

Federal Court



Cour fédérale

Date: 20241029

**Dockets: IMM-10553-23
IMM-6500-22**

Citation: 2024 FC 1721

Ottawa, Ontario, October 29, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

CHARLES PRINCE UWA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Charles Prince Uwa [Applicant], sought refugee protection in Canada on the basis of his political opinion and his status as a person with human immunodeficiency virus [HIV]. He seeks judicial review of two decisions, because of a breach of procedural fairness arising from the incompetence of his former legal counsel.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board had found that the Applicant is neither a Convention refugee nor person in need of protection pursuant to section 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] On appeal from to the Refugee Appeal Division [RAD], the Applicant's previous legal counsel advanced the argument that the RPD erred with respect to the Applicant's citizenship. At issue was whether he was a citizen of Liberia or Nigeria. The RPD found the Applicant not credible because of a series of omissions, inconsistencies and discrepancies in the basis of claim narrative and his testimony as well as documentary evidence. The RPD held that the Applicant was a citizen of Liberia, and failed to establish "a forward-looking personalized persecution or risk of life" in that country. The RAD confirmed the RPD's decision. Former counsel did not pursue the RPD's findings related to his HIV status. As such, the RAD did not address the risk of persecution or risk to his life in Liberia due to his HIV status.

[4] With the assistance of his new counsel, the Applicant requested that the RAD reopen his appeal on the basis of ineffective assistance from former counsel who represented him before the RPD and the RAD. The Applicant argued that the RAD's decision was procedurally unfair because his counsel failed to challenge key parts of the RPD's decision relating to his HIV status that were determinative to the outcome of the appeal. The RAD refused to reopen the appeal.

[5] The Applicant obtained leave for judicial review of the RAD's decision confirming the RPD's decision (IMM-6500-22) as well leave for judicial review of the RAD's decision rejecting

the request to reopen the appeal (IMM-10553-23). By order of this Court dated September 12, 2024, both proceedings were consolidated.

[6] For the following reasons, the applications for judicial review are granted. The incompetent representation of former counsel resulted in a breach of fairness that vitiates the RAD's decision on the Applicant's status as a refugee or a person in need of protection. Further, the RAD's decision not to reopen the appeal is not reasonable.

II. Issues and Standard of Review

[7] The issues are whether there was a breach of procedural fairness due to the incompetence of the Applicant's former counsel and whether the RAD erred in refusing to reopen the appeal.

[8] Breaches of procedural fairness in administrative contexts have been considered reviewable on a standard akin to correctness "even though, strictly speaking, no standard of review is being applied." The focus of the reviewing court is essentially whether the process was fair, bearing in mind the duty of procedural fairness is variable, flexible and context-specific (*Kandiah v Canada (Citizenship and Immigration)*, 2021 FC 1388 at para 17 [*Kandiah*], citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [*Vavilov*], at para 77).

[9] In extraordinary circumstances, counsel's behaviour may amount to a breach of natural justice, warranting redetermination by the decision-maker. The test for reviewable counsel conduct is three-part, and the onus is on an applicant to establish that:

- i. the previous representative's acts or omissions constituted incompetence or negligence;
- ii. but for the impugned conduct, there is a reasonable probability that the outcome would have been different (in other words, a miscarriage of justice has occurred as a result of the conduct) and
- iii. the representative had a reasonable opportunity to respond to an allegation of incompetence or negligence.

(*Kandiah* at paras 47-48)

[10] Under section 49 of the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules], the RAD may consider a request to reopen an appeal. The RAD "must not allow the application unless it is established that there was a failure to observe a principle of natural justice" (section 49(6) of the Rules). The reasonableness standard applies to the RAD's decision on reopening an appeal (*Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103, at para 24 [*Brown*]).

[11] Applying the reasonableness standard of review, the Court must consider whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision-maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

III. Analysis

[12] In its decision refusing to reopen the appeal, the RAD found that the record supports former counsel's assertion that the issue of the Applicant's citizenship was central to the determination of his claim. While current counsel may have argued the RAD appeal differently, the RAD found that the memorandum of appeal from former counsel does not demonstrate incompetence. Rather, counsel pursued the argument he found the most convincing.

[13] The Applicant states that the RAD erred in focusing only on the justification to pursue the citizenship issue whereas he had submitted that incompetence arose from not bringing forward the HIV status. There was no reasonable explanation not to advance both arguments – citizenship and HIV status. The RAD's decision on reopening the appeal does not reasonably address the issue of not advancing one of the core components of establishing his claim, among other things.

[14] The Respondent acknowledged that the submissions of former counsel to the RAD were “not a model of perfection,” but that they are entitled to the strong presumption of professional competence. The Respondent submits that the Applicant has to bear the consequences of his own counsel and the reasonable strategic decision to pursue the sole issue of citizenship on appeal (citing *Chukwudebe v Canada (Citizenship and Immigration)*, 2009 FC 211 at paragraph 13). The choice in drafting an appeal to highlight one particular issue, rather than another, is a matter of professional judgment on which competent counsel may disagree. The Respondent states that

it was open for former counsel to pursue the issue of Liberian citizenship given that it could have been a determinative issue.

A. *The Test for Incompetence of Counsel*

[15] The Applicant's former counsel was given notice of the allegations of incompetence and provided a response to the RAD. Former counsel was also served with the applications for judicial review, but has not responded to these Court proceedings.

[16] I find that the Applicant has satisfied the test for reviewable counsel conduct.

[17] It is helpful to start with the second factor of the tripartite test: whether but for counsel's conduct, there is a reasonable probability that the outcome would have been different (or, whether a miscarriage of justice has occurred as a result of the conduct). This analysis also informs the first part, whether the conduct constituted incompetence.

[18] The Applicant has submitted cases where the only issue before the RAD was whether the discrimination experienced by individuals who are HIV positive amounted to persecution. He submits that HIV status on its own could also have reasonably been a determinative issue. The record before the RPD demonstrated that there was stigma, discrimination and violence toward HIV positive individuals in Liberia. The RPD accepted that the Applicant was HIV positive, but found that the discrimination he might experience would not rise to the level of persecution. The Applicant states that the RPD erred in making this finding on a flawed analysis. In addition, the RPD's references to the record was selective. However, the RAD did not have the opportunity to

review the validity of the RPD's determination on the Applicant's risk due to his HIV status because former counsel abandoned this argument on appeal.

[19] In his response before the RAD, former counsel indicated that the national country conditions were not sufficient to pursue the HIV status on appeal. He justified his decision to pursue the citizenship issue. More troubling, however, was his position that "it was open to RAD to consider and review the RPD's findings and conclusions on the Applicant's fear of persecution in Liberia as someone living with HIV."

[20] The Applicant underlines that this statement demonstrates that former counsel misunderstood the role and the authority of the RAD. Despite his assertion, the jurisprudence is clear that the RAD has no obligation to consider a ground not raised on appeal. The Respondent appropriately cited instances where the RAD could raise a new issue on appeal, but must first give notice to the Applicant. However, I find that those cases are distinguishable, as this did not occur in the Applicant's circumstances.

[21] Indeed, the Court's jurisprudence states that responsibility rests with an applicant to raise any potential grounds of appeal that arise from the RPD's decision. The RAD has no responsibility to consider other grounds (*Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 39). Applicants who fail to specify in their submissions to the RAD where and how the RPD erred do so at their peril (*Gadafi v Canada (Citizenship and Immigration)*, 2021 FC 1011 at para 18).

[22] It is incorrect for former counsel to assert that the RAD could have somehow corrected his omission despite not raising a specific ground on appeal in any event. The response provided by former counsel to the RAD also focused on justifying the citizenship argument. His explanation for not advancing the HIV status argument is much less detailed in comparison, and silent on why he could not advance both arguments on appeal.

[23] I agree with the Applicant's submission that he was prejudiced by his former counsel omitting one of the core arguments on appeal. There were no adverse credibility findings on his HIV status, and no justification provided on why one argument had to be advanced to the exclusion of the other. It is difficult to assess the impact of the omission because the RAD could only focus on the citizenship argument. However, the Applicant's references support his argument that his HIV status could have been a determinative issue. As such, the Applicant has demonstrated a reasonable probability of a different result, but for the incompetence of counsel (*Kandiah* at paras 59-60), which is the second factor of the test.

[24] Having found the HIV status to be a reasonable determinative issue, in these circumstances, former counsel's failure to make submissions on this determinative issue before the RAD amounts to incompetence (*Kandiah* at para 59, citing *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 at para 25 [*Rendon Segovia*]). The Applicant has satisfied the first factor of the test for the incompetence of counsel.

[25] As Justice Diner states in *Rendon Segovia*, at paragraph 25: "Failing to make submissions on the determinative issue in a decision – when appealing the merits of that decision – amounts

to pure incompetence. This is particularly the case when the ... tribunal reminds the representative of the key issue in the decision being challenged... this is not a situation where the immigration consultant's actions would be covered by the usual presumption of a 'wide range of reasonable professional assistance' with the benefit and 'wisdom of hindsight.'

[26] This also applies to the Applicant's case. The RAD sent a message in its decision after analyzing the citizenship question (the only question before it): "Counsel did not submit additional arguments related to the RPD's credibility and forward-looking risk findings."

[27] The third factor in the tripartite test for incompetence of counsel was met. Former counsel was notified and given an opportunity to respond.

[28] A breach of procedural fairness occurred in the RAD's decision related to the RPD appeal. The Applicant has demonstrated that the effect of the counsel's omission amounted to incompetent conduct; and, the incompetent conduct resulted in a miscarriage of justice. The former counsel had the opportunity to fully explain his perspective.

B. *The RAD's decision is unreasonable*

[29] I find that the RAD's refusal to reopen the appeal is not reasonable.

[30] The Respondent states that the issue of HIV as a ground of risk was pursued before the RPD. This is not a case where a lawyer made a clear error or completely missed the relevant ground of persecution. The decision to pursue the citizenship argument on appeal because it

could have been determinative was reasonable. It was therefore open to the RAD to find that former counsel made a strategic decision. There was no breach of procedural fairness and it was reasonable not to reopen the appeal.

[31] However, the Respondent, like the RAD, addresses the justification of advancing only the citizenship argument. Rather, the Applicant challenged former counsel's abandonment of the HIV status argument and highlighted the error of focusing only on the citizenship argument. The RAD did not sufficiently engage in the Applicant's argument that his HIV status should also have been part of the appeal. Its findings did not address the central issue that failing to raise a determinative issue resulted in his appeal not being effectively heard. This renders the decision unreasonable.

[32] I also agree with the Applicant's submissions that the RAD did not engage in giving adequate consideration to the argument and mischaracterized the relevant evidence surrounding HIV positive individuals, constituting a reviewable error (*Brown* at paras. 31-35).

IV. Conclusion

[33] The applications for judicial review are granted, because the representation of former counsel before the RAD resulted in a breach of procedural fairness and the RAD's decision refusing to reopen the appeal was unreasonable.

[34] Both of the RAD's decisions are set aside and the Applicant's appeal of the RPD's decision will be remitted to the RAD for redetermination by a different panel. The RAD will

provide the Applicant with the opportunity to file a new notice of appeal, evidence and submissions.

[35] There was no question of general importance to be certified.

JUDGMENT in IMM-10553-23 and IMM-6500-22

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are allowed.
2. The RAD's decisions dated June 14, 2022 and August 4, 2023 are set aside.
3. The Applicant's appeal of the RPD decision dated January 25, 2022 will be remitted to the RAD for redetermination by a different panel.
4. The RAD will provide the Applicant with the opportunity to file a new notice of appeal, evidence and submissions.
5. There is no question to certify.

"Phuong T.V. Ngo"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS: IMM-10553-23 AND IMM-6500-22

STYLE OF CAUSE: CHARLES PRINCE UWA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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