Federal Court  Cour fédérale

Date: 20220218

Docket: IMM-2630-20

Citation: 2022 FC 221

Ottawa, Ontario, February 18, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KAWALJEET KAUR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Kawaljeet Kaur, seeks judicial review of the decision of the Immigration Appeal Division ("IAD"), dated May 18, 2020, dismissing the Applicant's appeal of a refusal of her application to sponsor her husband under the Family Class. The IAD found that the Applicant's marriage was not genuine pursuant to section 4(1) of the *Immigration and*

Refugee Protection Regulations, SOR/2002-227 and was entered into primarily to acquire status or privilege under the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the incompetence of her former immigration consultant (the "Consultant") in her appeal to the IAD led to a miscarriage of justice constituting a breach of procedural fairness.

[3] For the reasons that follow, I find that the Consultant's incompetence resulted in a breach of the Applicant's right to procedural fairness. I therefore allow this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant is a 32-year-old Canadian citizen. She was born in India and immigrated to Canada as a dependent of her parents in April 2011. The Applicant lives with an intellectual disability. She has never worked outside the home, has not received any formal education and has always lived with her parents.

[5] On January 10, 2016, the Applicant married her husband, Mr. Gagandeep Singh (Mr. "Singh"), in India and subsequently filed an application to sponsor him for immigration to Canada under the Family Class. Mr. Singh is 26 years old and a citizen of India.

[6] The Applicant and Mr. Singh are distant relatives and have known each other since childhood. In December 2015, the Applicant's family and Mr. Singh's family met to arrange the marriage and the couple was engaged on January 9, 2016. The Applicant and Mr. Singh have one son, who was born in Canada on September 4, 2017.

[7] By letter dated March 28, 2017, a visa officer of Immigration, Refugees and Citizenship Canada (the "Visa Officer") refused the sponsorship application on the grounds that the marriage is not genuine and had been entered into primarily for the purpose of acquiring status or privilege under the *IRPA*. The Visa Officer did not find the account of the development of the relationship to be credible, and did not find the couple to be compatible in terms of education, age, and intellectual and emotional maturity.

[8] The Applicant then hired the Consultant to appeal the Visa Officer's decision to the IAD.

[9] On July 21, 2020, the Applicant's counsel sent a letter to the Consultant informing him of the allegations of incompetence during the Consultant's representation of the Applicant. The same day, the Consultant sent a letter responding to the allegations.

B. *Decision Under Review*

[10] In a decision dated May 18, 2020, the IAD found that the marriage is not genuine and was entered into primarily to acquire status or privilege under the *IRPA*.

[11] The IAD explained that because of the Applicant's intellectual disability, her cousin was assigned as her designated representative (the "Designated Representative") to assist her during the IAD hearing. The IAD noted that at the hearing, the Designated Representative was asked if he had any additional evidence to add and he declined to present any.

[12] The IAD found that many of the Applicant's answers provided during the hearing did not make sense, and found discrepancies between the Applicant's testimony and Mr. Singh's. The IAD also found the evidence to be lacking, since the Applicant's parents were not present at the hearing and did not provide evidence of why they considered the match to be suitable.

[13] The evidence before the IAD included a psychological assessment prepared on May 22, 2013 (the "Psychological Assessment"). The Psychological Assessment states that the Applicant has a deficit in daily living skills, and concludes that she has a moderate developmental intellectual disability that would continue to require an intensive level of support. Based on the Applicant's testimony and the Psychological Assessment, the IAD determined that the Applicant needs supervision for most tasks and can only care for her child for short amounts of time.

[14] The IAD found that, on a balance of probabilities, the marriage is genuine from the Applicant's perspective, but not that of Mr. Singh. The IAD determined that Mr. Singh is either not knowledgeable about the Applicant's limitations in daily living, her disability, and her need for supervision, or he was not honest at the hearing. The IAD also found Mr. Singh's inability to articulate a real plan for their future together without knowing the Applicant's limitations to be an indication that the marriage is not genuine.

