Federal Court  Cour fédérale

Date: 20230309

Docket: IMM-1518-22

Citation: 2023 FC 328

Montréal, Québec, March 9, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

Satya DEVI
Jatinder KAUR
Sonia RANI
Jagir SINGH

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision of an immigration officer [Officer] at the Canadian High Commission in New Delhi, rejecting their permanent resident applications. I granted the Application from the bench, promising reasons to follow. These are the Reasons.

I. Background

[2] The Applicants are citizens of India. The Applicants are a mother and her three children whom she shares with her spouse [Mr. Kumar], a Canadian permanent resident and protected person. Mr. Kumar currently resides in Canada while the Applicants reside in India.

[3] The Applicants and Mr. Kumar filed for permanent residence together in October 2015. Mr. Kumar was granted permanent resident status as a protected person in August 2017.

[4] In June 2017, the Officer sent the Applicants a procedural fairness letter advising them of concerns of insufficient evidence provided to support the relationship between Mr. Kumar and the Applicants, who were listed as dependents in the permanent residence application. As such, the Applicants were given an opportunity to undergo DNA testing.

[5] On October 17, 2017, the Officer found that the Applicants did not meet the requirements for permanent residence because they did not respond to the procedural fairness letter nor complied with its DNA testing requirement. The Officer rejected their applications [Decision].

[6] On February 16, 2022, nearly five years after the Decision was issued, the Applicants filed an Application for Leave and Judicial Review [ALJR] of the Decision alleging incompetence on the part of their former immigration consultant [Consultant]. The Applicants allege that they were only informed of the Decision to refuse their permanent resident applications in January 2022. They claim that they only learned of the Decisions when Mr.

Kumar received a response from Immigration, Refugees and Citizenship Canada [IRCC] in December 2021 to a status inquiry request.

II. Analysis

[7] The Applicants allege that there was a breach of natural justice as a result of the incompetence of their Consultant, because she failed to notify the Officer of their intention and willingness to comply with the procedural fairness letter and undergo DNA testing, which was subsequently the only reason why the Officer refused the Applicants' permanent residence applications.

[8] Justice Norris recently summarized the framework of analysis for allegations of incompetence on the part of a former counsel or authorized representative in *Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at paragraphs 30 and 31 [*Discua*]:

> [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.

[9] I will address each element of this framework for the case at bar.

A. *The Applicants' Consultant had a reasonable opportunity to respond to the allegations*

[10] The Federal Court's *Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection Proceedings* dated June 24, 2022 contain the protocol [Protocol] with the procedures that should be followed when an allegation against former counsel or another authorized representative is advanced as a ground for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (the Protocol is reproduced at Annex A to these Reasons).

[11] In this case, Counsel for the Applicants failed to comply with the requisite steps of the Protocol before filing the ALJR. Instead, Counsel completed these steps – namely, notifying the Consultant of the allegations made against her in this Application, and providing her with a copy of the Protocol and a signed authorization from the Applicants releasing any privilege attached to the former representation – on December 19, 2022, after Leave was granted by this Court. At the same time, Counsel provided the Consultant with a copy of the Leave Order.

[12] The Respondent argues that this Court should not consider this Application because Counsel for the Applicants failed to comply with the Protocol in a timely manner – before filing the ALJR – and did not provide a reasonable explanation for this non-compliance, simply admitting that Counsel was unaware of the Protocol.

[13] In the very particular circumstances of this case, I find that it was reasonable for Counsel to have filed the ALJR before complying with the requisite steps in the Protocol to preserve the

rights of the Applicants, which had already been compromised by the actions of their Consultant. Applicants' counsel also explained that he was unable to comply with the Protocol in a timely manner because the Consultant could not be reached and that as a result, he tried to file a Motion for an Extension of Time, which was granted by this Court. In light of the particular circumstances of this case, I am satisfied that the Protocol has been complied with in substance and that the Applicants' Consultant had a reasonable opportunity to respond to the allegations of incompetence raised in this Application.

[14] I note that while an applicant or their counsel fails to comply with the Protocol at their peril, the Court can take unique circumstances into account. Such circumstances arose this year in *Discua*, where Justice Norris was satisfied that notice to former counsel had been provided "despite the failure to comply with the protocol to the letter" (at para 51).In *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522, Justice Fuhrer addressed the allegations of incompetence of former counsel despite the applicant not fully complying with the Protocol (at para 26).

B. *The Applicants' Consultant's conduct was negligent (the performance component) and resulted in a miscarriage of justice (the prejudice component)*

[15] Continuing with the framework of the "incompetence" analysis, to satisfy the performance component, the Applicants must establish that (i) they relied on the conduct of their Consultant and (ii) that this conduct fell below the standard of reasonable professional assistance or judgment (*Discua* at para 51, citing *R v GDB*, [2000] 1 SCR 520 at para 27 [*GDB*]).

