Federal Court Cour fédérale

Date: 20250106

Docket: IMM-16498-23

Citation: 2025 FC 33

Ottawa, Ontario, January 6, 2025

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

HARPREET KAUR AHUJA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this judicial review, the Applicant Harpreet Kaur Ahuja, a citizen of India, alleges a breach of natural justice because of incompetence on the part of her former counsel who, on her behalf, submitted an incomplete application for permanent residence that was rejected.

[2] The Respondent argues that, as was open to the Applicant to do, she simply should have reapplied with the missing documentation, rather than waste scarce judicial resources, in the absence of compelling evidence that her former counsel was incompetent.

[3] Having considered the parties' records, their oral submissions and relevant jurisprudence, I am not satisfied that Ms. Ahuja's current counsel followed the Court's *Protocol* regarding allegations of incompetence against authorized representatives in a procedurally fair manner. Nor am I persuaded that there is conclusive evidence of former counsel's incompetence warranting judicial intervention. For the more detailed reasons that follow, this judicial review application thus will be dismissed.

[4] I deal first with the issue of incomplete compliance with the *Protocol* by Ms. Ahuja's current counsel, and then second with the issue of inconclusive evidence of incompetence on the part of Ms. Ahuja's former counsel.

II. Analysis

A. *Current counsel's incomplete compliance with the Protocol*

[5] I note that the Applicant's Record shows incomplete compliance with the Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* dated June 24, 2022 (last amended October 31, 2023) insofar as the guidelines relate to the protocol for *Allegations against authorized representatives in Citizenship, Immigration and Refugee Cases before the Federal Court* [*Protocol*]. Although the *Protocol*

does not describe consequences for non-compliance, whether any instance of non-compliance will attract judicial scrutiny and repercussion is highly fact-dependent and at the discretion of the judge in each case. As I explain, while I am sympathetic to Ms. Ahuja's frustration, the factual matrix here, when considered holistically, warrants the result, especially in the context of the third element of the test for counsel incompetence described below.

[6] The *Protocol* mandates that, before making allegations against a former authorized representative, an applicant's current counsel must be satisfied that there is a "clear and reasonable factual foundation" for the allegations. The current counsel then must notify the former representative in writing, providing a concise summary of the allegations, along with any supporting evidence (emphasis added). Inherent in the latter requirement, in particular, is an element of fairness to the former representative, given the potentially serious professional ramifications of incompetence allegations. The *Protocol* describes that one of its purposes is to ensure a procedurally fair process for the parties involved. I add that, in my view, the *Protocol* strives to balance the potential harm to an applicant by reason of incompetent counsel, if shown, with the potential harm to an authorized representative, especially if the allegations are not established.

[7] Consistent with the above fairness considerations, the *Protocol* further stipulates that if, following current counsel's investigation, an applicant's perfected record contains allegations of incompetence, the record must be served on the former representative, with proof of service filed with the Court. The former representative then has 10 days to submit to the parties a written reply or supporting affidavit.

[8] It is the responsibility of an applicant's current counsel to file any reply material with the Court. It also is the current counsel's responsibility to provide the former representative with the Court's order granting leave to commence the applicable judicial review.

[9] I note that the requirement to provide a former representative with supporting evidence is a new addition to the October 2023 version of *Protocol* that was not part of the June 2022 version. Ms. Ahuja's current counsel advised her former counsel in writing on February 3, 2024 [Notice] of the change in representation and of their intention to pursue an ineffective assistance of counsel argument in the judicial review application presently before the Court. In other words, the October 2023 version of the *Protocol*, including the requirement to disclose supporting evidence, applies to this matter.

[10] The Notice states that current counsel forwarded a signed letter of authorization directing the release of any and all information and documents, and to discuss any fact or detail contained in Ms. Ahuja's file. The Notice does not indicate, however, that there were any other attachments or enclosures, and there is no evidence before the Court that current counsel provided the former counsel with any supporting evidence or with a copy of the *Protocol*, both of which are current requirements.

[11] In addition, current counsel gave the former counsel seven days to respond, instead of the current 10 days under the October 2023 version of the *Protocol*. The former counsel responded during the 7-day period. After the Applicant's Record in this matter was served and filed, the

former counsel served on the parties and filed with the Court a supporting affidavit which essentially attests to the information in the timely response to the Notice.

[12] The above instances of non-compliance with the *Protocol* may not be sufficiently significant in themselves, apart from the failure to provide former counsel with supporting evidence, to warrant dismissal of a judicial review application in circumstances, such as here, where the only arguments before the Court are centred squarely on the incompetence allegations. Of greater concern, however, is the lack of evidence that current counsel provided former counsel with the Court's order dated August 21, 2024 granting Ms. Ahuja leave to commence her application for judicial review.

[13] Both the June 2022 and the October 2023 versions of the *Protocol* stipulate, as noted above, that upon leave being granted, former counsel must provide a copy of the order granting leave and setting the matter down for hearing to the former representative. Under the October 2023 version of the *Protocol* this must be done within five days. The reason for mandating this step is clear in both versions of the *Protocol*, namely, to provide the former representative with an opportunity to request leave to intervene.

[14] As this Court previously has held, the failure to provide former counsel with a copy of the leave order is a sufficient basis for the Court not to deal with the issue of alleged incompetent counsel: *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at para 26. I nonetheless turn to this issue next, in part because of the response to the Notice and supporting affidavit in

evidence from the previous counsel, but also because Ms. Ahuja has based her arguments in this matter entirely on the allegation of incompetent counsel.

B. *There is no conclusive evidence that former counsel was incompetent*

[15] I am not convinced that the former counsel's representation of Ms. Ahuja rises to the level of incompetence to warrant the judicial remedy she seeks, that is setting aside the rejection of her application for permanent residence with the matter remitted for redetermination and an opportunity for Ms. Ahuja to submit updated documentation.

[16] It is sometimes said that questions involving a breach of natural justice or procedural fairness attract a correctness-like standard of review: *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 [*Rendon Segovia*] at para 9. Regardless, the focus of the reviewing court is whether the process was fair in all the circumstances: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 77; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54-56; *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

[17] *Rendon Segovia* describes (at para 22) the conjunctive tripartite test, for establishing the incompetence of counsel amounting to a breach of natural justice or procedural fairness, as comprising the following elements: (i) prior counsel's acts or omissions constituted incompetence or negligence; (ii) a miscarriage of justice occurred, meaning that, but for the alleged conduct, there is a reasonable probability there would have been a different result; and (iii) the representative had a reasonable opportunity to respond to an allegation of incompetence

or negligence. See also *Kandiah v Canada (Citizenship and Immigration)*, 2021 FC 1388 at para 48.

[18] The test is cumulative, meaning that an applicant has the burden of proving all the components of the test for the Court to conclude that an authorized representative was incompetent: *Twizeyumukiza v Canada (Citizenship and Immigration)*, 2024 FC 974 at para 31.

[19] As this Court noted in *Rendon Segovia* (at para 22), a consideration of counsel's alleged incompetence begins with a strong presumption that acceptable counsel conduct falls within a wide range of reasonable professional assistance and, further, incompetence of counsel resulting in a breach of natural justice will occur only in "extraordinary circumstances." These principles are consistent, in my view, with the general rule that applicants bear the consequences of their choice of adviser: *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 at para 6; *El Ghazaly v Canada (Citizenship and Immigration)*, 2007 FC 1329 at para 20; *Shirzad v Canada (Citizenship and Immigration)*, 2022 FC 89 at para 37.

[20] I add that earlier case law, on which Ms. Ahuja relies, indicates that establishing former counsel's act or omission constitutes incompetence must be done "without the benefit and wisdom of hindsight": *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 84b. In my view, hindsight factors significantly into the arguments of Ms. Ahuja's counsel on this judicial review application.

[21] Leaving aside the third element of the test, which in my view has not been met because of the incomplete compliance with the *Protocol*, I provide a summary of the facts and an analysis of the first and second elements of the test.

[22] By way of brief background, Ms. Ahuja attests in her supporting affidavit that she received an "invitation to apply" in connection with her express entry profile. On Ms. Ahuja's behalf, the former counsel filed an express entry application for permanent residence as a member of the Canadian Experience Class. Immigration, Refugees and Citizenship Canada [IRCC] rejected the application as incomplete [Decision] because her non-accompanying spouse's medical examination from a previous visa application was expired, instead of upfront and valid for 12 months, when the permanent residence application was filed.

