Federal Court  Cour fédérale

Date: 20250721

Docket: IMM-7285-23

Citation: 2025 FC 1299

Ottawa, Ontario, July 21, 2025

PRESENT: Mr. Justice Pentney

BETWEEN:

TAMARA LATOYA BAILEY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Tamara Latoya Bailey, the Applicant in this matter, has been the victim of family violence at the hands of several of her partners since her arrival in Canada in 2016. In May 2021, she was granted a Temporary Resident Permit (TRP) as well as a work permit through a special program to assist victims of family violence.

[2] In April 2022, the Applicant applied for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds. This application was refused. The Applicant seeks judicial review of the decision. The Applicant claims that she was denied procedural fairness because of incompetent representation by her former counsel, who failed to file key documents in support of her H&C application. She also argues that the decision is unreasonable.

[3] For the reasons set out below, this application for judicial review is granted. There are two separate flaws that undermine the decision. First, I am persuaded that the Applicant's former counsel's inadvertent failure to file key documents denied her procedural fairness. Second, the Officer failed to grapple with the core element underlying the Applicant's H&C request.

I. Background

[4] The Applicant is a citizen of Jamaica. She came to Canada on July 1, 2016, on a visitor visa and has been here since then. She has a daughter who was born in Canada in November 2017.

[5] The Applicant has had two abusive relationships while she was in Canada. Following the breakdown of her first relationship, the Applicant obtained a TRP and work permit through the family violence program. She applied under this program in October 2020 and received a favourable decision in May 2021.

[6] The Applicant then began a new relationship, but her new partner was also abusive. She eventually fled from this relationship. With the assistance of her former counsel, the Applicant

filed an application for permanent residence on H&C grounds in April 2022. Her initial application stated that further submissions and evidence would be filed later. When the Applicant received a copy of the initial H&C application from her former counsel's legal assistant, she noticed that several important documents were missing.

[7] The Applicant contacted the former counsel's office to advise them about the missing documents, and was told that the former counsel would address the matter. Former counsel then transferred carriage of the Applicant's file to another lawyer in his office (whom I shall refer to as "former counsel No. 2", and collectively the two of them shall be referred to as "former counsel"). Former counsel No. 2 mistakenly assumed that the missing documents had been previously filed, and so did not include them with the additional evidence and submissions she provided to the Officer in July 2022. The Applicant was not provided an opportunity to review the update package before it was filed by former counsel No. 2, and so she was unaware that the missing documents had still not been filed.

[8] The Applicant's H&C request was denied. The Officer considered the Applicant's establishment in Canada, the best interests of her daughter, as well as the hardships the Applicant would face on a return to Jamaica. It is not necessary to summarize the decision in detail here; parts of it will be examined below in connection with the analysis of the procedural fairness issue and in the discussion of the reasonableness of the decision.

[9] The Applicant seeks judicial review of this decision.

II. Issues and Standard of Review

[10] There are two issues in this case:

A. Was there a miscarriage of justice due to the incompetence of her former counsel?

B. Is the decision unreasonable?

[11] The Applicant is raising the competence of counsel for the first time on judicial review and therefore it does not engage a standard of review: *Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at para 31 [*Discua*].

[12] The second question is assessed under the framework for reasonableness review set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, [*Vavilov*],2019 SCC 65, and confirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[13] In summary, under the *Vavilov* framework, a reviewing court is to review the reasons given by the administrative decision maker and determine whether the decision is based on an internally coherent chain of reasoning and is justified in light of the relevant legal and factual constraints (*Vavilov* at para 85). The onus is on the Applicants to demonstrate that "any shortcomings or flaws … are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). Absent exceptional circumstances, reviewing courts must not interfere with the decision-maker's factual findings and cannot reweigh and reassess evidence considered by the decision-maker (*Vavilov* at para 125).

III. Analysis

A. *There was a miscarriage of justice that denied the Applicant a fair hearing*

[14] The Applicant claims that she was denied procedural fairness because former counsel No. 2 inadvertently failed to include key documents in support of her H&C application. Although this was the result of pure inadvertence and a misunderstanding between former counsel No. 1 and former counsel No. 2, the Applicant says the result was that she was denied a full and fair opportunity to make her case.

[15] The Court's approach to assessing allegations of incompetence of counsel was summarized by Justice Norris in *Discua*:

> [30] The framework within which an allegation of ineffective assistance of counsel is to be assessed in the context of an application for judicial review under the *IRPA* is well-established. First, as a prerequisite to having the issue considered by the reviewing Court, an applicant must establish that former counsel has had a reasonable opportunity to respond to the allegations. Then, on the merits of the allegation, the applicant must establish that the conduct of former counsel was negligent or incompetent (the performance component) and that this resulted in a miscarriage of justice (the prejudice component). See, among other cases, *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 36-38; *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 at para 17; *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 at paras 33-39; and *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at paras 22-24.

[16] The procedures for raising such claims were set out in the Court's Protocol *Re: Allegations against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* (March 7, 2014). The Protocol has since been

further elaborated upon and incorporated into the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022, last amended June 20, 2025) (see paragraphs 47–55) [the *Guidelines*]. The steps set out in the *Guidelines* help to ensure that all relevant information is before the Court when an allegation is made against former counsel. It also provides procedural fairness to former counsel, whose competence is being called into question and whose professional reputation is therefore at stake.

[17] In this case, the Applicant's current counsel did not comply with each of the steps set out in the *Guidelines*. That is not fatal to the claim, however, because the Court has found that substantial compliance may be sufficient, as long as the former counsel had sufficient notice and an opportunity to decide whether to respond to the allegations, and the Court's fact-finding function has not been prejudiced: *Discua* at para 36; *El Khatib v Canada (Citizenship and Immigration)*, 2025 FC 49 at para 19 [*El Khatib*].

[18] In this case, on July 6, 2023, Applicant's current counsel asked former counsel No. 2 about certain documents that appeared to have been omitted from the H&C application. These documents had been included in the Applicant's previous request for a TRP, but appeared to have been omitted from the H&C request. Applicant's counsel did not formally advise former counsel that they intended to put forward allegations of professional incompetence. Former counsel No. 2 confirmed that the documents were not included in the H&C application, stating "(i)t was a complete oversight."

[19] The following day, July 7, 2023, Applicant's counsel filed the Application Record seeking leave to pursue judicial review and duly served it on former counsel as well as on Respondent's counsel. The Applicant's affidavit and the written submissions set out the allegations of incompetent representation. Former counsel did not seek to participate in the proceedings or provide any further information. I am satisfied that Applicant's counsel has complied with the substance of the procedure set out in the *Guidelines*. Former counsel had notice of the details of the allegations of incompetent representation and a full opportunity to participate in the proceedings. Despite the failure to follow all of the procedural steps in the *Guidelines*, the Court's fact-finding process was not impaired.

[20] Turning to the substance of the allegation of incompetent representation, the analysis proceeds in two stages. First, the Applicant must establish that former counsel's conduct fell below the standards of professional competence (the performance component). Second, the Applicant must demonstrate that miscarriage of justice resulted from the lack of competent representation (the prejudice component).

[21] In many cases, the focus of the second element is whether the party claiming incompetent representation has demonstrated that there is a reasonable probability that a different result would have been reached but for the inadequate representation, usually referred to as the "reliability of the result". The test, however, is whether a miscarriage of justice has occurred, and this can simply involve a finding that the claimant was denied a fair opportunity to put forward their case: see the discussion in *Discua* at paras 30 and 75; and *El Khatib* at paras 39–47.

[22] The specific allegation in this case is that former counsel failed to meet their professional obligations by omitting crucial documents from the Applicant's H&C application. These documents include a letter from the pastor at the church the Applicant attends, two letters from her friends, and a psychological evaluation by Dr. Parul Agarwal. These documents were in the possession of the former counsel. Indeed, they had been submitted by former counsel as part of the Applicant's application for a TRP in October 2020. However, they were not included in the H&C materials and were thus not before the Officer when the decision being challenged was made.

