Federal Court  Cour fédérale

Date: 20250801

Docket: IMM-15924-24

Citation: 2025 FC 1344

Ottawa, Ontario, August 1, 2025

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

XIAOYAN LIN
JUN SU
XUERONG SU

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant Xiaoyan Lin and her two dependent children [Dependent Applicants] seek judicial review of a decision by a senior immigration officer refusing their application for permanent residence on humanitarian and compassionate grounds [H&C] under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The sole

ground of review is the ineffective assistance of the Applicants' former counsel (an immigration consultant). They allege that his representation was incompetent and resulted in a miscarriage of justice because he failed to file any evidence or submissions addressing the hardship they would face if they were returned to either China or Argentina.

[2] I am allowing the application. Former counsel's conduct in this case fell below the standard of reasonable professional judgment and assistance, and compromised the fairness of the adjudicative process.

II. Background

[3] The Applicants are citizens of China. The Principal Applicant immigrated to Argentina in 2009 with her husband. She subsequently received permanent residence status in Argentina, and the couple had their first two children (the Dependent Applicants) in Argentina. Each child has Argentinian citizenship, but no status in China.

[4] The family arrived in Canada in July 2015. The Applicants applied for asylum under false identities in November 2015, seeking protection from China without having to address their status in Argentina. Their claim was rejected by the Refugee Protection Division [RPD] in October 2016, the Refugee Appeal Division [RAD] refused their appeal in January 2017, and this Court denied leave in May 2017.

[5] The Applicants applied for a Pre-Removal Risk Assessment in February 2018. It was refused in July 2018. While an application for leave and for judicial review was filed, it was withdrawn in October 2018.

[6] The Principal Applicant's spouse submitted his own asylum claim in April 2019. The RPD rejected the claim in June 2022, finding that he was excluded from refugee protection pursuant to Article 1E of the United Nations Refugee Convention, given his status in Argentina. The RAD dismissed his appeal in February 2023. Because of this, the Principal Applicant's spouse was statutorily barred from inclusion in the Applicants' H&C application under subparagraph 25(1.2)(c)(i) of the *IRPA*.

[7] Since living in Canada, the Principal Applicant and her spouse have had two more children, both Canadian citizens.

[8] In October 2022, the Applicants hired their former counsel, their pastor Peikang Dai, a registered immigration consultant, to prepare their H&C application. In support of their application, he filed a Statutory Declaration of the Principal Applicant's spouse, and various documents relevant to their establishment in Canada and the best interests of the children.

[9] By decision dated August 9, 2024, the officer refused their application, finding that the Applicants had failed to establish that their circumstances warranted the granting of an exemption under section 25(1) of the *IRPA*. In particular, the officer noted that "insufficient evidence" had been submitted about "the obstructions or adverse effects" the Principal Applicant would face if

she was required to leave Canada: Reasons for Decision – Humanitarian and Compassionate Grounds, August 9, 2024 at 6, Certified Tribunal Record [CTR] at 10 [H&C Decision]. Throughout the officer's analysis of the best interests of the children, they also noted the paucity of evidence concerning the challenges the Principal Applicant's children would face in either Argentina or China: H&C Decision at 8–10, CTR at 12–14.

III. Analysis

A. *Preliminary issues*

(1) The Principal Applicant's husband has no standing

[10] As a preliminary issue, the Respondent argued that the Principal Applicant's spouse has no standing in this application and should be removed from the style of cause as an applicant. As discussed above, he was not included in the H&C application because he was barred from applying for permanent residence. At the hearing, Applicants' counsel agreed that, in the circumstances, he should not have been included as an applicant. Consequently, I ordered that the style of cause be amended to remove Canran Su as an applicant.

(2) Admissibility of former counsel's recent correspondence

[11] Within days of the scheduled hearing date, the Applicants served their application record and the Court's order granting leave on their former counsel. Their former counsel responded on July 18, 2025, advising that he did not intend to participate in the hearing. He essentially reiterated what he had stated in his earlier October 2024 correspondence to Applicants' current counsel.

Former counsel conceded that he had failed to raise many issues that could have been discussed in the Applicants' H&C application.

[12] The Applicants sought leave of the Court to file former counsel's July 18, 2025 correspondence. As further discussed below, Applicants' current counsel did not strictly comply with the Court's protocol for making allegations of ineffective assistance of counsel. I will, however, allow the filing of former counsel's July 18, 2025 correspondence because this late filing did not prejudice the Court's fact-finding nor the Respondent's ability to respond, given that former counsel simply repeated his previous concession.

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

[13] When an applicant raises the issue of ineffective assistance for the first time on judicial review, it does not engage a standard of review: *Bailey v Canada (Citizenship and Immigration)*, 2025 FC 1299 at para 11 [*Bailey*]; *El Khatib v Canada (Citizenship and Immigration)*, 2025 FC 49 at para 5 [*El Khatib*]; *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*].

[14] 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 Court's protocol on *Allegations against authorized representatives in Citizenship, Immigration and Refugee Cases before the Federal Court* [*Protocol*].

[15] Second, an applicant must demonstrate that former counsel's conduct was negligent or incompetent (the performance component). Third, they must establish that their incompetence resulted in a miscarriage of justice (the prejudice component): *El Khatib* at paras 10–11; *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.

(1) Former counsel was provided notice

[16] The Court first adopted the *Protocol* in March 2014. It has been updated several times and is incorporated in the Federal Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* [*Guidelines*]. The *Protocol* was last amended on June 20, 2025. However, it is the version included in the October 2023 *Guidelines* that applies in this case.

[17] The *Protocol* applies to lawyers, notaries, paralegals, and immigration consultants. The purpose of the *Protocol* is to assist the Court in adjudicating allegations of ineffective assistance of counsel, and to ensure a procedurally fair process to former counsel whose professional reputation is at stake: October 2023 *Guidelines* at para 48; *Discua* at para 34.

[18] The *Protocol* provides for notice to former counsel and an opportunity to respond to the allegations at three junctures. First, before raising the issue in an application for leave and for judicial review, applicant's current counsel must notify former counsel in writing, "providing a

concise summary of the allegations, as well as any supporting evidence": October 2023 *Guidelines* at para 50.

[19] Second, if applicant's current counsel decides to pursue the allegations, they must include any response from former counsel in their application record. Further, they must serve former counsel with the perfected application: October 2023 *Guidelines* at para 53. Third, applicant's current counsel must provide former counsel a copy of the Court's order granting leave and setting the matter down for a hearing, within five days of the date of that order: October 2023 *Guidelines* at para 63.

[20] I note that until May 27, 2025, the Applicants were represented by another counsel at the same law firm as counsel who appeared on their behalf at the hearing of this judicial review. As it follows, references to "Applicants' current counsel" in these Reasons are to the original lawyer at the law firm who filed the underlying application. Here, while Applicants' current counsel did not strictly comply with the *Protocol*, former counsel was provided notice of the allegations and given an opportunity to respond.

[21] Applicants' current counsel failed to provide notice of the allegations of ineffective counsel to former counsel before filing the application for leave and for judicial review on August 29, 2024, as required by the *Protocol*. Rather, she only notified former counsel on October 8, 2024, a week before perfecting the application: Email dated October 8, 2024, Applicants' Record at 59.

[22] Former counsel replied on October 11, 2024, conceding that he had failed to provide relevant information in support of the Applicants' H&C application: Email dated October 11, 2024, Applicants' Record at 60. His response was included in the Applicants' application record filed on October 15, 2024, and was thus before the Court when leave was granted.

[23] Further, Applicants' current counsel did not comply with the *Protocol* and serve their perfected application before filing it with the Court on October 15, 2024. Instead, she served former counsel with their application record on July 17, 2025, just days before the judicial review hearing. At that same time, she also served former counsel with the Court's order of May 2, 2025, granting leave and setting the matter down for hearing on July 21, 2025. In accordance with the *Protocol*, she should have provided the order to former counsel within five days of leave being granted. As already discussed, however, former counsel responded on July 18, 2025, simply repeating what he had said in his October 11, 2024 response and indicating that he did not intend to participate in the hearing.

[24] The Court has the discretion to entertain allegations of incompetence where the *Protocol* is not followed. The relevant question is whether the Court's fact-finding function has been prejudiced by the failure to comply: *Bailey* at para 17; *El Khatib* at para 19; *Discua* at para 36. Furthermore, certain instances of non-compliance with the *Protocol* may not be sufficiently significant to warrant dismissal of a judicial review application in circumstances, such as here, where ineffective assistance of counsel is the only issue raised on judicial review: *Ahuja v Canada (Citizenship and Immigration)*, 2025 FC 33 at para 12.

[25] In the circumstances, I have decided to exercise my discretion and consider the allegations of ineffective counsel on their merits. Notwithstanding Applicants' current counsel's non-compliance, former counsel was provided with notice of the allegations and a chance to respond before the application was perfected and after leave was granted. Indeed, former counsel responded both times conceding his "incompetence and negligence": Letter dated July 18, 2025; Email dated October 11, 2024, Applicants' Record at 60. Furthermore, the non-compliance did not impede the Court's fact-finding process.

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

[26] To succeed at this stage, an applicant must establish that former counsel's conduct fell below the standard of reasonable professional judgment and assistance: *R v GDB*, 2000 SCC 22 at para 27 [*GDB*]. 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) (TD)*, 1993 CanLII 17477 (FC), [1994] 2 FC 51 at 60. Counsel benefit from a strong presumption that their performance falls within the wide range of acceptable professional conduct.

[27] The Applicants assert that former counsel's concession "provides unequivocal evidence that [they] were provided with incompetent representation": Applicants' Memorandum of Argument at para 10. On the other hand, the Respondent argues that his admissions are "gratuitous" and should not be relied upon.

[28] The Respondent filed evidence that Applicants' current counsel has raised incompetence allegations against former counsel on at least two previous occasions. In both cases, former counsel

admitted failing to file relevant documents. To date, former counsel continues to be a registered immigration consultant, and there are no records of complaints or disciplinary proceedings: Affidavit of Janet Forbes, sworn June 5, 2025 at paras 5–7. The Respondent argues that, in the circumstances, the absence of a complaint is relevant and calls into question "whether [former counsel's] assistance was truly ineffective at the high threshold required or the result of a judgment call": Respondent's Further Memorandum of Argument at para 22.

[29] While I have some misgivings about former counsel's repeated concessions of incompetence, the Applicants have satisfied me that, in this case, his representation fell below the standard of reasonable professional judgment. Even setting aside former counsel's concession, I find that the Applicants have met the performance component of their allegations of ineffective assistance of counsel.

[30] In my view, the main failing of former counsel was not filing any evidence or submissions specifically addressing the hardship the Applicants would face in either Argentina or China. The Applicants acknowledge that the statutory declaration of the Principal Applicant's spouse makes a general reference to "hardships and plight in Argentina" and that the Dependent Applicants "suffered a lot in China": Statutory Declaration dated November 10, 2021, CTR at 250. However, as they point out, there are no details in the statutory declaration regarding hardship, nor did former counsel file any submissions addressing this issue.

[31] Significantly, the officer repeatedly refers to the lack of evidence of hardship throughout their decision. For example:

> • "The evidence before me provides few details and insufficiently demonstrates, explains or provides examples of mistreatment the applicant, her dependants, and her non accompanying spouse, based on their own personal circumstances, experienced in either Argentina or China."
>
> • "Insufficient evidence has been presented for examination which demonstrates the obstructions or adverse effects the applicant would face in the event they are required to depart Canada. An explanation on why the applicant would be unable to access suitable housing, food, clothing, medical services, employment and other basic amenities is not before me for examination and consideration."
>
> • "However, there is little evidence before me which demonstrates the children would be unable to adjust and become successful in their daily lives should they depart Canada with their parents."
>
> • "There is little to indicate the applicant would be unable to provide an environment in which the children would have access to suitable housing, education, medical needs, clothing, food and other basis amenities which would offer a comparative lifestyle to which the children currently have."
>
> • "Based on the evidence presented and on a balance of probabilities, the applicant has not conclusively demonstrated the well-being of her children would be significantly compromised if the applicant were to return to Argentina or China."
>
> H&C Decision at 8–10, CTR at 10–14

[32] According to the Principal Applicant, former counsel "did not ask [them] what hardships [her] family would face if [they] had to return to Argentina or China, such [*sic*] the difficulties [her] children would face in their education": Affidavit of Xiaoyan Lin, sworn October 11, 2024 at para 13, Applicants' Record at 21 [Principal Applicant's affidavit].

[33] The Applicants argue that had they known hardship was a central factor to be considered on an H&C application, they would have submitted evidence and submissions addressing the

hardships they would face as a family in Argentina and China. This includes: (i) evidence that the children would not have access to public education in China as foreign nationals; (ii) evidence of speech delay and therapy experienced by one of the Dependent Applicants; (iii) evidence of the autism diagnosis and treatment for one of the Canadian-born children, as well as country condition evidence of the treatment of autism in China; (iv) submissions about the impact schooling in a foreign language would have on the children; and (v) country condition evidence on the impact of the Hukou system on accessing social services, including education, in China: Principal Applicant's affidavit at paras 13–15, 21–23, Applicants' Record at 21–24; Applicants' Memorandum of Argument at paras 13–23.

[34] The Respondent asserts that the Applicants have failed to demonstrate that former counsel's failure to present sufficient evidence about hardship amounts to ineffective assistance of counsel. They submit that the Applicants' arguments are advanced with "the benefit of hindsight": Respondent's Further Memorandum of Argument at para 24. I do not agree.

[35] Hardship is a key consideration on an H&C application: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 26–27 [*Kanthasamy*]. As Justice Diner aptly put it, "[h]ardship, in the context of applying for permanent residency from Canada as opposed to abroad, is thus at the very heart of the H&C process" [emphasis added]: *Mulla v Canada (Citizenship and Immigration)*, 2017 FC 445 at para 15. Indeed, section 25(1.3) of the *IRPA* specifically requires the consideration of "elements related to the hardship that affect the foreign national".

[36] Here, former counsel failed to advance any evidence or submissions addressing hardship. This is not a case of hindsight analysis, but one where it is clearly established that former counsel failed his clients.

[37] The Respondent further argues that the Principal Applicant's provision of updated documents to former counsel on three occasions between May and August 2024 undermines her evidence that he did not advise her that she could submit supplementary submissions: Respondent's Further Memorandum of Argument at para 23. I disagree.

[38] The Principal Applicant states that she did not know she could "add additional reasons to stay in Canada" [emphasis added], such as information about her daughter's autism diagnosis and treatment. This diagnosis was made in December 2023, over one year after the filing of the H&C application: Principal Applicant's affidavit at paras 14–15, Applicants' Record at 21–22. Notably, the documents provided by the Principal Applicant to former counsel for submission to Immigration, Refugees and Citizenship Canada consisted of new photographs, income tax assessments, pay stubs, and vehicle ownership. These documents related to the family's establishment in Canada, which had been addressed in the H&C application. This is distinct from hardship issues, which had not been raised by former counsel. On this basis, there is no contradiction in the Principal Applicant's evidence.

[39] For these reasons, I find that the Applicants have established that former counsel's representation fell below the expected standard.

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

[40] The prejudice component of the test is concerned with whether a miscarriage of justice resulted from former counsel's conduct. Miscarriages of justice may take different forms in the context of ineffective assistance of counsel: *R v Meer*, 2016 SCC 5 at para 3; *GDB* at para 28. This includes where former counsel's conduct has compromised the reliability of the result of the underlying adjudicative process, and where their conduct has compromised the fairness of the adjudicative process itself: *Bailey* at para 21; *El-Khatib* at paras 39–47; *Discua* at para 75.

[41] I agree with the Respondent that the Applicants have failed to demonstrate a reasonable probability that, but for former counsel's conduct, the outcome of their H&C application would have been different: *El Khatib* at para 48; *Uwa* at para 17, *Singh* at para 29. H&C officers are required to cumulatively "consider and weigh *all* the relevant facts and factors before them" [emphasis in original]: *Kanthasamy* at para 25. While the officer referred to the lack of evidence about hardship numerous times, their decision "does not [make] clear the probability of a different result": *El Khatib* at para 49.

[42] This said, I find that former counsel's conduct compromised the fairness of the H&C decision-making process. As already discussed, hardship is a central pillar of an H&C application. Former counsel's failure to present any evidence or submissions about hardship resulted in the Applicants advancing a significantly weaker case: *Discua* at para 78.

[43] Had evidence and submissions on hardship been presented, the officer would have considered and weighed it in their global assessment of the H&C application: *Kanthasamy* at para 28. Further, the Applicants have demonstrated subjective prejudice by providing evidence on judicial review that they would have submitted on their H&C application if they had been properly advised: *El Khatib* at paras 55, 60. As Justice Pentney recently explained: "Fairness dictates that the Applicant should have had the opportunity to have this evidence weighed by the Officer, regardless of the outcome": *Bailey* at para 32.

[44] In the circumstances, former counsel's ineffective representation deprived the Applicants of a full and fair opportunity to present their case. A fresh determination of their H&C application is therefore required.

[45] I do not accept the Respondent's argument that redetermination is not warranted because the Applicants can simply file a new H&C application: Respondent's Further Memorandum of Argument at paras 15, 24. The Applicants filed their H&C application in October 2022, but a decision was not made until August 2024, almost two years later. Having established ineffective assistance of former counsel, they are entitled to have the officer's decision set aside and redetermined. The Applicants should not be required to file a new H&C application and wait once again in the queue for a determination.

IV. Conclusion

[46] For these reasons, the application for judicial review is granted. The matter is remitted to another officer for redetermination. The Applicants must be given an opportunity to submit new evidence and submissions.

[47] The parties did not propose a question for certification, and I agree that none arise.

JUDGMENT in IMM-15924-24

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove Canran Su as an applicant;
2. The application is granted.
3. The decision dated August 9, 2024, is set aside and the matter is remitted to a different officer for redetermination.
4. The Applicants will be provided an opportunity to file further evidence and submissions in support of their H&C application.
5. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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