Federal Court Cour fédérale

Date: 20240122

Docket: IMM-3352-22

Citation: 2024 FC 105

Ottawa, Ontario, January 22, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

JAMES ANDREW BROWN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant is a 46-year-old citizen of the United Kingdom. In 2020, he applied for permanent residence in Canada under the sponsorship of his wife, a Canadian citizen. An Ontario lawyer assisted the applicant and his wife with preparing and submitting the application.

[2] In a decision dated March 8, 2022, an officer with Immigration, Refugees and Citizenship Canada (IRCC) refused the application. The officer found that because the applicant failed to disclose in his application that he had prior criminal convictions in the United Kingdom, he was inadmissible to Canada due to misrepresentation under paragraph 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The officer also concluded that the UK convictions rendered the applicant inadmissible due to criminality and serious criminality.

[3] The applicant now seeks judicial review of this decision on the basis that he received ineffective assistance from the lawyer who assisted him with the application for permanent residence. As I explain in the reasons that follow, I agree with the applicant former counsel represented him ineffectively and that the application for judicial review should, therefore, be allowed.

II. BACKGROUND

[4] The applicant first met his now wife when she was visiting England on holidays in 2017. A romantic relationship developed and they eventually decided to live together in Canada. The applicant and his wife were married in Canada in November 2019. Around this time, they retained an Ontario lawyer to assist them with a spousal sponsorship application by which the applicant could obtain permanent residence in Canada. I will refer to this lawyer as former counsel.

[5] According to the applicant, as part of the application process, former counsel asked him to complete Schedule A – Background/Declaration (IMM 5669). Question 4 on this form asks:

"Have you or, if you are the principal applicant, any of your family members listed in your application for permanent residence in Canada ever: [. . .] (b) been convicted of, or are you currently charged with, on trial for, or party to a crime or offence, or subject to any criminal proceedings in any country?" An applicant is to answer this question by checking a box for either "No" or "Yes". The form instructs that if an applicant answers "Yes", details should be provided. (Question 4 on Schedule A asks a number of other questions as well but none are germane to this application.)

[6] According to the applicant, during one of their first meetings, he explained to former counsel that he had a criminal history in England. The applicant was unsure how much detail to provide in response to Question 4(b) so he asked former counsel for her advice. According to the applicant, former counsel told him to order a police certificate from the UK and see what it said before completing the form.

[7] The applicant eventually received a Police Certificate dated November 26, 2019, from the ACRO Criminal Records Office. Under the heading "Summary of convictions and reprimands/warnings/cautions/impending prosecutions/under investigations held on UK police data bases and disclosed in accordance with the ACRO stepdown model" the certificate stated "NO LIVE TRACE". According to the applicant, when he shared this information with former counsel, she advised him to answer "No" to Question 4(b) on Schedule A. The applicant did so. He completed and signed the form on July 3, 2020. The form was submitted to IRCC on August 5, 2020, along with the Police Certificate and other supporting documents.

[8] In April 2021, IRCC sent the applicant two letters care of former counsel. First, on April 7, 2021, IRCC requested additional information concerning the applicant's adult son and daughter in the UK, who had been listed as family members in his application. Then, on April 12, 2021, IRCC requested that the applicant submit a Subject Access Request to the ACRO Criminal Records Office and provide the result to IRCC. The letter explained: "The police certificate you submitted with your application shows results of No Live Trace which is an indication of previous records existing."

[9] Former counsel responded to these two letters by letter dated April 28, 2021. She provided the information requested concerning the applicant's adult children, although she also added that they did not intend to come to Canada. Former counsel also submitted a new Schedule A for the applicant, which the applicant had signed on April 20, 2021. Once again, the applicant answered "No" when asked whether he had any foreign criminal convictions. (On the form, this is now Question 6(b).) Former counsel also confirmed that the applicant had submitted a request for a Subject Access Report. She enclosed a copy of the request the applicant had submitted. As reflected on the latter document, a Subject Access Report provides a list of all information held on the Police National Computer, including arrests, criminal convictions, cautions, and so on. Alternatively, if no information is held, this will be stated in the response.

