Federal Court Cour fédérale

Date: 20230602

Docket: IMM-10235-22

Citation: 2023 FC 776

Vancouver, British Columbia, June 2, 2023

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

BARINDER SINGH SIDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Immigration Appeal Division [IAD] declared Mr. Sidhu inadmissible to Canada. It also declined to stay his removal from Canada based on humanitarian and compassionate [H&C] considerations. Mr. Sidhu then asked the IAD to reopen his case, alleging that his former counsel provided incompetent representation with respect to the H&C factors, in particular by refusing to follow his instructions to call his sister and wife as witnesses. The IAD declined to reopen the case. Mr. Sidhu now seeks judicial review of the latter decision.

[2] I am dismissing Mr. Sidhu's application. The IAD reasonably held that Mr. Sidhu's former counsel never refused to call his sister and wife as witnesses. Rather, this was a strategic decision discussed with Mr. Sidhu. The IAD's finding that the former counsel did not provide incompetent representation regarding the H&C factors was also reasonable. As this is sufficient to dispose of the application, I need not address the issue of what the outcome of the case would have been had these witnesses been called to testify.

I. Background

[3] Jaswinder Kaur Sidhu was murdered in India in 2000. The murder was allegedly arranged by her family in Canada, who disapproved of her marriage to an Indian man. The murder spawned multiple proceedings in both India and Canada, including this application for judicial review.

[4] The applicant, Balwinder Singh Sidhu, had no involvement in the murder. His father, however, was convicted of conspiracy to commit murder in 2005 by an Indian court, because his phone was used in planning the murder.

[5] In 2008, while on parole, Mr. Sidhu's father obtained permanent residence in Canada. He was sponsored by his daughter, Mr. Sidhu's sister. He failed to declare the murder conviction both in his application and during his interview at the port of entry. Mr. Sidhu was included in his father's application as a dependent child and obtained permanent residence as well.

[6] The Supreme Court of India later overturned the conviction of Mr. Sidhu's father. The Court gave him the benefit of the doubt, because other people had access to the phone allegedly used to plan the murder. It appears that Mr. Sidhu's father is no longer in Canada.

[7] It should also be noted that two members of Mr. Sidhu's extended family, Surjit Singh Badesha and Malkit Kaur Sidhu, were extradited to India in 2019 to face charges related to the murder, after proceedings that culminated in the Supreme Court of Canada: *India v Badesha*, 2017 SCC 44, [2017] 2 SCR 127. Mr. Badesha and Ms. Sidhu are respectively the uncle and the mother of the victim. Mr. Badesha's son is married to Mr. Sidhu's (the Applicant's) sister.

[8] In 2015, the Minister initiated proceedings to have Mr. Sidhu declared inadmissible to Canada for misrepresentation. These proceedings gave rise to the decision of the Federal Court of Appeal in *Sidhu v Canada (Citizenship and Immigration)*, 2019 FCA 169, [2019] 4 FCR 508, which sent the matter back to the IAD.

[9] In November 2020, the IAD allowed the appeal from the original decision of the Immigration Division and found Mr. Sidhu to be inadmissible. I will call this decision the "inadmissibility decision." The IAD found that Mr. Sidhu was inadmissible pursuant to section 40 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], because his father's misrepresentation could be attributed to him and, in any event, his own duty of candour required him to disclose his father's conviction to immigration authorities.

[10] What is most relevant to this application is the IAD's consideration of humanitarian and compassionate [H&C] considerations, pursuant to subsection 69(2) of the Act. The IAD noted that Mr. Sidhu showed no remorse and continued to blame his father and that the misrepresentation was serious. Regarding the impact of removal on Mr. Sidhu's family, the IAD found that the evidence was lacking, in particular because his wife and sister (who lives nearby) did not testify in his support. Nevertheless, the IAD found that Mr. Sidhu's wife would suffer some hardship and that this was a mildly positive factor. Establishment in Canada and hardship upon return to India were considered to be moderately positive factors. The IAD then turned to the best interest of Mr. Sidhu's daughter, who was then five years old. It highlighted the paucity of evidence on that subject and acknowledged Mr. Sidhu's testimony to the effect that his wife and daughter would remain in Canada. Nevertheless, it gave weight to this factor, because it was in the daughter's interest that her father remain in Canada. In the end, despite the positive factors, the IAD concluded that the situation did not warrant special relief and issued an exclusion order.

