

Federal Court



Cour fédérale

Date: 20240426

Docket: IMM-12366-22

Citation: 2024 FC 643

Ottawa, Ontario, April 26, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

RITU ANTTAL

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of India, seeks judicial review of a decision made by an Immigration, Refugees and Citizenship Canada officer [Officer] on November 4, 2022, refusing her application for a spousal open work permit and finding that she was inadmissible to Canada in accordance with paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the IRPA. Specifically, the Applicant failed to disclose that she had received three prior refusals for Canadian study permits.

[2] The Applicant does not assert that the Officer's decision was unreasonable. Rather, the Applicant asserts that there was a breach of her right to procedural fairness arising from incompetent representation by a licensed paralegal who acted as her representative [Representative] on the underlying work permit application. The Applicant argues that her Representative: (a) misinformed the Applicant that she was eligible for a spousal open work permit; (b) failed to disclose the Applicant's previous refusals in her application, which the Applicant asserts had been brought to the Representative's attention on more than one occasion; and (c) misrepresented that he was a lawyer.

[3] The Representative was given notice of the allegations made against him and he filed written submissions on March 8, 2023, together with various WhatsApp exchanges that were not exhibited to an affidavit. The Representative disputes all allegations of incompetence made against him. However, the Applicant did not serve the Representative with the leave order "forthwith," as required by this Court's protocol. Rather, the leave order was served on the Representative on April 15, 2024. Thereafter, in the limited time between service and the hearing of the application on April 24, 2024, the Representative brought no motion for leave to intervene, nor were any further communications received from the Representative.

[4] Allegations of incompetent counsel pertain to an applicant's right to fully present their case, which is an issue of procedural fairness [see *Zhou v Canada (Citizenship and Immigration)*, 2022 FC 1046 at para 9, citing *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27; *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 1360 at paras 24-26].

[5] The parties agree, and I concur, that the applicable standard of review with respect to the issue of competent representation is that akin to correctness. Breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a “reviewing exercise... ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” [see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54]. The duty of procedural fairness is “eminently variable,” inherently flexible and context-specific. A court assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances, including the *Baker* factors [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77; *Canadian Pacific Railway Company v Canada (Attorney General)*, *supra* at para 54].

[6] In order for the Applicant to succeed in establishing a violation of her right to procedural fairness resulting from incompetent representation, the Applicant must meet the requirements of the following tripartite test: (a) that the Representative’s alleged acts constitute incompetence; (b) that there was a miscarriage of justice in that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and (c) that the Representative has been given a reasonable opportunity to respond [see *Ram v Canada (Citizenship and Immigration)*, 2022 FC 795 at para 12 [*Ram*], citing *Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16]. The test for incompetent or negligent counsel is very high and will only constitute a breach of natural justice in “extraordinary circumstances” [see *Ram*, *supra* at para 12; *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at para 56].

[7] To satisfy the first prong of the test, the Applicant bears the onus of establishing that her Representative's conduct fell outside the range of reasonable professional assistance. There is a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" [see *Aluthge v Canada (Citizenship and Immigration)*, 2022 FC 1225 at para 36 [*Aluthge*], citing *R v GDB*, 2000 SCC 22 at para 27].

[8] To satisfy the second prong of the test, the Applicant must demonstrate that, but for the alleged conduct of her Representative, there is a reasonable probability that the original result would have been different [see *Aluthge, supra* at para 39].

[9] With respect to the Applicant's assertion that her Representative misinformed her that she was eligible for a spousal open work permit, the Applicant has not provided evidence as to the criteria for eligibility for a spousal open work permit, nor evidence as to why she does not meet those criteria, so as to establish that the Representative's conduct fell outside of the range of reasonable professional assistance. Moreover, a review of the Global Case Management System notes reveals that the Officer's decision turned on the sufficiency of the evidence provided to demonstrate that the Applicant and her fiancé were in a common-law relationship, and not a specific finding of threshold ineligibility. The Applicant has an obligation to provide the Court with clear evidence of incompetent representation and it is not the role of the Court to parse through the record to try to find evidence to support the Applicant's allegation.

[10] With respect to the Applicant's assertion that the Representative failed to disclose the Applicant's previous refusals in her application, the Applicant points to screenshots of WhatsApp conversations between her sister and the Representative where her sister informed the

Representative on two occasions of the Applicant's three prior refusals. However, the Representative claims in his letter that the Applicant's fiancé visited the Representative's home to complete the eligibility questions (including the question about past refusals) and reviewed the whole application thoroughly before the Representative submitted it.

[11] While I appreciate that the Representative has not provided affidavit evidence in support of his submission, neither the Applicant nor her fiancé provided any evidence that would contradict the submission of the Representative, despite having an opportunity to do so. At the hearing of the application, counsel for the Applicant in fact confirmed that the fiancé did review a version of the application before it was finalized.

[12] This is not a case where a representative improperly informed an applicant that they did not need to disclose a prior refusal, such as in *Aluthge*. Rather, the allegation here is that the Representative had knowledge of the prior refusals but failed to include them in the application. I have no evidence from the Applicant that she sought to review her application before it was submitted. Indeed, it would appear that she delegated the transmission of key information to the Representative to her fiancé and her sister, and delegated review of the application to her fiancé, neither of whom provided affidavits on this application. In the circumstances, I am not satisfied that the Applicant has provided sufficiently clear evidence so as to demonstrate incompetence on the part of her Representative as related to this issue.

[13] Moreover and importantly, it must be recalled that an applicant filing a work permit application has a duty of candour. The Applicant chose to rely on her Representative to submit the

required information without reviewing it herself. I find that it would be contrary to the Applicant's duty of candour to permit her to seek to overturn the decision of the Officer by pointing to asserted incompetence by her Representative in failing to disclose the prior refusals, while at the same time relying on her own failure to review her application to ensure that it was truthful and complete [see *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at paras 41-42]. In circumstances such as this, it would be nonsensical to permit a claim of incompetence to overcome the Applicant's own negligence in performing this duty.

[14] With respect to the Applicant's assertion that the Representative misrepresented his status as a lawyer, I am not satisfied that this constitutes a stand-alone ground of incompetence for the Court's consideration.

[15] Accordingly, I am not satisfied that the Applicant met the first part of the tripartite test for incompetent representation, which is a sufficient basis upon which to find that the Applicant has not demonstrated that there was a breach of her right to procedural fairness arising from incompetent representation. The application shall therefore be dismissed.

[16] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-12366-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The parties proposed no question for certification and none arises.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-12366-22

STYLE OF CAUSE: RITU ANTTAL v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 24, 2024

JUDGMENT AND REASONS: AYLEN J.

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