III. Issue and Standard of Review

[15] The sole issue in this case is whether the Applicant was denied procedural fairness in her appeal before the IAD as a result of the Consultant's incompetence.

[16] In accordance with this Court's decision in *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 *(*"*Satkunanathan*") at paragraph 31, I find that the issue is reviewable on the correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23).

[17] Correctness is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. Analysis

[18] An applicant who alleges incompetence or negligence by their former counsel must show that: a) the impugned counsel's acts or omissions constitute incompetence; and b) the acts or omissions resulted in a miscarriage of justice (*Satkunanathan* at paras 35-36; see also: *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 ("*Hamdan*") at paras 36-38).

Errors and omissions of a former representative must be exceptional to constitute incompetence, and the alleged incompetence will only amount to a breach of natural justice in “extraordinary” cases (*Hamdan* at para 38).

A. *Whether the Consultant’s acts or omissions constitute incompetence.*

[19] The Applicant submits that the Consultant failed to competently represent her in several ways. Overall, the Applicant submits that as someone who lives with an intellectual disability, the Applicant’s vulnerability required the Consultant to display a higher level of appreciation for the specialized nature of her case.

[20] In particular, the Applicant argues that the Consultant acted incompetently by failing to call a third-party witness, such as the Applicant’s father, to testify during the IAD hearing. The Applicant states that, in sponsorship cases involving the genuineness of marriage such as this one, it is logical for a representative to call third-party witnesses who can speak to the genesis and genuineness of a relationship. A competent representative would have researched the jurisprudence and understood the case to be met. The Applicant argues that this was especially important in a case such as this one, where the IAD identified gaps in the Applicant’s testimony and found that many of the Applicant’s answers did not make sense.

[21] The Applicant further submits that the Consultant had a duty to prepare witnesses for their testimony before the IAD, as well as a duty to let the Applicant’s father know that he should testify (*Kavihuha v Canada (Citizenship and Immigration),* 2015 FC 328 at para 27). The

Applicant argues that the Consultant showed a lack of competence and loyalty to his client when he stated at the IAD hearing that he was "surprised" the Applicant's father was not in attendance.

[22] The Applicant relies on *Kim v Canada (Citizenship and Immigration)*, 2012 FC 687 ("*Kim*"), in which this Court found that a consultant acted incompetently by failing to submit evidence which the officer specifically found to be lacking in the applicant's application (paras 8; 18-21). The Applicant also submits that in *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 ("*Guadron*"), this Court affirms that the jurisprudence has found incompetence "[…] due to a failure of the representative to submit evidence that clearly should have been submitted and for which logic defies failure to submit that evidence" (at para 25). At paragraph 29 of *Guadron*, this Court further states:

> […] I find that as the duly appointed legal representative under the Act, it was the representative's responsibility to make reasonable attempts to seek out crucial information required for the Applicant to overcome the significant hurdles in obtaining a highly discretionary and exceptional H&C remedy. It is not good enough to state that the Applicant (or her family) did not volunteer it.

[23] The Respondent contends that in the Consultant's response letter, he explains that he had intended to call the Applicant's father as a witness, had notified the Applicant's family two months prior to the hearing that the father would be called as a witness, and that he had expected the father to be present on the day of the hearing. The Consultant's letter states: "I called him [a] few days before the hearing to let him know that he is required to be there as he is a witness to this case. He informed me that he was in the U.S.A. and could not attend."

[24] However, the Applicant's father's sworn affidavit states that the Consultant did not ask him to testify as a witness. The Applicant's father's affidavit explains that the IAD hearing was rescheduled twice, and states:

> Myself and my wife attended both of these initial hearing dates. However, I asked the consultant if I needed to attend the final hearing, since [the Designated Representative] was accompanying the Applicant there, and the consultant said that I did not need to.

[25] The Applicant submits that the Respondent arbitrarily prefers the Consultant's unsworn letter over the Applicant's father's sworn affidavit. I agree.