[11] Mr. Sidhu brought an application for leave and judicial review of the inadmissibility decision, but abandoned it. Rather, represented by new counsel, he asked the IAD to reopen his case based on incompetent representation by his former counsel. He alleged that his former counsel failed to follow his instructions to call his sister and wife as witnesses and failed to bring adequate evidence of the H&C factors. The former counsel was notified of the allegations and denied them, providing a detailed account of the litigation strategy that was pursued. In particular, he denied that Mr. Sidhu gave him instructions to call his sister and wife as witnesses.

[12] In September 2022, a different panel of the IAD dismissed Mr. Sidhu's application to reopen the case. The IAD preferred the former counsel's version of the facts. It found that Mr. Sidhu had thorough discussions with his former counsel regarding the litigation strategy and the desirability of calling his sister and wife. Moreover, it relied on the fact that the previous IAD member specifically asked Mr. Sidhu to explain why his wife did not testify, and that Mr. Sidhu's answer suggests that he did not want his wife to testify. With respect to H&C considerations more generally, the IAD found that the former counsel and Mr. Sidhu discussed the need to obtain evidence. Moreover, there was in fact extensive H&C evidence before the inadmissibility panel and it was canvassed in the former counsel's submissions. The IAD also rejected Mr. Sidhu's contention that his former counsel reached a deal with the Minister's counsel that he would focus exclusively on the "point of law." Thus, the IAD concluded that Mr. Sidhu had not established his former counsel's incompetence. In addition, the IAD found that the alleged incompetence did not affect the previous panel's material findings, with the consequence that the outcome would probably not have been different.

[13] Mr. Sidhu now seeks judicial review of the IAD's reconsideration decision.

II. Analysis

[14] Mr. Sidhu made three allegations of incompetence against his former counsel: he failed to follow his instructions to call his sister as a witness; he failed to follow his instructions to call his wife as a witness; and he failed to bring sufficient evidence of the H&C factors. While the first two allegations can be analyzed together, I will treat the third one separately.

[15] Before analyzing whether the IAD's rejection of these allegations was reasonable, I will briefly outline the analytical framework for assessing allegations of lawyer incompetence.

A. *Analytical Framework*

[16] Litigants are usually bound by the acts of their counsel. In exceptional cases, however, incompetent representation may give rise to a breach of procedural fairness. In this case, section 71 of the Act allows the IAD to reopen a matter where "it failed to observe a principle of natural justice," which includes cases of incompetent representation.

[17] The Supreme Court of Canada provided the following guidance for the assessment of allegation of incompetent representation in *R v GDB*, 2000 SCC 22 at paragraphs 26–27, [2000] 1 SCR 520 [*GDB*]:

> . . . it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.
>
> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[18] The two components of the test are sometimes called the "performance" and the "prejudice" components, respectively.

[19] My colleague Justice Alan Diner summarized these requirements as they apply in immigration proceedings as follows, in *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at paragraph 11:

> 1. The representative's alleged acts or omissions constituted incompetence;
>
> 2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and
>
> 3. The representative be given notice and a reasonable opportunity to respond.

[20] The parties disagree as to whether the words "reasonable probability," in the second prong of this test, accurately describe the nature of the burden that the applicant needs to discharge to show that he has suffered prejudice because of incompetent representation. In this regard, Mr. Sidhu argues that *Sabitu v Canada (Citizenship and Immigration)*, 2021 FC 165 at paragraphs 70–80, offers a more accurate formulation of the test. However, because I conclude that the IAD reasonably found that the former counsel was not incompetent, I need not address this issue.

[21] However, I need to address an issue regarding the IAD's understanding of the first prong of the test. At paragraph 50 of its decision, the IAD stated that "it has not been demonstrated on a balance of probabilities that [the former counsel's conduct] rises to a level of incompetence." Mr. Sidhu argues that this is a mistake, because the standard, according to *GDB*, is reasonableness, not balance of probabilities. In my view, the IAD did not err. The concept of balance of probabilities pertains to the assessment of conflicting evidence. For example, whether the former counsel's account of events should be preferred to Mr. Sidhu's is an evidentiary issue that falls to

be determined according to the balance of probabilities. Once the facts are established, they are assessed in light of what could reasonably be expected of a lawyer in the circumstances. This is what the Supreme Court explained in the excerpt from *GDB* reproduced above. I am satisfied that the IAD did not confuse the two concepts.

B. *Failure to Call Mr. Sidhu's Sister and Wife as Witnesses*

[22] Mr. Sidhu's first two allegations of incompetence were entirely based on his own account of the events, according to which he gave instructions to his former counsel to call his sister and wife as witnesses, but his former counsel refused. The former counsel gave an entirely different version of the facts. According to him, not calling Mr. Sidhu's sister and wife was a strategic decision made at the beginning of the proceeding based on the risk that their testimonies would not help Mr. Sidhu's case and the desire to avoid negative impacts on other members of the family who were involved in existing or potential proceedings. If the former counsel's version of the facts is preferred, the basis for Mr. Sidhu's first two allegations of incompetence entirely disappears.

[23] Thus, the determinative issue before the IAD with respect to these allegations was a pure question of fact. It did not involve the appreciation of the conduct of the former counsel. On this issue, the gist of the IAD's reasons is found at paragraph 30 of the decision:

> Ultimately, I prefer the statements of former counsel written down and made contemporaneous with their actual consultative discussions, and not made in preparation for this Application, over the Applicant's more recent arguments based on his recollections of discussions with former counsel a full year after the consultation, months after the hearing, and after the Applicant has had an opportunity to soberly process the areas where a different

> strategy might have been invoked. This is especially so where the Applicant failed to seize the opportunity to produce his wife to testify or explain her absence in a manner consistent with his present Affidavit statements, when prompted directly by the Member at the second sitting.

[24] On judicial review, findings of fact are afforded a high level of deference. The Court intervenes only "where the decision maker has fundamentally misapprehended or failed to account for the evidence before it": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 126, [2019] 4 SCR 653 [*Vavilov*].

[25] In this case, after reviewing the evidence, the IAD's reasons and the parties' submissions, I conclude that the IAD's finding that Mr. Sidhu never instructed his former counsel to call his sister and wife as witnesses was reasonable. Mr. Sidhu's submissions to the contrary are more in the nature of the proverbial "line-by-line treasure hunt for error" (*Vavilov*, at paragraph 102), which is not the role of the Court on judicial review. I analyze these submissions below, grouping them in what appears to be the most logical order.

(1) An Illogical Strategy?

[26] Mr. Sidhu first argues that the IAD unreasonably accepted the former counsel's version of the facts in spite of its internal inconsistencies. He contends that there was no need for a strategic discussion regarding potential witnesses before H&C factors came into play in early 2020. Moreover, because Mr. Badesha and Ms. Sidhu were extradited in 2019, there was no longer any need to have their interests in mind at the admissibility hearing in 2020.

[27] The former counsel's file opening notes, however, show that these concerns were already discussed in 2016. Further notes show that they were discussed again in 2019, in preparation for the admissibility hearing. While it is true that the extradition took place in 2019, there were other ways in which the testimony of Mr. Sidhu's sister and wife could be detrimental to family members. This was explained in the former counsel's answer to the allegations of incompetence and need not be set out in detail here. Moreover, the former counsel explained that there were other reasons for the decision not to call Mr. Sidhu's sister and wife.

[28] Thus, there is nothing anachronistic, inconsistent or illogical in the former counsel's description of the strategy he pursued.

