Federal Court  Cour fédérale

Date: 20230713

Docket: IMM-9363-22

Citation: 2023 FC 951

Ottawa, Ontario, July 13, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

RAJAT WADHWA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Rajat Wadhwa [Applicant] seeks judicial review of an Immigration, Refugees and Citizenship Canada [IRCC] officer's [Officer] September 7, 2022 decision [Decision] refusing the Applicant's application to sponsor his father because he did not meet the minimum necessary income [MNI] requirements under subparagraph 133(1)(j)(i) of the *Immigration and Refugee*

Protection Regulations, SOR/2002-227 [*IRPR*]. The Officer noted there was no right to appeal as the Applicant elected to withdraw the application if he was found ineligible to sponsor.

[2] The application for judicial review is dismissed. The Applicant has not demonstrated that there was a breach of procedural fairness due to incompetent representation by his former authorized representative.

II. Background

[3] The Applicant, a permanent resident of Canada, applied to sponsor his father, an Indian national, to Canada. In response to the first question in his sponsorship application, the Applicant elected to withdraw his application if found ineligible [Withdrawal Answer].

[4] On September 7, 2022, the Applicant was found ineligible to sponsor his father. On September 23, 2022, the Applicant filed an Application for Leave and for Judicial Review [ALJR] of the Decision.

III. The Decision

[5] The Officer refused the Applicant's sponsorship application because the Applicant did not meet the MNI requirements under subparagraph 133(1)(j)(i) of *IRPR*. The Officer assessed the Applicant's total eligible income against the MNI requirements for the years 2018 to 2020 [Assessment Period]. The Applicant met the MNI in only the last year of the Assessment Period. The Officer concluded that there was no right to appeal the Decision as the Applicant elected to withdraw his application if found ineligible.

IV. Issues and Standard of Review

[6] The sole issue for determination is whether there a breach of procedural fairness based on incompetent representation.

[7] The Applicant does not address the standard of review for a breach of procedural fairness. The Respondent submits the standard of review for a breach of procedural fairness is akin to correctness (*Kaur v Canada (Citizenship and Immigration)*, 2021 FC 1242 at para 10 [*Kaur*]; *Canada (MCI) v Vavilov*, 2019 SCC 65 at paras 10, 23).

[8] I agree with the Respondent the standard of review is akin to correctness (*Kaur* at para 10; *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at para 54 [*CP Railway*]; *Sidhu v Canada (Citizenship and Immigration)*, 2022 FC 56 at para 18; *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 at para 9). The reviewing court must ask whether the procedure was fair having regard to all the circumstances, including whether the Applicant knew the case to meet and had a full and fair chance to respond (*CP Railway* at paras 54, 56; *Kaur* at para 10).

V. Analysis

A. *Applicant's Position*

[9] An applicant must satisfy a three-part test to establish a breach of procedural fairness on the basis of counsel's performance (*Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 [*Galyas*], citing *R v GDB*, 2000 SCC 22 [*GDB*]):

> [62] … (i) he must provide corroboration by giving notice to the former counsel and providing them an opportunity to respond; (ii) he must establish that his counsel's act or omission constituted incompetence without the wisdom of hindsight; and (iii) he must establish that the outcome would have been different but for the incompetence.

[10] First, the Applicant complied with the *Allegations against former counsel or another authorized representative in Citizenship, Immigration and Refugee Cases before the Federal Court* [Protocol]. On October 14, 2022, after filing his ALJR, the Applicant provided his former authorized representative notice that his instructions were not sought regarding the Withdrawal Answer. The representative did not answer. The Applicant then filed and served his application record on October 24, 2022.

[11] Further, the only evidence available are these reasonable and logical allegations. Namely, the Applicant's former authorized representative did not seek his instructions or explain the consequences of selecting the Withdrawal Answer. There is no reasonable additional evidence.

[12] Lastly, the third part of the test does not require consideration of whether the IAD appeal hearing before the Immigration Appeal Division [IAD] would have been successful. Rather, the issue is whether the outcome would have been different in terms of being afforded a right to appeal. Here, the Applicant lost his ability to have a substantive appeal heard on its merits based on existing Humanitarian and Compassionate [H&C] factors. This is especially noteworthy given that the Applicant is only able to apply to sponsor if selected in IRCC's annual "lottery", resulting in no ability for the Applicant to re-submit his application. The nature of sponsorship applications result in significant prejudice to the Applicant.

B. *Respondent's Position*

[13] There was no breach of procedural fairness due to incompetent representation. The bar to establish a breach of procedural fairness in this case is high and only applies in extraordinary circumstances. The Respondent agrees with the Applicant's submissions of the three-part test. In oral submissions, the Respondent submitted that the second part of the test is known as the performance component and the third part of the test is known as the prejudice component.

[14] First, the Applicant did not abide by the Protocol as set out in the Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings [Guidelines]. The Guidelines require notice be given to the former authorized representative prior to pleading incompetence, and that absence urgency, the Applicant wait for a written response before filing and serving the application record. Here, the Applicant only adduced evidence indicating he notified his former authorized representative three weeks after filing his ALJR. There is no proof of receipt or evidence relating to a response from the former authorized representative.

[15] Even if the Guidelines were followed, the Applicant has not filed an affidavit or other evidence to support his allegation. Namely, there is no evidence to support the Applicant's allegations that his former authorized representative was incompetent or that the outcome of the application would have been different but for the alleged incompetence. The Applicant has also provided no evidence relating to alleged H&C factors in this case. Therefore, it is purely speculative for the Applicant to state the outcome would have been different if he had elected to proceed with the application and had the right to appeal to the IAD on H&C grounds.

C. *Conclusion*

[16] The parties have correctly articulated the conjunctive tri-partite test. I acknowledge the Respondent's characterization of the second part of the test as the performance component and the third part of the test as the prejudice component has recently been acknowledged as such by this Court (*Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at para 30 [*Discua*]). Only in extraordinary cases can incompetent representation give rise to a breach of procedural fairness (*Galyas* at para 83). The Applicant has failed to satisfy all parts of the test.

[17] First, the Protocol contains procedures that the Applicant ought to follow when alleging incompetence against his former authorized representative as a ground for judicial review. Counsel must notify the former authorized representative in writing with sufficient details of the allegations prior to pleading incompetence as a ground for relief and advise the matter will be pled in the application. The written notice must also advise the former authorized representative that they have seven days from the receipt of the notice to respond. Unless urgent, counsel should wait for a written response from the former authorized representative before filing and serving the application record. Counsel must also send a signed authorization form releasing privilege attached to the former representation and serve the application record on the former authorized representative. If no response from the former 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 representative is being submitted.

[18] The Applicant claims that he complied with the Protocol because he notified his former authorized representative prior to filing and serving his application record. However, the Applicant only partially complied with the Protocol by notifying the former authorized representative prior to filing his application record. The ALJR did not contain a pleading of incompetent representation. Incompetence was raised in the Applicant's counsel's letter to the former authorized representative, dated October 14, 2022, and pled only in the Applicant's memorandum contained in the application record as well as his reply submissions. While there is no indication that current counsel served the former authorized representative with the application record, conversely there is no evidence he did not. The Applicant submits that he provided the application record by email but that the former representative did not respond. Nor is there any evidence that Applicant's counsel advised the Court and the Respondent that no further information from the representative would be submitted.

[19] Regardless of the technicalities in abiding by the Protocol, recent jurisprudence has emphasized the Court can take unique circumstances into account in determining whether the Applicant or their counsel complied with the first step of the test (*Discua* at para 51; *Devi v Canada (Citizenship and Immigration)*, 2023 FC 328 at para 14; *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at para 26 [*Nik*]). In this case, the Applicant has not pointed to any unique circumstances. Unlike in *Discua* and *Nik*, the former counsel or representative did not respond to the notice specifying allegations of incompetent counsel. Further, unlike in *Devi*, counsel provided no explanation as to why the Applicant was unable to comply with the Protocol in a timely manner. The fact that there is no confirmation that the application record was served on the former authorized representative and the fact that current counsel did not advise the Court

and the Respondent that no further information from the former authorized representative would be submitted strongly indicates the Applicant failed to meet the first prong of the test.

[20] For completeness, I nevertheless find that the Applicant has not satisfied the second part of the test. This is determinative to the application for judicial review. In this part of the test, the Applicant has a two-fold onus to: (1) establish the facts they rely on to impugn the conduct of their former authorized representative, and (2) demonstrate the conduct fell below the standard of reasonable professional assistance of judgment (*Discua* at para 52; *GDB* at para 27).

[21] As outlined by Justice Norris, "an expression of general dissatisfaction with former counsel's conduct is insufficient; the allegation of negligence or incompetence must be specific and clearly supported by the evidence" (*Discua* at para 53, emphasis added). Here, although the Applicant has specified the allegations, he has not advanced any evidence in support of these allegations. Nor does the Applicant demonstrate in an affidavit or other evidence that his former authorized representative did not seek instructions with respect to the Withdrawal Answer or explain the consequences of withdrawing the application if found ineligible. The Applicant's pleadings merely set out the allegations regarding his former authorized representative without anything more. This is not sufficient to meet the high threshold outlined in the second part of the test.

[22] In light of my determination that the Applicant has not satisfied the first two parts of the test as outlined in the jurisprudence, it is not necessary to assess the third part of the test.

VI. Conclusion

[23] The Applicant did not satisfy the tri-partite test to establish a breach of procedural fairness based on incompetent representation.

[24] The parties do not propose a question for certification and I agree none arises.

JUDGMENT in IMM-9363-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9363-22
STYLE OF CAUSE:	RAJAT WADHWA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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DEPARTMENT OF JUSTICE VANCOUVER, BC	FOR THE RESPONDENT