

Federal Court



Cour fédérale

Date: 20230526

Docket: IMM-5097-21

Citation: 2023 FC 743

Vancouver, British Columbia, May 26, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

HARPREET SINGH

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS AND
THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Harpreet Singh, is a citizen of India. Mr. Singh asks for the judicial review of a decision dated June 30, 2021 [Decision], whereby the Refugee Appeal Division [RAD] allowed the appeal of the Minister of Public Safety and Emergency Preparedness and the Minister of Immigration, Refugees and Citizenship [Minister]. The RAD determined that,

contrary to what the Refugee Protection Division [RPD] had found, Mr. Singh was not a Convention refugee nor a person in need of protection since he had a viable internal flight alternative [IFA] in India.

[2] Mr. Singh submits that the incompetence of his counsel before the RAD has resulted in a miscarriage of justice and a breach of procedural fairness. He therefore asks the Court to quash the Decision and to return it to the RAD for redetermination by a differently constituted panel.

[3] For the reasons below, I will grant Mr. Singh's application for judicial review. After considering the RAD's findings, the evidence presented and the applicable law, I find that, in the circumstances of this case, the incompetence of Mr. Singh's former counsel resulted in a miscarriage of justice and amounted to a procedural fairness violation. This is sufficient to justify the intervention of this Court, and I must therefore remit the case for reconsideration by a different panel of the RAD.

II. **Background**

A. *The factual context*

[4] Mr. Singh arrived in Canada in 2015 as an international student. However, he failed to comply with the requirements of his status in Canada.

[5] In 2019, Mr. Singh was arrested for robbery. Eventually, the charges against him were stayed and he was transferred to “immigration hold”.

[6] In December 2019, Mr. Singh finally made a claim for refugee protection, arguing that he faces a risk to his life or a risk of cruel and unusual punishment in India due to a land dispute with his family’s neighbours in India. Mr. Singh also alleged that he fears that the father of his ex-girlfriend will harm him in retaliation for the breach of Mr. Singh’s promise to marry his daughter. The RPD granted refugee status to Mr. Singh.

[7] In October 2020, the Minister appealed the RPD decision to the RAD. The Minister argued that the RPD erred in its IFA analysis, since Mr. Singh would have viable IFAs in Mumbai and New Delhi.

[8] Throughout the RPD and the RAD proceedings, Mr. Singh was represented by Ms. Mandy Cheema.

B. *The RAD Decision*

[9] In the Decision, the RAD first admitted the new evidence adduced by both Mr. Singh and the Minister, but decided not to proceed with an oral hearing, as the new evidence did not raise a serious issue with respect to Mr. Singh’s credibility.

[10] The RAD then noted the two-prong test for the validity of a proposed IFA, where it had to determine whether: 1) there is a serious possibility of Mr. Singh being persecuted or, on a balance of probabilities, being subjected personally to a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment in the proposed IFA locations; and 2) it is objectively unreasonable or unduly harsh in all the circumstances, including those particular to Mr. Singh, for him to seek refuge in the proposed IFAs.

[11] The RAD found that the RPD erred on the second prong of the test. Particularly, the RAD held that, in light of the new evidence adduced by the Minister and the lack of new evidence from Mr. Singh in response to the Minister's new evidence, the RPD's findings were incorrect. More specifically, the RAD held that Mr. Singh would be able to find employment suitable for him and to receive substance abuse treatment to continue his recovery from addiction in the IFA locations.

[12] The RAD concluded in the following manner at paragraph 54 of the Decision:

The RPD's finding that it would be unreasonable for [Mr. Singh] to seek refuge in New Delhi was based to a significant extent on its consideration of various factors in the context of the [Mr. Singh's] recovery from addiction, including its findings that substance abuse treatment would not be available or accessible to him, and that it would be exceptionally difficult for him to obtain employment. In light of all the evidence, including the new evidence, I have found those findings to be incorrect. I find that this undermines the RPD's finding that he would likely become destitute and that his survival would be threatened. In my independent assessment of the evidence, I find that [Mr. Singh] lacks financial resources, that he has never lived in the IFA Locations, and that he has no family, friends, or existing social network in those cities. I find that these factors, while presenting difficulty, and even hardship, do not result in conditions that jeopardize the life and safety of [Mr. Singh]. I note again that it is

probable that he will find employment, that there are significant Sikh communities in both cities, from which it is reasonable to expect that he will find some support in enabling him to integrate and, if needed, he will have access to further substance abuse counselling and treatment.

