisexual orientation.

[5] The Applicants' former counsel, Mr. Ugochukwu Udogu (Counsel Udogu), represented them before the Refugee Protection Division (RPD) and the RAD. Counsel Udogu has intervened in these proceedings.

[6] The Applicants allege that Counsel Udogu was incompetent for two reasons.

[7] First, the Applicants allege that Counsel Udogu texted them during RPD proceedings in order to coach them on their responses during testimony. They allege that the texts distracted them and hindered their testimony, resulting in the denial of a fair hearing and the ultimate refusal of their claims.

[8] Second, the Applicants allege that Counsel Udogu was incompetent before the RAD for failing to raise evidence indicating that three of the Applicants lost Mexican citizenship because they lived outside of Mexico for more than five years. The RAD denied their appeal solely based on the existence of an internal flight alternative (IFA) for the Applicants in Merida, Mexico.

[9] Aside from the issue of counsel incompetence, the Applicants challenge the reasonableness of the RAD's decision for its failure to deal with evidence indicating that they lost Mexican citizenship, regardless of Counsel Udogu's failure to raise this evidence.

[10] Following the RAD's decision, the Applicants retained Counsel Udogu in an application for leave and judicial review. Leave was denied by a judge of this Court on September 30, 2022.

[11] Therefore, this is the Applicants' second attempt at judicial review of the RAD's decision, filed in February 2023 through their present counsel. Leave was granted by this Court on February 4, 2025.

[12] The Applicants were removed to Nigeria on March 31, 2023, after a stay of removal was denied by a judge of this Court. It is noteworthy that the RAD explicitly declined to adjudicate the Applicants' alleged risks in Nigeria.

III. Issues

[13] The Respondent raised a preliminary issue regarding whether this matter is barred by the doctrine of *res judicata* because this is the Applicants' second attempt at judicial review of the same decision.

[14] If *res judicata* does not pose a barrier to the hearing of this application, the main issues are:

- Did former counsel's conduct result in a breach of procedural fairness for the Applicants?
- Is the RAD's decision reasonable?
- If the application is allowed, what is the appropriate remedy given that the Applicants were removed from Canada?

IV. Analysis

A. *Preliminary issue: the matter is not barred by the doctrine of res judicata*

[15] The Respondent argues that the adjudication of this application is barred by the doctrine of *res judicata*. As stated above, an application for leave and judicial review of the RAD's decision was dismissed by the Court on September 30, 2022.

[16] The doctrine of *res judicata* prevents litigation in two scenarios: issue estoppel (preventing the relitigation of specific issues) and cause of action estoppel (preventing the relitigation of an entire legal proceeding which has been litigated previously) (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 (*Danyluk*) at para 20).

[17] The Respondent's further memorandum of argument identifies issue estoppel as the branch of *res judicata* relevant to this proceeding. In oral argument, the Respondent characterized the relevant branch of *res judicata* as cause of action estoppel. This change of position was not clearly explained.

[18] The Respondent argued that cause of action estoppel deprives the Court of jurisdiction to hear the application. Issue estoppel, by contrast, does not apply to a court's jurisdiction because it prevents a form of abuse of process (*Heavy Shields v Red Crow Community College*, 2015 ABPC 185 at paras 52-53, citing *Danyluk* at para 24).

[19] As explained below in regard to the Respondent's proposed certified question, the Court's jurisdiction to hear this matter arose from the order of Justice Elizabeth Heneghan dated February 4, 2025, granting leave pursuant to the operation of subsections 72(1)-(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The doctrine of cause of action estoppel cannot override Justice Heneghan's order. However, even if the matter was barred by cause of action estoppel, I would exercise my discretion to hear the matter due to the breach of procedural fairness which resulted from the incompetence of Counsel Udogu.

[20] In written submissions, the Respondent advanced issue estoppel because the RAD's IFA decision was upheld by the Court when it denied leave to challenge the RAD's decision in September 2022.

[21] Resolving questions of issue estoppel involves two stages. The first stage assesses the technical requirements barring reconsideration of a previously litigated issue. If the matter is barred at the first stage, the Court proceeds to the second stage in which it determines whether to exercise its discretion to adjudicate a matter, considering the interests of justice.