[10] The applicant received his Subject Access Report at the beginning of June 2021. The report lists the following criminal convictions: assault occasioning actual bodily harm (7 May 1999); possession of a controlled drug (10 May 1999); uttering threats (6 April 2003); criminal

damage to property (30 September 2004); battery (8 June 2006); and driving a motor vehicle with excess alcohol (30 November 2015). For all of these matters, the applicant received monetary fines; in the case of the 2015 driving offence, he was also disqualified from driving for a time. As well, in July 2003 the applicant was convicted of failure to drive with due care, failure to stop, and failure to report an accident. (These do not appear to be criminal convictions.) The report also lists a number of other arrests. Apart from the 2015 incident, the applicant's last contact with the police was in 2006.

[11] The applicant's wife sent the Subject Access Report to former counsel by email on June 2, 2021. The report is missing from the Certified Tribunal Record; however, as will be seen immediately below, there is no question that it was submitted to IRCC, presumably by former counsel.

[12] On February 2, 2022, an IRCC officer sent the applicant a procedural fairness letter care of former counsel. The officer raised two potential concerns. First, the applicant's Subject Access Report lists several arrests and convictions in the United Kingdom. The convictions would appear to render the applicant inadmissible to Canada under paragraphs 36(1)(b) and 36(2)(b) of the *IRPA* due to serious criminality or criminality, respectively. Second, given the information in the Subject Access Report, the applicant's response to Question 4(b) on the Schedule A he signed on July 3, 2020, would appear to be a misrepresentation of material facts and this would render him inadmissible to Canada under paragraph 40(1)(a) of the *IRPA*. The applicant was given 30 days to provide a response.

[13] Former counsel responded to the procedural fairness letter by letter dated February 25, 2022. In material part, the letter states the following:

> It only came to Mr. Brown's attention on February 2, 2022, about a possible misrepresentation. Mr. Brown would like to clarify that he has never misrepresented himself and every information that he has provided is genuine and correct. Mr. Brown would like to plead that he has provided his police clearance to your office. Mr. Brown did not serve jail time. He was under the impression that question 4(b) was asking him if he was ever incarcerated. Mr. Brown had just paid a fine and did community service. At the time of the incident, Mr. Brown's blood sample was negative, and no alcohol was detected in his system.
>
> Mr. Brown has volunteered at his stepdaughter's soccer club and was required to do police clearances. No where on the police clearance did it states [*sic*] he was convicted. Hence, he was under the impression that he had no criminal record.
>
> [. . .]
>
> Mr. Brown has not directly or indirectly produced any fraudulent documents, nor has he withheld any material facts. Mr. Brown does not pose a risk to the Canadian society. Mr. Brown has now realized upon further review of his police clearance, and your letter dated February 2, 2022 that although he thought he was not guilty and convicted [*sic*], he should have mentioned that he did have a criminal background. He is extremely apologetic for this error and is hopeful that this will not cause any issues.

[14] Enclosed with former counsel's letter was a letter from the applicant to IRCC dated February 13, 2022. In material part, this letter states the following:

> Although I am not proud of my background, I do feel it is very important to advise immigration Canada that following the DUI charge that occurred on June 13, 2015, in Thirsk, at no time, completed any jail time for this charge, nor was criminally convicted [*sic*]. Rather, I was issued a fine and a reduced driving suspension with a requirement to complete a safety awareness course. This is outlined on (background check), page (1).
>
> Also, it's important to share that to reinforce this position, I have been permitted to rent a car in the UK on dates as recent as Nov 9-

> 16 2018, May 15-21 2019, Nov 15-21 2019, and Nov 10-17 2021, without issue. It is my understanding that if criminally convicted, this would not have been possible. For easy reference, I have added the car rental invoices to support this.
>
> Given this supporting documentation, and explanation of how it may have appeared that I had misrepresented myself on my VISA application, I sincerely believe that I have not.

[15] In a decision dated March 8, 2022, the IRCC officer concluded that the applicant is inadmissible to Canada due to misrepresentation, criminality, and serious criminality. The applicant's application for permanent residence was refused accordingly.

III. ANALYSIS

[16] The sole ground on which the applicant seeks judicial review of the officer's decision is that he received ineffective assistance from his former counsel. Since this issue is being raised for the first time on judicial review, it does not engage a standard of review.

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

Canada (Citizenship and Immigration), 2020 FC 470 at paras 33-39; and *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at paras 22-24.

[18] I will consider each of these elements in turn.

A. *Notice to Former Counsel and Her Responses*

[19] This Court has adopted a protocol setting out the procedure that should be followed when an allegation of ineffective assistance of counsel is being considered as a ground for judicial review under subsection 72(1) of the *IRPA* and when that ground is actually advanced.

[20] In the present matter, the procedure to be followed was the one set out in paragraphs 46 to 54 of the Federal Court's *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022). That version of the *Guidelines* had incorporated without change the *Protocol Re Allegations against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* adopted on March 7, 2014. Subsequent to this matter being perfected, the Court has adopted revised guidelines dealing with allegations against counsel or other authorized representatives: see paragraphs 46 to 63 of the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (October 31, 2023).

[21] In all of its iterations, the procedure to be followed is meant to ensure that all relevant information is before the Court when an allegation of ineffective assistance is made against

former counsel. It also provides procedural fairness to former counsel, whose competence is being called into question and whose professional reputation is therefore at stake.

[22] At three key junctures, the guidelines require notice to former counsel of an allegation of ineffective assistance and an opportunity to respond.

[23] First, prior to raising the issue before the Court, current counsel must notify former counsel of the allegation in writing, alert former counsel that the issue may be raised in an application for leave and for judicial review, and invite any response that former counsel may wish to make to the allegation. Among other things, former counsel must be given sufficient information about the allegation to be able to provide a meaningful response, should they so choose. An applicant must waive any applicable privilege that would otherwise hinder or prevent their former counsel from responding to the allegation.

[24] Second, if, in light of the available information (including any response from former counsel), current counsel decides to pursue the allegation as a ground for judicial review, the perfected application must be served on former counsel and proof of service must be provided to the Court. If former counsel provides a response to the allegation as it has been advanced in the application record, current counsel must provide this response to the Court. Current counsel may also provide material responding to former counsel's response. All of these materials will be considered by the Court when determining the leave application.

[25] Third, if leave to proceed with judicial review is granted, current counsel must provide former counsel with a copy of the order granting leave and setting the matter down for a hearing. This affords former counsel an opportunity to seek leave to intervene in the judicial review application, should they wish to do so.

[26] There is no issue that, at each of these stages, the applicant complied with the applicable protocol by giving his former counsel notice of the allegations against her and a reasonable opportunity to respond. Nor is there any issue that the applicant's complaints go well beyond general dissatisfaction with former counsel's conduct. As required, his allegations are specific, detailed, and supported by evidence: see *Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 (CA) at para 12.

[27] By letter dated June 2, 2022, current counsel informed former counsel that they had been instructed to pursue an allegation of ineffective assistance against her. Some of the allegations set out in the letter relate to the failure of former counsel to provide the applicant with timely advice concerning his right to seek judicial review of the March 8, 2022, decision. These are no longer in issue. The letter also raised the following allegations and asked for a response:

- The applicant informed former counsel about his UK criminal record during an in person meeting in or around November 2019.

- During an in person meeting in or around January 2020, former counsel advised the applicant that he was not required to declare his UK criminal record in his application for permanent residence because the Police Certificate he had obtained stated "No Live Trace."

