Federal Court  Cour fédérale

Date: 20230802

Docket: IMM-10400-22

Citation: 2023 FC 1064

Vancouver, British Columbia, August 2, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

MANDEEP KAUR & ARAV

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, Mandeep Kaur and her son, bring this application for judicial review of a September 30, 2022 decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board that set aside the Refugee Protection Division's (RPD) decision, and found that the applicants are not Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [*IRPA*] because they have viable internal flight alternatives (IFAs) within India.

[2] The applicants fear that if they return to India, they will be killed or harmed by Ms. Kaur's brother-in-law and his wife, who became increasingly abusive over a land dispute. Ms. Kaur's husband also suffered abuse at the hands of his brother, but he chose not to travel to Canada in order to care for his ill father.

[3] The sole issue for review is whether the applicants were denied procedural fairness or natural justice due to the incompetence of their former representative, a registered immigration consultant who represented the applicants at their hearing before the RPD. Prior to the RPD hearing, Ms. Kaur states she sent the former representative a petition for divorce that her husband had served on her from India. Ms. Kaur states she relied on the former representative to advise her how to utilize the document, and he told her not to change her story as she would need to maintain a consistent story in order to be successful. The divorce petition was not submitted as evidence.

[4] Although Ms. Kaur was represented by different counsel before the RAD, she states she did not share the information with her new counsel as she continued to rely on the advice her former representative gave her. Ms. Kaur submits it was reasonable to continue to rely on his advice because she had been successful before the RPD. The applicants argue that the negligence and incompetence of the former representative flowed to the RAD appeal despite having new counsel, based on Ms. Kaur's reasonable, ongoing reliance on the previous advice.

[5] The applicants contend the divorce petition is central to the RAD's reasons for overturning the RPD's determination and concluding that the applicants have viable IFAs in India.

[6] The RPD had found the applicants were Convention refugees under section 96 of the *IRPA* as members of a particular social group at risk of domestic violence. While there were no grounds to fear persecution or harm under sections 96 or 97 in any of three proposed IFA cities (the applicants had not established that the agents of persecution had the ability or motivation to locate and harm them in the IFAs), the RPD found it would be unduly harsh for the applicants to relocate due to the difficulties they would face in securing employment and accommodation. One of the RPD's significant findings was that Ms. Kaur's husband would not relocate to an IFA in order to assist the applicants. The RPD therefore assessed the country condition evidence in light of Ms. Kaur's profile as a single woman, and found it would be objectively unreasonable or result in undue hardship for the applicants to relocate to the proposed IFAs due to the difficulties they would face in obtaining accommodation and employment.

[7] The RAD set aside the RPD's decision, on the basis the RPD had erred in finding it would be unreasonable, in all the circumstances, for the applicants to relocate to any of the proposed IFA cities. The RAD's reasons included that the RPD had failed to take into account relevant evidence and inconsistencies in Ms. Kaur's testimony when it found Ms. Kaur's husband would not relocate to any of the proposed IFA cities to provide assistance. The RPD had failed to consider that Ms. Kaur's refugee claim indicated her husband would accompany the applicants to Canada. The RPD had also asked Ms. Kaur if her husband would join the

applicants in the proposed IFAs and she testified, “Yes. I would say that, if we move into any of those cities, he will come because he is in India, he will come.” The RAD noted that at times Ms. Kaur indicated she was uncertain if her husband would leave his father to move to an IFA city; however, the RAD found it was Ms. Kaur who did not want her husband to leave his father, and Ms. Kaur testified her husband was “more than willing” to help the applicants. The RAD concluded that Ms. Kaur’s husband would likely move to be with the applicants, or at a minimum he would provide assistance. Therefore, it was an error for the RPD to treat Ms. Kaur’s situation as akin to that of a single mother who would be moving to one of the IFA cities on her own and who would be solely responsible for supporting herself and her son.

[8] The RAD also rejected the RPD’s characterization of Ms. Kaur as a single, uneducated woman, and found the evidence established that Ms. Kaur: (i) was still married and her husband was willing to assist her and their son if they relocate to an IFA city; (ii) completed her secondary education and has a certificate from the National Institute of Open Schooling; (iii) had worked in India as a gym trainer, and gained work experience in Canada at Amazon. The RAD concluded the applicants had failed to establish that any difficulties they would face in finding work and housing would be significant enough to put their lives and safety in jeopardy. While country condition evidence indicated that women in India have access to fewer employment opportunities that match their skills and education, the evidence did not indicate Ms. Kaur would be unable to find employment similar to her employment in Canada or that she would be unable to afford suitable housing—especially as Ms. Kaur’s husband would be doing what he could to assist, whether living with them in the IFA or from back in their hometown.

[9] The applicants submit they meet the test for establishing a breach of procedural fairness based on their former representative's performance: (i) they notified the former representative in accordance with Federal Court's protocol of March 7, 2014: *Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases* (Protocol), and he has not responded; (ii) the former representative's act or omission constituted incompetence without the benefit of hindsight because it was clear at the time that the divorce petition was relevant to the claim and whether Ms. Kaur's husband would relocate to an IFA, and it was negligent not to disclose relevant documents; and (iii) the outcome would have been different but for the incompetence, because the IFA analysis was premised on moving with Ms. Kaur's husband; therefore, the RAD failed to assess the IFA using Ms. Kaur's correct profile as a single, separated or divorced woman in view of country condition evidence about divorced women, and the RAD's finding regarding Ms. Kaur's inconsistent testimony would not have been a factor in the IFA analysis.

[10] The respondent submits the applicants improperly rely on evidence in Ms. Kaur's affidavit that was not before the RAD, and is inadmissible. Judicial review is not an opportunity to correct deficiencies in the evidence before the RAD and the RPD, and evidence that was not before the decision maker and goes to the merits of the matter is inadmissible unless it falls within limited exceptions: *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25. The respondent submits Ms. Kaur's affidavit in this proceeding does not fall under any exception for introducing new evidence on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at para 98 [*Tsleil-Waututh*

Nation]. The applicants could have sought to introduce the evidence on appeal to the RAD, and they did not do so.

[11] The respondent submits the applicants have not complied with the Protocol, and the allegations that they were denied procedural fairness due to the former representative's incompetence should not be considered. The applicants' current counsel did not satisfy himself, by means of personal investigation or inquiries, that there is some factual foundation for the allegations prior to pleading incompetence; in fact, the applicants only sent notice to the former representative after they filed a notice of application for leave and judicial review. In addition, current counsel did not provide the former representative with a signed authorization releasing any privilege attached to the former representation together with a copy of the Protocol, and current counsel did not wait for a written response from the former representative before serving and filing the application record.

[12] In any event, the respondent submits the applicants do not meet the high threshold for establishing a breach of procedural fairness due to incompetent representation: *Ibrahim v. Canada (Citizenship and Immigration)*, 2020 FC 1148 at para 30 [*Ibrahim*]. The general rule is that a representative's conduct cannot be separated from that of his client, and the jurisprudence is clear that in all but the most extraordinary cases, clients will be held to their choice of advisers: *Huynh v Canada (Minister of Employment & Immigration)* [1993] FCJ No 642, 21 Imm LR (2d) 18, 65 FTR 11.

[13] Furthermore, the respondent submits the RAD's IFA determination was based on the applicants' own evidence. Thus, there was no miscarriage of justice, and the applicants have not met the test to demonstrate a breach of procedural fairness resulting from incompetent representation.

[14] I conclude that this application for judicial review must be dismissed. For the reasons below, I find that the applicants failed to comply with the Protocol. While this is sufficient reason to dismiss the application, I also find the applicants have not established a breach of procedural fairness due to incompetent representation.

[15] I disagree with the respondent that Ms. Kaur's affidavit is inadmissible. In my view the affidavit is admissible, with the exception of paragraph 12. Paragraphs 1-10 and Exhibits A and B to Ms. Kaur's affidavit (which relate to her reliance on the former representative's advice including after retaining new counsel for the RAD appeal, the divorce petition, and emails showing the petition was provided to the former representative) fall within a recognized exception. This evidence describes defects that cannot be found in the evidentiary record that was before the administrative decision maker, and the evidence is necessary for the Court to engage in a meaningful review for procedural fairness: *Tsleil-Waututh Nation* at para 98. Paragraph 11 of Ms. Kaur's affidavit is admissible as it provides an explanation of Exhibits C and D, both of which are admissible. Exhibit C is the RPD decision, and Exhibit D is correspondence from the applicants' current counsel to the former representative, which is relevant to whether the applicants complied with the Protocol. Paragraph 12 of the affidavit

seeks to revise Ms. Kaur's testimony before the RPD about whether her husband would relocate to an IFA city, and is inadmissible.

[16] Turning to the Protocol, it appears to me that the applicants' current counsel did satisfy himself of a factual foundation for the allegations prior to pleading incompetence. Counsel had information that Ms. Kaur's husband had served a divorce petition, and that Ms. Kaur emailed the document to her former representative prior to the RPD hearing. Counsel also complied with the requirement to notify the former representative in writing. As per the Protocol, in November 2022 counsel sent a letter to the former representative by email, with details of the allegations of incompetence, and asked for a response within seven days. When the applicants filed their application record, the seven-day period had passed, and there had been no response from the former representative. In fact, current counsel states he never received a response to the November 2022 letter.

[17] The respondent is correct that the applicants did not provide a signed waiver of privilege; however, I am not satisfied that missing this step amounted to non-compliance with the Protocol. It is unclear to me if the former representative, a registered immigration consultant, required a waiver of privilege in order to respond to allegations of incompetence. Furthermore, there is nothing to suggest such a waiver would not have been provided, if the former representative asked for it.

[18] The missing steps that are more concerning relate to the failure to serve the former representative with a copy of the perfected application and file proof of service with the Court,

and the failure to send a copy of the order granting leave. In my view, these omissions interfere with a purpose of the Protocol, which is to provide the former representative with the opportunity to respond to the allegations made against him: *Pacheco v Canada (Citizenship and Immigration)*, 2018 FC 617 at para 20. The November 2022 letter, while detailed, was not served in accordance with the *Federal Courts Rules*. The failure to comply with these requirements may have deprived the former representative of an opportunity to request leave to intervene in this matter. In my view, compliance with these Protocol steps was particularly important in this case because the alleged incompetence—the only ground for relief—is not directly related to the RAD decision under challenge. The former representative is accused of negligence and incompetence that "flowed" to the RAD appeal, and he is blamed for the applicants' failure to raise the divorce decree on appeal even though he did not represent the applicants before the RAD. I am not satisfied that the applicants have substantially complied with the Protocol.

[19] My finding with respect to the Protocol is sufficient to dismiss this application, without entertaining the merits of the applicants' allegations of incompetence. However, I would note that the only evidence about the former representative's conduct is in Ms. Kaur's affidavit. Contrary to the applicants' submissions, the affidavit does not allege the former representative told Ms. Kaur "the documents would not be relevant to the claim". While Ms. Kaur states in her affidavit that she relied on her former representative to advise her how to use the divorce documents, she does not actually say what specific advice he provided about those documents. Ms. Kaur's affidavit only says the former representative told her "not to change my story", that she would "need to continue to maintain a consistent story for my case to be successful", and to

seek a lawyer to handle the Minister's appeal and "maintain my same story". There is no evidence or even an allegation that the former representative told Ms. Kaur to withhold information from her RAD counsel. Allegations of former counsel's incompetence must be sufficiently specific and clearly supported by the evidence: *Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at para 40. The evidence before me does not meet the threshold for demonstrating incompetence that results in a breach of procedural fairness: *Ibrahim* at para 30; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 63.

[20] The parties did not propose a serious question of general importance for certification. I find this case does not involve such a question.

JUDGMENT in IMM-10400-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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