Federal Court Cour fédérale

Date: 20250502

Docket: IMM-6795-24

Citation: 2025 FC 786

Ottawa, Ontario, May 2, 2025

PRESENT: The Honourable Mr. Justice Duchesne

BETWEEN:

KOVILEN COOLEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Kovilen Coolen, seeks judicial review of a decision by an officer [the Officer] of Immigration, Refugees and Citizenship Canada [IRCC] that rejected his work permit application [the Decision]. The Officer deemed him inadmissible pursuant to paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for directly or indirectly misrepresenting or withholding facts material to a matter that induces or could induce an error in the administration of the IRPA. The Decision also prohibited him from entering Canada for five years pursuant to paragraph 40(2)(a) of the IRPA.

[2] The Applicant alleges that the Decision was reached in a procedurally unfair manner because it resulted from his former immigration consultant's [the Former Consultant] professional incompetence.

[3] For the reasons set out below, I find that the Decision was reached in a procedurally fair manner despite the Former Consultant's incompetence. This application is therefore dismissed.

I. **Background**

[4] The Applicant is a citizen of Mauritius.

[5] The Applicant and his spouse contacted AOF Immigration Canada [AOF] to determine their eligibility to immigrate to Canada in July 2023. The Former Consultant, an immigration consultant working with or for AOF, sent the Applicant an AOF branded form titled "Formulaire de renseignements" that contained approximately 22 questions. The first box on the form reflected that the information sought through the form was to be used solely to determine the program that was most adapted to the Applicant's profile and immigration objectives. The AOF form did not include any questions pertaining to any prior conviction or criminal record.

[6] The Applicant completed and signed the « Formulaire de renseignements » (Translation: "Information Form") on July 5, 2024, and returned it to AOF via email on July 7, 2023.

[7] On July 14, 2023, the Former Consultant provided the Applicant with an analysis of his profile and recommendations to help maximize his chances to immigrate successfully to Canada.

The Former Consultant recommended that the Applicant apply for “le programme de travailleurs,” referring to the temporary foreign worker program through which the Applicant may be issued a limited work permit for a specific Canadian employer with a positive Labour Market Impact Assessment [LMIA].

[8] The Former Consultant quoted her fee of $9,250 CAD to coordinate the Applicant’s work permit application and arrival in Canada and sent the Applicant a “specimen” of a contract for services. The Former Consultant indicated that a contract for services would be sent to the Applicant once he was prepared to pursue his immigration plans.

[9] The Applicant engaged the Former Consultant to prepare and submit his work permit application. No contract for services between the Applicant and the Former Consultant or between the Applicant and OAF was led into evidence in this proceeding. The terms pursuant to which the Former Consultant represented the Applicant in his immigration efforts are not known other than as referred to above and discussed herein.

[10] At some point prior to November 7, 2023, the Former Consultant sent the Applicant a document titled « IMM 1295/Demande d’un permis de travail présenté à l’extérieur du Canada » (Translation: “IMM-1295 / Application for Work Permit Made Outside of Canada”) and requested that he complete it, sign it and return it to her [the AOF IMM 1295]. The document was a word processor-prepared document that bore some substantive resemblance to the actual IMM 1295 form published by IRCC. The AOF IMM 1295 form requested some but not all of the information required by IRCC in the actual IMM 1295 form that forms the basis of work permit

applications. The actual IMM 1295 form published by IRCC [the IMM 1295 Form] requires information regarding tuberculosis exposure, prior military or militia service, and whether the applicant has ever committed, been arrested for, been charged with, or convicted of a criminal offence in any country or territory along with other information that does not appear in the AOF IMM 1295 form. The AOF IMM 1295 form did not include these questions, but instead asked whether the Applicant had a LinkedIn, Facebook or Instagram account.

[11] The Applicant completed the AOF IMM 1295 form, signed it on November 7, 2023, and returned it to the Former Consultant via email.

[12] On December 2, 2023, the Applicant signed an employment agreement pursuant to which he was hired to work as a full-time employee of a fast-food establishment in Bouctouche, New Brunswick.

[13] The Former Consultant completed an IMM 1295 Form for submission to IRCC on behalf of the Applicant. The IMM 1295 Form completed and submitted by the Former Consultant contained checks in the “No” boxes in response to question 3 of the Background Information section of the form. Question 3 asks whether the Applicant has ever committed, been arrested for, been charged with, or convicted of any criminal offence in any country or territory, and if so, to provide details.

[14] On December 12, 2023, the Former Consultant submitted the IMM 1295 Form she had prepared and dated December 5, 2023, along with a fully executed IMM 5476 form to IRCC.

[15] The IMM 1295 Form submitted by the Former Consultant had been submitted without the Applicant being provided the opportunity to review its content or make any corrections to it prior to submission. The Applicant's name appears typed in the signature box of the submitted form, but there is no signature that appears on the IMM 1295 Form itself. The Applicant did not sign the IMM 1295 Form submitted by the Former Consultant. There is no evidence led that suggests that the Applicant and Former Consultant had any communication with respect to the content of the IMM 1295 Form between November 7, 2023, and December 12, 2023, when it was filed with IRCC.

[16] On December 14, 2023, the Applicant was informed that his work permit application had been submitted to IRCC.

[17] On January 22, 2024, IRCC sent a letter to the Former Consultant in connection with the Applicant's application. IRCC requested an original copy of a police certificate with respect to the Applicant for each state in which he has resided for more than 6 months since he was 18 years old. The Former Consultant sent an email to the Applicant on the same date but did not forward a copy of the IRCC letter to the Applicant. Instead, the Former Consultant informed the Applicant that she had received a letter from the government that requested that he provide his criminal record as soon as possible.

[18] On January 28, 2024, the Applicant sent an email to the Former Consultant along with his criminal record check obtained from the District Court of Moka in Mauritius. He noted in his email that his criminal record check reflected an infraction and fine he paid in October 2018. He

explained to the Former Consultant that his spouse had been working as a fishmonger in 2018, a trade for which a permit was required by the District Council (a local governmental authority), while she was pregnant with their son, and that he had worked in her place on a day when she was not feeling well. The local police issued a summons to him because the fishmonger permit was in his spouse's name and not his.

[19] In the same email, the Applicant asked the Former Consultant if the infraction and fine would cause him prejudice in his application to IRCC. The Former Consultant replied on January 28, 2024, that the conviction and sentence would not have a negative effect on his application because it was a fine and he had paid it.

[20] On February 2, 2024, the Former Consultant informed the Applicant that IRCC had requested a copy of the court documents relating to his conviction in Mauritius. On February 6, 2024, the Applicant provided the Former Consultant with the documentation he had obtained from the District Court of Moka. The summons and the Court Manager's letter produced reflected that the Applicant had pleaded guilty to the charge of carrying on a classified trade without paying fees as prescribed by the District Council and was fined 3600 Rs (approximately $106 CAD). The sentence was handed down and the fine was paid on November 8, 2018. The record does not reflect whether or when the Former Consultant provided the summons and Court Manager's letter to IRCC.

[21] On February 15, 2024, IRCC sent a procedural fairness letter to the Applicant care of the Former Consultant [the PFL]. The PFL set out that IRCC had reasonable grounds to believe that

the Applicant did not meet the requirements of subsection 16(1) of the IRPA because he had provided a negative and untruthful answer to question 3 on the IMM 1295 Form he had submitted on December 12, 2023. In addition, because the failure to answer truthfully meant that the Applicant had made a false declaration and misrepresented material facts relating to his application, the letter communicated that he would be inadmissible to enter Canada for a period of 5 years pursuant to sections 40(1)(a) and 40(2)(a) of the IRPA. IRCC provided him a period of 10 days within which to comment on the information contained in the February 15, 2024, letter.

[22] On February 15, 2024, the Former Consultant emailed the Applicant. The Former Consultant wrote:

> « Bonjour Jorsencoolen
>
> nous avons recu un email du gouvernement nous demandant des éclaircissements sur votre condamnation.
> dans le email que vous m'avez ecrit le 28 janvier lors de la demande de casier judiciaire vous disiez que c'était une contravention que vous avez et qui avait ete payé
> avez vous ete arrêté et condamné? »
>
> *(verbatim from the original)*
>
> (Translation: “Hello Jorsencoolen,
>
> We have received an email from the government asking for clarifications regarding your conviction.
> In the email that you sent to me on January 28 in response to the criminal record request, you wrote that what you had was a ticket, and that it had been paid.
> Have you been arrested and convicted? Can you write a letter explaining the situation and send it to us as soon as possible?”)

[23] The Former Consultant did not provide the Applicant with a copy of the PFL itself.

[24] The Former Consultant did not inform the Applicant that IRCC had noted an untruthful answer to question 3 on the IMM 1295 Form, or of the possible consequences of the false declaration and its misrepresentation of material fact. Without being provided with the PFL or an adequate summary of its content, the Applicant could not have known that IRCC had noted a false declaration and a material misrepresentation in his application that could lead to his becoming inadmissible to Canada for a period of 5 years, what the false declaration consisted of, or how and by whom it had been made.

[25] Still on February 15, 2024, the Applicant responded to the Former Consultant and confirmed that he had received a ticket and had paid the fine. He confirmed that all was explained in the court documents he had provided her. The Applicant and the Former Consultant spoke by telephone and the Applicant explained the circumstances of the ticket, conviction, sentence and fine payment to the Former Consultant.

[26] Within a few hours, still on February 15, 2024, the Former Consultant emailed the Applicant a letter to be submitted in response to the PFL [The PFL Response Letter]. The PFL Response Letter had been prepared by the Former Consultant. The Former Consultant asked the Applicant to read, sign and return the proposed PFL Response Letter to her as soon as possible if he was satisfied with its content so that it could be sent to IRCC.

[27] The PFL Response Letter prepared by the Former Consultant contains representations that:

a) the Applicant had received the PFL;

b) the Applicant had completed the IMM 1295 Form and had incorrectly checked the “no” box in answer to question about his criminal record;
c) he misinterpreted the question asked in the IMM 1295 Form and believed that only situations where he was in custody or incarcerated had to be considered in providing an answer;
d) he did not believe that the infraction and fine fell within the type of conduct that would require a positive answer to the question asked;
e) he re-read the question and now recognizes that he should have checked the “yes” box rather than the “no” box; and,
f) he has nothing to hide and recognizes the error he committed in his past that led to the conviction and fine.

[28] The Applicant had the opportunity to review the PFL Response Letter before he signed it and approved its delivery to IRCC. He carefully checked the details provided regarding the ticket to ensure the circumstances surrounding it were correctly mentioned. Being satisfied that they were accurate, he relied on the Former Consultant’s expertise and judgment for the other aspects of the letter to satisfy IRCC’s requirements. Trusting her professional advice, he signed the PFL Response Letter and sent it back to the Former Consultant. The Former Consultant filed the signed PFL Response Letter with IRCC.

[29] The Decision was made on March 1, 2024. On March 4, 2024, the Former Consultant informed the Applicant that his work permit application was refused due to misrepresentation and that he had also received a 5-year ban from Canada.

[30] The Applicant protested to the Former Consultant in various emails that he had never been told that the initial IMM 1295 Form had been completed incorrectly and demanded reimbursement of the $8,000 CAD amount he had paid to AOF as well as the rectification of the situation.

[31] On March 8, 2024, in response to additional inquiries by the Applicant, the Former Consultant summarized her position as follows:

> « vous m'avez écrit bien après le dépôt du permis pour nous dire que vous avez une amende et je vous ai dit que si l'amende avait été payée cela ne devrait pas poser problème j'ai répondu à votre question selon les informations que vous avez donné. mais vous n'avez jamais expliqué que vous êtes aller en cours et été condamné. cependant même si vous nous auriez dit, que pensez vous que j'aurai pu faire, c'est une information que vous auriez dû nous dire au tout début de votre dossier mais vous avez garder cette info juste pour vous et nous le dire qu'après dépôt du permis. **Le consultant n'est pas un voyant et n'est pas responsable des information qu'il ne connaît pas du client le client sera responsable des information qu'il donne vous avez choisi volontairement de donner ses information après le dépot du permis , cela n'est pas une erreur de notre part mais une responsabilité de la votre** » [emphasis added] [AR at 123].
>
> *(verbatim from the original)*
>
> (Translation: "You wrote to me long after the permit was filed to tell us that you had a ticket, and I told you that if the fine had been paid then it should not be a problem. I answered your question based on the information you gave. But you never explained that you had gone to court and been convicted. However, even if you had told us, what do you think I could have done? This is information that you should have told us at the very beginning of your file, but you kept this information to yourself and told us only after the permit was filed. **The consultant is not clairvoyant and is not responsible for the information that he does not know about the client; the client is responsible for the information he gives. You deliberately chose to provide this information after the permit was filed—this is not a mistake on our part but a responsibility that is yours.**" [emphasis added] [AR at 123].))

[32] On March 20, 2024, the Former Consultant responded to further inquiries by the Applicant, refused reimbursement and argued that his inadmissibility to Canada was not AOF's fault. The Former Consultant insisted that she had completed her work and had referred to the information the Applicant had provided her at the time of the application.

II. **Notification to the Former Consultant**

[33] On May 26, 2024, the Applicant's solicitor notified the Former Consultant of the Applicant's intended application for judicial review and the pending allegations of professional incompetence to be made within it against her in accordance with this Court's *Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection Proceedings* [the Guidelines].

[34] The Former Consultant responded on June 3, 2024. She responded that:

> "Before submitting his work permit, he forgets to tell us that he has a criminal record.
>
> When the work permit was transferred to the government, he told us in an e-mail that he had a ticket. However, after checking, I found that it was not a contravention but a delict. Of course, the application for a work permit was submitted months ago and we're still waiting for a reply. The government noticed the offence when it asked for his criminal record. On our side, after receiving the letter of refusal, we offered Mr. Coolen, as mentioned in the contract, a refund of $2,000. My personal response to Mr. Coolen is that I do not process requests for cancellation of inadmissibility. Finally, before we begin our work, Mr. Coolen has filed an information form to answer questions so that we can file the Government's EMI; we only follow the information he gives us. This information will also be sent to you. If Mr Coolen wishes to lodge a complaint about me with the Regulatory College, that is his right. However, I cannot give him a higher refund or a full refund because we have done our job to the end, as stipulated in the contract. All documents will be sent to you."

[35] The Former Consultant sent the Applicant's solicitor a copy the email exchanges she had had with the Applicant between November 6, 2023, and April 24, 2024.

[36] The email exchanges between the Former Consultant and the Applicant confirm and corroborate the Applicant's evidence of the events, communications and documents passing between them. The documents produced by the Former Consultant reflect that:

a) the Former Consultant sent an IMM 1295 form to the Applicant via email on November 6, 2023, and the email does not reflect whether the form sent was the AOF IMM 1295 or the actual IMM 1295 Form published by the IRCC;

b) The Former Consultant informed the Applicant via email on November 23, 2023, that

> « Sachez que tous mensonges concernant vos antécédents d'immigration peut engendrer un refus du dossier de la part du gouvernement ou même un bannissement »
>
> *(verbatim from the original)*
>
> (Translation: "Be aware that any lies regarding your immigration history may result in the refusal of your file by the government, or even banishment.");

c) The AOF IMM 1295 form contains a series of questions at question 3 with respect to the Applicant's immigration history whereas the IMM 1295 Form published by the IRCC and submitted by the Former Consultant on the Applicant's behalf on December 12, 2023, contains no such questions other than a single question in box 2 on page 6 of IRCC's form regarding whether the Applicant had previously applied to enter or to stay in Canada;

d) the Former Consultant first addressed the Applicant's criminal record on January 22, 2024, following IRCC's letter delivered to the Former Consultant requesting a copy of the Applicant's criminal record check;

e) the Applicant emailed to the Former Consultant on March 7, 2024, after having been informed of the Decision by the Former Consultant and asked:

> « Madame pourquoi quand j'ai vous ai envoye mon certificat de Character vous m'avez pas dit que vous ou votre agent a mal remplie le formulaire. »
>
> *(verbatim from the original)*
>
> (Translation: "Madam, why didn't you tell me, when I sent you my Certificate of Character, that you or your agent had filled out the form incorrectly?").

f) the Applicant emailed the Former Consultant on March 7 or 8, 2024, and wrote that:

> « Tout les information que vous m'avez demander tout les informations sont vraies sauf que c'est vous qui a remplie au niveau de mon casier judicaire sans meme me demander des renseignement. Done c'est vous qui est responsable de sa.
>
> Quand est ce que vous croyez que j'ai du donner les information quand vous me demandez bien sure non pas le remplir par vous meme.
>
> Montrer moi dans le formulaire 1295 que vous m'avez envoyer pour remplir s'il y avez mentioner ce bout la..
>
> […]
>
> Montrer moi dans le formulaire 1295 ou c'est ecrit au niveau de mon casier judicaire parcontre dans le 1295 partis ANTECEDENT que vous avez remplie il y a belle et bien la section 3 avec le detail de mon easier judiciare que c'est vous qui l'a belle et bien remplie. »
>
> *(verbatim from the original)*
>
> (Translation: "All of the information that you asked me for—all of the information is true. Except that you were the one who filled out the information regarding my criminal record, without even asking me for information. So, you are responsible for that.
>
> When do you think I should have given the information? When you asked me, of course—don't fill it out yourself.
>
> Show me where that part was mentioned on the 1295 form that you sent me to fill out.

> …
>
> Show me on the 1295 form where that is written about my criminal record. And yet, part 3 of the BACKGROUND INFORMATION section of the 1295 does include the details of my criminal record, and you are the one who actually filled it out.").

[37] The Applicant filed an application for leave and judicial review of the Decision on June 12, 2024.

III. **The Decision Under Review and The Certified Tribunal Record**

[38] The Decision indicates that Applicant's work permit application was denied because it failed to satisfy the requirements of the IRPA.

[39] The reasons contained in the Decision reflect that the Officer considered the Applicant's work permit application and supporting documents under the Temporary Foreign Worker Program. The Applicant was found inadmissible pursuant to paragraph 40(1)(a) of the IRPA for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the IRPA. The Decision also sets out that the Applicant is inadmissible to Canada for a period of five years pursuant to paragraph 40(2)(a) of the IRPA.

[40] The GCMS notes reflect the Officer's reasoning and how he came to the Decision. The key portions of the GCMS notes reflect as follows:

a) on January 31, 2024, an IRCC officer recorded "PC conviction-trading without a Licence 2018/11/08";

b) on January 31, 2024, an IRCC officer records that "**Conviction not declared on app form. Req explanation of circumstances of conviction.";

c) on February 15, 2024, an IRCC officer recorded that, "PA was charged with a case of carrying out trade without paying the prescribed fees by the district council. Applicant paid a fine of CAD$ 106. No sentence listed";

d) still on February 15, 2024, an IRCC officer recorded that "On balance I am satisfied that conviction listed does not render PA inadmissible to Cda. However pa has failed to declare conviction on app form A40 concerns – PFL sent"; and,

e) on March 1, 2024, an IRCC officer recorded as follows:

> "Rev PRL response. PA confirms conviction and states that he did not realise that his conviction was applicable to the question. H thought is was applicable if you were under police guard or incarcerated.
>
> PA further confirms in order to pay the required fine one has to appear before a judge which was done in his case.
>
> Pa confirms upon re-reading the question he realises that he should have answered yes - PA did not intend to hide anything from us and was simply an error.
>
> Applicant submitted notice of summons titled "Notice in lieu of summons to a party charged" - the fact applicant had to appear before a judge and is referred to as charged would indicate applicant would have been aware of the charges.
>
> While the conviction does not render pa in admissible to Cda - applicant failed to disclose that he has previously been charged with an offence.
>
> The questions on the application form are simple and clearly posed and PA failed to answer truthfully.
>
> I therefore recommend refusal of application under A40. App referred to IPM for final consideration."
>
> *(verbatim from the original)*

f) the recommendation was accepted by another IRCC Officer on March 1, 2024. The reasoning set out in the GCMS notes reads:

> "Application reviewed. PA was sent a PFL to address the concerns of undisclosed information in the statutory questions.
>
> Based on the application, I am satisfied that the applicant uttered a false document in support of the application. This information is material to the assessment of the application; therefore, it could have led to an error in the administration of the act. The PA was provided with an opportunity to address this concern and has failed to provide any information which overcomes said concern. Therefore, based on the information on file, I am satisfied that the PA is inadmissible under A40, misrepresentation and is inadmissible to Canada for a period of 5 years as a result."

IV. **Issues**

[41] There are two issues to be determined:

1) Did the Applicant waive his right to claim a violation of procedural fairness?
2) Did the Former Consultant's alleged incompetence constitute an infringement of procedural fairness?

V. **Positions and Analysis**

A. *Issue 1: Waiver of the right to claim a violation of procedural fairness*

[42] The Respondent argues that the Applicant waived his right to claim a violation of his procedural fairness rights because he failed to bring his procedural fairness concerns forward at the earliest possible opportunity. The Applicant's failure is therefore argued to be an "implied waiver" of any perceived breach of procedural fairness (*Alexander v Canada (Citizenship and*

Immigration), 2023 FC 438 at para 21; *Kozak v Canada (Citizenship and Immigration)* at para 66).

[43] The Respondent argues that the Applicant was provided the opportunity to review the PFL Response Letter, reviewed the letter, signed it and returned it to the Former Consultant for filing with IRCC without correcting any inaccuracies it might have contained. The Respondent argues that, in doing so, the Applicant did not attribute errors in his application to the Former Consultant but rather considered and signed an entirely different story or, at minimum, chose to go along with the Former Consultant's false story. The Respondent argues that the Court should not entertain the Applicant's procedural fairness argument because he raised only after having been unsuccessful in his application to the IRCC.

[44] I disagree with the Respondent and must reject his argument.

[45] Persons seeking to immigrate to Canada are responsible to be truthful in their application in accordance with their duty of candor to honestly disclose material facts relating to their application and they cannot assign blame to a representative for falsehoods contained in documents that they reviewed and signed (*Yang v Canada*, 2019 FC 402 at para 40 [*Yang*], (*Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at paras 13, 15). Nevertheless, applicants who were not provided copies or details of procedural fairness letters by representatives alleged to be incompetent may later raise procedural unfairness on judicial review (*Yang* at paras 13 – 16).

[46] While it is settled law that a party that knows of a procedural flaw, effect or irregularity with an administrative process must raise it with the administrative decision-maker as soon as reasonably possible and that failure to do so will amount to an implied waiver such that the issue cannot be raised on judicial review (see e,g *Nwokolo v Canada (Citizenship and Immigration)*, 2024 FC 1665 at paras 16 – 17), the earliest possible opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection (*Highway v Peter Ballantyne Cree Nation*, 2023 FC 565 at para 57 [*Highway*], citing *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para 220, aff'd 2007 FCA 199).

[47] The rationale for requiring a complainant to raise the procedural fairness issue at the earliest possibility is that raising the issue early provides the administrative decision-maker an opportunity to address the matter before any harm is done, to try to repair the harm, or to explain himself (*Highway* at para 58, *Hennessey v Canada*, 2016 FCA 180 at para 21). The party complaining of a violation of their procedural fairness rights cannot lay still in the weeds in wait and then pounce later.

[48] I do not find that the Applicant had been laying in wait only to raise the procedural fairness on judicial review. The Applicant was not aware of the relevant information that could have given him cause to fear a breach of his rights of procedural fairness because, as the record shows, he:

a) neither completed nor provided information to the Former Consultant in order to answer the criminal record questions asked as question 3 in the IMM 1295 Form;

b) was not aware that the actual IMM 1295 Form filed by the Former Consultant contained a question with respect to whether he had ever committed, been arrested for, been charged with, or convicted of any criminal offence in any country or territory;
c) had not been provided with a copy of the IMM 1295 Form actually filed by the Former Consultant on his behalf on December 12, 2023, that contained a misrepresentation at question 3 with respect to his criminal record;
d) had not been provided with a copy of the correspondence or communications between the Former Consultant and IRCC with respect to his criminal record;
e) had not been provided with a copy of the Former Consultant's communications to IRCC after he provided the Former Consultant with his criminal records check, summons and related documents;
f) had not been informed by the Former Consultant that she had answered question 3 on the IMM 1295 Form by representing that the Applicant had not been charged with or convicted of any criminal offence in any country or territory; and,
g) had not been provided with a copy of the PFL by the Former Consultant.

[49] The information critical to the Applicant becoming aware of a violation of his rights of procedural fairness due to incompetent representation and/or the negligent misrepresentations made by the Former Consultant was concealed from him and he was assured by the Former Consultant that any matter arising from his ticket and fine would not impact his application negatively. The Former Consultant controlled the flow and sharing of the relevant information and failed or omitted to provide the critical information that may have made the Applicant aware of a breach of his procedural fairness rights in time for him to raise the issue before IRCC. This

is so even though he had learned some of this information prior to the Decision because the crucial information that was contained in the PFL with respect to the misrepresentation and its consequences that might have given rise to a suspicion that his rights may not have been respected was not adequately conveyed to him in time for him to raise the issue with IRCC.

[50] I find that the Applicant has not waived his right to raise the procedural fairness issues he raises in this proceeding.

B. *Issue 2: Did the Former Consultant's alleged incompetence constitute an infringement of procedural fairness?*

[51] Procedural fairness arguments require the Court to ask whether the procedure was fair having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC). The Court asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. This reviewing exercise is best reflected in the correctness standard even though no standard of review is being applied (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; *Zdraviak v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25).

[52] The applicable test for establishing an infringement of procedural fairness rights due to the ineffective assistance of counsel has three components. The test applies equally and in the

same manner to immigration consultants and agents (*Ram v Canada (Citizenship and Immigration)*, 2022 FC 795 at para 12; *Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 16; *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305 at para 56). The three components are:

> 1. The former representative's alleged acts or omissions must constitute incompetence as determined on 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 applicant 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. 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 (*R v GDB*, 2000 SCC 22 at paras 27, 29 [*GDB*]);
>
> 2. There must have been a miscarriage of justice in the sense that, but for the alleged conduct, there was a reasonable probability that the result of the original matter would have been different (*Aluthge v Canada (Citizenship and Immigration)*, 2022 FC 1225 at para 22 [*Aluthge*]; *Singh v Canada (Citizenship and Immigration)*, 2024 FC 576 at para 34); and,
>
> 3. The representative must be given notice and a reasonable opportunity to respond (*Aluthge* at para 22; *GDB* at para 26).

[53] The Applicant argues that the Decision is procedurally unfair due to the Former Consultant's alleged incompetence and that all three requirements of the applicable test have been met.

[54] The Respondent agrees that the Former Consultant acted incompetently and that the first component of the test for a violation of procedural fairness due to the incompetence of an

immigration consultant has been met. The Respondent takes no issue with the notice component of the test being satisfied. Components 1 and 3 of the applicable test are therefore satisfied.

[55] The Respondent's concern is with respect to the second component of the test. He argues that the Applicant's duty of candour is distinct from the guidance/assistance that a representative provides to an applicant in an immigration matter. He also argues that applicants have an obligation to be truthful and cannot absolve themselves of that obligation by saying their representative told them to lie.

[56] The Respondent argues that the Applicant breached his obligation to be truthful when he signed the PFL Response Letter. He argues that the Applicant had the opportunity to fully explain what had occurred in the PFL Response Letter, but instead delivered a letter that contained an entirely different story with no mention of any responsibility or error on the part of the Former Consultant. He argues that the Former Consultant's responsibility for the original omission does not excuse the Applicant's failure to raise the Former Consultant's error in his response to the PFL. To this end, the Respondent relies on Madam Justice Aylen's words in *Anttal v Canada (Citizenship and Immigration*), 2024 FC 643 at para 13, that "it would be nonsensical to permit a claim of incompetence to overcome the Applicant's own negligence in performing this duty." The Respondent also relies on *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971, *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428, *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 and others to this effect.

[57] The issue now becomes whether the Applicant's review and signature of the PRL Response Letter on February 15, 2024, can constitute a misrepresentation and a breach of the duty of candour that falls within the scope of paragraph 40(1)(a) of the IRPA that has an effect on the second component of the applicable test regarding the breach of procedural fairness rights due to a representative's incompetence.

[58] Madam Justice Strickland recently reiterated the principles applicable when considering allegations of misrepresentation and the exceptions to them in connection with section 40 of the IRPA in *Lui v Canada* (*Citizenship and Immigration)*, 2025 FC 370 at paras 34 and 35, as follows:

> [34] I have previously summarized the legal backdrop to paragraph 40(1)(a) of the IRPA in *Malik v Canada (Citizenship and Immigration),* 2021 FC 1004 [*Malik*] as follows:
>
> > [15] I have previously summarized the general principles concerning misrepresentation in *Goburdhun v Canada (Citizenship and Immigration),* 2013 FC 971 at para 28. For the purposes of this application they include that s 40 is to be given a broad interpretation in order to promote its underlying purpose (*Khan v Canada (Citizenship and Immigration),* 2008 FC 512 at para 25 ("*Khan*")), its objective being to deter misrepresentation and maintain the integrity of the immigration process. To accomplish this, the onus is placed on the applicant to ensure the completeness and accuracy of their application (*Oloumi v Canada (Citizenship and Immigration),* 2012 FC 428 at para 23 ("*Oloumi*"); *Jiang* at para 35; *Wang v Canada (Minister of Citizenship and Immigration),* 2005 FC 1059 at paras 55-56 ("*Wang*")).
> >
> > [16] In this regard an applicant has a duty of candour to provide complete, honest and truthful information in every manner when applying for entry into Canada (*Bodine v Canada (Citizenship*

and Immigration), 2008 FC 848 at paras 41-42 ("*Bodine*"); *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 at para 15 ("*Baro*"); *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315 at para 11 ("*Haque*")). Section 40 is intentionally broadly worded and applied and encompasses even misrepresentations made by another party, including an immigration consultant, without the knowledge of the applicant (*Jiang* at para 35; *Wang* at paras 55-56).

[17] The exception to s 40 is narrow and applies only to truly extraordinary circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a material fact and knowledge of the misrepresentation was beyond the applicant's control (*Masoud v Canada (Citizenship and Immigration)*, 2012 FC 422 at paras 33-37 ("*Masoud*"); *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 at para 40 ("*Goudarzi*")). That is, the applicant was subjectively unaware that he or she was withholding information (*Medel v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 345 (FCA) ("*Medel*"); *Canada (Citizenship and Immigration) v Singh Sidhu*, 2018 FC 306 at para 55 ("*Singh Sidhu*")).

[18] In determining whether a misrepresentation is material, regard must be had for the wording of the provision and its underlying purpose (*Oloumi* at para 22). It is necessary, in each case, to look at the surrounding circumstances to decide whether the withholding of information constitutes a misrepresentation (*Baro* at para 17; *Bodine* at paras 41-42; *Singh Sidhu* at paras 59-61). Further, a misrepresentation need not be decisive or determinative. It is material if it is important enough to affect the process (*Oloumi* at para 25).

[19] Nor can an applicant take advantage of the fact that the misrepresentation is caught by the immigration authorities before the final assessment of the application. The materiality analysis is not limited to a particular point in time in the processing of the application (*Haque* at paras 12, 17; *Khan* at paras 25, 27, 29; *Shahin v Canada*

> *(Citizenship and Immigration)*, 2012 FC 423 at para 29 ("*Shahin*")).
>
> [35] Further, two factors must be present for a finding of inadmissibility under s. 40(1). There must be a misrepresentation by the applicant and the misrepresentation must be material in that it could have induced an error in the administration of the IRPA (Malik, at para 11, citing *Bellido v Canada (Minister of Citizenship and Immigration)*, 2005 FC 452 at para 27; see also *Singh v Canada (citizenship and Immigration)*, 2023 FC 747 at paras 25–29; *Tsang* at paras 23–26).

[59] I agree with the parties that the Former Consultant acted incompetently as determined on a reasonableness standard and that the Former Consultant had received appropriate notice of the allegations of incompetence made in this proceeding. I agree that the issue to be determined relates to the second component of the applicable three part test only.

[60] It is useful to consider the Former Consultant's conduct in connection with the specific events that occurred in order to properly assess the Respondent's argument regarding the effect of the PFL Response Letter on the applicable three-part test despite the parties' admissions.

VI. A) The Code of Professional Conduct for College of Immigration and Citizenship Consultants Licensees, SOR/2022-128

[61] The evidence led establishes that the Former Consultant is a licensed member of the College of Immigration and Citizenship Consultants [the College].

[62] The College is governed by the *College of Immigration and Citizenship Consultants Act*, SC 2019, c 29, s 292, and the regulations made pursuant to the statute. Section 44 of the *College of Immigration and Citizenship Consultants Act* provides that "a licensee must meet the

standards of professional conduct and competence that are established by the code of professional conduct. A licensee who fails to meet those standards commits professional misconduct or is incompetent".

[63] The *Code of Professional Conduct for College of Immigration and Citizenship Consultants Licensees*, SOR/2022-128 was enacted and came into force on June 10, 2022 [the *Code*] when it was published in the Canada Gazette.

[64] The Applicant was the Former Consultant's client pursuant to section 1 of the *Code.* Pursuant to section 6 of the *Code*, the Former Consultant was required to be honest and candid when advising the Applicant.

[65] Pursuant to section 12 of the *Code*, the Former Consultant was required to not knowingly assist in or encourage dishonesty, fraud or illegal conduct.

[66] Pursuant to section 19 and subsections 19(2) and 22(2) of the *Code* the Former Consultant was required to fulfill the professional obligations she owed to the Applicant competently and diligently, to protect the Applicant's interests through her written communications skills, and to ensure that all the necessary documents in respect of the application filed on behalf of the Applicant she was representing were properly prepared, signed and submitted.

[67] Pursuant to section 44 of the *College of Immigration and Citizenship Consultants Act*, the Former Consultant can reasonably be considered for the purposes of this proceeding as having either committed professional misconduct or been incompetent if the evidence reflects that she reasonably failed to comply with a standard set out in the *Code*.

VII. **B) Original Omission – the IMM 1295 Form**

[68] The evidence in the record is that the Former Consultant asked the Applicant to complete the AOF IMM 1295 form. The content of the AOF Form did not contain all of the information contained in the IMM 1295 Form published and used by the IRCC for the purposes of the Applicant's application. The AOF Form did not contain the crucial question as to whether the Applicant had a criminal record. In my view, the Former Consultant failed to act reasonably or diligently by proceeding in this manner without then providing the Applicant with the proper IMM 1295 Form to complete.

[69] The Former Consultant filled out question 3 of the IMM 1295 Form on or about December 5, 2022, and filed the form with the IRCC on December 12, 2023, without providing the prepared form to the Applicant for review and correction, without contacting the Applicant with respect to its content and without the Applicant's signature. This appears to be contrary to the competence requirements set out in subsection 22(2) of the *Code* by failing to ensure that the IMM 1295 Form was properly prepared, signed and submitted.

[70] The Former Consultant checked off the "No" box in response to the question 3 of the IMM 1295 Form and filed the completed form on December 12, 2023, without inquiring as to

whether the Applicant had a past criminal record until January 22, 2024. The Former Consultant thereby made a binding representation on behalf of the Applicant that he had no past criminal record without taking reasonable care to ask the Applicant whether he had a criminal record. This, too, appears to be a failure to comply with her competence and diligence requirements set out in subsection 22(2) of the *Code*.

[71] I am satisfied that the Applicant has established the Former Consultant's conduct with respect to the IMM 1295 Form she completed and filed with IRCC was not the product of reasonable professional judgment and reasonably constitutes incompetence.

[72] The Former Consultant's failures lead me to conclude that whatever the Former Consultant may have misrepresented in the completed IMM 1295 Form she submitted was a misrepresentation that was unknown to the Applicant and his beyond his control.

VIII. **C) The Procedural Fairness Letter**

[73] The Former Consultant did not provide the Applicant with the PFL that she had received from IRCC on February 15, 2023, concealed from the Applicant that IRCC had noted an untruthful answer to question 3 on the IMM 1295 Form, and did not inform the Applicant that IRCC had outlined the possible consequences of a false declaration and of a misrepresentation of material fact contained in his filed application with respect to a past criminal record. These omissions appear to be failures to comply with sections 6 and 12 of the *Code* and also failures to comply with the requirements of competent and diligent representation and service quality set out in sections 19 and 22 of the *Code.* These too are instances of incompetence.

IX. **D) The PFL Response Letter**

[74] The Former Consultant's proposed PFL Response Letter contained five (5) false and untrue representations highlighted above as items a) to e) of paragraph 27 of this Judgment. The fact of providing these proposed dishonest representations to the Applicant for his consideration and review while not informing the Applicant of the true state of the affairs also appears to be violation of section 12 of the *Code* and in my view constitutes incompetence for the purposes of this proceeding.

[75] Notwithstanding the Former Consultant's various omissions and incompetence, I must find that the Applicant nevertheless breached his duty of candour when he approved of and signed the PFL Response Letter despite its factual inaccuracies. The evidence before me establishes that the Applicant took no steps or insufficient steps to require changes to the proposed PFL Response Letter despite that it contained five factual inaccuracies that he could not have believed to be true as they were plainly not true as questions of fact; they misrepresented actions he did not take and considerations that he did not entertain. The record shows, however, that the actions and considerations he adopted as his own were the Former Consultant's actions and considerations.

[76] He had not received a copy of the PFL and therefore could not truthfully represent that he had. He did not complete the IMM 1295 Form and therefore could not have made any honest representation in the PFL Response Letter as to the four statements regarding the form's interpretation that led to it being completed with a misrepresentation in the manner that it was.

The content of the PFL Response Letter contained misrepresentations by the Applicant that could have induced an error in the application of the IRPA.

[77] Despite my finding that the Former Consultant's conduct was incompetent, I cannot find that the Applicant honestly and reasonably believed that he was not misrepresenting material facts or that knowledge of these misrepresentations were beyond his control when he signed the PFL Response Letter with the expectation that it would be filed with IRCC (*Malik* at para 17).

[78] The Applicant's reliance on the Former Consultant's expertise and judgment on these aspects of the PFL Response Letter does not exonerate him from his misrepresentations or of their effect. He independently breached the duty of candour that was incumbent upon him pursuant to paragraph 40(1)(a) of the IRPA despite that that breach was largely driven by the Former Consultant's incompetence and his acceptance of the Former Consultant's suggestions to deliver a dishonest letter to IRCC.

[79] Turning to the second component of the applicable test, I cannot on the facts of this case find that there has been miscarriage of justice in the sense that there is a reasonable probability that the Applicant's application would have been determined differently but for the Former Consultant's incompetence. The GCMS notes reflect that the Decision was based at least in part on the accepted misrepresentations contained in the PFL Response Letter that the Applicant had reviewed, approved of and signed. The explanation provided in the PFL Response Letter was accepted the IRCC. The content of the PFL Response Letter did not overcome IRCC's concerns with his application and the initial misrepresentation made by the Former Consultant. The

Applicant's procedural fairness rights were therefore not breached due to his Former Consultant's incompetence.

[80] The Applicant has failed to satisfy the second component of the applicable test. I cannot find that his rights of procedural fairness have been breached. This application must therefore be dismissed.

[81] I have considered Justice Manson's reasoning at para 51 of *Yang v. Canada (Citizenship and Immigration)*, 2019 FC 402 and find its directness and potential application to the facts this case compelling but not determinative. Justice Manson found that the applicant in that proceeding had met the heavy burden of demonstrating that there was a reasonable probability that the original decision would have been different but for the representative's incompetence in a situation where, as would have been a likely scenario here, no procedural fairness letter would likely have been issued and the application would very likely not have been rejected had it been completed by the representative with the accurate information at the outset or via update with IRCC. This case is similar in that it is unfortunate that the Applicant's application contained a crucial misrepresentation that he had not made and that that misrepresentation commenced a chain of events that led to the PFL Response Letter and the rejection of his application.

[82] It is equally unfortunate but more concerning in my view that the Former Consultant appears on the record before me to have recommended a course of action to the Applicant that assigned blame to the Applicant when the original misrepresentation of concern had been made by the Former Consultant without apparent regard for its truth or falsity. The Former

Consultant's conduct as reflected in the record appears intended to deflect blame at a crucial time for the Applicant rather than accept responsibility for the shortcomings in her work potentially to the benefit of her client, the Applicant. Such conduct ill behooves a professional consultant. The outcome for the Applicant might have been different had the Former Consultant suggested, as the record does, that the PFL Response Letter reflect that the initial misrepresentation in the filed IMM 1295 Form had been the Former Consultant's independent misrepresentation made without notice to or the knowledge of the Applicant.

X. **Conclusion**

[83] I find on this record before me that the Applicant's rights of procedural fairness were not violated despite his Former Consultant's incompetence.

[84] The parties to this application did not propose a question for certification and I agree that none arises.

JUDGMENT in IMM-6795-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No questions are certified.

3. No costs are awarded to any party.

"Benoit M. Duchesne"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6795-24
STYLE OF CAUSE:	KOVILEN COOLEN v. MCI
PLACE OF HEARING:	ZOOM VIDEOCONFERENCE
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APPEARANCES:

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