[23] In many cases, a question arises as to whether the conduct of former counsel falls below the standard of competent representation. The law is clear: there is a strong presumption that counsel's conduct fell within the range of reasonable professional assistance: *Discua* at para 53. A reviewing court must avoid second-guessing the tactical decisions of counsel, and the wisdom of hindsight has not place in the assessment: *R v GDB*, 2000 SCC 22 at para 27 [*GDB*].

[24] I am satisfied that the Applicant has demonstrated that former counsel's conduct fell short of reasonably competent professional representation. Former counsel No. 2 has admitted that she inadvertently failed to submit the documents. Her response to Applicant's counsel's inquiry states the following:

> I just checked and I can confirm that those documents are missing from the new H&C. It was a complete oversight. I wrongfully assumed that all support documents were included in our electronic file for the new H&C and I operated under that assumption. In H&Cs, I come in at the written submission stage and submit any new documents we have that were not included in the original application. I followed up with [the Applicant] to ask for new evidence and we submitted anything new we had, including the

> Applicant's affidavit. I mistakenly forgot to sign the affidavit. My sincerest apologies to the Applicant.

[25] I will discuss the significance of the omitted documents in greater detail in the next part of the analysis. At this stage, it is sufficient to note that the missing documents were not merely peripheral, additional material. Instead, I find that they set out important details regarding the nature and degree of her establishment in Canada, which were relevant to one of the central themes of her H&C application. The omitted documents also set out in some detail the nature of domestic abuse the Applicant endured, which is another central theme in her narrative.

[26] By any measure, it was counsel's obligation to include these documents with the Applicant's H&C application. Former counsel No. 2 does not claim that their omission from the package of materials was the result of any strategic choice. It appears to have been the product of inadvertence and miscommunication within the law firm. I find that former counsel's failure to include them fell short of the standards of professional competence. I make this finding based on: the importance of the materials to central features of the Applicant's H&C application, and the acknowledgement that former counsel had possession of them and had intended to include them in support of the Applicant's H&C request, but did not do so through inadvertence and a failure to confirm with former counsel No. 1 that he had previously submitted them.

[27] Based on the analysis set out above, the Applicant has established the performance component of the test. With that, I turn to the prejudice component.

[28] On the second element of the test, the Applicant must establish that the failings of their former counsel resulted in a miscarriage of justice. On this point, Justice Norris provided the following helpful clarification in *Discua* at para 75:

> Miscarriages of justice can take many forms in the context of ineffective assistance of counsel (*GDB* at para 28). This includes where former counsel's conduct has compromised the reliability of the result of the earlier proceeding and where former counsel's conduct has affected the fairness of the earlier proceeding (*ibid.*).

[29] In assessing the significance of the missing material, it is important to begin with the Officer's findings on the Applicant's establishment in Canada. On this point, it is particularly significant in my view that the Officer made the following finding:

> Apart from the friendship between the applicant and WATKIS, however, I am unable to conclude that the applicant has made other close and enduring friendships or that she is actively involved in the community, such as volunteerism.

[30] The omitted letters speak directly to the Officer's finding on this point. For example, the Letter from Pastor Mensah discusses the Applicant's involvement at Brampton Newlife Outreach Ministry and how the Applicant has been involved in taking care of and mentoring the children of the church. The other letters of support from Ava Bowen and Tashana Perry, the Applicant's friends, speak to the Applicant's role as a "confidant who is always willing to lend a listening ear and offer good advice" and demonstrate that the Applicant has indeed established close and enduring friendships, contrary to the Officer's finding.

[31] In terms of the psychological report, this was relevant to the issue of hardship upon return, and the Officer would have had to discuss it in that portion of their analysis.

