Federal Court Cour fédérale

Date: 20200401

Docket: IMM-3114-19

Citation: 2020 FC 470

Ottawa, Ontario, April 1, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

THINUJA SATKUNANATHAN

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a decision by the Immigration Appeal Division [IAD] dated April 19, 2019, wherein the IAD dismissed the appeal of an immigration officer's decision to refuse the Applicant's sponsorship application.

[2] For the reasons that follow, I grant the application.

II. Facts

[3] The Applicant is a Canadian citizen. She has a common-law relationship with the father of her two children (the first born in 2015, the second born in 2017). They are all Canadian citizens.

[4] In 2011, the Applicant submitted an application to sponsor her father as a permanent resident to Canada. The sponsorship application included, as dependants, the Applicant's mother and three siblings. Immigration, Refugees and Citizenship Canada [IRCC] received the application on July 6, 2011.

[5] There were delays in the processing of the sponsorship application on account of changes in the minimum necessary income [MNI] provisions and a temporary hold on the parental sponsorship program. Eventually, some five years later, in April 2016, IRCC requested that the Applicant update her file by providing a completed financial evaluation form, which she did later that month.

[6] On February 21, 2017, as a result of the change in the Applicant's family size because of the birth of her first child, IRCC sent the Applicant a letter requesting updated financial information. The letter also notified the Applicant of the option of adding a co-signer to the sponsorship application.

[7] In March 2017, the Applicant sent an amended sponsorship application to add her common-law partner as a co-signer and provided updated financial information.

[8] On April 6, 2017, the immigration officer rejected the claim for sponsorship on the basis that the Applicant's income fell short of the MNI threshold (paragraph 133(1)(j) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]). In addition, the officer determined that the Applicant's partner did not meet the definition of a common-law partner and thus could not be added as a co-signer to the sponsorship application.

[9] Dissatisfied with the determination, the Applicant sought the assistance of a licensed paralegal in Ontario [Former Counsel] in order to prepare a reconsideration request.

[10] Two requests for reconsideration were made: the first was dated April 20, 2017 (responded to by the IRCC on May 29, 2017), and the second was a series of letters that enclosed additional documents and was submitted in June 2017.

[11] On July 12, 2017, after updating the Applicant's family size and reassessing her eligibility to sponsor on that basis, the immigration officer rejected the sponsorship application on the basis that the Applicant again did not meet the MNI threshold. In fact, the officer found that she did not meet the low income cut-off for a family of seven, and most importantly, did not satisfy paragraph 133(1)(j) of the IRPR, at the time the application was filed, which meant she could not add her partner as a co-signer under Operational Bulletin 324 - July 19, 2011 (*Instructions to officers on adding a co-signer to a family class sponsorship undertaking*). The Applicant could therefore not sponsor her family to become permanent residents in Canada.

[12] The IRCC's decision was only received by the Applicant some seven months later; on February 20, 2018, the IAD received the Applicant's notice of appeal.

[13] The Applicant then received a letter from the IAD dated May 23, 2018 [the May 23, 2018 IAD letter] concerning her appeal. The letter stated the following:

> Under section 67 of the *Immigration and Refugee Protection Act* ("IRPA"), for the appeal to be allowed, the IAD must be satisfied that the decision appealed is wrong in law, fact, or mixed law and fact, that a principle of natural justice has not been observed, **or** that, taking into account the best interests of a child directly affected by the decision, there exist sufficient humanitarian and compassionate considerations in light of all the circumstances of the case.
>
> [Emphasis and double emphasis added; footnote omitted.]

[14] The Applicant consulted her Former Counsel about the letter. According to her, she asked her Former Counsel whether she could explain her personal circumstances in the appeal, and her Former Counsel advised her that the only issue in appeal was whether her partner should have been added as a co-signer to her application.

[15] As a result, the Applicant provided only updated income and tax documents for herself and her partner and no evidence to support a request for relief on humanitarian and compassionate [H&C] grounds under paragraph 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[16] The hearing before the IAD took place on April 18, 2019. The Applicant did not raise any H&C grounds during the hearing, nor did she offer evidence in support of such grounds of appeal.

[17] At the outset of the hearing, the IAD panel member confirmed his understanding with Former Counsel and counsel for the Minister that in terms of the issues to be raised before him, the Applicant would limit her argument to issues of legal validity, i.e., whether her partner should have been added as a co-signer to the sponsorship application and whether his income should have been assessed along with her own. Former Counsel made no comment; specifically, he/she did not raise the prospect that the Applicant was requesting that her application also be considered on H&C grounds.

