

Federal Court



Cour fédérale

Date: 20250520

Docket: IMM-13660-22

Citation: 2025 FC 916

Ottawa, Ontario, May 20, 2025

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

**X KARMJIT SINGH
PALVINDER KAUR**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of India. The Refugee Protection Division of the Immigration and Refugee Board [IRB] refused their claim for protection, and the Refugee Appeal Division [RAD] subsequently dismissed their appeal of that determination in a decision dated November 29, 2022. They seek judicial review of the RAD's finding that they are neither refugees nor

persons in need of protection because they have viable internal flight alternatives [IFAs] in Mumbai, Delhi, and Jaipur.

[2] The Applicants argue that the proceeding before the RAD was procedurally unfair and the RAD's IFA conclusions amount to a miscarriage of justice due to the incompetence and negligence of their counsel before the RAD.

[3] The threshold for granting relief on the grounds of counsel incompetence is high. A party asserting a breach of fairness, and a resultant miscarriage of justice must establish (1) incompetence on the part of their counsel, and (2) that a different outcome was reasonably probable but for counsel's incompetence. The Applicants have failed to meet this standard. The Application will therefore be dismissed. My reasons follow.

II. Background

[4] The Applicants entered Canada in December 2018 and claimed protection. They fear Mr. Singh's wealthy uncle, reporting that the uncle has powerful connections to the police and his involvement in real estate and the transport business. They also fear associates of Mr. Singh's uncle and the Punjab police.

[5] The RPD identified two determinative issues: credibility, and the availability of an IFA.

[6] The RPD's credibility concerns arose because of significant omissions in the Applicants' original basis of claim forms [BOC]. Prior to the hearing before the RPD, the Applicants

submitted two amendments to the original BOC. On the day of the RPD hearing, a third BOC amendment was submitted.

[7] The third BOC amendment reported that the agents of persecution had physically assaulted the Applicants in their home, and that Mr. Singh had also been detained by police on fabricated drug and alcohol related charges. The RPD rejected the Applicants' explanation that the omission of the assault and detention was the result of former counsel not previously including the information in the BOC.

[8] The RPD found that "there is no reason why the claimant's counsel, regardless of his level of competence, would take time to include other details about the claimants' allegations, but would not include two of the most significant incidents of abuse in their narrative, if the claimants had told them about these incidents." The RPD noted that the Applicants had signed their original BOC, declaring the contents had been interpreted to them and that the information was complete, true, and correct. The RPD further noted Mr. Singh had indicated in his documentation that he had never been detained. Finally, the RPD commented on the Applicants' failure to comply with the required procedures where allegations of inadequate representation are to be relied upon before IRB.

[9] As a result, the RPD (1) found that, on a balance of probabilities, neither the freshly alleged assault nor the reported detention occurred, (2) drew a negative inference with respect to the Applicants' overall credibility, and (3) concluded, after addressing the remaining evidence, that the omissions undermined the entirety of the Applicants' claim.

[10] The RPD also undertook an alternative IFA analysis, finding that, in any event, the Applicants had viable IFAs in Mumbai, Delhi, and Jaipur.

[11] In upholding the RPD's determination, the RAD found the availability of an IFA to be determinative.

[12] To the extent the RAD relied on the evidence before it, the Applicants do not take issue with the RAD's IFA findings. Instead, the Applicants argue a denial of procedural fairness before the RAD because their former counsel failed to put new evidence before the RAD that the Applicants had brought to counsel's attention. The Applicants report that Mr. Singh was arrested, charged, and convicted of offences in India and that judicial proceedings are ongoing with respect to the conviction. Mr. Singh further reports he did not rely on this evidence in pursuing his claim – he did not include this information in either his original BOC or any of the amendments made – or report it to his representative before the RPD because he was advised by an individual who referred him to his RPD counsel that to do so “would look negative on [his] character.”

[13] Mr. Singh asserts he disclosed his prior arrest and conviction in India and provided relevant documentation to counsel representing him before the RAD, but counsel advised that there was no point in seeking to place this evidence before the RAD, as it was too late to do so.

[14] While the Applicants' written submissions allege incompetence on the part of their former counsel before the RAD on a variety of grounds, current counsel for the Applicants

confirmed in oral submissions that the sole ground of incompetence being relied upon is that their former representative failed to seek to have the evidence of Mr. Singh's reported arrest, conviction, and ongoing appeal proceedings in India admitted and considered as new evidence before the RAD.

[15] The Applicants have complied with the Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings*, 24 June 2022 (last amended 31 October 2023), requiring that notice be given to counsel where allegations of ineffective assistance of counsel are being relied upon in immigration and refugee judicial review applications before the Court (paragraphs 46-63).

III. Issues and Standard of Review

[16] The sole issue raised on this Application is whether the Applicants were denied procedural fairness due to the incompetence and negligence of their representative before the RAD.

[17] Where procedural fairness is in issue, the ultimate question before a court is whether an applicant has had a full and fair opportunity to be heard (*Siffort v Canada (Citizenship and Immigration)*, 2020 FC 351 at para 18). Strictly speaking, no standard of review is being applied. However, the correctness standard best reflects the standard that is to be applied by a reviewing court (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. Approach where incompetence alleged

[18] In *R v GDB*, 2000 SCC 22, the Supreme Court of Canada teaches that where ineffectiveness or incompetence of counsel is alleged, the party asserting incompetence must demonstrate (1) that counsel's actions constitute incompetence, and (2) that a miscarriage of justice resulted from that incompetence:

26. The approach to an ineffectiveness claim is explained in *Strickland v. Washington*, 466 U.S. 668 (1984), per O'Connor J. The reasons contain a performance component and a prejudice component. For an appeal to succeed, it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

27. Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

28. Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.

29. In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, supra, at p. 697). [Emphasis added.]

[19] In circumstances where it is apparent that no prejudice has occurred, courts will generally not engage in a consideration of the "performance" component of the two-part test. It is not the

role of a court to grade a representative's performance; that, instead, is a matter that rests with the professional's governing body.

V. Analysis

[20] The Applicants submit the new evidence disclosed that Mr. Singh had been previously arrested, charged, and convicted of offences in India – evidence that was of direct relevance to the RAD's consideration of whether the Applicants had established that they would be identified in criminal or person-of-interest databases. It is therefore reasonably probable, the Applicants argue, that had their representative placed the new evidence before the RAD, the outcome would have been different. I disagree.

[21] To establish the prejudice component of the test, the Applicants need to demonstrate on a reasonable probability standard that the outcome of the decision would have been different but for the alleged incompetence of their representative (*Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 at para 22; see also *Singh v Canada (Citizenship and Immigration)*, 2025 FC 48 at para 25). To do so in this instance, the Applicants must first establish the RAD could have accepted the new evidence.

[22] Subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 states that new evidence can only be relied upon before the RAD where one of three conditions are met: 1) the evidence arose only after the RPD's rejection of the claim; 2) the evidence was not reasonably available prior to the rejection of the claim; or 3) it could not reasonably have been

expected in the circumstances for the appellant to have presented the evidence prior to the rejection of the claim.

[23] In this instance, and as the Applicants acknowledge, the only basis upon which the new evidence could have been considered by the RAD is condition 3 – i.e. that the RAD could not reasonably have expected the Applicants to present the evidence prior to the rejection of the claim. However, Mr. Singh was well aware of the “new” evidence from the outset of his claim. He choose not to disclose the evidence to his counsel before the RPD and he also failed to disclose the evidence to the RPD despite direct questioning from the RPD that would have resulted in disclosure if the Applicant was responding completely and frankly to the questions asked (for example, before the RPD, Mr. Singh was asked to confirm that the narrative was “complete, true, and correct”, he replied yes knowing it was not; he was also directed to the refugee claim forms the Applicants completed and he was reminded that those forms specifically asked about detention in two locations, yet Mr. Singh did not take this opportunity to report his arrest and conviction to the RPD). Other than a bald assertion that he had been advised that disclosure of the new evidence would negatively impact his character, no explanation for the non-disclosure is given.

[24] In my view, it is clear that Mr. Singh made the calculated decision not to disclose the evidence of his arrest and conviction in the course of his refugee claim. That being so, the Applicants could not then benefit from that decision before the RAD, and Condition 3 of subsection 110(4) therefore could not have been satisfied. It is therefore apparent that no prejudice has occurred as a result of the alleged incompetence.

[25] The prejudice component of the test not being satisfied, there was no procedural unfairness.

[26] While not necessary to address, I am also of the view that the Applicants have failed to satisfy the high threshold for demonstrating incompetence. The evidence of incompetence amounts to little more than a bald assertion that the new evidence was provided to their representative before the RAD. The representative strongly denies the assertion. While the Applicants argue the Court should prefer their assertions over those of their former representative, citing inconsistencies in the representatives reply in respect of the date the representative was retained, this inconsistency alone is not sufficient to overcome the high evidentiary threshold to establish incompetence. In the absence of some evidence corroborating the bald assertion that the new evidence was provided to the representative, the Applicants cannot succeed on the performance component of the test.

VI. Conclusion

[27] The Application for judicial review is dismissed. The Parties have not proposed a question for certification, and none arises.

JUDGMENT IN IMM-13660-22

THIS COURT’S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. No question is certified.

“Patrick Gleeson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-13660-22

STYLE OF CAUSE: X KARMJIT SINGH PALVINDER KAUR v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONERENCE

DATE OF HEARING: MAY 15, 2025

JUDGMENT AND REASONS: GLEESON J.

DATED: MAY 20, 2025

APPEARANCES:

Emre Esensoy	FOR THE APPLICANTS
Nimanthika Kaneira	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Green and Spiegel Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT