Federal Court  Cour fédérale

Date: 20191121

Docket: IMM-6186-18

Citation: 2019 FC 1485

Ottawa, Ontario, November 21, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

RODRIGO COUBE DE CARVALHO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by an immigration officer of Immigration, Refugees and Citizenship Canada ("IRCC"), dated November 30, 2018, denying the Applicant's permanent residency application on the basis that, pursuant to section 40(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), the Applicant is inadmissible to Canada for misrepresentation.

[2] For the reasons that follow, this application for judicial review is dismissed.

Background

[3] The Applicant, Rodrigo Coube de Carvalho, is a citizen of Brazil. He was issued a temporary resident visa in December 2014, and he arrived in Canada on January 15, 2015. Because he was accompanying his then-spouse, Gesilene Marques Da Fonseca Carvalho, who held a study permit, the Applicant was eligible to apply for and received an open work permit on March 26, 2015, valid to December 8, 2017.

[4] The Applicant and his then-spouse went to the Niagara Falls port of entry on November 22, 2017, where the Applicant successfully applied for a second work permit, this time as the spouse of a skilled worker, which work permit was valid to August 21, 2020.

[5] The Applicant applied for permanent residency under the Canadian Experience Class on September 22, 2018. In that application, the Applicant indicated that he was legally separated from his then-spouse and provided a copy of a November 8, 2016 custody agreement pertaining to their two sons.

[6] A procedural fairness letter was sent to the Applicant on November 2, 2018, alerting him to IRCC's concern that he had misrepresented his marital status when he applied for the second work permit. By letter of November 9, 2018, from KPMG Law LLP ("KPMG"), which also attached a November 8, 2018 letter from the Applicant himself, the Applicant responded to the procedural fairness letter. He stated that there was never any intent to misrepresent his marital status and any omission was inadvertent. He and his wife had started experiencing trouble in their relationship in August 2016. The custody agreement was effected when he and his wife started living apart, but at that time, the Applicant believed that they would reconcile. When the

family attended the port of entry in Niagara Falls, the Applicant and his wife were still married. The Applicant stated that in his culture, the status of "legally separated" is not considered a distinct marital status, persons are considered to be married until a certificate of divorce is issued, and at the time that he sought the second work permit, neither he nor his wife had applied for a divorce. Further, had the immigration officer at the port of entry asked about the status of their relationship, they would have addressed it. The Applicant states that he was not represented by legal counsel with respect to the family law matters when he applied for the second work permit and he was not aware that there would be a change in his marital status prior to him and his wife obtaining a final divorce document.

[7] The Applicant's application for permanent residency was denied.

Decision under review

[8] The decision was contained in a letter to the Applicant dated November 30, 2018. Therein, the Officer determined that the Applicant was inadmissible to Canada for misrepresentation pursuant to s 40(1)(a) of IRPA. The Officer found that the Applicant had misrepresented his marital status when he applied for a work permit on November 22, 2017. Specifically, that the Applicant had withheld the fact that he was no longer cohabitating with his spouse. This was relevant to his work permit application as the Applicant was issued an open work permit on the basis of his marriage to a skilled worker, his wife. Because of his misrepresentation, the Officer concluded that the Applicant was inadmissible to Canada, and pursuant to s 11(1) of IRPA, his application for permanent residence was refused.

[9] In the Global Case Management System ("GCMS") notes, which form a part of the reasons for the decision (*De Hoedt Daniel v Canada (Citizenship and Immigration)*, 2012 FC 1391 at para 51; *Afridi v Canada (Citizenship and Immigration)*, 2014 FC 193 at para 20; *Muthui v Canada (Citizenship and Immigration)*, 2014 FC 105 at para 3), the Officer addressed the Applicant's response to the procedural fairness letter, including his submission that while he and his wife were not living together and had effected a custody agreement at the time that the Applicant applied for the for the second work permit, the Applicant was informed by the cultural norms of Brazil which he submitted did not consider "legally separated" to be a distinct marital status. However, the Officer found that the onus was on the Applicant to understand the definition of "legally separated" and that it was his responsibility to ensure that his application was truthful and complete. Further, the Officer noted that definitions for marital status were found in the instruction guide for completing applications. These included, amongst other definitions, annulled marriage, common-law, married, divorced and "Legally Separated: This means that you are married, but no longer living with your spouse." The Officer noted that the Applicant had also provided a copy of the filed application for divorce, dated October 30, 2018, which states that the Applicant and his wife were separated from August 1, 2016. And, although the Applicant stated that he believed he would reconcile with his wife, his work permit application was based on his marital status at the time the application was made, not on a future prospect of reconciliation. He and his wife had been living apart for over a year when the application was made.

[10] The Officer noted that the Applicant has two minor sons who are in Canada temporarily and that it is in the best interests of the children to be with their biological parents. However, that none of the family members have permanent residence status in Canada and it is assumed that

temporary residents will comply with the requirement to return to their home country at the end of their authorized stay.

[11] The Officer stated that, had the Applicant been truthful about his marital status, he would not have been eligible to receive an open work permit as the spouse of a skilled worker. The Officer concluded that there were reasonable grounds to believe that the Applicant was inadmissible for misrepresentation pursuant to s 40(1)(a) of IRPA for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induced of could induce an error in the administration of the IRPA and, on that basis, refused the application.

Issues and standard of review

[12] The Applicant is self-represented and does not make any submissions identifying the issues that arise or the standard of review. The Respondent submits, and I agree, that the issue is whether it was reasonable for the Officer to conclude that the Applicant is inadmissible for misrepresentation.

[13] Reasonableness is the presumptive standard of review for questions of mixed fact and law. The issue in this matter is such a question as it engages the Officer's application of the law on misrepresentation to facts of the Applicant's case (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 ("*Dunsmuir*"); *Sun v Canada (Citizenship and Immigration)*, 2019 FC 824 at paras 10, 13; *Tofangchi v Canada (Citizenship and Immigration)*, 2012 FC 427 at para 13 ("*Tofangchi*")).

[14] In judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process and also with whether the

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47).

Relevant legislation

[15] The relevant provisions of the IRPA are as follows:

11(1) Application before entering Canada - A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
16 (1) Obligation — answer truthfully - A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
40 (1) Misrepresentation - A permanent resident or a foreign national is inadmissible for misrepresentation	40 (1) Fausses déclarations - Emportent interdiction de territoire pour fausses déclarations les faits suivants:
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce	a) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une

an error in the administration of this Act;	réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

Analysis

[16] As indicated above, the Applicant is self-represented. In his written representations, he states that the he did not believe he was legally separated from his wife when he applied for his second work permit. He states that he told the immigration officer all of the facts, did not lie about his marriage, did not make any misrepresentations, and that s 40(1)(a) of IRPA has no application in his case. He also appears to argue that he did not understand that his counsel in his permanent residency application had indicated that the Applicant was separated, that this was not true at the time, and that he signed the application without reading it properly. When appearing before me, the Applicant stated that his mistake was to sign a document before reading it, being the permanent residency application, which had been prepared by his immigration counsel. By this I understand him to mean that he considered himself to be still married, although he and his then wife were living apart.

[17] The Respondent submits that the Applicant, in his November 22, 2017 work permit application which the Applicant submitted as the spouse of a skilled worker, the Applicant declared that he was married. He now admits that he was legally separated at that time. Although the Applicant claims that the misrepresentation was inadvertent, the onus was on the Applicant to understand the legal definitions of "married" and "legally separated" and to ensure that his application was accurate. Had he been forthright, he would not have been granted a work permit.

Therefore, the Applicant committed a misrepresentation that caused an error in the administration of the IRPA and is inadmissible pursuant to s 40(1)(a).

[18] The Respondent submits that the Applicant's submissions do not address the Officer's findings. To the extent that the Applicant is challenging the merits of the inadmissibility decision, even if the truth of the Applicant's explanation were accepted, he is still inadmissible because an innocent failure to provide material information still constitutes misrepresentation (*Tofangchi* at paras 33,40; *Jiang v Canada (Citizenship and Immigration)*, 2011 FC 942 at para 35 ("*Jiang*"); *Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 at paras 56-58 ("*Wang 2005*"); *Wang v Canada (Citizenship and Immigration)*, 2015 FC 647 at paras 24-25; *Smith v Canada (Citizenship and Immigration)*, 2018 FC 1020 at para 10 ("*Smith*")). While there is a narrow exception to s 40(1)(a) when an applicant honestly and reasonably believed that they were not misrepresenting a material fact and where the knowledge of the material fact was beyond their control, the exception applies only in truly exceptional cases. The Respondent submits that this is not such a case. The duty of candour found in s 16(1) of IRPA includes a duty to ensure that documents are complete and accurate. Here, the Applicant failed to consult with the application guide, which contained the definition of "legally separated". This knowledge was not beyond his control and the Applicant did not act reasonably and failed discharge his duty to ensure that his application was complete and accurate (*Tofangchi* at paras 33-40; *Appiah v Canada (Citizenship and Immigration)*, 2018 FC 1043 at paras 17-18 ("*Appiah*"); *Smith* at para 12; *Zhou v Canada (Citizenship and Immigration)*, 2018 FC 880 at para 25; *Wang 2005* at paras 56-58).

[19] In my view, the Respondent has accurately identified and described the applicable jurisprudence. In *Tofangchi*, Justice Tremblay-Lamer clearly set out the law on misrepresentation and inadmissibility pursuant to s 40(1)(a) of IRPA:

> [38] It must be kept in mind that foreign nationals seeking to enter Canada have a duty of candour: *Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848, at paragraph 41; *Baro v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at paragraph 15. Section 16(1) of the Act reads that "[a] person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires."
>
> [39] As noted in Bodine (at paragraph 44):
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> > …The purpose of section 40(1)(a) of the Act is to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada (see *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 (F.C.T.D.), *Khan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 512 (F.C.T.D.), *Wang v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059 (F.C.T.D.), aff'd on other grounds, 2006 FCA 345 (F.C.A.)). In some situations, even silence can be a misrepresentation (see *Mohammed v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 299) and the present facts went well beyond mere silence.
>
> [40] In keeping with this duty of candour, there is, in my opinion, a duty for an applicant to make sure that when making an application, the documents are complete and accurate. It is too easy to later claim innocence and blame a third party when, as in the present case, the application form clearly stated that language results were to be attached, and the form required signature by the applicants. It is only in exceptional cases where an applicant can demonstrate that they honestly and *reasonably* believed that they were not withholding material information, where "the knowledge of which was beyond their control", that an applicant may be able to take advantage of an exception to the application of section 40(1)(a). This is not such a case.

[emphasis original]

[20] In *Appiah*, Justice Martineau discussed the innocent misrepresentation exception:

> [18] The innocent misrepresentation exception is narrow and shall only excuse withholding material information in extraordinary circumstances in which the applicant honestly and reasonably believed he was not misrepresenting a material fact, knowledge of the misrepresentation was beyond the applicant's control, and the applicant was unaware of the misrepresentation
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> (Also see: *Wang v Canada (Citizenship and Immigration)*, 2018 FC 368 at paras 16-18)

[21] This and other jurisprudence establishes that an applicant is under an obligation to ensure that their application is complete and accurate, and that even innocent misrepresentation does not absolve an applicant except in exceptional circumstances (see, for example, *Osisanwo v Canada (Citizenship and Immigration)*, 2011 FC 1126).

[22] As to the alleged misrepresentation in this case, the procedural fairness letter states that in the Applicant's "current application for permanent residence under the Canadian Experience Class you declared yourself as legally separated since July 2017 and you provided a court order relating to child support and custody from November 2016." However, I am unable to locate anything in the Applicant's September 21, 2018 application for permanent residence that indicates that the Applicant separated from his wife in July 2017. It confirms that they are separated, but provides no date of separation.

[23] The Respondent has filed an affidavit of Anthony Martino, Manager of Inland Enforcement in the Southern Ontario Region, CBSA, which states that he has reviewed the GCMS notes concerning the Applicant. According to Mr. Martino, because the November 22,

2017 work permit application was made at the port of entry, no paper application was required or submitted, the decision was made by a CBSA officer, and there is no paper record of that decision. Mr. Martino attaches as Exhibit A to his affidavit an undated screen shot responding to a search for UCI 92579407 (apparently the Applicant's identification indicator) which, under Work Permit, Exemption Code, indicates that C41 was selected in the drop down box. Mr. Martino states C41 applies to spouses or common law partners of skilled persons coming to Canada as foreign workers. Attached as Exhibit B to Mr. Martino's affidavit are what he describes as "point-in-time" GCMS notes dated November 23, 2017, the day after the Applicant's work permit application. Mr. Martino states that according to these GCMS notes the Applicant first applied for permanent residence in July 2017. That application was subsequently cancelled as it was incomplete. However, in that first application the Applicant declared that he was legally separated.