[18] The hearing proceeded with evidence and arguments regarding the Applicant's relationship with her partner as well as regarding their financial assets and income. Towards the end of the hearing, the Minister's counsel eluded to the prospect that even with the Applicant's partner's income taken into account, the Applicant did not meet even the lower H&C financial threshold. This prompted the IAD member to interrupt and state the following:

> Okay. I — I do not — think we have heard anything on that, I do not think there has been a request for consideration of H&C under 67(1)(c) in this appeal. So I… […] I am still — I will take your submissions they would not meet the Jagpal [*sic*] standard but they have not made any submissions […] on H&C grounds.

[19] Former Counsel kept silent and did not speak up to address, one way or the other, the panel member's comment or to make any submissions regarding H&C considerations.

III. Decision Under Review

[20] Ultimately, by a decision dated April 19, 2019 [the Decision], the IAD maintained the rejection of the sponsorship application without the member turning his mind to any H&C considerations.

[21] In the Decision, the IAD found that the Applicant had not established that the visa officer's decision was not legally valid. The IAD found that testimonial evidence regarding the Applicant's period of cohabitation with her common-law partner lacked credibility and that it was reasonable for the visa officer to have decided that her partner was excluded as a member of the family class.

[22] Without the Applicant's partner as a co-signer, the IAD concluded that the Applicant did not meet the MNI requirements, and the officer's decision was legally valid. Accordingly, the IAD dismissed the appeal.

[23] In the Decision, the IAD specifically noted the following:

> The appellant did not make a request for special relief under section 67(1)(c) of the Immigration and Refugee Protection Act, and no evidence was provided regarding any possible humanitarian and compassionate considerations.
>
> [Footnote omitted.]

[24] Following the appeal, the Applicant consulted her present counsel [Current Counsel], who reviewed the decision and advised her that her Former Counsel could have requested special relief based on H&C grounds.

[25] The Applicant claims she was unaware of that possibility and alleges that she would have pursued relief on such grounds had she known that she could have presented evidence as to her personal circumstances to the IAD.

[26] Before me, the Applicant argues that, if given the opportunity to do so, she would have raised the following H&C considerations: best interests of the children, establishment in Canada, financial and job stability, hardship due to family separation, and hardship due to country conditions in Sri Lanka.

[27] In accordance with this Court's Procedural Protocol regarding *Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*, dated March 7, 2014 [Procedural Protocol], the Applicant's Former Counsel was given notice of the Applicant's allegations on June 24, 2019 [Procedural Protocol letter] and was given an opportunity to respond.

[28] Former Counsel responded by letter dated July 4, 2019 [July 4, 2019 response]. The Applicant nonetheless decided to move forward with her ineffective representation argument, and on July 17, 2019, she served her Former Counsel with a copy of her perfected application, as provided for in the Procedural Protocol.

[29] Former Counsel responded further by letter dated July 26, 2019 [July 26, 2019 response]. He/she did not file a motion for leave to intervene or to participate further in these proceedings.

IV. Issue

[30] This matter raises one issue:

> Was the Applicant denied procedural fairness and natural justice in her appeal before the IAD as a result of negligent or incompetent representation, such that judicial review of the IAD decision is warranted?

V. Standard of Review

[31] The parties submit, and I agree, that this issue is reviewable on the correctness standard of review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at paras 37-56; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 100; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27 [*Galyas*]; *Canada (Attorney General) v Sketchley*, 2005 FCA 404, [2006] 3 FCR 392 at para 53).

VI. Analysis

[32] The Applicant takes no issue with the basis and findings of the Decision as regards legal validity, but argues simply that she has been denied procedural fairness and natural justice because of her Former Counsel's negligent or incompetent representation. In particular, the Applicant claims her Former Counsel failed to explain the grounds of appeal at the IAD stage and failed to raise H&C grounds before the IAD. To the Applicant, both of these shortcomings were determinative and resulted in a miscarriage of justice.

[33] It is established that ineffective or incompetent counsel may be sufficient grounds for a breach of natural justice (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51, 1993 CanLII 3026 (FCA) at pp 60-61 [*Shirwa*]; *Osagie v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1368 at paras 24-27; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 64 [*Memari*]; *Rodrigues v Canada (Minister of Citizenship and Immigration)*, 2008 FC 77, [2008] 4 FCR 474 at para 39 [*Rodrigues*]; *Mcintyre v Canada*

(Citizenship and Immigration), 2016 FC 1351 at paras 34, 39-40 [*Mcintyre*]; *Kavihuha v Canada (Citizenship and Immigration)*, 2015 FC 328 at paras 27-28; *El Kaissi v Canada (Citizenship and Immigration)*, 2011 FC 1234 at para 33).

[34] However, this Court holds a high standard in finding a counsel to be incompetent (*Huynh v Canada (Minister of Employment and Immigration)* (1993), 65 FTR 11 (TD) at 23 [*Huynh*]; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Williams v Canada (Minister of Employment and Immigration)* (1994), 74 FTR 34, [1994] FCJ No 258 (QL) at para 20).

[35] In *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 36-38, Chief Justice Crampton set forth a two-part test for a finding of counsel incompetency regarding representation before the Refugee Protection Division (citing *R v GDB*, 2000 SCC 22, [2000] 1 SCR 520 at paras 26-29 [*GDB*]; see also *Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39-43; *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 at para 17 [*Gombos*]).

[36] First, an applicant must establish that his/her previous counsel's acts or omissions constituted incompetence. Second, the acts or omissions must have resulted in a miscarriage of justice.

[37] As a preliminary matter, an applicant must also give notice to his/her former counsel regarding the allegations of incompetency so as to give him/her an opportunity to respond

(*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at paras 10-11; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16-17; *Gombos* at paras 17-18; *Galyas* at para 84).

[38] In *Gombos*, Madam Justice Strickland summarized the law concerning counsel competence and found that the applicant has the burden of proof to provide sufficient evidence to establish both parts of the test (at para 17).

[39] In addition, as a hearing before the IAD has actually taken place, the decision that emanates therefrom can only be reviewed on the basis of a breach of natural justice. Mister Justice Denault stated the following in *Shirwa* at pages 60-61:

> In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.

1. Incompetence

[40] First of all, I find that the Applicant complied with the procedures provided for in the Procedural Protocol.

[41] Next, at the first stage of the two-prong test, I must determine whether the level of service provided by Former Counsel failed to meet the standard of what one would reasonably expect from competent counsel.

[42] The Applicant submits that her Former Counsel failed to recognize that the Applicant could have brought her appeal on multiple grounds; he/she either failed to recognize a possible ground for appeal or did not know that it was possible to argue multiple grounds of appeal, including H&C considerations. The Applicant argues that such conduct fell below what would be reasonably expected from competent counsel.

[43] The Applicant submits that *Central Trust Co v Rafuse*, [1986] 2 SCR 147, 1986 CanLII 29 (SCC) [*Central Trust*], is particularly instructive in this regard because in that case the Supreme Court affirmed that a solicitor "must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points" (at p 208).

[44] The Applicant also submits that her Former Counsel's failure to advise the Applicant on the possibility of special relief conflicts with his/her obligations as a licensed paralegal under Rules 3 and 4 of the Law Society of Ontario's *Paralegal Rules of Conduct* and *Paralegal Professional Conduct Guidelines*.

[45] In her affidavit filed in support of the present application, the Applicant states that her Former Counsel did not discuss any H&C considerations as they were deemed not to be an issue in the appeal. She stated the following at paragraph 7:

> [My Former Counsel] advised me that my common-law partner and I had to submit proof of our relationship and our income in order to succeed in my appeal. [He/She] explained to me that this was the only issue in the appeal. We did not discuss any humanitarian and compassionate considerations in my case and I did not know that they were relevant to my appeal. I also did not know that I could succeed in my appeal on humanitarian and compassionate grounds.

[46] In the same affidavit, the Applicant recounts further discussing the matter with her Former Counsel after receiving the May 23, 2018 IAD letter (an excerpt of which is set out in paragraph 13 above), which states the possible grounds for appeal (which include "sufficient humanitarian and compassionate considerations"):

> After receiving the letter, I spoke to [my Former Counsel] over the phone and we discussed the letter. I asked [him/her] whether I could explain my personal circumstances in my appeal, but [he/she] told me that the only issue was whether [my partner] should have been added as a co-signer to my application.

[47] The Applicant also affirms that her Former Counsel "did not advise [her] to provide [him/her] with any other documents to support [her] appeal and [she] did not know that [she] could have submitted documents related to humanitarian and compassionate considerations in [her] case." Apparently, her Former Counsel did not ask for such documents because "the only issue in [her] appeal was the relationship between [her] partner and [her] and [their] income."

[48] As a result, the Applicant did not call her parents or siblings as witnesses in support of her appeal or provide additional documentation in support of an H&C consideration claim. It was

only after the appeal that the Applicant learned from her Current Counsel that she could have asked for special relief on H&C grounds.

[49] In the July 4, 2019 response, Former Counsel stated, amongst other things, that according to the manner in which he/she read the May 23, 2018 IAD letter (an excerpt of which is set out in paragraph 13 above), he/she was under the impression that, in the Applicant's appeal before the IAD, the Applicant had to choose between arguing the legal validity of the immigration officer's decision *or* arguing the appeal on H&C grounds. He/she stated the following:

> On May 23, 2018, we received the correspondence from IAD stating (in paragraph 4) that for the appeal to be allowed the IAD must be satisfied that the decision appealed is wrong in law, fact or mixed law and fact that the principle of the natural justice [*sic*] has not been observed, **or** that, taking into account the best interest of the child directly affected by the decision. According to this paragraph, <u>we were provided the option to choose either</u> law, fact and mixed law or H & C.
>
> [Underlining added; bold in original.]

[50] Reading the May 23, 2018 IAD letter in this way was clearly legally wrong. The Applicant did not have to make a choice and could have requested relief before the IAD on H&C grounds concurrently with a legal validly argument.

[51] I accept that English is clearly not Former Counsel's first language and that he/she may have misunderstood the May 23, 2018 IAD letter; however, as a result of such a misunderstanding, Former Counsel stated the following:

> We filed an appeal only for the reasons of income requirements and determination of the co-signer being apart [*sic*] of the family class [. . .]
>
> […]

> […] after weighting [*sic*] the facts and evidence we chose to argue in respect to law, fact and mixed law.
>
> […]
>
> In our professional assessment we found the validation of the common law and the determination of the income to include over 12 documents of evidence and facts to support [*sic*]. For the H & C matter, we had substantially less evidential [*sic*] weight. […]

[52] What is strange is that when it came time to file written submissions with the IAD in advance of the expected hearing, Former Counsel did raise the prospect of an H&C argument. In his/her June 12, 2018 letter to the IAD [Applicant's brief], Former Counsel provided written submissions in support of the Applicant's appeal. The following is stated on the first page of the submissions:

> Based on the *IRP Regulations*, the sponsor and co-signer both met the financial requirements for the application of Family Class. Therefore, the appellant sponsor requests to consider the appeal to be <u>heard under Humanitarian and Compassionate (H&C) grounds for the best interest of the children</u>.
>
> [Emphasis added.]

[53] However, after the prospect of an H&C argument was raised on the first page, the Applicant's brief contains no submissions in support of such an argument, with no evidence led other than documents relating to the Applicant's partner being a member of the family class and meeting the MNI financial requirements.

[54] Following a 27-paragraph appeal brief, including case citations and legal arguments focusing exclusively on the issues of the relationship of the couple and making passing reference to the children and their financial status in relation to the requirements of the legislation, the Applicant's brief ends with the following:

> Based on the facts, law and mixed law to be considered that the co-signer included as a family class which is accepted by CIC's letter dated July 12, 2017 and to be considered the best interest of the children who is a biological father of the children.
>
> […]
>
> Under these circumstances, the submission to the Immigration Appeal Division to allow the Notice of appeal based on the humanitarian ground [*sic*] and grant the sponsorship application.
>
> [Emphasis added.]

[55] Former Counsel acknowledges in the July 4, 2019 response that the Applicant's brief does request that the IAD consider the matter on H&C grounds based upon the best interests of the children, but he/she does not address why no part of the Applicant's brief focused on such grounds or why he/she did not correct the IAD panel member when he mentioned during the hearing that as far as he was concerned, relief on H&C grounds was not being pursued as part of the Applicant's appeal.

[56] Rather, Former Counsel stated the following in the July 4, 2019 response:

> According to the IAD case law file number MB16802, dated July 28, 2015, paragraph 55 states "It is clear, on the balance of probabilities, that there are certain humanitarian and compassionate considerations. Nevertheless, the panel wishes to emphasize that, even without the humanitarian and compassionate considerations, it is of the opinions that there are enough factors to determine that, on a balance of probabilities."

[57] In the end, Former Counsel maintained the following: "[w]e discussed with the client details and also discussed that which way we were proceeding because of the availability of facts and evidence. Therefore, the client was aware that we were proceeding with the law, facts and mixed law." The Former Counsel continues: "[a]ll these factors we considered in our

professional assessment that law, facts, and mixed law had substantially stronger evidence as opposed to the consideration of H & C grounds."

[58] Former Counsel's attempt to address the Procedural Protocol letter is unintelligible. On the one hand, Former Counsel's response suggests that he/she understood that the choice of grounds for appeal was a binary proposition: either one challenges the legal validity of the decision *or* one presents H&C factors.

[59] On the other hand, however, the prospect of H&C relief is raised in the Applicant's brief in addition to the issue of legal validity.

[60] I am unable to understand why Former Counsel refers to previous IAD decision MB16802. Clearly, Former Counsel is alive to the concept of appealing on H&C grounds. However, in reading the Applicant's brief as well as the July 4, 2019 response to the Procedural Protocol letter, it seems to me that it is almost as if there was an initial intention to also argue the matter on H&C grounds, but that Former Counsel did not have the faintest idea of how to develop the framework in that regard.

[61] The reference on the last page of the Applicant's brief to the "best interest of the children" seems to be limited to the determination of the legal validity issue, i.e., whether the partner is to be found to be a member of the family class. This is problematic.

[62] The Applicant suggests that such a meaningless reference to H&C considerations in the Applicant's brief cannot be taken as a second ground of appeal. I must agree.

[63] No doubt the burden is on the Applicant to make out her case, and given the paucity of argumentation and evidence to support an appeal on H&C grounds, the mere sprinkling of the magic words "H&C" cannot be seriously seen as raising an appeal on these grounds. I would also suggest that the IAD panel member, given his comments during the hearing on the issues to be raised in the appeal, likely saw the matter in the same way.

[64] The exchanges between both sets of counsel continued.

[65] Current Counsel wrote to Former Counsel on July 17, 2019 and Former Counsel provided the July 26, 2019 response, setting out an excerpt of his/her docket entries suggesting that he/she did discuss with the Applicant the prospect of raising an H&C argument as a secondary argument, but that somehow it was the Applicant's choice not to pursue such grounds of appeal as the evidence simply did not support the relief sought.

[66] I must say that I take Former Counsel's point that the Applicant was at least aware of the prospect of arguing the appeal on H&C grounds. The Applicant herself admits in her affidavit that after receiving the May 23, 2018 IAD letter, she spoke with her Former Counsel and "asked [him/her] whether [she] could explain [her] personal circumstances in [the] appeal."

[67] Clearly, the Applicant was aware of the possibility of raising “her personal circumstances”; however, the way I read her affidavit, she was advised by her Former Counsel that, given the context and given the finding of the immigration officer, an appeal on H&C grounds was not recommended. In any event, even if I accept that the prospect of pursuing the appeal on H&C grounds was discussed with the Applicant and that she accepted that these grounds of appeal should not be pursued, this neither explains why the reference to H&C considerations is made in the Applicant’s brief nor excuses the fact that once such reference was made, no evidentiary support or corresponding written submissions were provided to support that narrative.

[68] Also, in the July 26, 2019 response, Former Counsel refers to his/her docket entries and responds to the Applicant’s allegations:

> Paragraphs seven, eight, nine and thirteen mentions about the Human and Compassionate [*sic*], but was an alternative, I also considered as a strategy to tackle the issue, but the standard of the test is high and has many elements of the test. Based on that, I prioritize [*sic*] the validation of the common law partner that came from conjugal partnership and income to support the application.
>
> There was very strong evidence to validate the existing conjugal relationship, such as: financial support, travel tickets, passports, cultural marriage, family pictures, social activities, family-types [*sic*] responsibilities, sexual and personal behavior, children together that include live birth certificate and capacity to consent, that was included as support to verify a conjugal relationship and common law marriage from 2012. In my experience and knowledge this was more than sufficient facts to demonstrate and support the existing relationship.

[69] It appears that the Applicant’s Former Counsel decided that a claim for relief based upon H&C considerations was secondary to the financial requirement issue. As a matter of legal

strategy, his/her decision to concentrate on the co-signer issue may have been the optimal ground of appeal.

[70] However, this explanation does not account for Former Counsel's exclusive focus on the co-signer issue, nor does it account for his/her failure to lead evidence to adequately support a claim for relief based upon H&C considerations after raising the possibility of an H&C argument in the Applicant's brief.

[71] The Applicant's Former Counsel stated the following:

> I also had the opportunity to explain the appeal process in first visit to my office, I also explained the grounds for the Humanitarian and Compassionate and it appeared that she understood the bases of the procedures.
>
> Ms. Satkunanathan also alleged that the "best interest of the child direct," was never discussed, but it was mentioned in the Immigration Appeal Division in the correspondence dated May 23, 2018, sent to her address, Volume I of II page 272, fourth paragraph which states the following:
>
> "*Under section 67 of the Immigration and Refugee Protection Act ("IRPA"), for the appeal to be allowed, the IAD must be satisfied that the decision appealed is wrong in law, fact, or mixed law and fact, that a principle of natural justice has not been observed, or that, taking into account the best interest of a child directly affected by the decision, there exist sufficient humanitarian and compassionate consideration in light of all the circumstances of the case.*"
>
> The issue was looked at, explained and assessed during our meeting, she didn't appear to have sufficient confidence in this issued that it was one of the arguments in the submission dated June 12, 2018. She also stated in her Affidavit dated July 13th, 2019; Volume II of II, page 525 paragraph 9, she states the following:
>
> "*After receiving the letter, I spoke to [my Former Counsel] over the phone and we discuss the letter. I asked [him/her] whether I*

> *could explain my personal circumstances in my appeal, but [he/she] told me that the only issue was whether [my partner] should have been added as a co-signer to my application*"

[72] The Applicant's Former Counsel continued by stating the following:

> I considered the argument for the best interest of the child directly, Volume II of II page 276, in the submission to her Sponsorship Appeal, which I had her proof read and she approved it, a copy of this document was provided, which is as an Exhibit "A1", in paragraph four mentioned:
>
> "*Based on the IRP Regulation the sponsor and the co-signer both met the financial requirements for the application of the Family Class. Therefore, the appellant sponsor requests to consider the appeal to be heard under Humanitarian and Compassionate grounds for the best interest of the child*."
>
> Therefore, there are reasonable assumptions that this issue was brought up at least more than two times during our nine meetings. In addition, she did not follow up with any supporting information to use as evidence for this issue.
>
> The member found that the witness statement was not credible, but one should consider that, there was sufficient support in the exhibits to prove strong belief that the commonality in law relationship [*sic*] exists since 2009 and continued 2014 up the [*sic*] last day I spoke to Ms. Satkunanathan.

[73] In these passages, it appears that Former Counsel believed that the "best interest of the child" was the only relevant H&C consideration. However, the Applicant also wanted to address other considerations for special relief, namely, establishment in Canada, financial and job stability, hardship due to family separation, and hardship due to country conditions in Sri Lanka.

[74] The July 26, 2019 response concludes with Former Counsel stating the following:

> Also, as I mentioned, my documentation had the challenge for a Humanitarian and Compassionate grounds [*sic*] <u>if it was raised</u> and could have been considered. Furthermore, from the time the

> retainer took place, before the appeal and after the appeal the element of threshold has varied.
>
> [Emphasis added.]

[75] From this, it would seem that Former Counsel may have been expecting someone else, possibly the IAD or the Minister’s counsel, to raise the prospect of a challenge on H&C grounds. Again, Former Counsel seems to have misunderstood the role of an applicant’s counsel in these proceedings and the onus on applicants to advance their own case. Given that Former Counsel did not make it clear to the IAD at the hearing that the Applicant was appealing on H&C grounds and did not lead evidence to support such grounds, the IAD member was justified to think that legal validity was the only issue in the appeal.

[76] I must admit that Former Counsel’s attempts at explaining his/her thought process in developing the strategy in appeal are incomprehensible. I think it would have served him/her well had he/she sought leave to intervene in the present proceedings so as to properly explain his/her work product and strategy.

[77] The Respondent argues that the Applicant, by way of her Former Counsel, chose not to request special relief based upon H&C considerations as part of her litigation strategy and that the Applicant is simply attempting to characterize her Former Counsel as negligent or incompetent based on his/her decision to pursue such a strategy. The Respondent argues that the Applicant’s Former Counsel presented the Applicant’s strongest argument at the appeal, namely, that the officer’s decision was wrong in law, fact, or mixed law and fact. The Respondent affirms that the fact that the Applicant’s Former Counsel could have employed a different legal strategy is not evidence of incompetence.

[78] I would tend to agree with the Respondent's counsel had the evidence suggested that Former Counsel elected, as part of the litigation strategy, to focus entirely on the legal validity of the immigration officer's refusal; however, that was not the case here.

[79] I would agree with the Respondent's counsel that the outcome of this case may have been different had the evidence suggested that Former Counsel did raise H&C considerations in the appeal (which he/she did in the Applicant's brief) and also led meaningful and persuasive evidence in support of such an argument; however, that was not done, which in and of itself is grounds for a finding of ineffective conduct leading to a breach of natural justice (*Rodrigues* at para 39; *Mcintyre* at paras 34, 40).

[80] One answer may be that there was insufficient evidence to present before the IAD in support of an H&C argument. However, if that was the case, why did the Applicant's written arguments on appeal to the IAD specifically mention that the request was being sought on H&C grounds? I would have expected Former Counsel to be clear on this point in his/her reply or at least in answer to the IAD panel member's comments during the hearing.

[81] I could understand Former Counsel somehow downplaying arguments on H&C considerations had there been a strategic advantage to only focusing on the legal validity issue. During the hearing, I enquired with counsel for the Respondent as to whether there could be any advantage at all with not pressing forward with an H&C argument before the IAD. He was unable to think of any, and neither can I in this context.

[82] Former Counsel's lack of response to the IAD panel member's expressed understanding that an H&C argument was not being pursued adds to the confusion. When it came time for the IAD member to understand the Applicant's case, Former Counsel did not correct the IAD member when he asserted that no H&C argument was being put forward. The result of such an understanding was that the IAD member did not turn his mind in any way to or consider the matter on H&C grounds even though a rather cryptic reference to H&C considerations was buried in the written submissions of Former Counsel.

[83] Again, the answer may have been that no meaningful or persuasive evidence existed to support such an argument. However, if this was the case, it should have been made clear in view of the reference to H&C considerations expressed in the Applicant's brief.

[84] This is not as simple, as the Respondent puts it, as counsel making a professional choice on legal strategy. Making a legal choice presupposes that counsel understands the legal framework sufficiently to make such a choice. Here, I do not think that Former Counsel did.

[85] In any event, as neither the Respondent's counsel nor I can think of any strategic advantage to not advancing a parallel H&C argument in the Applicant's appeal before the IAD, I must disagree with the Respondent. We must also keep in mind that the choice of strategy stemming from counsel incompetence can, in certain circumstances, result in a miscarriage of justice (*Corpuz Ledda v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 811 at para 17 [*Ledda*]).

[86] Rather, I think a better explanation is that either Former Counsel simply failed to recognize that the Applicant was able to structure her appeal on both legal validity and H&C grounds or Former Counsel somehow misunderstood the manner and context in which H&C considerations are to form the basis of an appeal before the IAD. Either way, there was a serious problem with Former Counsel's professional conduct.

[87] To paraphrase Mr. Justice Denault in *Shirwa*, a review must be based upon a precise factual foundation and there must be sufficient evidence to establish the exact dimensions of the problem, which is the case here. I appreciate that incompetence is determined through a lens of reasonableness and that there is a strong presumption that Former Counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27). However, I cannot see how the confusing response from Former Counsel to the Procedural Protocol letter clarifies whether he/she was in any way clear on the concept of H&C and the framework upon which it was to be argued before the IAD.

[88] I accept that, in general, applicants are tied to their counsel (*Jouzichin v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1886 (QL), 1994 CarswellNat 1592 at para 2; *Huynh*). However, this is not a case where counsel simply made a mistake.

[89] In reviewing the evidence, it seems to me that Former Counsel simply did not possess a sufficient knowledge of the fundamentals or principles of law applicable to the particular work he/she had undertaken so as to allow him/her to perceive the need to ascertain the law on relevant points (*Central Trust* at paras 58-59). In addition, it is because of such shortcomings on

the part of Former Counsel that the Applicant was deprived of a full and complete hearing before the IAD (*Mathon v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 707 (QL)).

[90] As a result, strictly as regards the Applicant's appeal before the IAD, I find that the Former Counsel's conduct fell below the standard of what one could reasonably expect from competent counsel and outside what would be normal professional judgment.

