Federal Court  Cour fédérale

Date: 20211206

Docket: IMM-3049-20

Citation: 2021 FC 1360

Ottawa, Ontario, December 6, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KEWEI XIAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Kewei Xiao, seeks judicial review of a decision by the Immigration Appeal Division (the "IAD") dated May 11, 2020, dismissing the Applicant's appeal of a visa officer's (the "Officer") refusal of the Applicant's Family Class sponsorship application for her daughter (the "Sponsorship Application").

[2] The IAD confirmed the Officer's finding that the Applicant had failed to meet the requirements of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 ("*IRPR*") to submit the Sponsorship Application before her daughter, Ms. Jiayu Cao (the "Applicant's Daughter"), turned 22 years-old.

[3] The Applicant submits that she was denied procedural fairness and natural justice due to ineffective and incompetent representation by her former immigration consultant, Mr. Jeffrey Hemlin (the "Consultant"), in both the Sponsorship Application process and the IAD. The Applicant submits that the Consultant a) failed to submit the Sponsorship Application in a timely manner; b) failed to be honest and candid; and c) continued to act for the Applicant in the Sponsorship Application and appeal process, despite an existing conflict of interest.

[4] For the reasons that follow, I find the Applicant's procedural fairness rights have been breached because of the Consultant's acts and omissions. I therefore allow this application for judicial review.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a national of China. In 2017, the Applicant applied to immigrate to Canada and became a permanent resident on June 4, 2018. The Applicant's Daughter was not included as a dependent child in the Applicant's permanent residence application.

[6] In August 2018, the Applicant decided to sponsor her daughter under the Family Class as a dependent child under the age of 22 years. The Applicant's Daughter was born on January 19, 1997 and turned 22 years-old on January 19, 2019.

[7] On November 9, 2018, the Applicant retained the Consultant to assist her with the Sponsorship Application. The Consultant was accredited under the Immigration Consultants of Canada Regulatory Council (the "ICCRC").

[8] From November 9, 2018 to November 15, 2018, the Applicant provided the Consultant with information required for the Sponsorship Application.

[9] On November 18, 2018, the Applicant's Daughter received an email from the Consultant containing forms requiring her signature. The Applicant's Daughter signed the forms and returned them to the Applicant on November 22, 2018. On November 23, 2018, the Applicant hand delivered the signed forms to the Consultant and instructed him, with the help of an interpreter, to submit the Sponsorship Application to ensure it was received before her daughter turned 22 years-old.

[10] On December 22, 2018, the Applicant received a message from her interpreter who explained that the Consultant had confirmed that the Sponsorship Application had been submitted "on December 5 or 6, 2018."

[11] A receipt and post-mark stamp from Canada Post (Xpresspost) note that the Sponsorship Application was in fact sent by mail on January 18, 2019. However, the Sponsorship Application was received by Immigration, Refugees and Citizenship Canada ("IRCC") on January 23, 2019, four days after the Applicant's Daughter turned 22 years-old.

[12] By way of letter dated March 11, 2019, IRCC informed the Applicant that she met the requirements for eligibility as a sponsor. The Sponsorship Application was then sent to the IRCC office in Hong Kong for additional processing.

[13] On October 17, 2019, the Officer expressed concerns that the Applicant's Daughter did not meet the definition of a "dependent child" because the Sponsorship Application was received by the IRCC after she turned 22 years-old. On November 16, 2019, the Consultant sent a response to the Officer explaining that the Sponsorship Application was submitted via Canada Post on January 18, 2019, when the Applicant's Daughter was still 21 years-old. The Consultant argued that the Sponsorship Application ought to be deemed submitted on the date that it was postmarked by Canada Post. The Consultant did not inform the Applicant of the Officer's letter and the concerns it outlined.

[14] On January 3, 2020, the Officer refused the Sponsorship Application on the grounds that the Applicant's Daughter did not meet the age requirement to be considered a "dependent child" under the Family Class at the time that IRCC received the application.

[15] According to the Applicant, on January 27, 2020, after experiencing some difficulties in contacting the Consultant, she met with him to sign a Notice of Appeal. On this day, the Consultant told the Applicant that there should be "no problem" with the Sponsorship Application and the appeal.

[16] The Notice of Appeal of the Officer's decision was filed with the IAD on January 31, 2020. Through written submissions, the Consultant argued that the Officer should have applied the date that the application was couriered and postmarked by Canada Post – January 18, 2019 – as the "lock in" date for determining the Applicant's Daughter's age rather than when the application was received by the IRCC on January 23, 2019.

