IMMIGRATION AND REFUGEE BOARD
(APPEAL DIVISION)

LA COMMISSION DE L'IMMIGRATION
ET DU STATUT DE REFUGIE
(SECTION D'APPEL)

V98-03881

REASONS FOR DECISION AND ORDER

APPELLANT(S)/APPLICANTS — APPELANT(S)/REQUÉRANT(S)

SUKHBIR SINGH TUT

RESPONDENT — INTIMÉ

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

DATE(S) OF HEARING — DATE(S) DE L'AUDITION

March 7, 2002

PLACE OF HEARING — LIEU DE L'AUDITION

Vancouver, B.C.
In Chambers

DATE OF DECISION — DATE DE LA DÉCISION

March 7, 2002

CORAM — CORAM

Kashi Mattu

FOR THE APPELLANT(S)/APPLICANT(S)) — POUR L'APPELANT(S)/REQUÉRANT(S)

Massood Joomratty
Barrister & Solicitor

FOR THE RESPONDENT — POUR L'INTIMÉ

Steve Bulmer

You can obtain, within 72 hours, a translation or a copy of these reasons for decision in the other official language by writing to the Editing and Translation Services Directorate of the IRB, 344 Slater Street, 14th floor, Ottawa, Ontario, K1A 0K1 or by sending a request to the following e-mail address: translation.traduction@irb.gc.ca or to facsimile number (613) 947-3213.

Vous pouvez obtenir la traduction ou une copie de ces motifs de décision dans l'autre langue officielle dans les 72 heures, en vous adressant par écrit à la Direction des services de révision et de traduction de la CISR, 344, rue Slater, 14e étage, Ottawa (Ontario) K1A 0K1, par courrier électronique à l'adresse suivante : translation.traduction@cisr.gc.ca ou par télécopieur au (613) 947-3213.

These are the reasons and decision of the Immigration Appeal Division in the motion, pursuant to section 27(1) of the *Immigration Appeal Division Rules*, to reopen the appeal by Sukhbir Singh TUT (the "appellant") of his sponsored application for permanent residence of his spouse, Harbans Kaur TUT (the "applicant"), from India.

BACKGROUND

Mr. Tut filed an undertaking in March 1998. The application for permanent residence was filed in August 1998 and the application was refused on October 15, 1998 on the basis the visa officer found Mrs. Tut to be a person described under section 4(3) of the *Immigration Regulations, 1978* (the "*Regulations*"). Mr. Tut appealed the refusal. He retained counsel, Mr. Andrew McKinley ("previous counsel"), and the appeal was heard on July 15, 1999. The Appeal Division dismissed the appeal on November 8, 1999.

Mr. Tut filed a second undertaking to sponsor Mrs. Tut in April 2000, another application for permanent residence was filed in May 2000 and the application was refused on October 10, 2000. The visa officer found Mrs. Tut to be a person described under section 4(3) of the *Regulations* and found that Mr. Tut was bound by the previous decision of the Appeal Division. Mr. Tut appealed the second refusal and retained new counsel in March 2001. On May 1, 2001, Minister's counsel filed a motion to dismiss the appeal on the basis of *res judicata*. Counsel for Mr. Tut filed submissions in response to the motion to dismiss alleging incompetence of previous counsel as the basis that *res judicata* did not apply. Subsequently counsel for Mr. Tut filed this motion to reopen the original appeal heard on July 15, 1999 on the basis of incompetence of previous counsel. Minister's counsel filed submissions in response to the motion to reopen and previous counsel also filed submissions in response to the motion to reopen.

ANALYSIS

The issue to be determined in this motion is whether or not the original appeal heard on July 15, 1999 should be reopened.

THE TEST ON A MOTION TO RE-OPEN

The Supreme Court of Canada in Grillas[1] confirms the Appeal Division's jurisdiction to deal with matters of natural justice. The Federal Court in Drummond[2] also confirmed that competency of counsel may give rise to a natural justice issue and established that the Appeal Division has jurisdiction to consider a motion to reopen a sponsorship appeal arising out of the incompetence of counsel.

In order for the Appeal Division to come to the conclusion that there was incompetent or negligent representation at the first hearing, there must be clear and compelling evidence of the alleged incompetent or negligent representation and that it was so deficient as to amount to a denial of natural justice.

> …The evidence must be so clear and unequivocal, and the circumstances so egregious that unfairness would be virtually obvious. The experience of the courts, as drawn from the jurisprudence, is that occasionally applications are made on the basis of incompetence of counsel. However, because of the high standard to be met, such cases are infrequent."[3]
>
> …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 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 or a failure to do anything on the part of the tribunal.[4]

A recent decision of the Appeal Division considered this issue and set out additional clarification of the threshold that counsel's conduct must meet to trigger a breach of natural justice. It also indicated that evidence from the original counsel in response to allegations of negligence would shed some light on the merits of the allegations.

---

1 Grillas v. Canada (Minister of Manpower and Immigration), [1972] S.C.R. 577; 23 D.L.R. (3d) 1 (S.C.C.).
2 Drummond v. Canada (Minister of Citizenship and Immigration) (1996), 33 Imm. L.R. (2d) 258 (F.C.T.D.)
3 Drummond, at paragraph 6.
4 Shirwa v. MEI, [1994] 2 FC 51; (1993) 23 Imm. LR (2d) 123 (FCTD) at paragraph 12.

> …The reason for that is that counsel may make tactical choices about what evidence to present and how to present it based on confidential instructions from the client. At times what may appear to be glaring omission on the part of counsel is the result of an informed and professional judgement. What is clear is that the Division will not second-guess tactical choices, given that it is usually not privy to all of the information motivating that choice.[5]

THE LAW APPLICALBE TO A 4(3) MARRIAGE REFUSAL

A brief summary of the jurisprudence with respect to appeals involving marriage refusals based on section 4(3) of the *Regulations* provides some background to assess previous counsel's conduct in this case. The law applicable to marriage refusals based on section 4(3) of the *Regulations* is well settled and widely followed. The Federal Court set it out clearly in Horbas[6]

> In subsection 4(3) of the Immigration Regulations, 1978 the visa officer is directed to have regard to two criteria: first, whether the marriage was entered into primarily for the purpose of gaining admission to Canada, and secondly whether the sponsored spouse has the intention of residing permanently with the other spouse...Admittedly the application of these criteria raise difficult questions of fact, the more so because they involve the assessment of the intention of the sponsored spouse.
>
> …It must be kept in mind that in order to reject such an application on the basis of this subsection, it must be found that there is both a marriage entered into by the sponsored spouse primarily for the purposes of immigration and lack of intention on his or her part to live permanently with the other spouse.

This interpretation was confirmed and further clarified Kaloti[7] where the Federal Court stated:

> It follows that the two criteria are to be applied to the intention of a spouse at the time he or she entered into the marriage. The applicant submits that the same issues were not involved in the second appeal as a change of circumstances occurred and the question became whether or not she was a member of the family class at the time of the second application. He claims that the Appeal Division ought to have considered whether the intention of the applicant's spouse had changed since the first appeal.
>
> In my view, the plain meaning of paragraph 4(3) of the Regulations cannot be a "forward looking test", as submitted by the applicant. The test is whether or not the spouse in question "entered into the marriage primarily for the purpose of gaining admission to Canada… and not with the intention of residing permanently with the other spouse". Clearly, both criteria apply to the intention of the spouse at the time of the marriage.

---

5 Grant, O'Neil Rohan V. MCI, (T93-00071), Aterman, February 6, 2002, p. 10.
6 Horbas v. Canada (Minister of Employment and Immigration), [1985] 2 F.C. 359 (T.D.).
7 Kaloti, Yaspal Singh v. MCI, (IMM-4932-97), Dube, (FCTD), paragraphs 7 and 8.

APPEAL DIVISION HEARING

I have reviewed the transcript of the first hearing and the packages of authorities submitted by previous counsel. From the voluminous, verbose and, in many instances, convoluted and confusing submissions, the following is my understanding of the submissions particularly relevant to this motion:

- At the outset of the first hearing, previous counsel advised the presiding member that he was not calling any witnesses and would proceed with a complex, novel argument. He submitted that the "the dual intentions, as outlined in Horbas, are to be determined, in fact and in law, as of this date, at this time, in this hearing."[8]

- Previous counsel submitted, “what it really comes down to is what someone says or does before the hearing is not pertinent or relevant, not probative in any connection”.

- Previous counsel set out his interpretation of a *de novo* hearing. He argued that the decision in Kahlon has been misapplied and his interpretation of a *de novo* hearing supports his argument that the intentions of the applicant are to be determined at the time of the hearing.[9]

- Previous counsel argued that the visa officer provided opinion evidence, which was inadmissible, as well as undependable and unreliable.[10]

- During submissions related to the visa officer's refusal letter, the presiding member cautioned previous counsel that his arguments might “backfire” and previous counsel responded: "…if I've got a train to ride, I've got to ride it, whatever the consequences."[11]

- In the context of submissions related to not calling any witnesses, previous counsel submitted that no adverse inference can be drawn.

- Previous counsel also submitted that irrespective of section 4(3) of the *Regulations* there is a rebuttable presumption that when two people get married they intend to live together.[12]

In the reasons for decision,[13] the presiding member did not refer to any of previous counsel's submissions from the hearing other than the fact that "counsel for the appellant advised the panel that neither the appellant nor any other witness would testify at the hearing." The presiding member did not refer to any adverse inference drawn but stated:

---

8 Transcript p.2, lines 35-36.
9 Transcript; p.10, lines 11-12, 14-20; p.11, lines 45-49; p. 15, lines 7-50; p. 16, lines 32-38.
10 Transcript; p.2, lines 31-32; p.7, lines21-22.
11 Transcript; p.6, line 47; p.7, lines 5-6.
12 Transcript; p.18, lines 21-31; p.20, lines 1-6.
13 Tut, Sukhbir Singh v. MCI, (V98-03881), Singh, November 8, 1999, pp. 1,5.

"The appellant was present at the hearing. He, however, chose not to testify nor did any other witness testify at the hearing." The presiding member made the following findings:

> It is the applicant's intention, at the time of her marriage to the appellant, which is determinative of the issues involved in this case. Circumstances surrounding the applicant's marriage to the appellant and her knowledge of personal details of the appellant are relevant factors in determining the applicant's intention in entering into the marriage with him.
>
> …The evidence indicates that the appellant entered into marriage primarily to gain her admission to Canada.
>
> …Any one of the above factors relied upon by the visa officer, in itself, may not be sufficient to gauge the applicant's intention to reside permanently with the appellant. The cumulative effect of all the factors relied upon by the visa officer, however, indicates that the applicant's intention, on a balance of probabilities, is not to reside permanently with the appellant.

POSITION OF NEW COUNSEL

Counsel for Mr. Tut submits that previous counsel was incompetent or negligent in a number of ways at the first hearing, particularly in failing to call any oral testimony through the appellant and applicant who were willing and available to testify at the hearing and proceeding only with "novel" submissions despite warning from the presiding member and regardless of the consequences to the appellant.

POSITION OF MINISTER'S COUNSEL

Minister’s counsel submits that previous counsel was competent and specifically, among other things, that:

- New counsel has not met the onus required to meet the test to prove gross incompetence;
- The lack of *viva voce* testimony is not unusual, and of itself does not infer gross incompetence;
- Affidavit, Transcripts, Exhibits and Decision support the competence of previous counsel;
- Mr. Tut, an adult, made an informed decision in choosing previous counsel; and
- The presiding member’s decision was all encompassing, with no adverse inference drawn pursuant to *viva voce* testimony.

POSITION OF PREVIOUS COUNSEL

Previous counsel was given the opportunity to respond to the allegations regarding his conduct at the first hearing to shed some light on the merits of the allegations. He was provided with a copy of the transcript of the hearing and the submissions of new counsel and Minister's counsel on the motion to re-open. Previous counsel filed written submissions to clarify his conduct at the first hearing and he took issue with certain statements in Mr. Tut's affidavit as well as new counsel's submissions.

Previous counsel explained that he had earlier discussions with Mr. Tut in relation to what evidence would be called at the hearing and that Mr. Tut confirmed trust and confidence in him as counsel and Mr. Tut left the decision to counsel as to what evidence to introduce at the first hearing. He clarified that he advised Mr. Tut just prior to entering the courtroom of his decision not to have either Mr. Tut or Mrs. Tut testify. Previous counsel further explained he based this determination on his consideration of: the facts as gleaned from the Record, particularly Mrs. Tut's interview and the letters; the applicable case law in connection with section 4(3) of the *Regulations*; the applicable case law that no adverse inference was to be drawn if neither testified; and the fact Mrs. Tut had lied about Mr. Tut's children at the interview and Mr. Tut had told her to lie which he submitted would have a significant bearing on their credibility.[14]

Further, previous counsel set out his current interpretation of the applicable law. He stated "it is trite that it is the intention of the applicant **at the time she entered into the marriage** which is relevant…" (emphasis added)[15]

Previous counsel clarified that his novel argument and the presiding member's caution were only in relation to his arguments about opinion evidence of the visa officer's

---

14 Written Submissions of Andrew McKinley dated December 5, 2001, pp.3-5.
15 Ibid. p. 5.

and his novel (new) argument was only one part of his entire argument, other parts not being so.[16]

APPLICATION OF THE TEST

A determination of counsel not to introduce any *viva voce* testimony does not of itself infer incompetence or negligent representation. Moreover, it is open to a panel not to draw an adverse inference from a determination not to call *viva voce* evidence. Nevertheless, that does not preclude a subsequent challenge to the conduct of counsel or a subsequent finding, albeit in exceptional circumstances, that counsel's conduct amounted to incompetence or negligent representation.

The determinative issues at the previous hearing were Mrs. Tut's intentions at the time of the marriage. The transcript provides clear and unequivocal evidence that previous counsel argued an incorrect interpretation of the applicable law at the first hearing. Previous counsel confirmed in his submissions that he has represented many clients before the Appeal Division on marriage refusals based on section 4(3) of the *Regulations* and in his recent submissions he correctly states the well-established interpretation of the applicable law. Previous counsel provided no explanation for his specific arguments at the first hearing in relation to Horbas or Kahlon where he submitted the intentions of the applicant are to be determined at the time of the hearing. He did clarify and restrict his "novel" arguments and the presiding member's warning to be only in relation to the opinion evidence of the visa officer. In this case, previous counsel did not inadvertently misquote or misinterpret the applicable law. In my view, previous counsel deliberately failed to provide an explanation why he argued and attempted to persuade the presiding member to apply an incorrect interpretation of the applicable law at the first hearing because he knew his representations were wrong. These representations were fundamental to the issues to be determined at the first hearing and I find the conduct of previous counsel in this respect was negligent.

---

16 Ibid. pp.8,9.

Previous counsel explained his determination not to call either Mr. or Mrs. Tut to provide additional evidence was based on his review of the facts in the Record and his interpretation of the applicable law. However, the facts in the Record were essentially from Mrs. Tut's interview, which the visa officer relied on to refuse the sponsorship application. One of the authorities that previous counsel relied on, both at the first hearing and in his submissions to clarify his conduct in this case, was a decision in which he acted as counsel for the appellant and chose to rely on documents, the Record and arguments of counsel. In that case, although no adverse inference was drawn from not calling either the appellant or the applicant, the panel dismissed the appeal on the basis that there was no credible evidence presented to the panel to persuade it to come to a conclusion different than that of the visa officer.[17] Nevertheless, despite the fact Mr. and Mrs. Tut were willing and available to testify to provide additional evidence for the presiding member to consider, previous counsel deliberately chose not to introduce their testimony to explain, clarify or supplement the evidence Mrs. Tut provided at her interview. It is clear from the reasons and decision of the previous hearing that the presiding member applied the correct interpretation of the applicable law to the only relevant evidence before him, Mrs. Tut's evidence from her interview, and came to the same conclusion as the visa officer because it clearly did not meet the onus of proof.

In my view, there is clear and unequivocal evidence that previous counsel's representations were negligent in material respects. Previous counsel's conduct in this case meets the high threshold of the test set out by the Federal Court in Shirwa and Drummond. Previous counsel deliberately chose not to introduce any *viva voce* testimony relying on his deliberate misinterpretation of the well-established law relating to marriage refusals under section 4(3) of the *Regulations* and notwithstanding the opportunity to rebut all or some of the adverse evidence in the Record. I find that this conduct was so deficient that it ensured that the appeal could not succeed and was therefore inherently

---

[17] Rai, Kuljinder Singh v. MCI, (V97-02362), Hoare, June 30, 1998, p.4.

prejudicial to Mr. Tut. The conduct amounts to a denial of natural justice as Mr. Tut was denied a full and fair hearing of his appeal.

DECISION

Based on the evidence before me, I find Mr. Tut was denied a full and fair hearing due to his previous counsel's conduct. The motion to reopen the appeal is granted. I therefore, order that the appeal be remitted for a rehearing on a date to be set by the Registrar.

ORDER

The Immigration Appeal Division orders that the appeal of Sukhbir Singh TUT be rescheduled as a hearing *de novo* before the Immigration Appeal Division on a date to be set by the Registrar.

"Kashi Mattu"
Kashi Mattu

Dated at Vancouver, B.C. this 7th day of March, 20002.

You have the right under ss. 82.1(1) of the *Immigration Act* to apply for a judicial review of this decision, with leave of a judge of the Federal Court - Trial Division. You may wish to consult with counsel immediately as your time for applying for leave is limited under that section.