[91] As I need not do so, I make no finding as to the application in this case of the Law Society of Ontario's *Paralegal Rules of Conduct* and *Paralegal Professional Conduct Guidelines* and leave the issue of their application and of compliance with these provisions for possibly another day.

2. Prejudice and Miscarriage of Justice

[92] The Applicant submits that her Former Counsel's conduct resulted in a miscarriage of justice because she was deprived of the opportunity to access all available grounds for appeal and the opportunity to lead evidence on the H&C considerations in her case, and she states that had she been given the opportunity, she would have advanced numerous H&C factors.

[93] The Respondent submits that the Applicant's Former Counsel did not fail to submit or file a document with the tribunal, nor did he/she conduct himself/herself at the hearing in any way that would have raised concerns about whether procedural fairness was being followed or whether natural justice had been breached.

[94] I do not agree. The Applicant's Former Counsel's failure to explain the notion of H&C, his/her insistence on dismissing the Applicant's personal circumstances, his/her failure to lead any evidence or make any submissions as regards the Applicant's H&C position, and his/her allowing of the IAD member to render a decision on the premise that no request for the matter to be considered on H&C grounds had been made, resulted in a prejudice to the Applicant.

[95] The final issue is whether there is any evidence to suggest that the H&C argument, had it been put forward, had a reasonable chance of success.

[96] The Applicant must show that there is a reasonable probability that, but for her Former Counsel's unprofessional conduct, the result of her appeal would have been different; a reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood" (*Olia v Canada (Minister of Citizenship and Immigration)*, 2005 FC 315 at para 6; *R v Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667 at para 26).

[97] In *Ledda*, this Court returned a matter for redetermination to the IAD, which had formerly determined that, notwithstanding a finding of incompetence on the part of counsel, there was no miscarriage of justice. Mr. Justice Mosley stated the following at paragraph 16:

> The applicant was not advised that he had a right of appeal from the inadmissibility finding. Given his long residence in Canada, his family ties to this country and the nature of the criminal conviction an appeal could have been successful.
>
> [Emphasis added.]

[98] The Applicant sets out in her material before me the evidence that she intends to file with the IAD in the event that the present application is successful. The Respondent did not challenge such evidence other than to argue that the comments of the IAD member that I reproduced in paragraph 18, above, suggest that even if further evidence had been provided, the appeal would nonetheless have been dismissed.

[99] I do not read the IAD member's comments in the same way. It is, of course, impossible to determine whether the evidence and further submissions of Current Counsel would yield the desired result for the Applicant; however, there seems to be at least a reasonable probability of such a result.

[100] In short, as a result of identified failures on the part of Former Counsel, the Applicant was, in the words of Mr. Justice Denault in *Shirwa*, "unable to fully demonstrate [her] case before the tribunal" (at para 3). She was deprived of the opportunity to access all of the grounds for appeal as well as the opportunity to present documentary and testimonial evidence on the H&C considerations.

[101] Finally, the Respondent argues that the proper recourse for the Applicant, faced with incompetent counsel, is to file a complaint with the Law Society, which regulates the conduct of paralegals. I find that this is little comfort to an Applicant who lost her chance to bring her family to Canada.

[102] Under the circumstances, I find that what the Applicant lost equated to more than a mere possibility of success. This prejudice warrants redetermination of the sponsorship appeal (see also *Medica v Canada (Citizenship and Immigration)*, 2011 FC 927 at paras 41-42).

VII. Conclusion

[103] Accordingly, I grant the application for judicial review and return the matter to a new IAD member for reconsideration. However, considering that the Applicant is not challenging the findings of the IAD on legal validity (the appropriateness of including her partner as a co-signer and her failure to satisfy MNI requirements), such reconsideration shall be limited to a review of the application for H&C considerations alone (*Williams v Canada (Citizenship and Immigration)*, 2020 FC 8).

[104] This is not a case where any failure on the part of Former Counsel affected the IAD's determination on the issues upon which the IAD did make its findings. As such, the determination already made by the IAD as regards the Applicant's failure to meet MNI requirements shall stand as is.

JUDGMENT in IMM-3114-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted in part and the matter is returned to a different panel member of the Immigration Appeal Division for reconsideration to deal solely with the humanitarian and compassionate factors arising in the Applicant's sponsorship application.

2. There is no question to certify.

"Peter G. Pamel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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