B. *Decision Under Review*

[17] On May 11, 2020, the IAD dismissed the Applicant's appeal under subsection 63(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("*IRPA*"). In the reasons for the decision (the "IAD Sponsorship Decision"), the IAD found that the "lock-in" date of sponsorship applications under the Family Class is when they are received by IRCC, not when they are mailed or couriered. The IAD concluded that the Officer had therefore applied the correct dates and had made no factual or legal error by refusing to issue a permanent resident visa for the Applicant's Daughter. The IAD further determined that under section 65 of the *IRPA,* it did not have discretionary jurisdiction to make any humanitarian and compassionate ("H&C") exemptions in this case.

[18] According to the Applicant, she did not become aware of the IAD decision until July 6, 2020 and received a copy of the decision on July 10, 2020.

[19] On July 17, 2020, notice of the Applicant's intended allegations against the Consultant were delivered to him by email and by fax.

C. *The Second IAD Decision*

[20] On September 18, 2020, the Applicant filed an application with the IAD to reopen the appeal on the grounds that negligence of her former counsel resulted in a miscarriage of justice.

[21] On December 10, 2020, the IAD refused the Applicant's application to reopen her appeal (the "Second IAD Decision"). The IAD accepted that the negligence and incompetence of the Consultant and his failure to submit the Sponsorship Application on time greatly prejudiced the Applicant, causing her to lose the opportunity to sponsor her daughter as her dependent child before she aged out of the Family Class. The IAD further determined that this resulted in a miscarriage of justice in the Officer's decision because the Applicant did not have the opportunity to make arguments that the Sponsorship Application should be allowed on H&C grounds under section 25 of the *IRPA.*

[22] However, the IAD did not find that that a re-opening of the Applicant's appeal was warranted because it was not established that her daughter was a member of the Family Class when the Sponsorship Application was received by IRCC. As a result, the IAD concluded that it had no further jurisdiction over the appeal.

[23] The IAD further determined that the Consultant's errors did not result in a miscarriage of justice in the matter before the IAD, because section 65 of the *IRPA* precludes the IAD from assessing the impact of the Consultant's errors on H&C grounds once it is established that the Applicant is not in fact a member of the Family Class.

III. **Issue and Standard of Review**

[24] The sole issue in this case is whether the Applicant was denied procedural fairness and natural justice in her appeal before the IAD.

[25] Both parties submit that the appropriate standard of review is correctness because this case involves issues of procedural fairness and natural justice. I agree (*Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 *(*"*Satkunanathan*") at para 31; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23).

[26] Correctness is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28, (*Canadian Pacific Railway Company* at para 54).

IV. **Analysis**

[27] The Applicant submits that she has suffered a breach of procedural fairness because the Consultant acted negligently and incompetently in both his representation of the Applicant in the Sponsorship Application process and his representation of the Applicant at the IAD, and that these acts and omissions amount to a miscarriage of justice.

[28] In *Satkunanathan*, my colleague Justice Pamel found that it has been established "that ineffective or incompetent counsel may be sufficient grounds for a breach of natural justice" (at para 33). Pursuant to *Satkunanathan,* an applicant who alleges incompetence or negligence by their former counsel must show that: a) the impugned counsel's acts or omissions constituted incompetence; and b) the acts or omissions must have resulted in a miscarriage of justice (*Satkunanathan* at paras 35-36; see also: *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 36-38).

A. *Whether the acts or omissions of the Consultant constituted incompetence.*

[29] The Applicant submits that the acts and omissions of the Consultant fall below the standard of conduct required by his profession and constitute incompetence.

[30] The professional standards required of immigration consultants in Canada are governed by the Code of Professional Ethics (the "Ethics Code") issued by the ICCRC. The Ethics Code requires immigration consultants to be competent (subsections 5.1 and 5.2), to maintain quality service (subsection 6.1), and to be honest and candid when advising clients (subsection 7.1).

[31] Under subsection 117(1)(b) of the *IRPR*, a foreign national is a member of the family class if they are the dependent child of the sponsor. Section 2 of the *IRPR* includes a child who is less than 22 years of age under the definition of a "dependant child."

[32] According to IRCC's guidelines for submitting a Family Class sponsorship application, an application is considered to be "made" at the time IRCC receives the complete application. The age of the dependent child is therefore "locked-in" when IRCC receives an application.

[33] The Applicant argues that the Consultant's failure to meet the age "lock-in" date and his failure to abide by the Ethics Code constitute incompetence. The Applicant explains that all forms and documents required for the Sponsorship Application were in the possession of the Consultant on November 23, 2018, and yet the application was not received by IRCC until January 23, 2019, after the Applicant's Daughter had already turned 22 years-old.

[34] I agree with the Applicant's submission that meeting a deadline is a serious component of a representative's duty to their client. Subsection 6.2.1 of the Ethics Code requires immigration consultants to make best efforts to ensure that documents are delivered to IRCC before any applicable deadline. In this case, the Consultant's failure to follow instructions with respect to the age "lock-in" deadline, and his failure to submit the Sponsorship Application on time led to the ineligibility of the Applicant's Daughter as a "dependent child" under the age of 22 years.

[35] I find that the Consultant further breached his duties of honesty and candour when he misleadingly advised the Applicant that he had submitted the Sponsorship Application in early December 2018.

[36] Overall, I agree with the Applicant that the Consultant acted incompetently and failed in his duties under the Ethics Code to provide quality service, submit documents on time, and be honest and candid. I also agree with the Applicant that the Consultant's failure to provide an explanation for his acts and omissions upon receiving multiple opportunities to do so further supports the finding that the Consultant acted incompetently. This is a similar conclusion as the one reached by Justice Barnes in *Enye v Canada (Public Safety and Emergency Preparedness)* 2021 FC 481, at para 10:

> [10] My finding that the consultant was negligent is further supported by the fact that he did not seek to counter Ms. Enye's allegations in this proceeding: see *Tapia Fernandez v Canada (MCI)*, 2020 FC 889 at para 31, [2020] FCJ No 937.

[37] I therefore find that the Consultant's acts and omissions constitute incompetence.

B. *Whether the acts or omissions of the Consultant have resulted in a miscarriage of justice.*

[38] The Applicant submits that she was significantly prejudiced by the Consultant's incompetence because his failure to submit the Sponsorship Application on time was the direct and singular cause of the Officer's determination that her daughter was not a "dependent child"

under the Family Class. As a result, the Applicant was unable to sponsor her daughter's immigration to Canada and argues that she suffered a miscarriage of justice.

[39] The Applicant submits that because the Consultant failed to advise her of the procedural fairness letter that he received from the Officer on October 17, 2019 indicating a preliminary concern that the Applicant's Daughter did not meet the definition of a "dependent child," the Applicant was not given the opportunity to seek legal advice with respect to the Consultant's acts or omissions and to respond to the procedural fairness letter from the Officer.

[40] The Applicant relies on *Yang v Canada (Citizenship and Immigration),* 2019 FC 402 ("*Yang*"), in which the applicant's representatives – an immigration agency in China, and a Canadian lawyer – failed to inform the applicant of a procedural fairness letter that illuminated a mistaken omission. At paragraph 43 of *Yang*, Justice Manson writes:

> The actions of the Canadian Representative and the Agent in the spring of 2018 were also incompetent. Rather than make the Applicant aware of the Procedural Fairness Letter, and thereby admit to the mistaken omission from the updated IMM5669 form, the Agent instead took deliberate steps to mislead both the Applicant and the IRCC. While the Canadian Representative may have been unaware of this deliberate attempt to mislead the Applicant, it was taken under his authorization and he must be held responsible. The deliberate withholding by the Agent of the Procedural Fairness Letter, authorized implicitly by the Canadian Representative, again falls outside the wide range of reasonable professional assistance that could and should have been provided.

[41] Although it was found that the applicant in *Yang* failed to show that the results of the decision would have differed but for the actions of the representatives to withhold the procedural

fairness letter (*Yang* at para 50), Justice Manson still found that the withholding of the procedural fairness letter by the representatives amounted to incompetence (*Yang* at para 44).

[42] The Applicant further submits that a breach of natural justice can be found even when the IAD itself was not the cause of the breach. Under paragraph 67(1)(b) of the *IRPA*, the IAD may allow an appeal if it is satisfied that a principle of natural justice has not been observed:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé:
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[43] To support this position, the Applicant relies on *Satkunanathan* at paragraph 39 (citing *Shirwa v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3026 (FCA), [1994] 2 FC 51 ("*Shirwa*") at pages 60-61):

> [39] In addition, as a hearing before the IAD has actually taken place, the decision that emanates therefrom can only be reviewed

> on the basis of a breach of natural justice. Mister Justice Denault stated the following in *Shirwa* at pages 60-61:
>
> > In other circumstances where a hearing does occur, the decision can only be reviewed in "extraordinary circumstances", where there is sufficient evidence to establish the "exact dimensions of the problem" and where the review is based on a "precise factual foundation." These latter limitations are necessary, in my opinion, to heed the concerns expressed by Justices MacGuigan and Rothstein that general dissatisfaction with the quality of representation freely chosen by the applicant should not provide grounds for judicial review of a negative decision. However, where the incompetence or negligence of the applicant's representative is sufficiently specific and clearly supported by the evidence such negligence or incompetence is inherently prejudicial to the applicant and will warrant overturning the decision, notwithstanding the lack of bad faith or absence of a failure to do anything on the part of the tribunal.
> >
> > (emphasis added)

[44] The Applicant submits that the Consultant's negligence and incompetence is "sufficiently specific and clearly supported by the evidence" pursuant to this Court's description in *Satkunanathan* and *Shirwa,* and that therefore his conduct was inherently prejudicial to the Applicant, even though the IAD itself was not to blame for the prejudice.

[45] The Applicant contends that by continuing to act for the Applicant in the appeal before the IAD, the Consultant placed himself in a conflict of interest with the Applicant. Under subsection 11.1.1(iii) of the Ethics Code, withdrawal as a client's representative is required if continued involvement will place the consultant in a conflict of interest. The Applicant argues that the Consultant's self-interest was to not admit any error on his part and continue to make unmeritorious arguments, while the Applicant's interest was to explain that she suffered a

miscarriage of justice due to the Consultant's error. The Applicant submits that she suffered prejudice in the IAD level because of the Consultant's dishonesty and his decision to represent her in the IAD proceeding.

[46] The Respondent submits that if the Applicant did not have an opportunity to make appropriate submissions in her appeal before the IAD, it is not due to a breach of natural justice but rather due to her own failure to inform herself of the arguments that would be made before the IAD, and for continuing to rely on the Consultant despite signs of his incompetence and poor service. The Respondent submits, "the failure of counsel, freely chosen by a client, cannot, in any but the most extraordinary case, result in an overturning of a decision on appeal or judicial review" (*Sathasivam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 438 at para 23, citing *Huynh v Canada (Minister of Employment and Immigration)* (1993), 21 Imm L.R. (2d) 18 (FCTD) at para 23). The Respondent further submits that judicial review should not be granted where an applicant "shows little or no interest in what is happening to [her] own application" (*Khan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 833 ("*Khan"*) at para 29, citing *Mussa v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 2047 at para 3).

[47] The Respondent acknowledges that there may be circumstances where an individual's representative's negligence or incompetence may result in a person being denied a fair hearing. However, a breach of procedural fairness should only be found "where there has been no contributory negligence or fault on the part of the [applicant]" (*Khan* at para 24), and where the applicant has acted with due care, but suffered injustice due to circumstances entirely out of their

control. In this case, the Respondent contends that the Applicant was neglectful and that she neither took steps to involve herself in the Sponsorship Application and IAD appeal, nor did she seek other counsel after receiving poor results, inadequate communication, and insufficient answers from the Consultant.

[48] At the hearing, the Applicant's counsel countered that the Applicant is not professionally trained to understand legal matters – this is the very reason why she hired the Consultant to assist her with the Sponsorship Application. The Applicant expected the Consultant to advise her properly, and did not expect that she should be required to review his conduct. I agree with the Applicant's counsel that it defeats the purpose of hiring a representative if the expectation was that the Applicant should scrutinize the submissions of her representative.

[49] In the case of *Satkunanathan*, at paragraphs 88-90, Justice Pamel recognizes that generally, applicants are tied to their counsel. However, this is not the case where a representative has made a mistake:

> [88] I accept that, in general, applicants are tied to their counsel *(Jouzichin v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1886 (QL), 1994 CarswellNat 1592 at para 2 […]). However, this is not a case where counsel simply made a mistake.
>
> [89] In reviewing the evidence, it seems to me that Former Counsel simply did not possess a sufficient knowledge of the fundamentals or principles of law applicable to the particular work he/she had undertaken so as to allow him/her to perceive the need to ascertain the law on relevant points (*Central Trust* at paras 58-59). In addition, it is because of such shortcomings on the part of Former Counsel that the Applicant was deprived of a full and complete hearing before the IAD (*Mathon v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 707 (QL)).

> [90] As a result, strictly as regards the Applicant's appeal before the IAD, I find that the Former Counsel's conduct fell below the standard of what one could reasonably expect from competent counsel and outside what would be normal professional judgment.

[50] In *Satkunanathan*, the applicant's counsel did not seek special relief on H&C grounds and failed to advise the applicant of this legal option. The Respondent distinguishes the Applicant's case by submitting that *Satkunanathan* involved legal negligence with respect to an issue that counsel was best placed to be aware of, whereas the present case did not involve a legal matter that would reasonably only fall under the purview of legal counsel. The Respondent submits that the task of filing the Sponsorship Application requires no legal expertise and was the Applicant's responsibility. Although the Applicant chose to delegate this task to the Consultant, the Respondent maintains that the onus remained on her to ensure the documents were filed properly and in a timely fashion.

[51] I disagree with the Respondent's position. In the affidavit submitted by the Applicant, she notes:

> At various times that I expressed my concerns to Mr. Hemlin about whether the sponsorship application was made in a timely manner, he would always tell me not to worry or that it should be no problem.
>
> If I had known about Mr. Hemlin's failure to submit the sponsorship application in a timely manner, I would have sought legal advice about what I could do, be it in the sponsorship application or in the IAD appeal.

[52] As someone who is not professionally trained to understand legal matters, the Applicant relied on the Consultant's expertise and training as an immigration consultant to submit the Sponsorship Application on time and to represent her interest at the IAD. But for the Consultant's negligence, incompetence and breaches of the Ethics Code that governs his profession, the Applicant's Sponsorship Application would have been submitted on time.

[53] I note that pursuant to subsection 13.2.1 of the Ethics Code, if an immigration consultant discovers that their acts or omissions are or may be damaging to a client, they are required to inform their client and recommend that the client obtain a lawyer's advice concerning any rights they may have arising from the acts or omissions. I agree with the Applicant that by failing to be honest about the reasons for the refusal and by failing to withdraw as her representation because of his mistake, the Consultant prejudiced the Applicant. As a result of the Consultant's errors, the Applicant was precluded from seeking legal advice with respect to his acts and omissions, with respect to how to proceed with an appeal, and other available courses of action. I find that the Consultant failed to undertake his professional services with the "reasonable care, skill and knowledge" (*Shirwa*, pages 60-61) expected of an immigration consultant.

[54] During the hearing, counsel for the Respondent submitted that should this Court find that there was a breach of procedural fairness in the IAD Sponsorship Decision, any such breach was remedied by virtue of the Second IAD Decision addressing the application to reopen the appeal before the IAD. The Respondent argued that although the Second IAD Decision is not the subject of this judicial review, the very availability of that decision has now granted the Applicant procedural fairness with respect to the appeal of the IAD Sponsorship Decision and

remedied any acts or omissions of the Consultant. In their reply, counsel for the Applicant noted that this argument puts them in an unfair position, as the Respondent did not raise this point in their written submissions. While the Applicant could argue that the Second IAD Decision was wrong, that decision is not the subject of this judicial review. I agree with the Applicant. The Second IAD Decision is informational: this Court can adopt it, reject it, or use it to gain additional insights, but this Court is not bound by that decision. I do not find that the submission that a breach of procedural fairness has been remedied is point of issue in this judicial review.

[55] The Applicant further explained that they are not arguing that the IAD has jurisdiction to make a determination on H&C grounds, but rather that paragraph 67(1)(b) of the *IRPA* empowers the IAD to allow an appeal based on a breach of natural justice. In support of this, the Applicant cites *Canada (Citizenship and Immigration) v Mora*, 2013 FC 332, at paragraph 31, in which this Court found that the "IAD has jurisdiction to rehear an appeal of a sponsorship application that was vitiated or nullified due to a breach of natural justice." I agree with this position. The issue in this judicial review is whether a breach of procedural fairness has been remedied, and I find that it has not. In this case, the incompetence of the Consultant resulted in a miscarriage of justice pursuant to *Satkunanathan* (paras 35-36).

V. **Conclusion**

[56] I find that the Consultant's acts and omissions constitute incompetence that resulted in a miscarriage of justice and a breach of the Applicant's right to procedural fairness. When the Consultant failed to ensure that the Sponsorship Application was received by IRCC on time, he also failed to be honest and candid with the Applicant about his errors and continued to represent

the Applicant at the IAD proceeding. As a consequence of his actions, the Applicant was unable to respond to the Officer's procedural fairness letter, she was unable to fully present her evidence and arguments to the IAD, she did not have the chance to seek out legal advice, and she lost the chance to sponsor her daughter's immigration to Canada. I therefore grant this application for judicial review and refer the matter back for redetermination by a different decision-maker.

[57] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3049-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination by a different decision-maker, in accordance with these reasons.

2. No question is certified.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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