[22] The first stage in the assessment of issue estoppel has three preconditions: (1) the same question has been decided; (2) the judicial decision creating the estoppel was final; and (3) the parties to the judicial decision are the same as the parties to the proceedings in which estoppel is raised (*Danyluk* at para 25).

[23] The Applicant's allegation of incompetent counsel is not caught by the first stage because it is a new issue not previously raised in the application for leave and judicial review dismissed by the Court in September 2022. The Court will therefore adjudicate this issue in this application.

[24] The Applicant's claim that the RAD's decision is unreasonable is caught by the first stage of issue estoppel because it was raised in the previously dismissed application. In addition, the dismissal of the application was final, and the same parties were involved.

[25] In considering whether to exercise discretion to assess the reasonableness of the RAD's decision, the Court should stand back and, taking into account the entirety of the circumstances,

consider whether application of issue estoppel in the particular case would work an injustice (*Danyluk* at para 80).

[26] This consideration includes, for example, whether an individual's claim has been "properly considered and adjudicated", the fairness of prior proceedings, and the fairness of using prior proceedings' results to preclude a subsequent proceeding (*Danyluk* at para 80; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at paras 40-41).

[27] As will be seen, I have determined that Counsel Udogu's incompetent conduct led to a breach of procedural fairness, and the Applicants' appeal was not properly decided. Refraining from reviewing the reasonableness of the RAD's decision would therefore compound the unfairness resulting from Counsel Udogu's incompetence. This is an exceptional circumstance justifying the exercise of the Court's discretion to assess the reasonableness of the RAD's decision despite the technical barrier posed by issue estoppel.

B. *Main issues*

[28] The main issues in this application concern the allegation of incompetence of Counsel Udogu and the reasonableness of the RAD's decision. I find that the conduct of Counsel Udogu rose to the level of incompetence, tainting the RAD proceedings. In addition, I find the RAD's decision to be unreasonable for its disregard of relevant evidence and failure to determine the Applicants' risk in Nigeria.

(1) The conduct of Counsel Udogu rose to the level of incompetence

[29] As mentioned above, the Applicants allege that Counsel Udogu was incompetent for two reasons: first, he interfered with their testimony before the RPD by texting them with suggested responses, and second, he failed to raise the prospect that three of the Applicants lost their Mexican citizenship.

[30] Three preconditions are required in order to establish a breach of fairness based on incompetent counsel: (1) compliance with the Court's procedure for incompetent counsel; (2) demonstration of negligent or incompetent conduct from former counsel; and (3) demonstration of incompetence resulting in a miscarriage of justice (*El Khatib v Canada (Citizenship and Immigration)*, 2025 FC 49 (*El Khatib*) at paras 10-11).

[31] As explained below, compliance with the procedure for incompetent counsel is not an obstacle in this case. While I cannot find that Counsel Udogu's texting resulted in a miscarriage of justice, his failure to proffer relevant evidence and submissions on a determinative issue constituted incompetent conduct resulting in a miscarriage of justice.

(a) *The Applicants have complied with the protocol on notifying former counsel of incompetence allegations*

[32] The Applicants have generally complied with the Protocol. They have notified Counsel Udogu in writing with a concise summary of the allegations, provided the Court's Protocols regarding incompetence, and filed a Law Society of Ontario complaint. Counsel Udogu responded to the allegations and obtained leave to intervene in these proceedings.

[33] If there has been any non-compliance with the Protocol, I exercise my discretion to overlook discrepancies because I am satisfied that Counsel Udogu has had the opportunity to respond to the allegations (*Pacheco v Canada (Citizenship and Immigration)*, 2018 FC 617 at paras 20, 22). This Court's fact-finding function has not been prejudiced by any of the Applicants' failures in compliance (*El Khatib* at para 19, citing *Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at para 36).

(b) *Counsel Udogu's conduct fell below the requisite standard for competence and resulted in a miscarriage of justice*

[34] The Applicants allege that Counsel Udogu texted them during testimony which interfered with their ability to provide evidence. Counsel Udogu initially admitted only to advising the Principal Applicant to "check his messages and see my thoughts on his testimony during … breaks." Later, during cross-examination, he effectively admitted texting his client during testimony. I agree with counsel for the Applicants that the evidence clearly reveals that Counsel Udogu was coaching his clients via text during their testimony.

[35] The Law Society of Ontario's *Rules of Professional Conduct* (Rules) are not determinative regarding standards of legal competence in this application, but they offer guidance regarding a professional regulator's views of professional conduct.

[36] The Rules generally advise strongly against communication between lawyers and their witnesses during the course of testimony (Rules, s 5.4). As suggested by the Rules, the conduct of a lawyer who interferes with witness testimony is mendacious, disrespectful to the tribunal, and ethically dubious. I find that Counsel Udogu's conduct in texting his clients during the

proceedings, to the extent that it occurred, fell below the requisite standard of competence. However, there is insufficient evidence regarding the extent of the behaviour and its impact in this case, and as a result I am unable to find that it resulted in a miscarriage of justice.

[37] However, Counsel Udogu's failure to advance relevant evidence and submissions suggesting that the Applicants may have lost Mexican citizenship does fall below the requisite standard of competence.

[38] In February 2022, the RAD put the Applicants on specific notice of its concern that the Applicants had an IFA in Mexico. There was evidence in the National Documentation Package (NDP) suggesting that Mexican citizenship could be lost when citizens reside outside of Mexico for five years, and Counsel Udogu knew that the Applicants left Mexico in 2016. The Applicants' Mexican citizenship was an aspect of their identity which should have been the starting point for responding to the RAD's concerns that they have IFAs in Mexico.

[39] The Court has held that "[i]t is incontrovertible that proof of identity is a pre-requisite for a person claiming refugee protection" and without such proof "there can be no sound basis for testing or verifying the claims of persecution or, indeed for determining [an applicant's] true nationality" (*Terganus v Canada (Citizenship and Immigration)*, 2020 FC 903 (*Terganus*) at para 22, citing *Edobor v Canada (Citizenship and Immigration)*, 2019 FC 1064 at para 8).

[40] Failing to put forward key arguments and failure to make submissions on a determinative issue will ground a finding of incompetence (*Tesema v Canada (Citizenship and Immigration)*, 2022 FC 1240 at para 20; *Kandiah v Canada (Citizenship and Immigration)*, 2021 FC 1388

(*Kandiah*) at para 59). As in the case of *Kandiah*, "[i]t was incumbent upon the legal representative, after having accepted the retainer, to apprise [the RPD] as fully as possible of all key factual elements relevant [to the applicant's claim]" (*Kandiah* at para 56, citing *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 27).

[41] It is irrelevant that there was no conclusive evidence establishing that the Applicants lost their Mexican citizenship; Counsel Udogu's failure to raise the issue and evidence for determination by the RAD deprived the Applicants of argument and evidence related to a fundamental issue in the appeal. This resulted in a miscarriage of justice.

[42] It is also irrelevant whether the Applicants were under the impression that they still had Mexican citizenship. Counsel incompetence is not mitigated by a client's impression of their legal circumstances. The entire purpose of retaining legal counsel is to ensure that all useful evidence and arguments are discovered and advanced by a professional with legal knowledge and expertise.

[43] Counsel Udogu failed to make submissions and lead any evidence on the determinative issue of the Applicants' Mexican citizenship (*Terganus* at para 22; *Kandiah* at para 59). Without ascertaining the Applicants' citizenship status in Mexico, Counsel Udogu failed to address one of the most fundamental issues in any refugee claim as it relates to claims of persecution. His failure to do so falls below the requisite standard and constitutes incompetence. This incompetent conduct contributed to the RAD's failure to advert to the issue and the evidence, and failure to resolve the issue. The Applicants were therefore deprived of the right to be heard and a fair hearing, resulting in a miscarriage of justice (*El Khatib* at para 57-58).

(2) The RAD's decision is unreasonable for overlooking relevant evidence and failing to resolve the Applicants' risks in Nigeria

[44] Independent of the issue of Counsel Udogu's incompetence, the RAD's decision is unreasonable, for two reasons.

[45] First, the RAD's decision is unreasonable for failing to address documentary evidence before it suggesting that the Applicants may have lost their Mexican citizenship. The existence of this key evidence in the Immigration and Refugee Board's NDP placed an obligation on the RAD to analyze it: "the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), [1999] 1 FC 52 at para 17; *Vavilov* at paras 125-126). The documentary evidence before the RAD was relevant for undermining the RAD's finding that the Applicants could return to Mexico, let alone live safely there. The RAD's failure to explain its conclusion in light of this evidence renders the decision unreasonable.

[46] Second, the RAD abdicated its responsibility to assess the Applicants' alleged risks in Nigeria. As stated by the Supreme Court of Canada (SCC): "In considering the claim of a refugee who enjoys nationality in more than one country, the Board must investigate whether the claimant is unable or unwilling to avail him- or herself of the protection of each and every country of nationality" (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 751). According to the SCC, this investigation is connected with Canada's international responsibility to protect refugees:

> … The exercise of assessing the claimant's fear in each country of citizenship at the stage of determination of "convention refugee" status, before conferring these rights on the claimant, accords with the principles underlying international refugee protection… (*Ward*, at 753).

[47] The assessment of all risks alleged by claimants is fundamental to the RAD's statutory obligation: "Just as a decision-maker cannot 'arrogate powers to themselves that they were never intended to have' (*Vavilov* at para 109), it is unreasonable for a decision maker to eschew powers they were intended to have" (*Al-Lamy v Canada (Citizenship and Immigration)*, 2024 FC 1621 (*Al-Lamy*) at para 11).

[48] As explained in *Al-Lamy*, it is unreasonable for the RAD to turn away from unchallenged RPD risk findings when they are central to a claimant's expressed fears (at para 18). In the present case, the Applicants did challenge the RPD's findings on their risk in Nigeria, and the RAD explicitly declined to adjudicate the challenge. The RAD's decision therefore did not accord with its statutory mandate, nor was it sufficiently responsive to the Applicants' central concerns (*Vavilov* at para 127).

[49] The severe consequences of the RAD's decision to abdicate its responsibility is apparent here: even though the RAD determined that the Applicants could be safe in Mexico, the Applicants were returned to Nigeria. The RAD effectively denied them an appellate determination of their risks in Nigeria, contrary to its statutory duty, and potentially exposed them to *refoulement*, contrary to Canada's obligations under international law.

V. Conclusion and Remedy

[50] The RAD's decision was procedurally unfair due to the incompetence of the Applicants' previous counsel. Further, the RAD's decision is unreasonable because it overlooked evidence raising doubts about the Applicants' Mexican citizenship, and because the RAD abdicated its

statutory responsibility to determine the Applicants' allegations of risk in Nigeria and respond to key concerns. The RAD's decision will therefore be quashed.

[51] Despite the fact that the RAD found that the Applicants could be safe in Mexico and did not resolve the Applicants' fears of persecution in Nigeria, the Applicants were removed from Canada to Nigeria on March 31, 2023. A question therefore arises regarding whether remitting this matter for redetermination would be futile.

[52] This concern arises because one of the statutory definitions to be applied by the RAD requires the Applicants to be outside of their countries of citizenship; the other applicable statutory definition requires the Applicants to be in Canada. As noted by Justice Nicholas McHaffie,

> As clearly stated in the *IRPA*, recognition as a Convention refugee under section 96 includes a condition that a person be "outside each of their countries of nationality." It is also a condition of a claim for recognition as a person in need of protection under section 97 that the applicant be "a person in Canada."…
>
> (*Jawad v Canada (Citizenship and Immigration)*, 2021 FC 1262 (*Jawad*) at para 10).

[53] To access an effective remedy, the Applicants have requested an order for the Respondent to make best efforts to return the Applicants to Canada. However, it is unclear that the Court has the ability to do this.

[54] This application reviews a decision of the RAD, and my order can enjoin only the RAD. An order for the Applicants' return to Canada would effectively be an order for *mandamus*, applying to decision makers outside the scope of this application. *Mandamus* has not been

requested or addressed in argument, and granting the requested order risks the granting of "disguised *mandamus*" (*Canada v Boloh 1(A)*, 2023 FCA 120 at paras 60-63).

[55] While the Court can issue directions to the RAD upon redetermination, the RAD is not empowered to order the return of appellants removed from Canada. The RAD has powers of witness compellability under the *Inquiries Act*, RSC 1985, c I-11, and the capacity to issue summons (IRPA, s 165; *Refugee Appeal Division Rules*, SOR/2012-257, r 62). However, the enforcement of a summons for persons outside of Canada is dubious because they are not within the RAD's territorial jurisdiction (see *e.g. R v Hape*, 2007 SCC 26 at para 65). Unlike the Immigration Appeal Division, the RAD does not have the power to require officers to facilitate the travel of a person subject to a hearing (IRPA, ss 175(2)).

[56] There is no impediment to the RAD proceeding with reconsideration and determination of the appeal if the Applicants are outside of Canada; the matter is not moot because a live controversy exists regarding the RPD's decision and the Applicants' risk (*Jawad* at paras 10-24; *Escobar Rosa v Canada (Citizenship and Immigration)*, 2014 FC 1234 at paras 36-38, 42). For this reason, the parties have suggested that I direct the RAD to consider the appeal as if the Applicants were in Canada, in order to ensure that their right to a procedurally fair, statutory appeal is realized. A direction to that effect will therefore be issued.

[57] Depending on its decision, the RAD may be required to consider the appropriate remedy based on the Applicants' circumstances as they exist at the time of the redetermination; the RAD cannot offer a remedy contrary to the statutory definitions.

[58] Nevertheless, even though the Applicants were removed to Nigeria, their circumstances may change prior to the time of redetermination. The Applicants may relocate such that they satisfy a condition of the remedy within the power of the RAD. I therefore find that remitting this matter to the RAD for redetermination is not futile.

VI. Proposed certified question

[59] The Respondent seeks to certify the following question:

> Does the Federal Court have jurisdiction to hear a fresh application for judicial review of an administrative decision previously unsuccessfully challenged in the Federal Court, which fresh application is based on new argument that the proceedings before the tribunal under review were procedurally unfair due [to] allegations of inadequate legal representation?

[60] The test for certification involves the following components: (1) the question is dispositive of an appeal; (2) the question has been raised and dealt with in the Court's reasons; (3) the question transcends the interests of the parties; and (4) the question must raise an issue of broad significance or general importance (*Zhu v Canada (Citizenship and Immigration)*, 2025 FC 661 at para 69 [citations omitted]). Further, the premise of the question must also accord with the facts of the case (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at para 34).

[61] The proposed question will not be certified because the premise of the question—the Court's jurisdiction in hearing a fresh application for judicial review—does not accord with the facts of this matter.

[62] The Court obtained jurisdiction to hear this matter when leave was granted by Justice Heneghan on February 4, 2025, applying subsections 72(1)-(2) of the IRPA. No appeal lies from this leave order, and the Court does not have the power in these circumstances to review, overturn, or ignore one of its own final orders (IRPA, s 72(2)(e); *Lesi v Canada (Citizenship and Immigration)*, 2016 FC 441 at paras 23-25; *Guzman v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 15 at paras 10-11).

[63] The Respondent's question was appropriate at the leave stage of this matter, but as leave has been granted, the Court's jurisdiction to hear a fresh application for judicial review on its merits does not arise on the facts. The question will therefore not be certified.

JUDGMENT in IMM-1679-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and the decision of the Refugee Appeal Division is quashed.

2. The matter is remitted for redetermination by a differently constituted panel of the Refugee Appeal Division.

3. The redetermination will comply with the following directions:

   - If the Applicants are not in Canada at the time of redetermination, the newly constituted panel will conduct its review as if the Applicants are in Canada at that time;

   - The new panel will determine all bases of risk alleged by the Applicants, including their alleged risks in Nigeria;

   - If the appeal is allowed, the panel's remedy will be informed by the circumstances of the Applicants at the time of the decision and the statutory definitions pursuant to which relief is sought.

4. There is no question for certification and no order regarding costs.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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