(2) Ms. Verma's Testimony

[29] Mr. Sidhu also raised a number of issues related to Ms. Verma, a friend who testified in his favour at the admissibility hearing.

[30] In this regard, the former counsel stated that Mr. Sidhu had instructed him that his wife and Ms. Verma should not be in the same room together, without giving any explanation. He surmised that they might have a relationship. Moreover, while Ms. Verma testified that she knew Mr. Sidhu's wife and regularly visited, the wife told the former counsel that she did not know Ms. Verma. The former counsel thus concluded that should the wife testify, she would likely contradict Ms. Verma, which would not help Mr. Sidhu's case. The IAD accepted this explanation.

[31] On judicial review, Mr. Sidhu challenges various aspects of the former counsel's account of this situation, suggesting that they are incoherent or that the former counsel should have acted differently. For example, he argues that it is illogical that the former counsel tried to secure a larger hearing room to allow Mr. Sidhu's wife and family to attend, if the wife could not be in the same room as Ms. Verma. He also suggests that if his wife and Ms. Verma were somehow incompatible, it would have been preferable to have his wife testify instead of Ms. Verma. In fact, these submissions were made before the IAD, who nevertheless preferred the former counsel's account of events.

[32] I am unable to find that these objections render the former counsel's account of the events so implausible that it was unreasonable for the IAD to accept it. Many things can happen in a hearing involving witnesses. Counsel may have to adapt quickly in a manner that may not seem perfectly logical in hindsight, but may nevertheless be reasonable in the circumstances. Moreover, in the affidavit she filed in the reconsideration proceedings, Mr. Sidhu's wife does not explain why she told the former counsel that she did not know Ms. Verma nor does she explicitly say whether she actually knows Ms. Verma.

(3) The Wife's Evidence

[33] Mr. Sidhu's wife provided an affidavit in support of the application to reopen the matter before the IAD. In its decision, the IAD did not refer directly to this evidence. Mr. Sidhu argues that in doing so, the IAD failed to account for evidence that directly contradicts its findings, contrary to *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).

[34] The wife's affidavit essentially reiterates Mr. Sidhu's account of the events. It also explains what evidence she could have provided had she been called to testify. Insofar as it merely duplicates Mr. Sidhu's evidence, the IAD was not required to mention it in its reasons.

C. *Failure to Adduce Sufficient Evidence of H&C Factors*

[35] Mr. Sidhu's last allegation of incompetence is somewhat different from the first two. The IAD could not dispose of it simply by preferring the former counsel's account of events to Mr. Sidhu's. Rather, the IAD had to assess, based on the whole record, whether the former counsel's representation of Mr. Sidhu reached the high threshold of incompetence. The IAD performed this assessment and found that Mr. Sidhu had not shown that his former counsel was incompetent in adducing evidence pertaining to the H&C factors.

[36] In my view, the IAD's decision is reasonable. The IAD conducted a thorough review of the proceedings at the admissibility hearing, based on the record, the inadmissibility decision and the explanations of the former counsel.

[37] To challenge the IAD's findings, Mr. Sidhu relies on certain excerpts from the inadmissibility decision and on the transcript of his conversation with a paralegal working for his former counsel. I address these submissions in turn.

(1) The Remarks in the Inadmissibility Decision Regarding the Lack of Evidence

[38] In the inadmissibility decision, the IAD noted several times the fact that Mr. Sidhu's wife and sister did not provide evidence, except by way of affidavit on a narrow issue. For example, at paragraph 68, the IAD wrote that "one would expect a concerned spouse to have participated in this final appeal stage in some manner." At paragraph 82, it noted the "significant lack of evidence regarding [Mr. Sidhu's] child and her circumstances."

[39] These comments may give rise to two different sets of concerns. They may first be relied upon as evidence of the former counsel's incompetence—the "performance" component of the test. They may also tend to show that, if incompetence has been established, it had an effect on the outcome of the case—the "prejudice" component of the test.