C. *The standard of review*

[13] Mr. Singh submits that the standard of correctness applies to allegations of counsel's incompetence leading to a miscarriage of justice, since such allegations relate to procedural fairness.

[14] It is true, as Mr. Singh argues, that many courts have stated that the standard of correctness applies to procedural fairness issues (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Heiltsuk Horizon Maritime Services Ltd v Atlantic Towing Limited*, 2021 FCA 26 at para 107). However, the Federal Court of Appeal has repeatedly held that procedural fairness does not truly require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at para 54). Rather, it is a legal question that must be assessed on the basis of the circumstances and which requires the reviewing court to determine whether or not the procedure followed by the administrative decision maker respected the standards of

fairness and natural justice (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54).

[15] Thus, when procedural fairness and alleged breaches of fundamental justice are the object of an application for judicial review, the reviewing court must take into account the particular context and circumstances at issue. Its role is to determine whether the process followed by the administrative decision maker was fair and offered the affected parties a right to be heard as well as a full and fair chance to know and respond to the case against them. The reviewing court owes no deference to the decision maker when considering issues of procedural fairness.

III. Analysis

[16] The determinative issue in this application for judicial review is the allegation of counsel's incompetence and Mr. Singh's claim that Ms. Cheema's behaviour amounted to a breach of procedural fairness.

[17] The tripartite test to establish a procedural fairness violation resulting from incompetent representation requires an applicant to demonstrate the following three elements: i) prior counsel's acts or omissions constituted incompetence; ii) a miscarriage of justice resulted from the incompetence, in the sense that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and iii) the prior counsel was given a reasonable opportunity to respond (*Zakeri v Canada (Citizenship and Immigration)*, 2023 FC 421 [*Zakeri*] at para 19; *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 [*Rendon*

Segovia] at para 22; *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 [Guadron] at para 11; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; *Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25).

[18] In *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paragraph 66, the Federal Court of Appeal held that “[i]t is settled that an applicant must live with the consequences of the actions of his counsel. [...] [t]here is a high threshold governing the circumstances and evidentiary criteria that must be met before the Court will grant relief under section 18.1 of the *Federal Courts Act* on the basis of the negligence of counsel”.

[19] With regard to the third prong of the test, the evidence on the record demonstrates that, on July 27, 2022, Ms. Cheema was informed of the allegations against her in the present proceedings and received the applicant’s record. On August 3, 2022, she replied in a one-page letter in which she denied the allegations of incompetence made by Mr. Singh. Ms. Cheema stated that she remained in contact with Mr. Singh throughout the entire process, and that Mr. Singh was aware of the content of the record before the RAD. However, Ms. Cheema did not provide any additional details or evidence to negate Mr. Singh’s allegations of incompetence. In light of the foregoing, I am satisfied that the third prong of the test is met, as Ms. Cheema was properly notified and had a reasonable opportunity to respond to Mr. Singh’s allegations.

[20] Therefore, the only issues to determine are whether Ms. Cheema’s acts constituted incompetence, and whether there is a reasonable probability that the result of the Decision would have been different, but for the alleged conduct.

A. Ms. Cheema's conduct

[21] Before the RAD, the Minister filed new evidence, which related to the availability of substance abuse treatments in India and to the possibilities of employment that would fit Mr. Singh's needs and skills. Ms. Cheema, in representing Mr. Singh, simply argued that Mr. Singh continued to rely on his testimony before the RPD to the effect that there is no substance abuse treatment available in India and no possibility of employment. Ms. Cheema wrote, on behalf of Mr. Singh, that there was no need to provide corroborating evidence to support Mr. Singh's testimonial evidence given at the hearing before the RPD. However, the lack of further evidence adduced by Mr. Singh to contradict the Minister's new evidence is precisely what led the RAD to allow the Minister's appeal.

[22] Mr. Singh submits that Ms. Cheema was incompetent before the RAD for the following reasons:

- 1) Ms. Cheema failed to keep Mr. Singh informed of his matter and did not prepare him for the appeal;
- 2) The materials filed in response to the Minister's record were minimal and the arguments made were irrelevant to the matters before the RAD and the Minister's position;
- 3) Ms. Cheema did not directly respond to the Minister's concerns found in the Minister's record;
- 4) After Ms. Cheema requested three extensions to file the Respondent's record, she submitted a short Respondent's record totalling 33 pages;
- 5) The only inquiry that Ms. Cheema responded to, when Mr. Singh contacted her during the period relevant to the RAD proceedings, was about submitting an affidavit;

6) Ms. Cheema did not provide an opportunity for Mr. Singh to review the materials submitted to the RAD;

7) Mr. Singh was only made aware of the arguments made at the RAD after retaining his current counsel and in a conversation with Canada Border Services Agency [CBSA] in March 2022; and

8) Ms. Cheema did not return Mr. Singh's calls most of the time and did not provide clear updates when she did speak with him.

[23] In this application for judicial review, Mr. Singh filed documents that seem to contradict the Minister's submissions before the RAD. Among others, in his affidavit and supporting materials, Mr. Singh provided recent country conditions documentation which attests to the fact that substance abuse treatment in India is ineffective for someone suffering from problems similar to his. Further, Mr. Singh brought, for the Court's consideration, a psychological assessment, evidence challenging the authenticity and reliability of employment data in India, and evidence of the continued treatment required by Mr. Singh here in Canada.

[24] It should be noted that new evidence is admissible on judicial review when it is relevant to assess whether there was an issue of procedural fairness before the decision maker (*Kandiah v Canada (Citizenship and Immigration)*, 2021 FC 1388 [*Kandiah*] at para 53, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20 and *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 25). Here, I am satisfied that Mr. Singh's affidavit and evidence in support of his application for judicial review serve the very purpose of demonstrating that Ms. Cheema acted incompetently in omitting to submit some of the evidence he has now provided to the Court, which led to a breach of his procedural fairness rights. This material can thus be considered by

the Court. I further underline that Mr. Singh's allegations of incompetence are sufficiently specific and supported by evidence.

[25] While Ms. Cheema denies Mr. Singh's allegations of incompetence, she did not provide further information about her communications with him or on the sufficiency of her submissions before the RAD to disprove Mr. Singh's allegations of incompetence against her. It is true that the threshold of professional incompetence is not one to be taken lightly. Nonetheless, a clear evidentiary gap or the failure to submit evidence that clearly should have been submitted can be sufficient to sustain allegations of counsel's incompetence (*Guadron* at para 25). In *Kandiah*, the Court held that counsel's failure to obtain and submit documents of high significance and to make submissions on the main issues can amount to incompetence (*Kandiah* at paras 50, 59).

[26] Ms. Cheema's brief letter to the Court fails to explain the gaps in the evidence and submissions she made before the RAD on behalf of Mr. Singh (*Kandiah* at para 56). As Justice Diner held in *Guadron* at paragraph 29:

[I]t was the representative's responsibility to make reasonable attempts to seek out crucial information required for the Applicant [...]. It is not good enough to state that the Applicant (or [his] family) did not volunteer it. That approach undermines the reason for hiring a licensed representative [...]. To find otherwise would posit the question as to why one would bother to hire a professional in the first place.

[27] In the present case, there is simply no explanation for the deficient record that Ms. Cheema submitted. Furthermore, considering Ms. Cheema's applications for an extension of time in order to complete Mr. Singh's appeal record before the RAD, there is nothing explaining

why Ms. Cheema did not manage to gather the evidence relevant to Mr. Singh's case and responsive to the Minister's evidence and submissions.

[28] Accordingly, I am satisfied that Ms. Cheema's failure to make submissions or adduce evidence in response to the Minister's main arguments before the RAD falls within the category of incompetent conduct hampering Mr. Singh's right to procedural fairness. This is not a situation where Ms. Cheema's conduct belongs to the "wide range of reasonable professional assistance" to be expected from counsel (*R v GDB*, 2000 SCC 22 at para 27). Ms. Cheema's questionable conduct amounts to more than an erroneous litigation strategy or an unsuccessful chosen option. The first prong of the test for incompetence of counsel is therefore met.

B. *Miscarriage of justice*

[29] I now turn to the second prong of the test, namely, the prejudice to Mr. Singh. In order to assess whether a miscarriage of justice resulted from Ms. Cheema's incompetent conduct, the Court is required to review the RAD's Decision to determine whether it is likely that the outcome would have been different but for the incompetence [emphasis added] (*Zakeri* at para 24; *Tesema v Canada (Citizenship and Immigration)*, 2022 FC 1240 at para 8; *Sidhu v Canada (Citizenship and Immigration)*, 2022 FC 56 at para 20). In the context of refugee claims, "the incompetence of counsel will only constitute a breach of natural justice in 'extraordinary circumstances'" (*Rendon Segovia* at para 22; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36).

[30] Mr. Singh maintains that there is evidence to address the Minister's arguments before the RAD, as described above. Mr. Singh argues that he was unable to file this evidence at the time of the RAD's proceedings because of Ms. Cheema's incompetence and her failure to inform him of the extent of the Minister's submissions on appeal. Mr. Singh submits that such evidence brings a reasonable probability that, but for Ms. Cheema's incompetence, the Decision would have had a different outcome.

[31] The Minister submits that, on the contrary, Ms. Cheema addressed the Minister's appeal submissions entirely, and that Mr. Singh failed to demonstrate how the quality of her submissions negatively affected the outcome of the Decision.

[32] With respect, I do not agree with the Minister. A review of Ms. Cheema's submissions before the RAD reveals that she only filed a short five-page memorandum of fact and law, which failed to respond to the evidence adduced by the Minister regarding employment in the IFA locations and substance abuse treatment in India. The gist of Ms. Cheema's submissions instead focused on Mr. Singh's subjective fear of persecution, for which she addressed Mr. Singh's delay in making his refugee claim, his return trips to India to visit his mother, and the IFA analysis. On the latter, Ms. Cheema restated that there is no access to substance abuse treatment in India and a lack of shelter, financial resources and social support for Mr. Singh. Ms. Cheema also claimed that farmers' protests in Delhi made this IFA location unsafe for Mr. Singh while, in Mumbai, Mr. Singh faced a language and culture barrier.

[33] The Decision itself makes it clear that Ms. Cheema's failure to adduce relevant evidence on employment and substance abuse treatment in India and to respond to the Minister's new evidence on those two fronts was the main defect of Mr. Singh's case before the RAD (*Kandiah* at para 60). In fact, as pointed out by counsel for Mr. Singh at the hearing, the RAD repeatedly referred, in its reasons, to Mr. Singh's failure to respond to the Minister's submissions.

[34] For example, at paragraph 32 of the Decision, the RAD states that "[t]here is no evidence that [Mr. Singh] has any direct knowledge or any way of knowing whether there are suitable jobs for him in the IFA Locations, and no objective evidence was presented or referred to." At paragraph 33, the RAD refers to the lack of response from Mr. Singh on the availability of employment in the IFA locations:

[Mr. Singh], in his reply memorandum, does not contest the authenticity, reliability, or accuracy of these documents; he states only that he continues to take the position that there is a lack of shelter, financial resources, and social support, and difficulties in finding employment. He does not provide any new evidence disputing the new evidence provided by the [Minister], and does not specifically challenge the [Minister's] arguments about the probative value of these new documents.

[35] Similarly, with respect to Mr. Singh's need for continued treatment due to his mental health condition, the RAD held the following at paragraph 38: "[Mr. Singh], in his responding memorandum, did not respond to this argument, did not dispute that he is now living in Ontario, and did not provide evidence or argue that he continues to receive or require substance abuse treatment or will need such treatment in the future."

[36] Finally, on the availability of substance abuse treatment in India and how it can impact the risk to Mr. Singh's life, the RAD stated:

[39] (...) In his Respondent's Record, [Mr. Singh] does not contest the authenticity, reliability, or accuracy of these documents, and does not comment on them or provide any contradictory evidence. He asserts, in his responding memorandum, that his survival would be threatened if he relocates to New Delhi because he would not be able to access substance abuse treatment. The documentary evidence does not support that argument. I am satisfied, on a balance of probabilities, that, in light of the new evidence, the RPD's finding that [Mr. Singh] would be unable to access substance abuse treatment in New Delhi is not correct. I find that such treatment is available to him, if required.

[37] Those excerpts are only a few examples of several statements made by the RAD throughout the Decision, highlighting the insufficiency of the evidence and submissions made on behalf of Mr. Singh. I am satisfied that, when all of Mr. Singh's evidence is considered and the RAD's Decision is looked in its entirety, the record is certainly sufficient to demonstrate a reasonable probability that the outcome of the Decision would have been different, but for Ms. Cheema's incompetence in dealing with Mr. Singh's case.

[38] As counsel for both parties agreed at the hearing, the test does not require a certainty that the outcome would have been different; instead, a "reasonable probability" is the required threshold. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" and "lies somewhere between a mere possibility and a likelihood" (*Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 at para 96, citing *Olia v Canada (Minister of Citizenship and Immigration)*, 2005 FC 315 at para 6 and *R v Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667 at para 26).

[39] In the circumstances of this case, I am satisfied that the incompetence of Mr. Singh's former counsel resulted in a miscarriage of justice and that Mr. Singh has shown that the outcome of the appeal before the RAD would likely have been different had the RAD received evidence responding to the Minister's submissions on employment in India and the impact of the limited access to substance abuse treatment. In other words, Mr. Singh has shown how the materials and submissions filed by Ms. Cheema before the RAD were so inadequate as to have reasonably likely affected the outcome of the RAD's appeal. In the end, because of Ms. Cheema's omissions, Mr. Singh was unable to present his case fully before the RAD and was deprived of the opportunity to submit the evidence to defend his case. This calls for the Court's intervention.

[40] It is not disputed that the onus is on the applicant to demonstrate to the Court that there is a reasonable probability the outcome would have been different but for the incompetence of their former counsel (*Guadron* at para 17). In argument and evidence before this Court, Mr. Singh has identified the information, documents and evidence that he was incapable of putting before the RAD owing to Ms. Cheema's incompetence. He has also outlined the arguments that could or should have been made and that were reasonably likely to change the outcome of the appeal before the RAD. I am therefore satisfied that Mr. Singh has shown a reasonable probability that the documents and arguments he has now provided in the context of this judicial review would have been admissible before the RAD and would have had a material bearing on the determinative issues before the RAD, and that the Decision would have been different but for his former counsel's omissions and incompetence. Not putting them before the RAD has prejudiced Mr. Singh.

IV. **Conclusion**

[41] For all the reasons detailed above, I conclude that the incompetence of Mr. Singh's former counsel resulted in a miscarriage of justice and amounted to a violation of his right to procedural fairness. Since Mr. Singh was not given a full and fair opportunity to be heard and to respond to the case he had to meet, I must allow this application for judicial review and return the matter to have his application redetermined by a differently constituted panel, in accordance with the Court's reasons.

[42] The parties proposed no question of general importance for certification and I agree that none arises in this case.

JUDGMENT in IMM-5097-21

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is granted, without costs.
2. The decision of the Refugee Appeal Division [RAD] dated June 30, 2021, rejecting the Applicant’s refugee claim, is set aside and the matter is referred back to a different panel of the RAD for redetermination on the merits, in accordance with the Court’s reasons.
3. There is no question of general importance to be certified.

“Denis Gascon”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5097-21

STYLE OF CAUSE: HARPREET SINGH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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JUDGMENT AND REASONS: GASCON J.

DATED: MAY 26, 2023

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