[26] From my reading, it seems that the Consultant failed to convey to the Applicant's father the expectation that he be present at the hearing to provide testimony as a third-party witness. At the hearing, when asked by the IAD member why those who helped arrange the marriage had not been called as witnesses, the Consultant responded:

> Yes, I did speak to the father several times and he was always there with the Appellant and I'm surprised myself today, the last two times when the hearing was rescheduled, that both families were here, sorry the mother and the father were both here, both times I think; there were questions prepared for the father to be answered today and I was surprised myself today that he has given some of the answers in the past that she needs a life partner because they are not going to be there for her forever […]

[27] In response, the IAD member stated: "[…] I am floored that you didn't have other witnesses but it is what it is and I can't take testimony from you, I am just curious why they were not here, that's all."

[28] Overall, the Respondent submits that the Consultant made "[…] reasonable attempts to seek out crucial information" (*Guadron* at para 29) and represented the Applicant to the best of his ability. According to the Respondent, unlike the case law cited by the Applicant, the Consultant in this matter did not fail to appreciate the need for certain evidence and testimony, but rather it was the Applicant and her family who failed to provide the requested evidence and testimony. The Respondent further submits that the Applicant must accept the consequences of the representation she freely chose (*Pathinathar v Canada (Citizenship and Immigration),* 2013 FC 1225 at para 38).

[29] I am not convinced that the Consultant adequately represented the Applicant's interests before the IAD. Given the Applicant's vulnerability and the fact that she lives with an intellectual disability, I find that the Consultant should have been more alert to her limitations and the specialized nature of her case. In particular, I agree with the Applicant that the Consultant erred by not calling any third-party witnesses who could speak to the genuineness and genesis of the relationship and the marriage. I find this to be a significant shortcoming, given that the IAD's decision specifically notes the absence of testimony from the Applicant's parents to explain the circumstances surrounding the arranged marriage:

> [29] The appellant's mother and father were not present at the hearing. Because they provide almost constant supervision of the appellant, it is reasonable they could explain why they considered this match to be suitable. This evidence was lacking. Counsel for the appellant stated that he was surprised the appellant's parents did not attend because he was prepared to ask her father questions at the hearing.

[30] I also find that it was unprofessional of the Consultant to state that he was “surprised” that the Applicant’s father was not present at the hearing. While there may have been a misunderstanding between the Consultant and the Applicant’s father regarding the expectation that the father would testify, it was the Consultant’s responsibility to ensure that this was made clear to his client, rather than to breach his relationship with his client in such a way.

[31] Furthermore, as the Applicant’s counsel appropriately pointed out during the hearing, a review of the transcript of the IAD hearing shows that there were also significant shortfalls with the Consultant’s oral advocacy before the IAD, such as his attempt to provide evidence in his submissions before the IAD:

> MR. KHINDA: I believe this marriage is genuine and it's not to facilitate any entry into Canada for the principal Applicant or the Applicant sorry, the marriage was arranged by a […] who is a trusted family member on both sides of the family; one of the reasons why this was arranged into close family, because the families were concerned that they didn't want any advantage taken of the…
>
> PRESIDING MEMBER: I heard no evidence of that. None of that. I've heard that they liked each other, and they were both vegetarians, that's what I've heard and that's why it was arranged, I didn't hear anything else, so don't give evidence.

[32] I therefore find that the Consultant’s errors were sufficient to constitute incompetence.

B. *Whether the Consultant's incompetence resulted in a breach of procedural fairness.*

[33] In *Galyas v Canada (Citizenship and Immigration),* 2013 FC 250 ("*Galyas*"), this Court confirmed that in order to establish that a representative's incompetence led to a breach of procedural fairness, the Applicant must demonstrate that the outcome would have been different but for the incompetence (at para 84).

[34] The Applicant submits that the IAD in the reasons for the decision, clearly relied on the fact that there was no evidence from the Applicant's family explaining why the marriage was arranged. The Applicant argues that the IAD's decision deplores the lack of third-party witnesses, and that the absence of witnesses led to adverse inferences against the Applicant. The Applicant asserts that these mistakes on the part of the Consultant led to a negative decision from the IAD, and that, had these omissions not occurred, the IAD could have reached a different decision.

[35] The Applicant relies on *Memari v Canada (Citizenship and Immigration),* 2010 FC 1196 ("*Memari*") in which this Court found that the applicant's counsel's illness and inattentiveness to the applicant's file led to a breach of procedural fairness. Due to an illness and the medication she was taking, the counsel in *Memari* admitted to making several errors in her representation of the applicant (at para 37). This Court found that a different overall conclusion regarding the applicant's credibility might have been reached if not for his counsel's inadequate representation (at paras 61-62). At paragraph 64, this Court notes:

> [64] In my view, on the particular facts of this case, the cumulative impact of the prejudice suffered by the Applicant as a result of Ms. Leggett's inadequate representation of him was sufficiently serious to compromise the reliability of the Board's decision. Taken in isolation, each of the individual actions and omissions on the part of Ms. Leggett addressed above would not have satisfied the prejudice component of the jurisprudence set forth above. However, I am satisfied that the combined effect of these actions and omissions was sufficient to result in a miscarriage of justice. Taken as a whole, Ms. Leggett's representation of the Applicant was not adequate or reasonable.
>
> [Emphasis added.]

[36] The Respondent contends that the Applicant has failed to establish that there is a reasonable probability that the outcome of her appeal would have been different but for the Consultant's alleged incompetence (*Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 21), or that there were "extraordinary circumstances" in this case that resulted in a breach of procedural fairness (*Hamdan* at para 38).

[37] In particular, the Respondent argues that the IAD's decision was based on Mr. Singh's testimony and personal knowledge. As such, even if a third-party witness had testified, this would not have changed the fact that Mr. Singh knew little about the Applicant's condition and limitations, nor could he articulate the couple's plans for the future, which contributed to the IAD's finding that Mr. Singh entered the marriage to gain status under the *IRPA*. The Respondent asserts that no other evidence could have reconciled Mr. Singh's testimony with the evidence provided, in particular the Applicant's own testimony.

[38] The Respondent also submits that the cases relied upon by the Applicant are distinguishable, as they involve situations where a representative's incompetence stemmed from

a lack of documentary evidence in matters where no oral evidence could be adduced, or in matters where the lack of proper documentary evidence created a credibility concern. In contrast, the Applicant and her husband were able to testify before the IAD in this case and the decision was based on Mr. Singh's oral evidence, rather than on a lack of documentary evidence to support the claim or contradictions with incomplete documentary evidence.

[39] I am not persuaded by the Respondent's arguments. While I agree that the Applicant and Mr. Singh were able to provide oral testimony, distinguishing the case at hand from the cases cited by the Applicant, I disagree with the Respondent that no other evidence could have reconciled Mr. Singh's testimony.

[40] Upon reviewing the IAD's decision, I agree with the Applicant that testimony from a third-party witness who was present for the genesis of the relationship and involved in the arranged marriage could have clarified the gaps between the testimonies of the Applicant and that of Mr. Singh. This was affirmed by the IAD when it specifically referred to the evidence that could have been provided from a third-party witness, noting that testimony from the Applicant's parents could have explained why the match is considered suitable (*Kim* at para 24).

[41] I find that the Consultant's inadequate representation is sufficiently serious in this case to have compromised the IAD's decision (*Galyas* at para 89), and that the cumulative impact of the Consultant's errors and his deficient representation of a vulnerable person resulted in a breach of the Applicant's right to procedural fairness.

[42] As an aside, I also take issue with the language used by the IAD in its decision. In its reasons, the IAD refers to the fact that the Applicant lives with an intellectual disability as suffering ‘from retardation’. Specifically, the IAD states that the Applicant “suffers from retardation that is severe enough that she is unable to work.” This language is outdated and offensive, and shows a lack of respect for the Applicant’s dignity.

V. Conclusion

[43] I find that the Consultant’s acts and omissions constitute incompetence and that this resulted in a breach of the Applicant’s right to procedural fairness in her appeal before the IAD. Accordingly, this application for judicial review is allowed.

[44] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-2630-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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