- The ACRO Criminal Records Office website states the following about a "No Live Trace" certificate: "No Live Trace: There is a criminal record but this information does not appear on the certificate because it has been stepped down." (A copy of the relevant page from the website was attached to the letter from current counsel.)

- Following receipt of the February 2, 2022, procedural fairness letter, former counsel acknowledged to the applicant that she had given him incorrect advice about declaring his criminal history. She also stated that she would inform IRCC of this.

- Former counsel never advised the applicant of the option of pursuing an application for a certificate of criminal rehabilitation to overcome his inadmissibility due to criminality and serious criminality.

- Former counsel never advised the applicant of the option of seeking a temporary resident permit or humanitarian and compassionate relief.

[28] Former counsel responded by letter dated June 9, 2022. Her responses to the material allegations were as follows:

- The applicant never told her he had a criminal record in the UK. When asked if he had ever been convicted, charged or been subject to any court proceeding in any country, he said he had not. She therefore advised him to answer "No" to Question 4(b) on Schedule A.

- Since she was not aware that the applicant had a criminal record, she did not advise him of the option of applying for a certificate of criminal rehabilitation to overcome his

inadmissibility. For the same reason, she did not advise him of any other options such as an application for humanitarian and compassionate relief. Had she been aware of his criminal record, she would have advised him of these options.

- When the applicant completed his Schedule A, she did not know the meaning of "No Live Trace". She did not look into the meaning of this term because the applicant was adamant that he did not have a criminal history.

- She never told the applicant that she had made an error in the advice she had given him regarding disclosing his criminal history to IRCC.

[29] Former counsel also stated: "I did mention to Mr. Brown that he seek advice from a criminal lawyer in the UK about his criminality once I was aware. I did not go into depth as Mr. Brown was adamant that he had no criminal record." Former counsel does not say when this occurred or how she became aware of the applicant's criminality.

[30] Current counsel sent a follow-up letter to former counsel dated June 13, 2022. The letter stated that current counsel had shared former counsel's letter with the applicant. Current counsel informed former counsel of the applicant's responses to the statements in her letter and made further inquiries as follows:

- The applicant maintains that he answered "No" to Question 4(b) on the advice of former counsel. Current counsel therefore asked former counsel if she had "any documentary evidence that confirms Mr. Brown informed you he did not have any criminal record, charges, or convictions."

- The applicant maintains that former counsel admitted to him that she had made an error in her advice regarding declaring his criminal history. This occurred in a telephone call involving former counsel, the applicant, his wife, and a friend of the applicant.

- Current counsel asked former counsel to confirm when she learned of the applicant's criminal record and when she advised him to consult with a UK criminal lawyer.

- Current counsel asked former counsel to confirm whether she received a copy of the applicant's Subject Access Report referred to in the IRCC procedural fairness letter dated February 2, 2022.

[31] Former counsel responded by letter dated June 13, 2022, as follows:

- The conversations about the applicant's criminal history took place in person and she has no written record of them.

- The applicant consistently maintained that he did not have a criminal record.

- At no point did she advise the applicant not to declare his criminal history despite the fact that he had informed her that he had criminal convictions in the UK (which he had not done).

- The applicant was given an opportunity to review a draft of her response to the IRCC procedural fairness letter and suggested some changes.

- After receiving the decision refusing the application, former counsel advised the applicant to seek advice from a criminal lawyer in the UK because he was adamant that he did not have a criminal record.

[32] Former counsel concluded by stating that current counsel had her complete file and she has nothing further to provide. She did not address the question concerning the Subject Access Report.

[33] Current counsel served the applicant's Application Record on former counsel on July 8, 2022. The record included an affidavit sworn by the applicant on June 24, 2022.

[34] In his affidavit, among other things, the applicant stated the following: (a) during one of their first meetings, the applicant told former counsel that he has a criminal history in the UK; (b) the applicant asked former counsel how much detail of this history to include on Schedule A; (c) former counsel told him to obtain a Police Certificate and wait and see what it said before completing Schedule A; (d) after receiving the certificate stating "No Live Trace", former counsel advised the applicant to answer "No" to Question 4(b) on Schedule A; (e) the applicant relied on the advice of counsel concerning what needed to be declared to Canadian immigration authorities about his criminal history in the UK; (f) following a request from IRCC, the applicant obtained a Subject Access Report; (g) the applicant's wife emailed this report to former counsel on June 2, 2021; (h) following receipt of the February 2, 2022, procedural fairness letter, former counsel advised the applicant that the letter had been sent because of the 2015 drive while

intoxicated conviction so this was what they should focus on in their response; and (i) the applicant accepted and followed this advice.

[35] The applicant also stated that on June 24, 2022, he had made a complaint to the Law Society of Ontario concerning former counsel's representation. A copy of the complaint is attached as an exhibit to the applicant's affidavit.

[36] Former counsel did not respond after being served with the Application Record.

[37] Leave to proceed with the application for judicial review was granted on August 15, 2023. Current counsel served a copy of the Order granting leave on former counsel on August 29, 2023. Former counsel confirmed receipt the same day. She has not responded in any other way.

[38] After leave was granted, the applicant swore a further affidavit on August 31, 2023. In it, he reiterates the main points set out in paragraph 34, above. The applicant was not cross-examined on this affidavit.

[39] The respondent did not file any affidavits at the leave stage or following the granting of leave.

B. *The Performance Component*

[40] Under this part of the test, the applicant bears a two-fold burden. He must establish the facts on which he relies in impugning the conduct of his former counsel and he must establish that that conduct fell below the standard of reasonable professional assistance or judgment (*R v GDB*, [2000] 1 SCR 520 at para 27).

[41] As I will explain, I am satisfied that the applicant has established the key facts on which he relies in advancing his claim of ineffective assistance.

[42] The respondent submits that I have been presented with two conflicting versions of relevant events – the applicant's and former counsel's. According to the respondent, this is a case of "he said/she said" and I should prefer the version of events provided by former counsel over that of the applicant.

[43] I do not agree.

[44] The applicant provides his account of relevant events in the form of a sworn affidavit. On the other hand, former counsel's account is before the court only in the form of two letters: one dated June 9, 2022; the other dated June 13, 2022. In accordance with the protocol, these letters were put before the Court as exhibits to an affidavit sworn by a paralegal in the office of current counsel.

[45] It was entirely appropriate for former counsel to provide her initial responses to the allegations of ineffective assistance in letter form. However, now that leave has been granted and the application must be determined on its merits, the Court must make findings of fact. Where, as in the present case, central factual issues are in dispute, this can only be done on the basis of evidence.

[46] The letters of former counsel are seriously wanting in this regard. I appreciate that they are the representations of a member of the bar and an officer of the court. However, former counsel figures in this matter as an interested party who has been drawn into the fray. She has a direct stake in the outcome. She purports to provide evidence on material issues. As such, her written representations are not entitled to any special consideration by virtue of her professional status: see *Pluri Vox Media Corp v Canada*, 2012 FCA 18 at paras 5-7. Moreover, as a result of the form in which former counsel's account of relevant matters is before the Court (letters attached as exhibits to an affidavit filed on behalf of the applicant), that account cannot be tested by way of cross-examination.

[47] For these reasons, I am not prepared to give any evidentiary value to the letters from former counsel on any point where they are inconsistent with the applicant's account. Consequently, the applicant's account, which was provided in an affidavit on which he was not cross-examined, stands unchallenged and uncontradicted.