[40] With respect to "performance" or, in other words, the former counsel's alleged incompetence, these comments are inextricably tied to the strategic decision not to call Mr. Sidhu's sister and, most importantly, his wife as witnesses. In this regard, the IAD found, at paragraph 23, that the "former counsel's conduct falls within the spectrum of what would be reasonable in the circumstances of the case." Mr. Sidhu did not attempt to challenge this finding, other than by arguing that the former counsel disobeyed explicit instructions. He did not argue that the strategic decision not to call his sister and wife to testify was unreasonable or the product of incompetent representation. Rather, he maintained that there was never such a strategic decision.

[41] In highlighting the statements contained in the inadmissibility decision, Mr. Sidhu appears to be arguing that he suffered prejudice from the failure to call his sister and wife as witnesses. Even if this were true, this does not show that the decision not to call these witnesses was the product of incompetence. Strategic decisions may have an impact on the outcome. Strategic decisions involve a balancing of risk and benefits. When the risk materializes, the strategic decision does not become unreasonable or the product of incompetence. As the Supreme Court stated in *GDB*, hindsight has no place in assessing incompetence. Therefore, the IAD's findings, in the reconsideration decision, are reasonable.

[42] As I explained above, given that I am able to dispose of the case on the "performance" component, I need not go a step further and inquire whether the IAD's finding that the failure to call Mr. Sidhu's sister and wife as witnesses had no impact on the outcome is reasonable.

(2) The Conversation with the Paralegal

[43] Mr. Sidhu also challenges the IAD's treatment of a recorded conversation with a paralegal who was assisting his former counsel. He provided the IAD with a transcript of the conversation, but not the recording itself. He alleged that the paralegal acknowledged that the former counsel had made a deal with the Minister's counsel, whereby he would not advance H&C considerations but rather "focus on the point of law."

[44] The IAD gave little weight to this evidence, for a number of reasons. First, the paralegal may not have fully understood the strategy nor have been privy to all the relevant conversations. Second, the original recording was not provided and the paralegal did not acknowledge that the

transcript was accurate. Third, the record shows that the former counsel did not exclusively focus on a “point of law,” but raised H&C considerations. Fourth, the allegation of a deal is incendiary and made with little evidence.

[45] In my view, the third reason given by the RAD is determinative. Whatever was said in the conversation, it is simply not true that the former counsel focused exclusively on Mr. Sidhu’s admissibility—if that is what is meant by a “point of law”—to the detriment of H&C considerations.

[46] With respect to the alleged deal, as far as we can understand from the transcript of the conversation, it was a proposed deal that never materialized.

[47] Therefore, it becomes immaterial that the IAD erred by discounting the transcript because the recording had not been provided or because the paralegal did not expressly acknowledge its accuracy. It is also immaterial that the IAD mistakenly referred to the November 2019 hearing as the final sitting instead of the initial sitting of the admissibility hearing. As a result, nothing in the transcript of this conversation affects the reasonableness of the IAD’s decision.

III. Disposition

[48] Mr. Sidhu failed to show that the IAD’s central finding, that his former counsel did not provide incompetent representation, is unreasonable. Quite simply, Mr. Sidhu’s application to reopen the case before the IAD was nothing but an attempt to reverse a strategic decision made in the course of the admissibility hearing. This was not a case of incompetent representation.

[49] For these reasons, the application for judicial review will be dismissed.

[50] The parties made submissions regarding the certification of a question pertaining to the second prong of the test, namely, the effect on the outcome of the case. As this issue is not determinative, I decline to certify the proposed question.

JUDGMENT in IMM-10235-22

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to substitute the Minister of Citizenship and Immigration as respondent.
2. The application for judicial review is dismissed.
3. No question is certified.

"Sébastien Grammond"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10235-22
STYLE OF CAUSE:	BARINDER SINGH SIDHU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 31, 2023
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	JUNE 2, 2023

APPEARANCES:

Harry Virk	FOR THE APPLICANT
Mary Murray	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Liberty Law Corporation Abbotsford, British Columbia	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT