Federal Court  Cour fédérale

Date: 20230130

Docket: IMM-2415-21

Citation: 2023 FC 137

Ottawa, Ontario, January 30, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

DARLIN MELISSA LAZO DISCUA,
EMELY MONSERRATH MEJIA LAZO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] Darlin Melissa Lazo Discua, the principal applicant, and her eight-year-old daughter Emely Monserrath Mejia Lazo, claim to be citizens of Honduras. They sought refugee protection in Canada on the basis of the risks they faced at the hands of the *Mara Salvatrucha* (also known as MS-13), a criminal gang in Honduras. Their claims were denied, however,

principally because the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") found that they had not established their national identities.

[2] The applicants now apply for judicial review of the RPD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). They contend that they received ineffective assistance from their counsel at the RPD and, in any event, that the RPD's decision is unreasonable.

[3] For the reasons that follow, I am satisfied that the applicants have established that the conduct of their former counsel (a lawyer) fell below the standard of reasonable professional assistance and judgment and that this occasioned a miscarriage of justice. As a result, a redetermination of their refugee claims is required. In view of this, except in one respect, it is not necessary to address the applicants' alternative argument that the RPD's decision is unreasonable.

II. BACKGROUND

[4] The principal applicant claims to have been born in Comayagua, Honduras in October 1993. Her daughter was born there in April 2014.

[5] The applicants first entered Canada at Fort Erie, Ontario, on May 16, 2019. They immediately claimed refugee protection. They had been in the United States without legal status since late September 2018, having left their home in Honduras earlier that month. After being processed by U.S. authorities and detained briefly in Arizona, the applicants made their way to

Kansas City, Missouri, where they stayed with a friend of Ms. Lazo Discua's until coming to Canada.

[6] When the applicants entered Canada, the principal applicant's husband and the minor applicant's father, Ronal Donary Mejia Bonilla, was already here on a work permit. Mr. Mejia Bonilla had been working in Canada since 2015 as an agricultural labourer. He would return to Honduras for about a month every year. His last work permit had been issued in January 2018 and was valid until January 2020.

[7] Mr. Mejia Bonilla and Ms. Lazo Discua first met in 2012. They were officially married in Honduras in August 2018 after being in a common law union for several years.

[8] Mr. Mejia Bonilla had last returned to Canada on the strength of his work permit in March 2019. (It appears that while the applicants were in the United States, Mr. Mejia Bonilla had been apprehended by U.S. authorities while attempting to enter that country illegally from Canada. He was deported to Honduras but made his way back to Canada about a month later.) As a result of his presence in Canada when they claimed refugee protection at the Port of Entry, the applicants were found to be eligible to have their cases referred to the RPD.

[9] When they presented themselves at the Port of Entry, the applicants identified themselves as Honduran nationals. As proof of their citizenship, Ms. Lazo Discua provided her and her daughter's birth certificates. She also provided a copy of her marriage certificate as well as an identity card with her name and photograph on it that had been issued by the Westside

Community Action Network Center, Inc., in Kansas City. The Canada Border Services Agency subsequently transmitted copies of these documents to the RPD.

[10] The applicants completed their basis of claims and other forms with the assistance of their former counsel. In these documents, the applicants again identified themselves as nationals of Honduras. However, Ms. Lazo Discua stated in her *Generic Application for Canada* form that neither she nor her daughter had passports or national identity documents. (Ms. Lazo Discua would later explain at the RPD hearing that while she once had a national identity card, she had provided it to immigration authorities in the United States and never received it back.) When asked in the *Schedule 12 – Refugee Claimants Inside Canada* form to list the supporting documents in their possession, the applicants listed only their respective Honduran birth certificates, which they stated were genuine.

[11] In July 2019, Mr. Mejia Bonilla submitted his own claim for refugee protection in Canada. He was assisted in the preparation of his claim by the same counsel as had assisted the applicants. As proof of his identity and citizenship, Mr. Mejia Bonilla provided his valid Honduran passport.

[12] While the refugee claims were pending, the applicants' former counsel received a disclosure package from the RPD dated September 30, 2020. This package included copies of documents Mr. Mejia Bonilla had submitted to Immigration, Refugees and Citizenship Canada ("IRCC") in support of his applications for Canadian work permits. Among these documents were a photocopy of Ms. Lazo Discua's Honduran national identity card and a copy of a

document in Spanish confirming Ms. Lazo Discua's civil union with Mr. Mejia Bonilla. Notably, the national identity card has a photograph of Ms. Lazo Discua on it.

[13] Under covering letter dated January 18, 2021, the applicants' former counsel provided disclosure to the RPD in relation to Ms. Lazo Discua's claim. The list of the claimant's documents included "Basis of Claim Form – and Claimant's International Passport – on IRB File." As will be discussed below, in fact, no such passport was "on file" with the RPD because Ms. Lazo Discua had never had a passport.

[14] The applicants' claims for refugee protection (together with that of Mr. Mejia Bonilla) were heard by the RPD by way of video conference on February 9, 2021. The applicants' former counsel represented all three claimants at the hearing.

[15] The RPD member questioned both Ms. Lazo Discua and Mr. Mejia Bonilla concerning their experiences in Honduras. The member did not ask Mr. Mejia Bonilla any questions about his identity documents. On the other hand, the member asked Ms. Lazo Discua several questions about this.

[16] When asked by the member what documentation she had brought with her when she left Honduras, Ms. Lazo Discua responded: "My ID, my daughter's birth certificate." A short time later, the member had the following exchange with Ms. Lazo Discua:

> Panel: Where is your passport from Honduras?
>
> Ms. Lazo: I don't have a passport, I wasn't bringing my passport, I only have my ID.

Panel: So, you've never had a passport?

Ms. Lazo: No.

Panel: Now, in your refugee documents, you said, you had written that you do not have a valid passport and you did not have a valid National Identity Card, is that correct?

Ms. Lazo: Yes, yes, my ID was taken by immigration when I entered the US and then I got an ID in the US just to have identification.

Panel: But the ID that you got in the US was not issued by Honduras, was it?

Ms. Lazo: No.

Panel: So, you travelled through at least three countries without any, without a passport.

Ms. Lazo: Yes.

Panel: Where is your daughter's passport?

Ms. Lazo: She didn't have one either, I had my daughter's birth certificate.

Panel: You've been in Canada now for almost 2 years, why have you not approached the Honduran embassy in Canada to obtain passports for you and your daughter?

Ms. Lazo: I don't know, I, I didn't know I have, I had to have it.

Panel: So, you, you and your daughter have no government issued photo identification from Honduras?

Ms. Lazo: No, my daughter just has a birth certificate.

Panel: Right, but a birth certificate is not a photo identification?

Ms. Lazo: No, with photo, no, its just the brown paper that they gave us in Canada.

[17] Former counsel for the applicants did not ask Ms. Lazo Discua any questions about her identity documents.

[18] After Ms. Lazo Discua and Mr. Mejia Bonilla concluded their evidence, the RPD member had the following exchange with their former counsel:

> Panel: Okay, so here's what my concerns are. With respect to the principal claimant, Darlin and the minor claimant, my concerns are with identity. That's really what I need to hear on, counsel. With respect to the associate claimant, Ronal, obviously there are some inconsistencies between his accounts and, and his wife's accounts and also the viability of a, of an internal flight alternative. Those are, that's what I want to hear on.
>
> Counsel: With respect to those issues, sir, I do not have much in terms of submission.
>
> Panel: (inaudible)
>
> Counsel: On the claimant's, the principal claimant and the minor's identity, I do not have any identity documents that I can rely on presently . . .
>
> Panel: Yeah.
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> Counsel: . . . but I'll be asking you to rely on the verbal identification by the adult male claimant, the father of the two of them as his wife and his daughter.
>
> Panel: Okay.
>
> Counsel: In the circumstances of his own identity having been established, what we have is his own identity is not in question and he has identified both the mother, his wife, and his daughter, I'll be asking you to accept those are sufficient to establish their identity. Apart from that, I will be asking if the Member could give the claimant the opportunity to submit additional identity documents post-hearing. So, the emphasis I'm making here is what is presently available which is the oral evidence of the father identifying both the wife and the

> daughter and that to give us the opportunity to see if they are able to get additional documents post the hearing.

[19] After hearing from counsel on the substance of the claims, the member stated the following:

> Panel: [. . .] So, counsel, I'll tell you that I'm not inclined to accept any post-hearing documentation on the issue of identity for the following reasons, both the IRPA and the rules of the Refugee Protection Division make it abundantly clear that all claimants who appear before the Board are required to present documentation to establish their personal identities on a balance of probabilities and where they have not done so they are required to either make reasonable attempts to get that documentation before the hearing or to provide an, a reasonable explanation for why they haven't. And in the case, in the case before me, the principal claimant has been very clear that she did not make any attempts to obtain government issues [*sic*] photo identification, whether it's a passport or a National Identity Card and as a result I have to then assess her explanation, her explanation was, well, I didn't really know that it was needed and [. . .] I have to assess the reasonableness of that explanation in the context of the claim, you know, particularly given that they have been represented by counsel and all legal counsel are presumed to be competent and to do their jobs effectively. And so, you know, I'm not going to render my decision today, I will consider your submissions and I will consider your, your argument that I can, that I can, you know, accept their, the identities of the minor claimant and the principal claimant based on the husband's testimony but I'm not inclined to accept any post hearing in that regard and that, those are my reasons.

[20] The member then took the matter under reserve.

III. DECISION UNDER REVIEW

[21] In a decision dated March 9, 2021, the RPD member determined that the applicants had failed to establish their personal and national identities. Stemming from this, the member also had serious concerns with the principal applicant's credibility. As a result, the claims for protection were rejected.

[22] The RPD also rejected the claim of Mr. Mejia Bonilla but, in his case, solely on grounds of credibility (having found that his identity was established with his Honduran passport). Unlike the applicants, Mr. Mejia Bonilla had a right to appeal this determination to the Refugee Appeal Division of the IRB. As a result, he is not a party to the present application.

[23] The RPD found that Ms. Lazo Discua had not made any attempt to obtain a passport or government-issued photo identification for herself or her daughter. While Ms. Lazo Discua claimed that she did not know she had to have a passport or government-issued photo identification, the member found that this explanation was not credible because, at all material times, the applicants were represented by counsel, who is presumed to be competent, and who would have advised Ms. Lazo Discua on the importance of obtaining documentation to establish identity. The member therefore drew an adverse inference concerning Ms. Lazo Discua's overall credibility on this basis.

[24] The member acknowledged that Ms. Lazo Discua had provided birth certificates for herself and her daughter as well as a photo ID card issued by the Westside Community Action

Network Center. The member found that while the birth certificates contained information consistent with the applicants' claimed identities, they were not Government of Honduras-issued photo identification. In the member's view, "Anyone could possess those documents." As for the photo ID card, "given that the principal claimant alleges that her only source of government-issued ID was seized by the U.S. authorities, it is unclear what government issued ID the Westside Community Action Network Center used to verify her identity, if they did so at all."

[25] The member observed that all refugee claimants are required to provide documentation establishing their personal and national identities on a balance of probabilities or provide a reasonable explanation for not having such documentation. The member found that, despite being represented by counsel for almost two years, the applicants had failed to do so.

[26] The member also noted that since the principal claimant had "traversed several South American countries, many of which are well-documented hotbeds of fraudulent documents [footnote omitted], the level of scrutiny over her identity and that of her daughter is even more important."

[27] The member did not accept Mr. Mejia Bonilla's identification of the applicants as sufficient proof of their identity. According to the member, "the law is quite clear on what is required to discharge the burden on the claimants." The member found that, "given the self-serving nature of the associate claimant's testimony, it does not have the inherent reliability and impartiality required to establish someone's identity."

[28] Finally, with respect to the substance of the claims for protection, the RPD found that "both the principal and associate claimants had serious credibility issues that were not adequately explained," which led the member to find that "they were not credible as witnesses on a balance of probabilities in any case."

IV. ANALYSIS

A. *Ineffective Assistance of Counsel*

[29] The principal ground on which the applicants seek judicial review of the RPD's decision is that they received ineffective assistance from their former counsel.

[30] The framework within which an allegation of ineffective assistance of counsel is to be assessed in the context of an application for judicial review under the *IRPA* is well-established. First, as a prerequisite to having the issue considered by the reviewing Court, an applicant must establish that former counsel has had a reasonable opportunity to respond to the allegations. Then, on the merits of the allegation, the applicant must establish that the conduct of former counsel was negligent or incompetent (the performance component) and that this resulted in a miscarriage of justice (the prejudice component). See, among other cases, *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 36-38; *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 at para 17; *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 at paras 33-39; and *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at paras 22-24.

[31] Since the issue of ineffective assistance is being raised for the first time on judicial review, strictly speaking, the application of this test does not engage a standard of review.

[32] All three elements of this framework are in issue here. I will address each in turn.

(1) Notice to Former Counsel

[33] This Court has adopted a protocol setting out the procedures that should be followed when an allegation of ineffective assistance of counsel is being considered as a ground for judicial review under subsection 72(1) of the *IRPA* and, further, when that ground is actually advanced. (The protocol also applies to allegations against former authorized representatives.)

[34] In the present matter, when the allegation against former counsel was first raised, the procedure to be followed was set out in *Protocol Re Allegations against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* (March 7, 2014). The protocol has since been incorporated without change into the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022) (see paragraphs 46-54). The protocol helps to ensure that all relevant information is before the Court when an allegation is made against former counsel. It also provides procedural fairness to former counsel, whose competence is being called into question and whose professional reputation is therefore at stake.

[35] The protocol provides for notice to former counsel and an opportunity to respond to the allegation of ineffective assistance at three key junctures. First, prior to raising the issue before

the Court, current counsel must notify former counsel of the allegation in writing, alert former counsel that the issue may be raised in an application for leave and judicial review, and invite any response that former counsel may wish to make to the allegation. Among other things, this notice must provide "sufficient detail" of the allegation. Second, if, in light of the available information (including any response from former counsel), current counsel decides to pursue the allegation as a ground for judicial review, the perfected application must be served on former counsel and proof of service must be provided to the Court. If former counsel then provides a response to the allegation as it has been advanced in the application record, current counsel must provide this response to the Court. Current counsel may also provide material responding to former counsel's response. All of these materials are meant to be considered by the Court when determining the leave application. Third, if leave to proceed with judicial review is granted, current counsel must provide former counsel with a copy of the order granting leave and setting the matter down for a hearing. This affords former counsel an opportunity to seek leave to intervene in the judicial review application, should they wish to do so.

[36] The respondent submits that I should decline to consider the merits of the allegations against the applicants' former counsel because their current counsel failed to comply with the protocol. I do not agree. As I will explain, while current counsel's efforts fell short of best practices, I am satisfied that the protocol was complied with in substance. Most importantly, I am satisfied that neither former counsel nor the Court's fact-finding function have been prejudiced by the lapses of current counsel.

[37] To begin with, I am satisfied that the first requirement for notice to former counsel as set out in the protocol was met. Indeed, the respondent does not suggest otherwise.

[38] Prior to perfecting the application for leave and judicial review, current counsel sent former counsel a letter dated June 25, 2021. As will be seen below, the applicants' principal concern is with respect to how former counsel dealt with the issue of their national identity, including marshalling and submitting evidence to support their claim that they are citizens of Honduras. The letter of June 25, 2021, clearly identified the applicants' concerns with how former counsel had dealt with this issue. Three specific areas of concern were set out in the letter. (These will be discussed below.) The letter indicated that a final decision had not been made on whether to pursue an allegation of ineffective assistance as a ground for judicial review and that any response former counsel might provide would be considered in making that decision.

[39] Former counsel provided a letter dated June 28, 2021, responding to the questions posed to him in the letter of June 25, 2021. Both letters are attached as exhibits to the affidavit Ms. Lazo Discua provided in support of the application for leave and judicial review. The letter from former counsel includes excerpts from emails he had exchanged earlier with the applicants' current counsel about the applicants' allegations. Thus, it is clear that former counsel was aware of the allegations even before he received the June 25, 2021, letter.

[40] The applicants' application record (which included Ms. Lazo Discua's affidavit) was served on the respondent and filed with the Court on July 9, 2021. As reflected in that record,

the applicants had decided to pursue the ineffective assistance of their former counsel as a ground for judicial review. Their current counsel emailed a copy of the application record to their former counsel on July 22, 2021. Proof of service of the application record on former counsel was not filed with the Court. However, as will be seen in a moment, there is no issue that former counsel received the application record. Thus, I am satisfied that the second requirement for notice to former counsel has also been satisfied.

[41] The applicants' former counsel wrote to their current counsel and to counsel for the respondent on July 27, 2021. He confirmed receipt of the application record by email on July 22, 2021. He raised several objections to how the applicants' current counsel had presented his position (as articulated in his letter of June 28, 2021) in her written submissions in support of the leave application. Nevertheless, he concluded his letter as follows: "Given however, that my actual letter is in the Application Records [*sic*] as Exhibit 'F', I need not make any further statement other than to have the letter speak for itself and the depiction of my letter by [current counsel] [*sic*]."

[42] Under the protocol, the applicants' current counsel should have provided this letter to the Court before a decision was made on the leave application. This was not done. As it happened, however, the respondent did not oppose leave. (This position was communicated to the Court in a letter dated August 9, 2021.) Moreover, former counsel had made it clear that he had nothing further to add to his letter of June 28, 2021. As a result, I am satisfied that the failure to comply with the protocol in this respect did not occasion any prejudice at the leave stage.

[43] Leave for judicial review was granted in an order dated February 15, 2022. The hearing of the application was set down for May 11, 2022.

[44] The July 27, 2021, letter from former counsel was eventually put before the Court as an exhibit to an affidavit that was filed by the respondent after leave was granted. This step would not have been necessary had the applicants' current counsel followed the protocol. Nevertheless, given that the letter of July 27, 2021, is before the Court, I am satisfied that the objective of ensuring that the Court is aware of former counsel's response to the allegation of ineffective assistance (as it had been presented in the application for leave and judicial review) has been met. In any event, as I have already noted, that response did not add anything material to former counsel's original response of June 25, 2021, which was already in the record.

[45] The respondent's Further Memorandum of Argument was served and filed on April 20, 2022. In it, the respondent pointed out that the applicants had not provided any evidence that, as required by the protocol, they had provided their former counsel with the order granting leave. On this basis, the respondent contended that the Court should not entertain the allegations against former counsel.

[46] At the hearing of this application on May 11, 2022, counsel for the applicants informed the Court that she had recently provided former counsel with a copy of the order granting leave (presumably as a result of the position taken by the respondent in its memorandum of argument). She also informed the Court that former counsel had confirmed to her that he did not wish to participate further in the application.

[47] This is the second point where, in my view, current counsel's actions fell short of best practices. She should not have put herself in the awkward position of effectively having to provide evidence at the hearing of the application about former counsel's receipt of the order granting leave and his response to this. This was a material and potentially contentious issue that should have been addressed in some other fashion.

[48] As well, while this part of the protocol may not be worded as precisely as it could be, there can be no doubt that the rationale for providing former counsel with a copy of the order granting leave is to alert them to a material development (leave has been granted) and to give them a reasonable opportunity to decide whether to seek leave to intervene in the application for judicial review. Thus, in the present case, the order granting leave should have been provided to former counsel as soon as reasonably possible after it had been received by the applicants. I would also observe that, while the protocol does not call for this, providing the Court with proof of timely delivery of the order to former counsel would obviate any concerns about whether former counsel was aware that leave has been granted and whether they had anything further to add on the issue of their conduct.

[49] Given the contents of the letter from former counsel of July 27, 2021, it may not have been unreasonable for the applicants' current counsel to assume that their former counsel had no interest in participating further in the matter, even if leave were granted. Nevertheless, the order granting leave should have been provided to him much sooner than it was.

[50] All this being said, as I indicated at the hearing, I am prepared to accept the representations of the applicants' current counsel as an officer of the court. As a result, I am satisfied that former counsel is aware that leave was granted. I am also satisfied that he maintained his position that he had nothing more to add to what he had already stated in response to the allegations against him.

[51] For these reasons, despite the failure to comply with the protocol to the letter, I am satisfied that it has been complied with in substance. I am therefore also satisfied that the issue of former counsel's conduct is properly before the Court and that it should be adjudicated on its merits. (I note parenthetically that in *Nik*, Justice Fuhrer also dealt with an allegation of ineffective assistance of counsel on its merits even though the protocol had not been complied with fully: see *Nik* at para 26.)

(2) The Performance Component

[52] At this stage, the applicants bear a two-fold burden. They must establish the facts on which they rely in impugning the conduct of their former counsel and they must establish that that conduct fell below the standard of reasonable professional assistance or judgment. See *R v GDB*, [2000] 1 SCR 520 at para 27.

[53] An applicant must meet a high threshold to establish the performance component of an allegation of ineffective assistance. This is because there is a strong presumption that their former counsel's conduct fell within the wide range of professional assistance (*GDB* at para 27). A reviewing court must be careful to avoid second-guessing the tactical decisions of counsel; the

wisdom of hindsight has no place in the assessment (*ibid.*). Moreover, an expression of general dissatisfaction with former counsel's conduct is insufficient; the allegation of negligence or incompetence must be specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 (CA) at para 12). If provided, former counsel's explanations for their conduct can be an important part of the assessment.

[54] In her letter of June 25, 2021, the applicants' current counsel asked their former counsel to respond to questions touching on three points relating to the evidence of the applicants' identity. First, she asked whether he had discussed with Ms. Lazo Discua what personal identity documents should be collected and submitted to the RPD in support of establishing her and her daughter's personal identity. Second, she asked whether he had met with Ms. Lazo Discua prior to the refugee hearing to prepare her to address issues that could arise during the hearing, including the issue of her personal identity. Third, she posed a number of questions relating to Ms. Lazo Discua's Honduran national identity card. In particular, she had determined that a disclosure package provided to former counsel by the RPD included a copy of Ms. Lazo Discua's identity card as well as a copy of a certificate confirming her common law union with Mr. Mejia Bonilla (see paragraph 12, above). Given this, the applicants' current counsel wished to know whether former counsel had had these documents translated and had filed them with the RPD. If these documents were not translated or were not filed with the RPD, she wished to know why not.

[55] As noted above, the applicants' former counsel responded to this letter by letter dated June 28, 2021. In summary, his responses to the questions posed to him were as follows:

- He did not have a specific discussion with Ms. Lazo Discua about a primary identity document such as a passport or national identity document. When he started dealing with her, he "somehow assumed that her primary identity document was before the Board."

- His practice is to provide clients with a written checklist that states what is required to bring a refugee claim, including the need for supporting documents such as identity documents. The checklist gives examples of both primary and secondary identity documents. The checklist also states that a claim "will most likely be denied if your identity is not satisfactorily established." Former counsel believed he provided a copy of the checklist to Ms. Lazo Discua in May 2019. As well, she was present in July 2019 when he provided the same checklist to her husband, Mr. Mejia Bonilla.

- From all of the meetings at which she was present as well as the checklist she received, Ms. Lazo Discua "was aware of the importance of identity documents."

- He prepared the *Generic Application for Canada* form for Ms. Lazo Discua. Her response to the questions concerning whether she had a passport or national identity card was "No". According to former counsel, "She stated that she did not have any identity document."

- He met with Ms. Lazo Discua "several times" to prepare for the refugee hearing. He understood throughout that she did not have any identity documents "other than what she presented to [him]."

- In preparing for the hearing, he discussed the availability of documentary evidence to support the claim (including identity evidence for third-parties who were providing

evidence in support of the claim) but this was "essentially around establishing what happened to her, IFA and State Protection."

- With respect to Ms. Lazo Discua's national identity card and the common law union certificate, since those documents had been provided by the IRB, former counsel "assumed that the documents were before the IRB."

- With respect to his failure to refer to the national identity card or the common law certificate during the hearing, former counsel responded as follows (emphasis in original):

> I advised you previously that – at the hearing, especially after several credibility issues have arisen – **I could not refer to the documents given the client's testimony before the Board that she did not have any government issued identity document from Honduras or any photo ID.** I would have been highlighting other credibility issues to the Board.

[56] I pause at this point to note that the applicants' former counsel's inclusion of Ms. Lazo Discua's "international passport" in her list of documents and the assertion that it was "on file" with the IRB (see paragraph 13, above) are left unexplained. Despite this, it would appear that former counsel simply made a mistake: as he knew, Ms. Lazo Discua had never had a passport.

[57] As set out above, the applicants' concerns with the conduct of their former counsel go well beyond general dissatisfaction with his performance. They have advanced clear and precise allegations, supported by evidence, of the ways in which they maintain his conduct fell short of reasonable professional assistance and judgment.

[58] In assessing the performance component of the applicants' allegation of ineffective assistance in relation to the issue of their personal and national identities, I begin by noting that the importance of establishing identity in refugee claims is axiomatic. Identity is at the "very core of every refugee claim" (*Hassan v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 459 at para 27). Proof of identity is therefore an essential requirement for a person claiming refugee protection. Without this, there can "be no sound basis for testing or verifying the claims of persecution or, indeed for determining the Applicant's true nationality" (*Jin v Canada (Minister of Citizenship and Immigration)*, 2006 FC 126 at para 26; see also *Liu v Canada (Citizenship and Immigration)*, 2007 FC 831 at para 18 and *Behary v Canada (Citizenship and Immigration)*, 2015 FC 794 at para 61). A failure to prove identity will be fatal to a claim; absent proof of identity, there is no need to examine the evidence or the claim any further: see *Elmi v Canada (Citizenship and Immigration)*, 2008 FC 773 at para 4; *Diallo v Canada (Citizenship and Immigration)*, 2014 FC 878 at para 3; *Liu* at para 18; *Ibnmogdad v Canada (Minister of Citizenship and Immigration)*, 2004 FC 321 at para 24; and *Behary* at para 61.

[59] In short, a refugee claimant must establish that they are who they say they are. At a minimum, this encompasses their personal identity and their nationality (or lack of nationality, as the case may be). Should they fail to establish these things, their claim for protection must also fail.

[60] The importance of establishing a claimant's identity is reflected in section 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [*Rules*]:

11 The claimant must provide acceptable documents	**11** Le demandeur d'asile transmet des documents

establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them.	acceptables qui permettent d'établir son identité et les autres éléments de sa demande d'asile. S'il ne peut le faire, il en donne la raison et indique quelles mesures il a prises pour se procurer de tels documents.

[61] Section 106 of the *IRPA* draws an express link between this obligation to produce acceptable documentation establishing identity (or to explain why it has not been produced) and a claimant's credibility. It provides as follows:

106 The Refugee Protection Division must take into account, with respect to the credibility of a claimant, whether the claimant possesses acceptable documentation establishing identity, and if not, whether they have provided a reasonable explanation for the lack of documentation or have taken reasonable steps to obtain the documentation.	**106** La Section de la protection des réfugiés prend en compte, s'agissant de crédibilité, le fait que, n'étant pas muni de papiers d'identité acceptables, le demandeur ne peut raisonnablement en justifier la raison et n'a pas pris les mesures voulues pour s'en procurer.

[62] What is "acceptable documentation establishing identity" is not defined in the *IRPA* or the *Rules*; it is for the RPD to determine in each case (subject, of course, to appeals to the RAD or judicial review).

[63] Together, section 11 of the *Rules* and section 106 of the *IRPA* place the onus on a claimant to provide acceptable documentation establishing their identity. Obviously, to be able to provide such documentation, the claimant must be in possession of it. If a claimant does not possess acceptable documentation establishing identity, they must provide a reasonable

explanation for why this is the case or demonstrate that reasonable steps were taken to obtain such documentation: see *Su v Canada (Citizenship and Immigration)*, 2012 FC 743 at para 4; *Malambu v Canada (Citizenship and Immigration)*, 2015 FC 763 at para 41; and *Tesfagaber v Canada (Citizenship and Immigration)*, 2018 FC 988 at para 28.

[64] As I will explain, while I am not satisfied that the applicants have established all of their allegations with respect to how their former counsel dealt with the issue of identity, I am satisfied that his failure to advise Ms. Lazo Discua concerning the potential insufficiency of the birth certificates as evidence of identity and his failure to submit the copy of her Honduran national identity card to the RPD fell below the standard of reasonable professional assistance and judgment.

[65] There is no suggestion that the applicants' former counsel did not understand the importance of establishing personal and nationality identity in a refugee claim. Rather, the applicants contend (in part) that he failed to advise them properly with respect to this issue and that he failed to adduce all the available evidence relating to their identity.

[66] On a general level, I am not persuaded that former counsel failed to advise the applicants properly on the importance of establishing identity in a refugee claim. In response to their initial allegations, the applicants' former counsel described a number of occasions in which Ms. Lazo Discua's attention would have been directed to the importance of establishing identity. This included the checklist former counsel stated that he had provided to both Ms. Lazo Discua and her husband as well as discussions they had had in the course of several meetings.

Ms. Lazo Discua has given me no reason to disbelieve this account, at least on a general level. Critically, she did not provide any evidence to contradict her former counsel's assertion that she had received the checklist or his account of their general discussions about the importance of documents establishing identity (as set out in his letter of June 28, 2021).

[67] On the other hand, I am satisfied that former counsel failed to advise Ms. Lazo Discua that the documentary evidence she was relying on to establish her and her daughter's national identities (their Honduran birth certificates) could well be found to be insufficient and that she should therefore see if she could find other documents that could help to establish her identity. Notably, former counsel never suggests that they had such a conversation. From his account, it appears that he was focused instead on other aspects of the claim and was not concerned that there would be any real issue with respect to the applicants' identity. I accept Ms. Lazo Discua's evidence that, had they had such a conversation, she would have been able to obtain a number of other documents to corroborate her claim to be a national of Honduras.

[68] Furthermore, and most importantly, I am also satisfied that former counsel completely overlooked Ms. Lazo Discua's national identity card in his preparation for the refugee hearing. I find that this error – and the ensuing failure to tender this document to the RPD – fell below the standard of reasonable professional assistance and judgment. I have reached these conclusions for the following reasons.

[69] First, there is no dispute that former counsel received a copy of the national identity card from the RPD in the September 30, 2020, disclosure package. I can only conclude that he must

have overlooked it. This is because, despite its obvious importance, there is no evidence that he ever discussed this document with Ms. Lazo Discua. On the contrary, Ms. Lazo Discua's uncontradicted evidence is that they never discussed it. Competent counsel would have recognized the importance of this document and would have discussed it with Ms. Lazo Discua in preparing for the refugee hearing.

[70] Second, competent counsel would also have included this document (and a certified English translation of it) in the claimant's pre-hearing disclosure to the RPD (as required by Rule 34 of the *Rules*). While it is true that former counsel received the document from the RPD, there was no basis for him to "assume" that it was therefore part of the record before the RPD (particularly considering that the package of documents in which it is found was never marked as an exhibit at the hearing). Relatedly, there was no basis for former counsel to assume that the document had already been translated into English. While it certainly should have been translated (given that it had been submitted to IRCC in support of a work permit application), a simple review of the September 30, 2020, disclosure package would have confirmed the absence of an English translation (at least in the package that had been received by the RPD). In the absence of a certified English translation of the document, the RPD would have been precluded from relying on it in any event: see Rule 32 of the RPD *Rules*.

[71] Third, I cannot accept former counsel's explanation for why he did not refer to the national identity card at the refugee hearing (even though he had assumed that it was "before" the RPD). Former counsel claims that to do so would have highlighted a further problem with Ms. Lazo Discua's credibility because it would draw attention to an inconsistency in her

narrative – namely, that she had said that she did not have a national identity card (see paragraph 55, above, in particular the statement emphasized by former counsel quoted in the last bullet point). However, there was no basis whatsoever for this alleged concern.
Ms. Lazo Discua had consistently maintained that she had had a national identity card from Honduras but she had surrendered it to U.S. authorities in September 2018 and it was never returned to her. The copy of her national identity card in the IRCC file had been submitted to IRCC well before she entered the United States. There is nothing inconsistent between her evidence that she no longer had her national identity card (because the U.S. authorities have it) and there being a copy of that card in her husband's IRCC file.

[72] Fourth, given how easily Ms. Lazo Discua's evidence can be reconciled with the presence of a copy of her national identity card in the IRCC file disclosed to her former counsel, I cannot accept that former counsel actually turned his mind to whether or not to bring the card to the RPD's attention. Rather, I find that his explanation for not referring to the card is an after the fact rationalization. Moreover, even if I had accepted that he turned his mind to this question and decided not to bring the copy of the card to the RPD's attention for tactical reasons, I would have found that this decision was not within the bounds of reasonable professional judgment (given that referring to the national identity card could not possibly impugn Ms. Lazo Discua's credibility or harm her case in any other way).

[73] In short, there was no reason not to rely on the national identity card as evidence of Ms. Lazo Discua's identity and every reason to do so. The failure of former counsel to put this document before the RPD as evidence of Ms. Lazo Discua's identity (or, in the alternative, the

failure to make any reference to it while being under the mistaken belief that it was already before the RPD) fell below the standard of reasonable professional judgment and assistance. The applicants have therefore established the performance component of their allegation of ineffective assistance.

[74] For the sake of completeness, I note that it is therefore not necessary to determine whether former counsel's failure to address the common law union certificate (which was also included in the IRCC file) also fell below the standard of reasonable professional assistance and judgment.

(3) The Prejudice Component

[75] At this stage, the applicants must establish that the failings of their former counsel resulted in a miscarriage of justice. Miscarriages of justice can take many forms in the context of ineffective assistance of counsel (*GDB* at para 28). This includes where former counsel's conduct has compromised the reliability of the result of the earlier proceeding and where former counsel's conduct has affected the fairness of the earlier proceeding (*ibid.*).

[76] In the present case, the applicants allege that the conduct of their former counsel calls into question the reliability of the result before the RPD. To succeed on this basis, they must demonstrate a reasonable probability that, but for the incompetence of their former counsel, the result would have been different (*Bisht v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1178 at para 24). A "reasonable probability" falls somewhere between a mere possibility and a likelihood: see *Satkunanathan* at para 96, adopting the test set out in *R v*

Dunbar, 2003 BCCA 667 at para 26, which in turn adopted the test set out in *R v Joanisse* (1995), 102 CCC (3d) 35 (Ont. C.A.) at 64; see also *Bi v Canada (Citizenship and Immigration)*, 2012 FC 293 at para 33 and *Corpuz Ledda v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 811 at para 15.

[77] I am satisfied that, had the applicants' former counsel relied on the copy of Ms. Lazo Discua's national identity card as evidence of her identity, there is a reasonable probability that the RPD would not have concluded that the applicants had failed to establish their identities. The more difficult question, however, is whether there is a reasonable probability that the ultimate result would have been different. This is a close case, especially considering that the RPD also rejected the closely related claim of Mr. Mejia Bonilla despite finding that his national identity had been established. Nevertheless, given the centrality of the issue of identity to a refugee claim, and given the strong and unequivocal adverse credibility findings the RPD member made with respect to Ms. Lazo Discua, findings that related almost entirely to the issue of her identity, I am satisfied that there is a reasonable probability that the result would have been different had the conduct of the applicants' former counsel not fallen below the standard of reasonable professional assistance and judgment (as set out above).

[78] Furthermore, and in any event, I am also satisfied that the failure of former counsel to present evidence of Ms. Lazo Discua's identity that was actually available to him compromised the fairness of the applicants' hearing. The actions of their former counsel, which fell below the standard of reasonable professional judgment and assistance, resulted in the applicants advancing a materially weaker case on the central issue of the principal applicant's identity than could have

been presented. This resulted in an unfair hearing. In light of this, it is not necessary to determine whether the fairness of the proceeding was also compromised by former counsel's failure to advise Ms. Lazo Discua that she should try to find additional evidence of her identity. It is sufficient that he failed to adduce the highly probative evidence of identity that was actually in his possession.

[79] Accordingly, I am satisfied that the applicants have also established the prejudice component of their allegation of ineffective assistance. A new determination of their refugee claims is therefore required.

B. *Other Grounds for Review*

[80] The applicants also contend that the RPD's decision is unreasonable in several respects. As I have already stated, except in one respect, it is not necessary to consider the applicants' other grounds for review.

[81] As set out above, the RPD member drew an adverse inference concerning Ms. Lazo Discua's overall credibility on the basis of her failure to make any attempt to obtain a Honduran passport for herself and her daughter once they were in Canada. The RPD specifically noted the absence of a "credible excuse for those lack of efforts" in drawing this adverse inference. The applicants submit that the RPD's treatment of this issue is unreasonable. I agree.

[82] It is well-established that applying for and obtaining a passport gives rise to a presumption that the person who has made the application is content to rely on the protection of

their country of nationality. Consequently, when a refugee applies for and obtains or renews a national passport, this gives rise to a presumption that they intend to avail themselves of the protection of their country of nationality. This, in turn, suggests that they therefore do not require the surrogate protection of another country and, as a result, that they do not come within the definition of a Convention refugee: see paragraph 96(a) of the *IRPA* and Article 1A(2) of the *Refugee Convention.* This is a rebuttable presumption: see *Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 at paras 62-66; see also *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (Reissued February 2019) at para 121. However, if the presumption is triggered and it is not rebutted, section 108 of the *IRPA* directs that a claim for refugee protection must be rejected. It also stipulates that the person in question is not a Convention refugee or a person in need of protection.

[83] Given this legal context, it was altogether unreasonable for the RPD to find fault with Ms. Lazo Discua because she did not attempt to obtain a Honduran passport once she was in Canada. Had she done so, and had a Honduran passport been issued to her, Ms. Lazo Discua would have created a significant impediment to her refugee claim which she would then have to try to overcome. Indeed, even simply applying for a passport could have raised serious questions about her willingness to seek the protection of her country of nationality and, as a result, whether she was a Convention refugee. In short, the RPD faulted Ms. Lazo Discua for failing to take a step that could have made it materially more difficult for her to establish her claim for refugee protection. This cannot reasonably ground an adverse finding concerning her credibility.

Indeed, it was unreasonable for the RPD even to pursue the line of questioning it did in this regard (see paragraph 16, above).

V. CONCLUSION

[84] For these reasons, the application for judicial review must be allowed. The decision of the RPD dated March 9, 2021, in respect of the applicants is set aside and the matter is remitted for redetermination by a different decision maker.

[85] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-2415-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated March 9, 2021, in respect of the applicants is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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