[32] Whether the H&C Officer would have accepted this additional evidence as changing the outcome of the H&C decision case is irrelevant. What is relevant, however, is that but for former counsel's error, this evidence would have been before the Officer, who would have weighed it in their analysis of the Applicant's establishment in Canada and hardship upon return. Fairness dictates that the Applicant should have had the opportunity to have this evidence weighed by the Officer, regardless of the outcome.

[33] Based on this, I am persuaded that the Applicant has been denied procedural fairness. This is sufficient to quash the decision and remit it for reconsideration.

[34] Both parties made submissions on the second issue, the reasonableness of the decision, and for the sake of completeness I will add a brief analysis of this question.

B. *The decision is unreasonable*

[35] The Applicant argues that the Officer ignored key evidence and relied on speculation in assessing her application. Among other things, she focuses on the Officer's finding that her siblings would "more likely than not" help mitigate the financial hardships caused by removal to Jamaica. The Applicant says this directly contradicts evidence in the affidavit she submitted with her H&C application.

[36] I agree with the Applicant on this point. The Officer's finding about the likelihood that the Applicant's siblings would assist her on her return to Jamaica flies in the face of the evidence. The Applicant's affidavit evidence, which is unchallenged, is to the effect that she

sends money to her family in Jamaica to help support her mother and elderly aunt. She did not grow up with her siblings and was raised by her paternal grandparents. While there is no evidence of a family rupture or ongoing animosity, there is equally no indication that her siblings would be able to help her financially.

[37] The Officer's speculation on this point is not sufficient, on its own, to make the entire decision unreasonable.

[38] A more fundamental flaw, however, is the Officer's failure to engage with the core substance of the Applicant's narrative: namely that she has been a victim of family violence. This is a crucial element of the assessment of the H&C considerations that needed to be assessed. The decision does not explicitly indicate that family violence was considered, focusing instead on the Applicant's establishment in Canada, the best interest of the children, as well as risks and hardship on return to Jamaica.

[39] The Applicant's affidavit together with the supporting material recount in painful detail the type of violence the Applicant has endured at the hands of her two former partners. It is not necessary to go into the details here. The evidence is clear that the Applicant's life in Canada has been scarred by ongoing and repeated mistreatment by her former partners. Despite this, the evidence also shows her strength, courage and resilience in ending these relationships, forming strong bonds in her community and seeking to make a contribution to the lives of her friends and her faith community, all while caring for her young daughter. It is a truly remarkable story.

[40] The governing principle in assessing a H&C application is whether the facts, as established by the evidence, would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, citing the test set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338.

[41] The Officer needed to demonstrate how this principle was applied to the assessment of the Applicant's situation. The failure to do so makes the decision unreasonable.

[42] It is impossible to give fair and due consideration to the Applicant's H&C claim without an express consideration of the impact of family violence on her life in Canada. To be clear, this involves a consideration of the pains and losses she endured at the hands of her former partners. It must also take account of her strength, courage and resilience in seeking to rebuild her life and to make a meaningful contribution to her friends and her wider community, while raising her daughter as a single parent.

[43] That type of analysis was not done in this case It must be done by the next Officer who considers the Applicant's case.

IV Conclusion

[44] Based on the analysis set out above, the application for judicial review will be granted. The Applicant was denied procedural fairness by virtue of former counsel's lapse, and the only fair outcome is to quash the decision and remit it for reconsideration.

[45] In view of the nature of the decision and the fact that relevant H&C considerations may have evolved due to the passage of time, the Applicant shall be given an opportunity to file further evidence and make new submissions, if she wishes to do so.

[46] There is no question of general importance for certification.

JUDGMENT in IMM-7285-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision dated May 24, 2023, is hereby quashed and set aside. The matter is remitted back for reconsideration by a different Officer.

3. The Applicant shall be given an opportunity to file further evidence and make new submissions, if she wishes to do so

4. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7285-23
STYLE OF CAUSE:	TAMARA LAYOTA BAILEY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 21, 2024
JUDGMENT AND REASONS	PENTNEY J.
DATED:	JULY 21 2025

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