[48] On the record before me, I am satisfied that the applicant has established the necessary facts on which he relies in impugning the conduct of former counsel. In particular, I make the following findings of fact:

- During one of his initial meetings with former counsel, the applicant disclosed that he had a criminal history in the UK. On his own account, the applicant's understanding of that history prior to receiving the Subject Access Report in June 2021 was vague and uncertain. Thus, while the applicant has established that former counsel was aware from early in the solicitor/client relationship that he had some sort of dated criminal history in the UK, he has not established that he provided her with the details of that history at that time. As a result, I find that, at this stage, former counsel had no reason to think that the applicant had criminal convictions in the UK.

- Former counsel advised the applicant to obtain his UK Police Certificate before completing Schedule A.

- After receiving the UK Police Certificate stating "No Live Trace", former counsel advised the applicant to answer "No" to Question 4(b) on Schedule A. The applicant followed this advice.

- At the time, former counsel did not know what "No Live Trace" meant. She did not take any steps to ascertain its meaning before the applicant completed Schedule A in July 2020.

- Despite receiving the April 12, 2021, letter from IRCC stating that "No Live Trace is an indication of a previous records existing," former counsel did not provide the applicant

with any legal advice in this regard. Notably, she did not advise the applicant to change his answer to the question about his criminal history when he completed a new Schedule A on April 20, 2021. The applicant completed the form accordingly.

- Former counsel received the Subject Access Report from the applicant in June 2021.

- Former counsel submitted the Subject Access Report to IRCC.

- Former counsel did not provide any legal advice to the applicant concerning the potential implications of the information in the Subject Access Report until receiving the February 2, 2022, procedural fairness letter.

- Former counsel advised the applicant that the focus of the response to the procedural fairness letter should be the 2015 drive while intoxicated charge. The applicant followed this advice. (On the other hand, I am not satisfied that, after receiving the procedural fairness letter, former counsel admitted to the applicant that she had erred in her original advice to him about declaring his criminal record and told him that she would inform IRCC of this. While raised in the initial correspondence between current counsel and former counsel, this allegation is not repeated in the applicant's affidavit sworn on August 31, 2023. As well, there is no evidence that the applicant raised any concerns about the omission of such an admission on the part of former counsel in her response to the procedural fairness letter, despite the fact that the applicant had the opportunity to review a draft of that letter and make suggestions for changes before it was submitted.)

- Former counsel did not provide any advice concerning the potential implications for his application for permanent residence of the information in the Subject Access Report concerning his other criminal convictions in the UK.

[49] In sum, while the applicant has not established all of his allegations against former counsel, I am satisfied that he has established the key facts on which he relies.

[50] I am also satisfied that the applicant has established that, in material respects, the conduct of former counsel fell below the standard of reasonable professional assistance or judgment. In drawing this conclusion, I have borne in mind that the applicant must meet a high threshold to establish this component of his allegation of ineffective assistance. There is a strong presumption that his former counsel's conduct fell within the wide range of professional assistance (*GDB*, at para 27). A reviewing court must be careful to avoid second-guessing the tactical decisions of counsel; the wisdom of hindsight has no place in the assessment (*ibid.*).

[51] In my view, it was not unreasonable for former counsel to advise the applicant to wait for the UK Police Certificate before completing Schedule A. As I have found, while the applicant had informed former counsel that he had a criminal history in the UK, when he first did so, the details of that history were vague and uncertain in his own mind.

[52] However, once the Police Certificate stating "No Live Trace" was received, the failure of former counsel to make any inquiries into what this meant fell below the standard of reasonable professional assistance. Former counsel has acknowledged that she did not know what "No Live

Trace" meant. Competent counsel would have taken at least some steps to determine what this term meant before giving a client advice on how to answer Question 4(b) on Schedule A. As demonstrated by the information from the ACRO Criminal Records Office website obtained by current counsel, former counsel would have had no difficulty learning that "No Live Trace" meant that the applicant had a criminal record in the UK. Even if, as former counsel claims, the applicant was "adamant" that he did not have a UK criminal record, in the particular circumstances of this case, it fell below the standard of reasonable professional assistance for her to simply take his word for this.

[53] There then followed a cascading series of failures on the part of former counsel. Not knowing what "No Live Trace" meant, former counsel lacked a reasonable basis to advise the applicant to answer "No" to Question 4(b) on Schedule A. Despite receiving the April 12, 2021, letter from IRCC stating that "No Live Trace is an indication of a previous records existing," former counsel did not provide the applicant with sound (if any) legal advice in this regard. Despite receiving the Subject Access Report in June 2021, former counsel did not provide any legal advice to the applicant concerning the implications of the information in that report until after she received the February 2, 2022, procedural fairness letter. Despite the clearly stated concerns of the IRCC officer regarding all of the applicant's criminal convictions, former counsel advised the applicant that the focus of the response to the procedural fairness letter should be the 2015 drive while intoxicated charge; all the other criminal convictions were simply ignored. The rationale of former counsel's approach escapes me entirely. Equally inexplicably, former counsel did not provide any legal advice concerning the potential implications of the

other information in the Subject Access Report for the applicant's application for permanent residence, including the risk of a misrepresentation finding.

[54] In all of these respects, the conduct of former counsel fell markedly below the standard of reasonable professional assistance.

C. *The Prejudice Component*

[55] At this stage, the applicant must establish that the failings of former counsel resulted in a miscarriage of justice. Miscarriages of justice can take many forms in the context of ineffective assistance of counsel (*GDB*, at para 28).

[56] I am satisfied that the failings of former counsel set out above caused actual prejudice to the applicant amounting to a miscarriage of justice. Specifically, I am satisfied that the applicant has demonstrated that there is a reasonable probability that, but for the incompetence of his former counsel, the result would have been different (*Bisht v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1178 at para 24; *Discua v Canada (Citizenship and Immigration)*, 2023 FC 137 at para 76).

[57] Had former counsel provided reasonable professional assistance to the applicant following receipt of the UK Police Certificate, the applicant would not have proceeded with his application for permanent residence – at least, not as it was then being framed. That is to say, I am satisfied that, had the applicant received competent legal advice from former counsel, he would not have proceeded with the application for permanent residence without first addressing

directly his potential inadmissibility due to criminality and serious criminality. Nor would he have answered Question 4(b) on Schedule A as he did.

[58] The failure of former counsel to identify a serious potential difficulty for the application for permanent residence (the applicant's criminal record in the UK) and to provide proper advice in this regard tainted the application from the outset. The subsequent professional failings of former counsel only compounded the effect of her initial errors. As a result of all of these failings, the applicant was ultimately found inadmissible to Canada due to misrepresentation. This result was entirely avoidable, if only the applicant had received proper legal advice from former counsel.

IV. CONCLUSION

[59] For these reasons, I am satisfied that the test for ineffective assistance of counsel has been met. This application for judicial review must, therefore, be allowed. The decision dated March 8, 2022, refusing the applicant's application for permanent residence and finding him to be inadmissible due to misrepresentation, criminality, and serious criminality will be set aside. The applicant's application for permanent residence shall be redetermined by IRCC but only if the applicant so requests. For greater certainty, the applicant shall be permitted to withdraw that application in its entirety, if so advised.

[60] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.

JUDGMENT IN IMM-3352-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision dated March 8, 2022, refusing the applicant's application for permanent residence and finding him to be inadmissible due to misrepresentation, criminality, and serious criminality is set aside.
3. The applicant's application for permanent residence shall be redetermined by IRCC but only if the applicant so requests.
4. For greater certainty, the applicant shall be permitted to withdraw that application in its entirety, if so advised.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3352-22
STYLE OF CAUSE:	JAMES ANDREW BROWN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 31, 2023
JUDGMENT AND REASONS:	NORRIS J.
DATED:	JANUARY 22, 2024

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