[24] Upon review of that exhibit, there appear to be two entries on July 5, 2017, both created at 19:45:08. In the first entry, MARITAL STATUS 1, the Applicant's marital status is noted as common-law, his spouse/partner being Gesilene Marques da Fonseca de Carvalho (updated time stamp 19:45:08). The second entry, MARITAL STATUS 2, states the Applicant's marital status as legally separated (updated time 19:46:51). Mr. Martino states that the latter entry was the most recent entry pertaining to the Applicant's marital status at the time he sought the subject work permit. Further, this latter entry indicates that, at the time of the Applicant's November 22, 2017 work permit application, the GCMS showed that he was legally separated but that this entry was "likely missed" by the CBSA officer who granted the work permit and the C41 exemption. I note that the certified tribunal record ("CTR") does not contain any documentation submitted by the Applicant pertaining to the July 2017 application for permanent residence.

[25] Other than the GCMS entry as interpreted by Mr. Martino, there is nothing in the record before me that establishes that the Applicant declared in the prior application for permanent residency that he was, in July 2017, separated from his then-wife as indicated in the procedural fairness letter.

[26] However, as noted above, in response to the procedural fairness letter, the Applicant indicated that a custody agreement was put in place when he and his wife separated. KPMG's letter indicates that the custody agreement was provided by that office in the Applicant's electronic application for permanent residence because a separation or divorce agreement was not yet available. Indeed, the procedural fairness letter references the November 2016 custody agreement. And, in response to the procedural fairness letter, KPMG also provided a copy of the application for divorce, filed on October 30, 2018. This indicates that the Applicant and his spouse separated on August 1, 2016.

[27] On September 21, 2018, the Applicant again applied for permanent residence, a copy of that application is contained in the CTR. This application states that the Applicant is legally separated from his spouse and that their divorce is in the process of being finalized.

[28] Given that the custody agreement was effected on November 8, 2016 and the divorce application indicates a separation date of August 1, 2016, while the Applicant may not have appreciated the immigration implications of a separation, the evidence in the record supports that he was separated from his then-spouse in 2016, prior to his original application for permanent residence and prior to his November 22, 2017 application for a second work permit.

[29] That said, while the Respondent submits that on his work permit application the Applicant declared that he was married, in fact, according to Mr. Martino, there was no written application. It may be that the Applicant made a verbal declaration, but there is no evidence of this before me. There is only the selection of exemption code C41 indicated by the screen shot, and the work permit itself, which is found in the CTR, and which indicates under Remarks\Observations “SPOUSE OF SKILLED WORKER”.

[30] The Applicant states that he responded truthfully to all of the questions put to him by the CBSA officer and that he made no misrepresentations. This was premised on the fact that he and his wife were, in fact, then still married. He also states that had the immigration officer asked, he would have disclosed that he and his wife had separated over a year before and that a custody agreement was in place. The Applicant submits that the fact of his separation was not intentionally withheld. He simply did not understand that the term “legally separated” existed and had application to him.

[31] As noted above, the jurisprudence is clear that the onus is on an applicant to ensure the completeness and accuracy of their application and that an applicant will be inadmissible if they misrepresent or withhold material facts that could induce an error in the administration of the IRPA. The duty of candour requires the disclosure of material facts, which extends to a change in marital status. The exception to the misrepresentation rule is narrow and applies only in truly exceptional circumstances where an applicant honestly and reasonably believed that they were not misrepresenting a relevant fact, the knowledge of which was beyond their control. Nor does the misrepresentation have to have been intentional, and an honest omission can still fall within the purview of misrepresentation (*Tofangchi* at paras 24, 33-40; *Baro v Canada (Citizenship and*

Immigration), 2007 FC 1299 at para 15 ("*Baro*"); *Jiang* at para 3; *Smith* at para 10; *Paashazadeh v Canada (Citizenship and Immigration)*, 2015 FC 327 at para 18; *Appiah* at para 18).

[32] Here, the Officer found that the Applicant misrepresented a material fact, his marital status, which induced an error in the administration of IRPA, since he was granted a work permit on the basis of his misrepresentation. The Respondent does not challenge, and I am satisfied, that the misrepresentation by omission was innocent. I am somewhat troubled by the fact that, in this case, there was no written application in which the fact of the separation was misrepresented or omitted and that that the guidelines to which the Officer refers were not explicitly identified nor are they found in the CTR. However, it remains that the onus was on the Applicant to ensure that his representations were complete. Knowledge of his marital status was within his control as he could have referenced the guidelines to understand that, although he was still married, his circumstances fell within the definition of legally separated. Further, he should have volunteered to the immigration officer the fact of his separation rather than waiting to see if he would be asked about this.

[33] This Court has found that the Immigration Appeal Division was reasonable in determining that an applicant's marital history was a material fact to be disclosed in an application for permanent residency in Canada:

> [17] Of course, applicants cannot be expected to anticipate the kinds of information that immigration officials might be interested in receiving. As the IAD noted here, "there is no onus on the person to disclose all information that might possibly be relevant". One must look at the surrounding circumstances to decide whether the applicant has failed to comply with s. 40(1)(*a*).
>
> [18] Here, the Canadian officials who were responsible for processing Mr. Baro's application for permanent residence, based on a spousal sponsorship, asked him for a "marriage check".

> Obviously, this request alerted Mr. Baro to the fact that those officials wanted to know if he had been married before. In my view, in these circumstances, Mr. Baro was obliged to disclose his marital history. True, he complied with the request for an official certificate of marriage registration. However, his compliance with that request did not absolve him of the obligation to divulge his previous marriage and the steps he took to have his first wife presumed dead. Mr. Baro could not have reasonably believed that he was not withholding material information.

[34] Here, the Applicant was aware that his eligibility for a work permit was tied to his marriage to his spouse, who was classified as a skilled worker. Even if he did not know that "legally separated" was a defined term that applied to his circumstances, the duty of candour required that he voluntarily disclose the fact of his separation.

[35] The Officer's decision is owed deference and it is reasonable as it falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law.

[36] Finally, I note that the Applicant in his submissions states that he has two sons studying in Canada and, as father, he must be in Canada to take care of them. The Officer acknowledged that the Applicant has two minor sons who are in Canada and that it is in the best interests of children to be with their biological parents. However, the Officer stated that no one in the Applicant's family has permanent resident status and it is assumed that, as temporary residents, they will return to Brazil at the end of their authorized stay. Based on these comments, the Respondent submits that the best interests of the children were not compromised by the Officer's decision, presumably because a separation would be short term.

[37] It is not clear to me that this is so, particularly since the Applicant himself was seeking permanent residence and in his September 21, 2018 application KPMG advised that his then-

spouse would be proceeding independently with a Canadian permanent residence application. In that event, and if permanent residence applications were granted to his former wife and their children, the inadmissibly finding against the Applicant could potentially have a significant impact on the children as the separation would be for 5 years pursuant to s 40(2)(a) of IRPA.

[38] That said, the Officer's comment appears to be directed to the Applicant's reply to the procedural fairness letter. This states that s 3(1) of IRPA identifies family reunification as an objective of Canada's immigration scheme and that the Applicant would be separated from his sons "for an excessive amount of time at a crucial time of their pre-adolescence should a finding of misrepresentation be made." And, that such a consequence would be disproportionate to the error in his work permit application.

[39] I note that while family separation and the innocence of the misrepresentation may provide the basis of any potential humanitarian and compassionate application for permanent residence that the Applicant may make in the future, the Applicant does not submit and it is not apparent to me that humanitarian and compassionate considerations and relief were intended to be placed before the Officer and addressed as such, or that the Officer did so. Accordingly, in these circumstances where it has reasonably been determined that a misrepresentation has occurred, any alleged disproportionality of the impact of that misrepresentation is not a factor the Officer was required to consider.

JUDGMENT in IMM-6186-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship Canada" as the named respondent to the "Minister of Citizenship and Immigration";

2. The application is dismissed;

3. No question of general importance was proposed for certification and none arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6186-18
STYLE OF CAUSE:	COUBE DE CARVALHO RODRIGO V MCI
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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Christopher Crighton	FOR THE RESPONDENT

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