[23] A subsequent request for reconsideration of the Decision also was rejected because of the expired medical examination. The Global Case Management System notes for the reconsideration indicate that, prior to October 1, 2023, Ms. Ahuja's own medical examination results were valid for 12 months only. In other words, they were not subject to a temporary public policy for in-Canada applicants that came into force on October 1, 2023 providing for a longer period of validity for medical examination results of in-Canada applicants. For non-accompanying family members, however, the medical examination results are still required to be upfront and valid at the time of the permanent residence application, meaning the temporary public policy does not apply to them.

[24] Ms. Ahuja asserts that there were 19 days left to submit her permanent residence application when her former counsel informed her of the requirements for a police clearance certificate and an upfront medical examination for her spouse. Instead of waiting for the latter, the former counsel submitted a "previously completed medical examination" for the spouse and indicated that "should a new exam be required, kindly let us know."

[25] The former counsel attests that, on her client's insistence, she took the step of submitting the expired medical examination with that explanation because Ms. Ahuja was in a rush to secure permanent residence. Former counsel's affidavit details Ms. Ahuja's history of submitting incomplete applications, necessitating counsel's assistance in submitting updated information or even new applications to ensure processing for the desired outcome. Further, the former counsel describes that Ms. Ahuja raised the public policy with her, in respect of which the former counsel advised her then client that although it referred specifically to those applying within Canada, it remained unclear for non-accompanying spouses.

[26] I note that the Notice is focused on the allegedly incompetent submission of an expired medical examination of Ms. Ahuja's spouse with the permanent residence application in the face of the requirement for a valid medical examination, about which, according to the Notice, the former counsel did not advise and inform Ms. Ahuja.

[27] The former counsel maintains, and Ms. Ahuja disputes, that the former counsel made Ms. Ahuja aware of the need for an upfront medical exam for the non-accompanying spouse each time the former counsel spoke with Ms. Ahuja about the requirements for the express entry

permanent residence application. Both affidavits attach email correspondence as an exhibit where Ms. Ahuja and her employer, who was assisting her with her express entry application, say “we will get on it” in response to former counsel’s request for an upfront medical exam for the spouse. In my view, this confirms that Ms. Ahuja and her employer were aware of the requirement for her spouse’s upfront medical exam, at least as of August 22, 2023.

[28] Neither Ms. Ahuja nor the former counsel was cross-examined on their affidavit.

[29] With the foregoing factual matrix in mind, I consider the second element of the test first—has Ms. Ahuja has established that, but for the alleged conduct, there is a reasonable probability there would have been a different result? Based on the evidence of record, I find Ms. Ahuja has shown, on a balance of probabilities, that had a valid medical examination for her non-accompanying spouse been submitted with her permanent residence application, it would not have been rejected as incomplete. I note that the Respondent conceded this point in written submissions.

[30] I add that in her written reply and in counsel’s oral submissions at the judicial review hearing, Ms. Ahuja asserted that following the rejection of her permanent residence application, she would not have been invited to apply again because her “score” was below that required in subsequent rounds of invitation. While this might have had an impact on the outcome, there is no supporting evidence for this assertion.

[31] Further, the former counsel's affidavit describes Ms. Ahuja's ability to improve her score on at least one occasion prior to the submission of her express entry permanent residence application. I therefore find that, without something more, current counsel's suggestion that Ms. Ahuja would not be invited again to apply is speculative.

[32] This brings us to the first element of the test, namely, whether the former counsel's acts or omissions constitute incompetence or negligence. Ms. Ahuja has not convinced me that they do. In particular, I am not persuaded that the strategy of submitting the expired medical exam, with an explanation, and with the expectation that an upfront medical exam would be submitted when available ("we will get on it"), given the stated processing time of six months or less for express entry applications, was so clearly outside the "wide range of reasonable professional assistance" contemplated in *Rendon Segovia* as to constitute incompetence. I agree with the Respondent that Ms. Ahuja has not shown that evidence submitted after the express entry application was filed (and, I add, before the application is processed) would not be considered by IRCC.

[33] In my view, current counsel's arguments about the incompetence of the former counsel's strategy of submitting the expired medical exam of Ms. Ahuja's non-accompanying spouse, with an explanation, are rooted in hindsight, i.e. the rejection of the express entry application as incomplete. Former counsel's uncontroverted evidence regarding Ms. Ahuja's history of submitting incomplete applications reinforces my view in this regard.

