Federal Court  Cour fédérale

**Date: 20220825**

**Docket: IMM-471-21**

**Citation: 2022 FC 1225**

**Ottawa, Ontario, August 25, 2022**

**PRESENT: Madam Justice Sadrehashemi**

**BETWEEN:**

**SACHINI RANMADU ALUTHGE**
**LASITHA GAYAN GAJENDRA RAJAPAKSE MUDIYANSELAGE**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] The Applicants are married: Sachini Ranmadu Aluthge ("Ms. Aluthge") and her husband Lasitha Gayan Gajendra Rajapakse Mudiyanselage ("Mr. Rajapakse Mudiyanselage"). A Migration Officer at Immigration, Refugees and Citizenship Canada [IRCC] London ("the Officer") found the Applicants inadmissible for misrepresentation due to their failure to disclose

Mr. Rajapakse Mudiyanselage's deportation from Australia in their application for permanent residence.

[2] A finding of misrepresentation has serious consequences. It resulted in the Applicants' applications for permanent residence being refused and the Applicants becoming subject to a five-year bar to applying for permanent residence or entering Canada.

[3] The Applicants are challenging the misrepresentation finding on two grounds. First, they argue that the incompetence of their former representative resulted in a breach of natural justice: but for the incompetence of their former representative, there is a reasonable probability that they would have disclosed the information and no misrepresentation finding would have been made against them. Second, they argue the Officer treated their explanation for the misrepresentation unreasonably.

[4] I find the breach of natural justice argument determinative. I am satisfied that the Applicants' former representative incompetently advised them not to disclose Mr. Rajapakse Mundiyanselage's deportation from Australia on their permanent residence forms. Further, I agree with the Applicants that but for this incompetence, there is a reasonable probability the misrepresentation would not have occurred, and their application for permanent residence would not have been refused on this ground.

[5] For the reasons below, I grant the application for judicial review.

## II. Background

[6] Ms. Aluthge is a citizen of Sri Lanka. She applied for permanent residence in Canada through the Economic Class under the Express Entry program. Listed as a dependent on this application was her husband, Mr. Rajapakse Mudiyanselage.

[7] In July 2017, Ms. Aluthge hired a licensed immigration consultant ("Consultant") to represent her and her husband in their permanent residence application. The application was initially refused in February 2018 because the Sri Lankan police clearances provided did not cover all of the required dates. Ms. Aluthge was invited to apply again and filed her second application for permanent residence in September 2018.

[8] Ms. Aluthge alleges that she repeatedly asked staff members at the Consultant's office whether she should disclose her husband's immigration history in Australia; in particular, that he had overstayed his visa and was deported from Australia. The Consultant disputed a number of Ms. Aluthge's allegations in their response filed in this judicial review, including the timing and nature of the disclosure. I set out my findings on this dispute in my analysis.

[9] A few months after the permanent resident application was filed, in a letter dated October 8, 2019, the Officer asked for further details about Ms. Aluthge husband's immigration history in Australia. Ms. Aluthge responded in an email, dated October 11, 2019 and a further affidavit dated October 13, 2019 providing the details of Mr. Rajapakse Mudinyanselage's immigration history; in particular, the Applicants disclosed that Mr. Rajapakse Mudinyanselage had

overstayed his visa and been removed from Australia. Ms. Aluthge also informed IRCC that she no longer wanted the Consultant to act as her representative.

[10] On October 17, 2019, Ms. Aluthge filed a complaint to the Immigration Consultants of Canada Regulatory Council, the body regulating licensed immigration consultants in Canada at the time. At the time Ms. Aluthge filed an affidavit in this judicial review, almost three years after filing the complaint, she was still awaiting its outcome.

[11] On November 4, 2019, Ms. Aluthge received a procedural fairness letter from the Officer, setting out their concern that the Applicants may be inadmissible for misrepresentation. Ms. Aluthge retained new counsel, who incidentally is not the same counsel who is representing her on this judicial review, to respond to the misrepresentation allegation. In her response to the procedural fairness letter, Ms. Aluthge explained that her former representative had advised that it was unnecessary to disclose the circumstances of her husband's departure from Australia. Ms. Aluthge also provided some evidence of her communications with her former representative on this issue.

[12] In a letter from IRCC dated December 10, 2020, the Applicants learned that their application for permanent residence had been refused because the Officer had found that they were inadmissible for misrepresentation. The Applicants filed the present application challenging this determination.

[13] As part of their arguments filed at the leave stage before this Court, the Applicants alleged the Consultant was incompetent. The Applicants notified the Consultant about the nature of these allegations. They did so in accordance with the procedural protocol *Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court.* The Consultant responded by letter, disputing some of the Applicants' allegations.

## III. Issues and Standard of Review

[14] As I noted above, the determinative issue is whether there was a breach of natural justice due to the ineffective assistance of the Applicants' former representative in preparing the Applicants' application for permanent residence. The general presumption of a reasonableness standard of review does not apply in these circumstances (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 77 [*Vavilov*]). The question I need to ask is whether the procedure was fair in all the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[15] The interests at stake are significant given the severe consequences of a misrepresentation finding for the Applicants, including a five-year period of inadmissibility during which they cannot apply for permanent residence and they must obtain Ministerial permission to enter Canada (*Immigration and Refugee Protection Act*, SC 2001, c 27, ss 40(2)-(3) [*IRPA*]). This Court has found that, given these severe consequences, a heightened duty of procedural fairness is owed (*Likhi v Canada (Minister of Citizenship and Immigration)*, 2020 FC 171 at para 27).

## IV. Preliminary Issue

[16] The Applicants' counsel noted in their written reply at the leave stage and at the outset of the judicial review hearing that the Respondent had not addressed the Applicants' central argument, namely that there was a breach of natural justice owing to the ineffective assistance of their former representative. The Respondent's written argument focused on the Applicants' secondary argument: the reasonableness of the Officer's decision in not accepting the Applicants' explanation for the misrepresentation. The Respondent did not file a further memorandum. The Applicants asked that the Respondent not be permitted to make new arguments on the natural justice issue given their failure to address it prior to the hearing.

[17] Respondent's counsel explained that they were new to the file. I note, however, that no request was made prior to the hearing for an opportunity to file new submissions on account of their recent carriage of the file.

[18] Respondent's counsel pointed to one paragraph in the Respondent's memorandum filed at the leave stage to argue that they addressed the incompetence of counsel argument. The paragraph says, referencing this Court's decision in *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196: "Proceedings under the IRPA that deal with incompetence of counsel will only constitute a breach of natural justice in extraordinary circumstances." As I pointed out at the hearing, while this paragraph addresses the incompetence issue at a high level, there were no direct submissions about the facts of this case and the ineffective assistance of counsel test.

[19] The Respondent's counsel provided submissions at the oral hearing that were not in their written materials on both substantive steps of the ineffective assistance of counsel test. I allowed these submissions for the following reasons.

[20] On the first step, whether there was evidence of incompetence on the part of the former representative, the Respondent's counsel relied on the arguments made by the Consultant in their letter filed in this matter. As these arguments were not new to the Applicants and in fact the Applicants had responded to them in writing in the Applicants' reply and further memorandum materials, I did not see a problem with hearing from the Respondent's counsel on this point.

[21] On the second issue, whether there was prejudice to the Applicants, the argument made by Respondent's counsel was new and raised for the first time at the hearing. I advised the parties that I would hear the submissions and that I was open to addressing a request from the Applicants' counsel for more time to respond to the argument. No request was made for additional time and Applicants' counsel addressed the Respondent's submissions on this point in their reply at the hearing.

## V. Analysis

### A. *Ineffective assistance of counsel test*

[22] In order to establish that there had been a breach of natural justice due to ineffective assistance of counsel in immigration proceedings, this Court has held that three components must

be established:

1. The representative's alleged acts or omissions constituted incompetence;
2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and
3. The representative be given notice and a reasonable opportunity to respond (*Guadron v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1092 at para 11*; R v GDB*, 2000 SCC 22 at para 26 [*GDB*]).

[23] There is no dispute that the third component of the test has been met. The Consultant was notified and given a reasonable opportunity to respond to the Applicants' allegations.

B. *Incompetence is established*

(1) Factual background to incompetence allegation

[24] The Applicants alleged that they received incompetent representation from the Consultant with respect to their application for permanent residence. They allege that the Consultant's firm advised them that Mr. Rajapakse Mudiyanselage's deportation from Australia need not be disclosed in response to the following question included on their application for permanent residence:

> Have you, or if you are the principal applicant, any of your family members listed in your application for permanent residence in Canada, ever:…been refused admission to, or ordered to leave, Canada or any other country or territory?

[25] In her affidavit filed in this judicial review, Ms. Aluthge set out the following circumstances in relation to the incompetence allegation:

- Prior to submitting the first application for permanent residence, she disclosed to the Consultant's firm that her husband had been deported from Australia and asked whether this information needed to be disclosed. She was advised over the phone by the Consultant's staff member that this did not need to be disclosed;
- Prior to submitting the second application for permanent residence, Ms. Aluthge asked again whether her husband's deportation needed to be disclosed. She specifically raised this issue because she understood that the information may be discovered by IRCC when her husband submitted his biometric information. She was assured, through text messaging and over the phone, by various staff members of the Consultant that this information need not be disclosed;
- The Consultant's firm told Ms. Aluthge that the deportation need not be disclosed because: i) the deportation happened over ten years ago; and ii) there was no criminal record that resulted from the deportation.

[26] The Consultant disputed three key issues in Ms. Aluthge's account. I note that the Consultant did not file sworn evidence in this matter, nor did the Consultant provide any evidence from the staff members to whom Ms. Aluthge is alleging she spoke in relation to this issue.

[27] First, the Consultant disputed when the Applicants first disclosed the deportation, though the Consultant accepted that a discussion about Mr. Rajapakse Mudiyanselage's immigration

history occurred prior to submitting the second application for permanent residence. Second, the Consultant disputed the number of times Ms. Aluthge disclosed the information to her staff, only accepting that she disclosed it once through WhatsApp messaging, just prior to the submission of the second application for permanent residence. A copy of these text messages was before this Court. Third, the Consultant disputed that Ms. Aluthge described her husband's departure from Australia as a deportation; the Consultant's position is that their staff initially understood that Ms. Aluthge's husband had voluntarily left Australia and was not deported.

[28] I do not find it is necessary or appropriate for me to resolve all points of the dispute between the Consultant and the Applicants. As the Supreme Court of Canada explained in in *GDB*: "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" (*GDB* at para 29).

[29] I will focus my analysis on the nature of the disclosure, namely whether Ms. Aluthge advised the Consultant's firm that Mr. Rajapakse Mudiyanselage was deported. I say this issue is determinative of the first branch of the test because, even if I accept the Consultant's version of events with respect to the timing and frequency of the disclosure of Mr. Rajapakse Mudiyanselage's immigration history in Australia, I find that incompetent advice was given in at least one exchange that the Applicants and the Consultant both agree occurred. As I explain below, this finding was reached based on my review of the text messages between Ms. Aluthge and the Consultant's staff.

[30] There is no dispute as to the accuracy of the copies of the text messages between the Consultant's staff and Ms. Aluthge provided to the Court. I have reviewed these messages. Although Ms. Aluthge noted to the Consultant's staff that her husband "willingly left the country without going for an appeal or claiming refuge or asylum," a review of the full exchange reveals it was abundantly clear that Ms. Aluthge was discussing a deportation from Australia after her husband overstayed his visa. This statement about his willingness to leave comes at the end of Ms. Aluthge's description of the events that led to her husband overstaying his visa, being detained, and ultimately being ordered removed from the country.

[31] From the outset of the text message conversation that began on September 5, 2018, Ms. Aluthge raised the issue as one relating to her husband's deportation. She wrote: "Will it be an issue with regards to [my husband's] deportation from Aussie?" The staff replied by asking Ms. Aluthge to "[Please] furnish the deportation details once more." Ms. Aluthge then provided the details that led to her husband's overstay and deportation, including that "immigration found out [about the overstay] and took him to one of their centers."

[32] The Consultant's staff asked for no further details and provided this response: "I have discussed it with [another staff member at the firm and] according to him it will not be an issue."

[33] Having reviewed the text messages, I am satisfied that Ms. Aluthge disclosed to the Consultant's firm that her husband overstayed his visa and then was ordered to leave Australia. Further, there was no attempt by the Consultant's staff to clarify or seek further information about the nature of the removal from Australia.

[34] The Consultant also alleged that the Applicants did not disclose Mr. Rajapakse Mudiyanselage's deportation in the information they provided to the Consultant's firm in a document entitled "Personal Details." This "Personal Details" form appears to be a fillable form used by the Consultant's firm to assist with their preparation of the permanent residence forms. I have reviewed this form and the Applicants' responses. I agree with the Applicants that the form does not assist the Consultant's position. As Ms. Aluthge notes in her affidavit: "There is no question on the form asking if there had been any previous immigration detention, deportation or overstay. The only question that was close to this information asked 'Have you ever been refused a visa to any country before – Study, Visa, Business or PR?'. We correctly answered 'No' to this question as [my husband] was never denied a visa to Australia."

[35] The question on the "Personal Details" form does not specifically ask the Consultant's firm's clients whether they were ever "ordered to leave" any country. It only asks whether they were ever refused a visa for admission. Instead of assisting the Consultant's position, in my view, the "Personal Details" form supports the Applicants' experience that the Consultant did not understand that applicants for permanent residence are required to disclose whether they were ever ordered to leave a country.

(2) Legal test for incompetence

[36] To satisfy the first prong of the test, the Applicants bear the onus of establishing that their representative's conduct fell outside the range of reasonable professional assistance. Incompetence is determined on a reasonableness standard with "a strong presumption that

counsel's conduct fell within the wide range of reasonable professional assistance" (*GDB* at para 27). I find that the Applicants have met their onus.

[37] The Applicants requested advice about whether they were required to disclose Mr. Rajapakse Mudiyanselage's deportation in response to a question on their permanent residence forms. The Consultant's firm advised them that it was not necessary to disclose this information. This was incorrect advice that the Consultant should not have given.

[38] The advice is particularly egregious given the serious consequences of non-disclosure, of which the Consultant should have been aware, and the limited attention given to the Applicants' inquiry about a critical issue (See *Yang v Canada (Minister of Citizenship and Immigration*), 2019 FC 402 at paras 41-42 [*Yang*]). As described above, I am satisfied that the Applicants' allegations of incompetence are "sufficiently specific and clearly supported by the evidence" (*Brown v Canada (Minister of Citizenship and Immigration*), 2012 FC 1305 at para 56 [*Brown*]). The Consultant's conduct fell well outside the range of reasonable professional assistance.

C. *Prejudice due to the incompetence is established*

[39] The second component, the prejudice component of the test, is met where the Applicants demonstrate that, but for the alleged conduct, there is a reasonable probability that the original result would have been different (*Guadron* at para 11; *Brown* at para 56; *GDB* at para 26).

[40] Prior to submitting the application, Ms. Aluthge asked the Consultant's firm whether she was required to disclose her husband's deportation from Australia. Ms. Aluthge swore in her

affidavit that had she not received the advice from the Consultant's firm that the disclosure of this information was unnecessary, she would have disclosed her husband's immigration history on their application for permanent residence. There is no reason to doubt this statement.

[41] I am satisfied there is a reasonable probability that Ms. Aluthge would have disclosed the information, had the Consultant not advised that the disclosure was unnecessary. Had the Applicants disclosed Mr. Rajapakse Mudiyanselage's deportation from Australia, the Officer would not have refused their application due to misrepresentation, nor would the Applicants be subject to the 5-year bar on entering Canada or applying for permanent residence in Canada. In *Yang*, Justice Manson considered a misrepresentation finding due to non-disclosure on account of incompetent representation. He noted, "Had the updated… form contained the information [omitted due to the counsel's incompetence], the entire basis for the Procedural Fairness Letter, and the ultimate rejection of the Application, would have not been an issue for the Officer to consider." The same is true here.

[42] The Respondent argued that the Applicants did not show that the result would have been different but for the incompetence, because the application for permanent residence would have been refused for reasons other than the misrepresentation. The Respondent relied on the Officer's determination that the misrepresentation about Mr. Rajapakse Mudiyanselage's deportation is material because it may have induced an error in the admissibility assessment under sections 34-37 of *IRPA*. From this determination on the materiality of the misrepresentation, and the possibility that it could have led to a further inquiry relating to inadmissibility, the Respondent jumped to the conclusion that this meant that the Applicants *would* have been found inadmissible

and their applications *would* have been refused even if there was no misrepresentation finding. There is no support for the leap that the Respondent is making. The Respondent did not explain on what basis or particular ground of inadmissibility Mr. Rajapakse Mudiyanselage's overstay in Australia would certainly result in the Applicants' permanent residence application being refused. Whether the Applicants are inadmissible on other grounds than misrepresentation can be assessed on redetermination; there is no basis for me to find that their applications will certainly be refused on another ground of inadmissibility, such that no prejudice resulted from their former representative's incompetence.

[43] In any case, as I explained above, had the information about Mr. Rajapakse Mudiyanselage's deportation been disclosed, the Applicants would not have been found to be inadmissible due to misrepresentation and would not be subjected to the consequences of this finding. I am satisfied that the Applicants have met their onus of establishing the prejudice component of the ineffective representation test.

## VI. Remedy

[44] The Applicants have established that their procedural rights were breached due to the incompetent representation of the Consultant. The application for judicial review is granted. The Applicants' application for permanent residence is sent back to be redetermined by a different officer. As I have found that the Applicants' initial failure to disclose Mr. Rajapakse Mudiyanselage's immigration history in Australia was due to the ineffective assistance of their former representative, the misrepresentation issue does not need redetermination.

[45] Neither party raised a serious question of general importance and I agree that none arises.

**JUDGMENT IN IMM-471-21**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is granted;
2. The decision dated December 10, 2020, refusing the Applicants' application for permanent residence and finding the Applicants inadmissible for misrepresentation is set aside;
3. The matter is remitted for redetermination by a different officer; and
4. No serious question of general importance is certified.

"Lobat Sadrehashemi"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-471-21 |
| **STYLE OF CAUSE:** | SACHINI RANMADU ALUTHGE ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | FEBRUARY 14, 2022 |
| **JUDGMENT AND REASONS:** | SADREHASHEMI J. |
| **DATED:** | AUGUST 25, 2022 |

**APPEARANCES:**

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| Nimanthika Kaneira | FOR THE RESPONDENT |

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