[16] The Applicants submit they relied on their Consultant to facilitate communications with the Officer regarding their permanent residence applications. The Applicants argue that their Consultant not only failed to inform the Officer of the Applicants' intention and willingness to undergo DNA testing, which was the only reason why the Officer refused the Applicants' permanent residence applications, but also then failed to inform them of the subsequent Decision.

[17] In support of their allegations, the Applicants submitted to this Court a decision by the College of Immigration and Citizenship Consultants Discipline Committee dated September 28, 2022, suspending the Consultant's licence as a Regulated Canadian Immigration Consultant until all the disciplinary complaints against her are resolved or adjudicated, citing "serious, systemic and recurring problems" with the Consultant's practice, including "failure to file immigration applications, failure to meet deadlines, failure to communicate decisions of issuing authorities to her clients and filing immigration applications containing false information."

[18] In short, I am satisfied that (i) the Applicants relied on the Consultant to facilitate communications with the Officer regarding their permanent residence applications, and (ii) that the Consultant failed to do so, falling short of the standard of reasonable professional assistance.

[19] With regard to the prejudice component, I am also satisfied that the Applicants have established that the failings of their Consultant resulted in a miscarriage of justice (*GDB* at para 28). The Consultant's actions not only deprived the Applicants of an opportunity to answer the

Officer’s concerns by undergoing DNA testing, but also compromised their right to judicial review under IRPA as the Consultant failed to notify the Applicants of the Decision.

C. *The Respondent’s oral submissions at the hearing*

[20] The Respondent raised in oral arguments (but not in written submissions) that the Applicants must have been aware of the Decision either (i) in 2017 when the email dated October 27, 2017, with the attached refusal letter, was originally sent to the Consultant and Mr. Kumar’s Yahoo email address; or (ii) in 2021 when the IRCC sent Mr. Kumar an email dated April 9, 2021, in response to one of his inquiries, indicating that the IRCC had sent him the Decision back in October 12, 2017 and asking him to check his Yahoo email address.

[21] However, based on the totality of the evidence, it appears that Mr. Kumar never received the October 27, 2017 email and was still unaware of the Decision after the April 9, 2021 email. First, Mr. Kumar indicated in an email to IRCC that his Yahoo email address, which he provided to IRCC at the time of his application, had been hacked and that he no longer had access to it and was now using a Gmail email address. Second, Mr. Kumar continued to follow up with IRCC on behalf of the Applicants, even after the April 9, 2021 email, until he finally heard that the applications had been refused from the Minister's Office on January 14, 2022.

[22] The evidence supports that up until January 14, 2022, the Applicants and Mr. Kumar were not aware of the Decision, since it was first sent to a defunct email address in 2017 (October 27, 2017 email), to which IRCC referred them again on April 9, 2021.

[23] I note that Mr. Kumar states at paragraph 3 of his Affidavit submitted in support of this application for judicial review: “I have NO knowledge of the [Yahoo email address] that appears on page 92 of the said added documents to the CTR.” I note that, Mr. Kumar was not cross-examined on this Affidavit, which supports his claimed ignorance of the subsequent refusal of the four applications.

[24] As the Applicants’ counsel states, there is a simple outcome that will arise from the granting of this judicial review. The Applicants will simply resubmit new DNA tests along with Mr. Kumar who had already submitted one - albeit late after he was unaware that the Applicants’ file had been closed. At that point, if the tests come back positive, indicating that Mr. Kumar is indeed the father of the three dependent Applicants, them and their mother will be issued visas as dependents, subject to any other admissibility concerns that might arise. If the tests are negative vis-à-vis a family relationship, the application will simply be refused.

III. Conclusion

[25] In light of the circumstances, the Application for Judicial Review is allowed. The Parties propose no question of general importance for certification, and I agree that none arises.

JUDGMENT in IMM-1518-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed.

2. No questions for certification were argued and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

Annex A

Consolidated Practice Guidelines for
Citizenship, Immigration, and Refugee Protection Proceedings
June 24, 2022

Allegations against former counsel or another authorized representative in Citizenship, Immigration and Refugee Cases before the Federal Court

46. Where an applicant alleges professional incompetence, negligence, or other conduct on the part of his or her former legal counsel or other authorized representative as a ground for relief in an application for leave and judicial review under the IRPA or in an application brought under the Citizenship Act, the protocol set out below should be followed. For the purposes of this protocol, "authorized representative" includes an immigration consultant, paralegals, a notary who is a member in good standing of the Chambre des notaires du Québec and a Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings 16 June 24, 2022 member in good standing of a body designated under subsection 91 (5) of the IRPA and section 21.1 of the Citizenship Act. The purpose of this protocol is solely to assist the Court in its adjudication of applications in which such allegations are made.

47. Requisite Steps. Prior to pleading incompetence, negligence or other conduct on the part of former legal counsel or other authorized representative as a grounds for relief, current counsel must satisfy him/herself, by means of personal investigations or inquiries, that there is some factual foundation for the allegation. In addition, current counsel must notify the former counsel or authorized representative in writing with sufficient details of the allegations and advise that the matter will be pled in an application described above. The written notice must advise the former counsel or authorized representative that they have seven days from receipt of the notice to respond. Along with this notice, and in cases where privilege may be applicable, current counsel must provide the former counsel or authorized representative with a signed authorization from the applicant releasing any privilege attached to the former representation along with a copy of this Protocol. This practice is strongly encouraged for stay motions time permitting.

48. Current counsel should, unless there is urgency, wait for a written response from the former counsel or authorized representative before filing and serving the application record. If the former counsel or authorized representative intends to respond he or she must do so, in writing to current counsel, within seven days of receipt of the notice from current counsel.

49. If after reviewing the response of the former counsel or authorized representative and any other available information, current counsel believes that there may be merit to the allegations, current counsel may file the application or appeal record with the Court. Any perfected application which raises allegations against the former counsel or authorized representative must be served on the former counsel or authorized representative and proof of service be provided to the Court. The application will be served on the respondent in the normal course.

50. Where current counsel is investigating the allegations against the former counsel or authorized representative and it becomes apparent that his or her pursuit of this investigation may delay the perfection of the application record beyond the timelines provided for by the FCCIRPR, current counsel may apply by motion for an extension of time to perfect the record.

51. If the former counsel or authorized representative wishes to respond to the allegations made in the record, he or she may do so in writing by sending a written response to current counsel and to counsel for the Respondent within ten days of service of the application or such further time as the Court may direct.

52. Current counsel who wishes to respond to the communication received from the former counsel or authorized representative must file a motion under Rule 369 for an extension of time and for leave to file further written submissions with respect to the new material received. Any relevant evidence shall be included in the motion record and filed by way of affidavit, including any response from the former counsel or authorized representative and documentation of a complaint made to the appropriate provincial or federal governing body.

53. If no response from the former counsel or authorized representative is received within ten days of service, and no extension of time has been granted, current counsel must advise the Court and the respondent that no further information from the former counsel or authorized representative is being submitted. The Court shall then base its decision on the application for leave on the material filed by the applicant and the respondent, and without any further notice to the former counsel or authorized representative.

54. Steps upon Leave Being Granted. If, upon reviewing the materials filed, the Court decides to grant leave, the following procedure will apply:

i. Current counsel will provide a copy of the order granting leave or the order(s) setting the matter down for hearing to the former counsel or authorized representative forthwith.

ii. If the former counsel or authorized representative deems his or her further participation in the proceedings necessary, he or she may make a motion pursuant to Rule 109 and Rule 369 for leave to intervene. It is presumed that in most cases, if leave to intervene is granted to the former counsel or authorized representative, written submissions will be permitted.

**Lignes directrices consolidées pour
les instances d'immigration, de statut de réfugié et de citoyenneté
24 juin 2022**

Allégations formulées contre des anciens avocats ou d'autres représentants autorisés dans le cadre d'instances de la Cour fédérale en matière de citoyenneté, d'immigration et des réfugiés.

46. Si un demandeur soulève des allégations concernant l'incompétence, la négligence ou la conduite répréhensible de son ancien avocat ou de son ancien représentant autorisé comme un motif de redressement dans une demande d'autorisation et de contrôle judiciaire en vertu de la LIPR ou dans une demande introduite en vertu de la Loi sur la citoyenneté, le protocole ci-dessous doit être suivi. Pour les besoins du présent protocole, un « représentant autorisé » comprend un consultant en immigration, des parajuristes, un notaire qui est membre en règle de la Chambre des notaires du Québec et un membre en règle d'un organisme désigné en vertu du paragraphe 91 (5) de la LIPR et de l'article 21.1 de la Loi sur la citoyenneté. L'objectif du présent protocole est uniquement d'aider la Cour à rendre sa décision dans les cas où de telles allégations sont formulées.

47. Les étapes nécessaires. Avant de plaider que l'incompétence, la négligence ou la conduite de l'ancien avocat ou de l'ancien représentant autorisé constitue un motif de redressement, l'avocat actuellement saisi du dossier doit être convaincu, après avoir lui-même effectué des enquêtes ou demandé des renseignements, que cette allégation repose sur quelque fondement factuel. De plus, il doit envoyer un avis écrit à l'ancien avocat ou à l'ancien représentant autorisé, en lui donnant suffisamment de détails au sujet des allégations et en l'avisant que la question sera plaidée dans le cadre d'une demande décrite ci-dessus. L'avis écrit doit aviser l'ancien avocat ou l'ancien représentant autorisé qu'il dispose de 7 jours, à compter de la réception de l'avis, pour présenter une réponse. Dans les cas où le secret professionnel peut être invoqué, l'avocat actuellement saisi du dossier doit fournir à l'ancien avocat ou à l'ancien représentant autorisé, en plus de l'avis et d'une copie du protocole, une autorisation signée par le demandeur par laquelle ce dernier renonce au secret professionnel rattaché à l'ancienne représentation.

48. L'avocat actuellement saisi du dossier doit, sauf en cas d'urgence, attendre une réponse écrite de l'ancien avocat ou de l'ancien représentant autorisé avant de déposer et de signifier le dossier de la demande. Si l'ancien avocat ou l'ancien représentant autorisé a l'intention de produire une réponse, il doit le faire par écrit à l'avocat actuellement saisi du dossier dans les sept jours suivant la réception de l'avis de l'avocat actuellement saisi du dossier.

49. Si, après avoir examiné la réponse de l'ancien avocat ou de l'ancien représentant autorisé et toute autre information disponible, l'avocat actuellement saisi du dossier croit que les allégations peuvent être fondées, ce dernier peut déposer le dossier de la demande ou le dossier de l'appel à la Cour. Toute demande mise en état qui soulève des allégations contre l'ancien avocat ou l'ancien représentant autorisé doit être signifiée à ce dernier, et

une preuve de cette signification doit être produite à la Cour. La demande sera signifiée au défendeur selon le cours normal.

50. Lorsque l'avocat actuellement saisi du dossier enquête sur les allégations formulées contre l'ancien avocat ou l'ancien représentant autorisé et qu'il devient manifeste que s'il poursuit cette enquête, la mise en état du dossier de demande ne pourra pas être faite dans les délais prévus dans les RCFCIPR, l'avocat actuellement saisi du dossier peut demander par requête une prorogation du délai afin de mettre le dossier en état.

51. Si l'ancien avocat ou l'ancien représentant autorisé souhaite répondre aux allégations formulées dans le dossier, il peut le faire en envoyant une réponse écrite à l'avocat actuellement saisi du dossier et à l'avocat du défendeur dans les 10 jours de la signification du dossier de la demande ou dans tout autre délai que la Cour pourra accorder.

52. L'avocat actuellement saisi du dossier qui souhaite répondre à la communication reçue de l'ancien avocat ou de l'ancien représentant autorisé doit déposer une requête en vertu de l'article 369 des Règles afin de demander une prorogation de délai ainsi que l'autorisation de déposer d'autres observations écrites relativement aux nouveaux documents reçus. Tout élément de preuve pertinent, y compris toute réponse de l'ancien avocat ou de l'ancien représentant autorisé et tout document relatif à une plainte déposée à l'organisme administratif provincial ou fédéral compétent, doit être inclus dans le dossier de requête et doit être déposé par affidavit.

53. Si aucune réponse de l'ancien avocat ou de l'ancien représentant autorisé n'est reçue dans les dix jours de la signification et qu'aucune prorogation de délai n'a été accordée, l'avocat actuellement saisi du dossier doit aviser la Cour et le défendeur qu'aucun autre renseignement n'est soumis par l'ancien avocat ou l'ancien représentant autorisé. La Cour fonde alors sa décision quant à la demande d'autorisation ou la demande, selon le cas, sur les documents déposés par le demandeur et le défendeur, et ce, sans autre avis à l'ancien avocat ou à l'ancien représentant autorisé.

54. Étapes suivant l'octroi de l'autorisation. Si, après avoir examiné les documents déposés, la Cour décide d'accorder l'autorisation, on procédera de la manière suivante :

i. L'avocat actuellement saisi du dossier remettra sans délai à l'ancien avocat ou à l'ancien représentant autorisé une copie de l'ordonnance accordant l'autorisation ou des ordonnances inscrivant l'affaire au rôle.

ii. Si l'ancien avocat ou l'ancien représentant autorisé estime qu'il est essentiel qu'il continue de participer à l'instance, il peut déposer une requête en vertu des articles 109 et 369 des Règles en vue d'être autorisé à intervenir. On présume que dans la majorité des cas où l'autorisation d'intervenir est accordée à l'ancien avocat ou à l'ancien représentant autorisé, celui-ci pourra déposer des observations écrites.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1518-22
STYLE OF CAUSE:	SATYA DEVI, JATLNDER KAUR, SONIA RANI, JAGIR SINGH v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	MARCH 8, 2023
JUDGMENT AND REASONS:	DINER J.
DATED:	MARCH 9, 2023

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