[34] The former counsel's affidavit discloses that Ms. Ahuja's goal was to secure permanent resident status in Canada as soon as possible. As mentioned above, former counsel's uncontroverted evidence is that Ms. Ahuja "made numerous requests to submit applications as soon as possible and even considered having multiple applications in processing at the same time." This urgency was communicated to former counsel in an email from Ms. Ahuja on July 19, 2023, and was confirmed in my view, in the email exchanges around the time the express entry application was submitted in August 2023.

[35] Ms. Ahuja's current counsel argues that former counsel's incompetence includes waiting until 19 days before the deadline for submitting the express entry application to inform Ms. Ahuja of the requirement for the non-accompanying spouse's upfront medical exam. I agree with the Respondent, however, that it is inconsistent to maintain that such act reflected incompetence on the one hand, while insisting that there was sufficient time to obtain the required medical exam in that 19-day period, on the other hand. More to the point, I find the argument that the express entry application should have been filed closer to the deadline was influenced by hindsight.

[36] I also agree with the Respondent that Ms. Ahuja's effort to retain her former counsel after the rejection of the express entry application for additional work was not consistent with Ms. Ahuja's subsequent view of incompetence: *Jalloh v Insurance Council of British Columbia*, 2016 BCCA 501 at para 26, leave to appeal refused, 2017 CanLII 35117 (SCC).

[37] During the course of the hearing, the Respondent observed that the submissions of Ms. Ahuja's current counsel involved revised allegations over those originally alleged in the Applicant's Record, and thus constituted "trial by ambush." I am sympathetic to the Respondent's observations and provide two examples.

[38] First, Ms. Ahuja's current counsel asserted at the hearing that the former counsel must have lied about when the express entry application was filed. In my view, the evidence is inconclusive. Further, this specific allegation was not put to the former counsel, nor was it raised in the Applicant's memorandum of law and arguments. This means that there was no opportunity for former counsel to respond to the allegation in the supporting affidavit served and filed after former counsel was served with the Applicant's Record (as outlined above).

[39] An exhibit to Ms. Ahuja's affidavit is an email from the former counsel dated August 23, 2023 which states, "This application has been submitted. You should see the charge on your credit card shortly. Once the Acknowledgement of Receipt generates, we will send it over to you." A further exhibit comprises an August 25, 2023 email from the former counsel forwarding the Acknowledgement of Receipt (which was not included as part of the exhibit). The certified tribunal record contains a receipt for the express entry application that confirms it was filed on August 25, 2023. Yet another exhibit to Ms. Ahuja's affidavit comprises an email sent by the former counsel to Ms. Ahuja's MP seeking assistance with the by-then rejected application in which the former counsel states, "The application was submitted on August 25th, 2023."

[40] There is no evidence, however, about the processing of the charge for the express entry application on Ms. Ahuja's credit card, nor any explanation for the possible delay in the issuance of the Acknowledgement of Receipt from the filing of the express entry application on or about August 23, 2023 (if it was submitted on that date) until August 25, 2023. As mentioned above, however, I find in the circumstances that former counsel was not provided with a reasonable opportunity to consider and respond to the argument.

[41] Second, Ms. Ahuja's current counsel asserted that the former counsel also must have lied about filing the police clearance certificate and the expired medical exam for the spouse by IRCC webform, as indicated in the former counsel's September 5, 2023 email. Current counsel based this argument on the absence of the webforms from the certified tribunal record. Because the December 5, 2023 rejection mentions only the expired medical exam, I am prepared to infer that both were received by IRCC. I also find that, as with the asserted lie about the filing of the express entry application, former counsel was not provided with a reasonable opportunity to consider and respond to the argument about the alleged lie concerning the webforms.

[42] For obvious reasons, I have not taken these arguments into account in the incompetence analysis.

III. Conclusion

[43] For the above reasons, I conclude that Ms. Ahuja has not met the test for counsel incompetence and, therefore, her judicial review application will be dismissed.

[44] Neither party proposed a serious question of general importance for certification. I find that none arises in the circumstances.

JUDGMENT in IMM-16498-23

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-16498-23
STYLE OF CAUSE:	HARPREET KAUR AHUJA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 18, 2024
JUDGMENT AND REASONS:	FUHRER J.
DATED:	JANUARY 6, 2025

APPEARANCES:

Andrew Mattu Ajaypal Singh	FOR THE APPLICANT
Joseph Granton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Godwit Law Office PC Brampton, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT