Federal Court  Cour fédérale

Date: 20180316

Docket: IMM-3817-17

Citation: 2018 FC 306

Ottawa, Ontario, March 16, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BARINDER SINGH SIDHU

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This application for judicial review raises questions about the responsibility of an applicant for permanent residence in Canada to disclose what they know about another family member's criminal history. Are they inadmissible for indirectly representing a material fact if they are landed as the dependent of the principal applicant who lied about his criminal record? Do they have a duty of candour to disclose their knowledge of that fact?

[2] In this application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA or the Act), the Minister of Citizenship and Immigration (the Applicant or the Minister) challenges a decision by the Immigration Appeal Division (IAD) to uphold a finding by the Immigration Division (ID) that the Respondent, Barinder Singh Sidhu, is not inadmissible for misrepresentation pursuant to s 40(1)(a) of the IRPA and had no duty of candour to disclose his father's criminal history.

[3] For the reasons that follow, the application is granted.

II. Background

[4] The respondent is a citizen of India. In 2000, his father, Darshan Singh Sidhu, was implicated in the alleged honour killing of Jaswinder Kaur, a Canadian, in India. Ms. Kaur had married a young man whom her family did not consider suitable. Following an investigation in India, seven individuals were arrested and charged with conspiracy and murder. Darshan Singh Sidhu was alleged to have arranged the killing on behalf of members of her family in Canada. He was convicted under the *Indian Penal Code* on October 21, 2005 and sentenced to life imprisonment. He appealed his conviction.

[5] On January 1, 2007, Darshan Singh Sidhu applied to become a permanent resident of Canada under the family class, along with his wife and the Respondent. The Respondent's sister, who was in Canada and married to a relative of Jaswinder Kaur, acted as the sponsor. Darshan Singh Sidhu listed the Respondent as an accompanying adult dependent on his application.

Canadian immigration authorities were evidently not aware of the father's criminal history at the time.

[6] In the Schedule 1 Background Declaration to his application for permanent residence in Canada, Darshan Singh Sidhu answered "no" to the question whether he had been the subject of any criminal proceedings. As he was 23 years old at the time, the Respondent signed his own declaration which, he says, was prepared by travel agents. In that declaration, the answer given to the same question was also, in his case truthfully, "no". The Respondent's application for permanent residence was joined to his father's application as the principal applicant.

[7] On February 15, 2008, an appellate court upheld Darshan Singh Sidhu's conviction. A further appeal was then made to India's highest court.

[8] It appears that Darshan Singh Sidhu was released on bail pending his appeals at various times. While serving his sentence, he was also periodically released on parole to bring in crops during the harvest season. While he was on one of these forms of release from detention, on May 4, 2008, the Respondent and his parents were landed at the Vancouver airport for entry as permanent residents. All three were interviewed separately at the airport.

[9] There are no records of the airport interviews in the Certified Tribunal Record other than brief entries in the immigration officer's computerized notes registering the landing of the three family members. At the ID hearing, the Respondent testified that he had been given a paper with

some questions in Punjabi to answer about himself and that he was not asked about his father's convictions.

[10] On February 21, 2014, the Respondent was interviewed at the Canadian Consulate in Chandigarh, India. By this time, Canadian immigration authorities had become aware that a convicted murderer and his family had managed to enter Canada and obtain permanent resident status. The goal of the Chandigarh interview was to confirm the Respondent's residency obligations as a permanent resident and to collect information about him, his father and their permanent residency application. The Respondent was asked to bring his parents to the interview. They did not attend. It appears that they have not returned to Canada and remain in India.

[11] During the Chandigarh interview, the visa officer questioned the Respondent regarding his father's criminal proceedings, parole and jail sentence:

> "Who lives in the house at the time? –Mother, paternal uncle and his family Not your father? No Where was he? –My father had a case against him, so he was in jail. When we had to go to Canada he was out on bail. I have it with me. (presented two documents from courts. One was a bail document from 2003 and one was from the supreme court in 2009) –After he was convicted from the session court he appealed to the supreme court and was granted bail from the supreme court. You went to Canada in May 2008. How long before this date was your father released from prison? – He was on parole from about a month before we left. You received your decision in April 2008. Was he in jail when the decision was received? –No, he was out on parole. This document states that he was not granted bail until 2009 –Yes, this is from the supreme court. The earlier document is from 2003 when he was on trial. When did he return to jail after his release in 2003? -2005 or 2006. According to these documents he stayed in jail from that point until 2009? –yes, but he got parole every 6 months Please explain what that means? –He was given leave. There is a law that farmers

> can apply for leave to go back to tend their fields and crops. How long was leave granted? -Depends on the superintendent of the jail. Sometimes 20 days or even 1 to 2 months. And this leave was granted every 6 months? –yes Which jail was he in? –One in Maler Kotla, then Sangrur, then Barnala Was he granted parole from all these? Yes, all 3 Did he pay money to get his parole? –No, but parole requires two witnesses who must have 1.5 acres of land and act as bondspersons. Would their [sic] have been legal agreements made under Punjab law or is this an arrangement between your father and prison officials? –This is legal. It is common for those in agriculture or with medical needs to be granted parole. It is not easy and must be approved by the District Commissioner. If this is approved by the DC there must be documentation? –Two weeks ago I wrote to request it but haven't heard back. My father would have it, but if I asked he would not have given it to me. This information about parole conflicts with information that we have from police that he was detained in 2008 –It was all legal. Even when on parole they had no objection to his travel or they would have seized his passport. The other accused had their passports seized. Are you saying that authorities were aware that he was traveling to Canada to become a PR while serving his sentence and they had no objections –I don't know if he disclosed that all of that, but there was no objection to travel. Parole did not include travel restrictions. So he was released on bail in 2009 […]

[12] On April 3, 2014, the visa officer approved the Respondent's application to return to Canada since he met the residency obligations.

[13] On February 5, 2015, an immigration officer issued a report pursuant to s 44(1) of the IRPA alleging that the Respondent was inadmissible pursuant to paragraph 40(1)(a) of the IRPA on the grounds that he "did not disclose and/or withheld information concerning his father's conviction, thereby inducing an error in the administration of the [IRPA]".

[14] On April 16, 2015, the Supreme Court of India acquitted the Respondent's father of all charges related to the murder and conspiracy to murder Jaswinder Kaur. He was given "the

benefit of the doubt", the Supreme Court said, as the telephone used to orchestrate the killing by calls to and from Ms Kaur's family in Canada was not under his exclusive control. His brother also had access to it.

[15] On June 1, 2016, the ID found that the Respondent was not inadmissible pursuant to paragraph 40(1)(a) of the IRPA. The ID found that the Respondent was not responsible for his father's misrepresentation about his own admissibility. The ID concluded that if Parliament had intended to attach the inadmissibility of a principal applicant for misrepresentation to all landed dependants, it would have expressly so provided in paragraph 40(1)(a). The Applicant appealed this decision to the IAD.

[16] The IAD dismissed the Minister's appeal on August 19, 2017. The IAD found that the Respondent did not directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induced an error in the administration of the Act. The IAD agreed with the ID's analysis of the legislative intent of paragraph 40(1)(a) and found that the Respondent did not have an obligation to disclose information about his father's criminality at the Port of Entry interview.

III. Issues

[17] The sole issue for consideration in this matter is whether the IAD's decision is reasonable with regard to its findings on misrepresentation and the duty of candour.

IV. Standard of review

[18] The parties submit and I agree that the standard of review for the IAD's decision is reasonableness. The presumption that reasonableness is the standard of review for a tribunal's interpretation of its home statute has not been rebutted in this matter, although the range of possible acceptable outcomes is narrower for the IAD on the questions of law presented by the Minister on the scope of misrepresentation and the duty of candour: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 23, [2016] 2 SCR 293; *Canada (MCI) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Geng v Canada (MPSEP)*, 2017 FC 1155 at paras 16-19; *Kazzi v Canada (MCI)*, 2017 FC 153 at paras 17-19. The IAD's decision must fall within a narrow range of reasonable, acceptable outcomes which are defensible in respect of the facts and the law.

V. Relevant legislation

[19] The relevant provisions of the IRPA read as follows:

Obligation — answer truthfully	**Obligation du demandeur**
16 (1) 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.
Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or	40 (1) Emportent interdiction

a foreign national is inadmissible for misrepresentation	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 an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;

VI. Analysis

A. *Misrepresentation*

[20] There is no dispute between the parties that Darshan Singh Sidhu was inadmissible to Canada and lied on the application forms when he denied having criminal convictions. He had been found guilty of murder and sentenced to life imprisonment when he filed his application and when he was landed. The Respondent and his mother failed to mention this in their application for permanent residency and at the point of entry interview. However, the Schedule 1 Background Declaration that the Respondent signed did not ask for information about any criminal convictions that other family members may have had – only his own. The Respondent answered that question truthfully. Nor is there any evidence that he was asked about his father's history during his examination for landing. He did not volunteer information about his father's status as a convicted and sentenced felon on that form or during the examination at the Port of

Entry. Thus, he did not make any direct misrepresentation that could induce an error in the administration of the legislation.

[21] The Applicant Minister argues that the IAD erred when it found that the word "indirect" at s 40(1)(a) of the IRPA does not apply to an accompanying family member who does not personally provide any factually untrue or misleading information in applying for permanent residency. This is an unreasonably narrow interpretation of the statute, the Applicant argues, and is not supported by the intent of Parliament or the broad interpretation endorsed by the jurisprudence.

[22] By failing to disclose his father's conviction, the Applicant submits, the Respondent withheld a material fact and this constitutes an indirect misrepresentation under s 40(1)(a) of the IRPA. The Applicant relies on *Geng v Canada (MCI)*, 2017 FC 1155 and *Wang v Canada (MCI)*, 2005 FC 1059, [*Wang*] aff'd on other grounds, 2006 FCA 345 [*Wang FCA*].

[23] In *Geng*, the Applicant and her husband became permanent residents of Canada. As permanent residents, they were required to be physically present in Canada for at least 730 days in the 1825 days prior to the examination period. The applicant was interviewed regarding this obligation and claimed that she was absent for 889 days. The visa officer found that the Applicant was actually absent for 1158 days. The Applicant abandoned the first application. During an audit on an immigration consultant's office, it was revealed that the Applicant was actually absent from Canada for 1641 days. The Applicant submitted a second application for a permanent resident card in 2015 which was denied on the ground that the Applicant committed a

misrepresentation on the 2008 application. In examining whether the misrepresentation induced an error in the administration of the IRPA, Justice McDonald found that "the fact that an error is possible allows an officer to find a misrepresentation:" *Geng*, above at para 33.

[24] As I will discuss in greater detail below, the failure to disclose a murder conviction could undoubtedly and clearly induce an error in the administration of the Act. The materiality of the misrepresentation is not an issue in the present matter.

[25] The Applicant primarily relies on *Wang*, above at paras 56-58, where the word "indirectly" at s 40(1)(a) of the IRPA was found to apply to a misrepresentation by the principal applicant regarding a material fact unknown at the time to the applicant before the Court. Reference is also made to *Li v Canada (MPSEP)*, 2017 FC 1151 [*Li*], which involved misrepresentations by a sponsor in relation to her parents' applications for permanent residence.

[26] The Respondent submits that the facts of this matter are distinguishable from *Wang* and *Li*, since the applicants in those cases completed immigration forms that contained actual misrepresentations. The case is also distinguishable, the Respondent submits, from *Haque v Canada (MCI)*, 2011 FC 315 where the forms were completed on behalf of the applicant by a third party and the applicant was held responsible for their content. In each of these cases, the Respondent argues, the applicants had a personal duty to complete the forms accurately. In contrast, the Respondent submits, in this instance he made no misrepresentations on his own forms.

[27] It was reasonable for the ID and IAD to find that the relevant remarks of Mr. Justice O'Keefe in *Wang* were mere *obiter* and distinguishable from the present matter, the Respondent submits. The IAD put it in these terms:

> [13] I acknowledge that the findings of Justice O'Keefe in Wang were not overturned by the Federal Court Appeal and that his comments on the interpretation of s. 40(l)(a) as it applies to indirect misrepresentations of accompanying dependents have been cited in several decisions. However, I find that the ID properly distinguished the finding of the court in Wang on the legislative intent of s. 40(1)(a) as *obiter* and agree with the ID's analysis that the legislative intent of s. 40(1)(a) does not extend so far as to apply to dependent applicants who have not misrepresented any facts in their own application or examination in the course of becoming a permanent resident of Canada.
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> […]
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> [17] I find the ID's analysis of the legislative intent of s. 40(1)(a) to be persuasive. With respect to Justice O'Keefe, I find that the absence of any specific provision or legislative clause pertaining to individuals in the respondent's situation to reflect a legislative intent that such persons are not inadmissible for the misrepresentations of a principal applicant once they have been granted permanent residence. Section 42(1)(b) of the Act renders foreign nationals inadmissible if they are accompanying an inadmissible family member but not permanent residents. The additional fact cited by Justice O'Keefe that the wording of the misrepresentation provisions of the former Act contained clear language that rendered persons in the respondent's position inadmissible but the current Act does not implies a clear legislative intent to exclude persons such as the respondent from suffering the consequences of the misrepresentations of their family members, absent compelling evidence to the contrary. I find that the appellant has not adduced sufficient evidence to find otherwise. I do not agree that the inclusion of the word "indirect" in s. 40(1)(a) applies to a situation such as this one where the respondent did not provide anything factually untrue or misleading in his application or examination for landing.

[28] The applicant before the Court in *Wang* had applied to immigrate to Canada as an accompanying spouse. She was not married to the principal applicant at that time but claimed that she was. The couple was interviewed and asked to bring any documents related to previous marriages. It emerged that the putative husband had a prior relationship and an undisclosed son. The applicant alleged that it was the first time that she had learned of this. The husband was found inadmissible for making a material misrepresentation. An exclusion order was also issued against the applicant for indirect misrepresentation.

[29] Justice O'Keefe found that the misrepresentation by the principal applicant was attributable to the accompanying spouse as "indirectly misrepresenting" a material fact, since the applicant failed to disclose the applicant's husband's previous relationship and son. The Court noted the following:

> [56] An initial reading of paragraph 40(1)(a) of IRPA would appear to support the applicant's assertion that paragraph 40(1)(a) does not apply to misrepresentations by other persons. However, if the section is given this meaning, it would lead to a potential absurdity in that an applicant could directly misrepresent in an application and bring a person such as the applicant in with him or her, and that person would then not be removable from Canada if the person had no knowledge of the misrepresentation. I am of the view that paragraph 40(1)(a) can be interpreted so as to apply to the applicant. The word "indirectly" can be interpreted to cover the situation such as the present one where the applicant relied on being included in her husband's application, even though she did not know of his being married with a son.

[30] In reaching this conclusion, Justice O'Keefe considered the principles of statutory interpretation and the legislative history of s 40, including extrinsic evidence that a recent

amendment was intended to have a similar effect as the comparable provision in the previous statute. He certified the following as a serious question of general importance:

> …is a permanent resident inadmissible for indirectly misrepresenting a material fact if they are landed as the dependant of a principal applicant who misrepresented material facts on his application for landing?

[31] The Federal Court of Appeal concluded that it was unnecessary to answer the question as it was based on the assumption that any misrepresentation made by the appellant was indirect. But, as noted above, the appellant had stated in her application that she was married to the principal applicant. This was false and constituted a direct misrepresentation for the purposes of s 40(1)(a) of the IRPA. This was sufficient to dispose of the appeal.

[32] The Federal Court has repeatedly followed *Wang* for the proposition that s 40(1)(a) of the IRPA applies to an applicant where a misrepresentation was made by another party: see *Chen v Canada (MCI)*, 2017 FC 1171 at para 14 citing *Jiang v Canada (MCI)*, 2011 FC 942; *Khedri v Canada (MCI)*, 2012 FC 1397; *Singh v Canada (MCI)*, 2010 FC 378; *Kaur Barm v Canada (MCI)*, 2008 FC 893; *Shahin v Canada (MCI)*, 2012 FC 423; *Goudarzi v Canada (MCI)*, 2012 FC 425; *Oloumi v Canada (MCI)*, 2012 FC 428.

[33] The goal of s 40(1)(a) of the IRPA is to ensure that applications provide "complete, honest and truthful information" and that "full disclosure is fundamental to the proper and fair administration of the immigration scheme": *Duquitan v Canada (MCI)*, 2015 FC 769 at para 10 [*Duquitan*], citing *Paashazadeh v Canada (MCI)*, 2015 FC 327 at paras 18, 25 and 26. The objective is to deter misrepresentations and maintain integrity of the immigration process:

Inocentes v Canada (MCI), 2015 FC 1187 paras 17-18; *Sayedi v Canada (MCI)*, 2012 FC 420 at paras 23-24.

[34] The section has been interpreted as broad in scope. It does not make a distinction between innocent misrepresentation and deliberate misrepresentations: *Bodine v Canada (MCI)*, 2008 FC 848 at paras 41–42 [*Bodine*]; *Zhamila v Canada (MCI)*, 2018 FC 88 at para 30; *Kobrosli v Canada (MCI)*, 2012 FC 757 at para 46.

[35] There is no dispute between the parties that but for Darshan Singh Sidhu's misrepresentation, the Respondent would not have been admitted to Canada as an accompanying family member. The visas would have been denied and the family denied landing at the Port of Entry. His permanent resident status is therefore predicated upon a lie, albeit a lie by his father when they applied for and gained entry to Canada.

[36] The Respondent knew about his father's conviction when they left India and came to Canada, as his interview in Chandigarh makes clear.

[37] It is also clear that the misrepresentation by the father directly induced an error – the issuance of permanent resident visas – in the administration of the Act as it foreclosed an avenue of investigation for immigration officials regarding the family's application for admission. In such an investigation, Darshan Singh Sidhu's murder conviction would undoubtedly be a material fact.

[38] The IAD's interpretation of s 40 appears to be predicated on the assumption that the Respondent could only be found to be inadmissible if his father was first subject to an inadmissibility hearing. At paragraph 16 the IAD states:

> Whereas Justice O'Keefe found that it would lead to an absurd result if a dependent family member could escape been found inadmissible when he or she could not have been landed but for the principal applicant's misrepresentation, I find that it would lead to an absurd result if the appellant were found inadmissible when the principal applicant who had an obligation to disclose information about his credibility is not subject to an admissibility hearing. In such circumstances, even s. 42 (1) (b) of the Act would not apply to the appellant as a foreign national because his father has not been found inadmissible.

[39] This interpretation would, in my view, defeat the object of the legislation in any case in which the principal applicant manages to avoid an admissibility hearing by remaining outside of the country. But the legislative scheme for finding a permanent resident inadmissible on the ground of misrepresentation is not dependent upon the issuance and service of a s 44 report and completion of an inadmissibility hearing against another party.

[40] As noted by Justice O'Keefe in *Wang* at para 43, "[w]hen Parliament introduced the new IRPA, one of the objects of the Act was to strengthen inadmissibility". Section 40, Justice O'Keefe stated at para 57, is similar to the provisions of the previous Act concerning misrepresentation but was modified "to enhance enforcement tools designed to eliminate abuse". See also *Chen*, above, at paragraph 31.

[41] The interpretation adopted by the IAD would undermine one of the objectives of the IRPA and allow individuals who have benefitted from the misrepresentation of a material fact,

albeit by another party, to remain in Canada. Contrary to the view of the IAD, this would be, I suggest, the type of absurd result discussed by the Supreme Court of Canada in *Tran v Canada (MPSEP)*, 2017 SCC 50 at paras 31-33.

[42] I agree with Justice Annis' comments in *Chen*, above, at para 34:

> The absurdity is gaining the benefit of entry to Canada by relying upon someone else's misrepresentation, without which the person would never have been admitted to Canada. The abuse arises from the potential of a parent wishing to confer the benefit of permanent residency on the child, even if the parent is removed.

[43] In my view, the fact that the principal applicant is not in Canada does not preclude a finding that an accompanying person is inadmissible for the misrepresentation of the principal applicant.

[44] Regarding the application of s 42(1), in *Chen*, at para 37, Justice Annis expressed the view that the provision is intended to apply only when the misconduct of the principal family member, either a foreign national or permanent resident, occurs after obtaining permanent residency. Justice Annis went on to say that "if the conduct involves a misrepresentation of the principal family member, the accompanying family member would be removed on the basis of his or her constructive inadmissibility, such that ss. 42 would not apply".

[45] I agree with Justice Annis' conclusion that the accompanying family member is inadmissible by reason of the misrepresentation of the principal family member. However, I do not agree that s 42(1) applies only in cases of inadmissibility for reasons of misconduct after the

grant of permanent resident status. It is clear on the face of the legislation that s 42(1) applies only to foreign nationals, a defined term that excludes those holding permanent resident status.

[46] Section 42(1) applies to a "foreign national, other than a protected person". The Respondent was not a protected person. "Foreign national" is defined in s 2(1) of the Act as a person who is not a Canadian Citizen or a permanent resident. At the time of his arrival at the Port of Entry, the Vancouver Airport, the Respondent was in possession of a permanent resident visa but only acquired permanent resident status upon being permitted entry following examination by an immigration officer. He gained that status by virtue of his father's misrepresentation. His father was inadmissible because of that misrepresentation.

[47] Under s 42(1) the Respondent was inadmissible as an accompanying family member of an inadmissible person. A finding to that effect was not dependent upon the issuance and service of a s 44 report and inadmissibility determination against the father. The officer who prepared the s 44 report against the Respondent was satisfied that the Father was inadmissible because of misrepresentation. As the father was outside Canada, there was no practical purpose in preparing a s 44 report against him or of seeking a removal order against him. The officer was not obliged to prepare a s 44 report. Section 44(1) of the IRPA states that an officer, who is of the opinion that a permanent resident who is in Canada is inadmissible, may prepare a report: see *Cha v Canada (MCI)*, 2006 FCA 126. In the circumstances, the ID and IAD should have proceeded on that understanding.

[48] In the present matter, an inadmissibility report under s 44(1) was issued against the Respondent for committing a material misrepresentation pursuant to s 40(1)(a). It stated that the Respondent's father was "inadmissible to Canada as he failed to disclose to the visa officer that he had been convicted of conspiracy to commit murder and kidnapping in India."

[49] Section 42(1)(b) provides that a foreign national is inadmissible on the grounds of an inadmissible family member if they are an accompanying family member of an inadmissible person. There is no requirement that an inadmissibility report be prepared pursuant to s 44(1) of the IRPA in order to find someone inadmissible pursuant to s 42(1)(b) of the IRPA. If the principal applicant is inadmissible, the dependant is inadmissible.

[50] The IAD's finding to the effect that the Respondent could only be found to be inadmissible if the father was subject to an inadmissibility hearing pursuant to s 44(2) of the IRPA, after the preparation of an inadmissibility report under s 44(1) of the IRPA, is unreasonable. The IAD's finding that the father's misrepresentation was not attributable to the Respondent as an "indirect" misrepresentation was also unreasonable.

[51] While these conclusions are sufficient to dispose of the application, I think it may be helpful to provide my reasons for how I would resolve the duty of candour question for the benefit of any further proceedings.

B. *Duty of Candour*

[52] The IAD held that the Respondent did not owe a duty of candour to disclose his father's conviction. It would lead to an absurd result, the IAD found, and the Respondent argues, if he was found to be inadmissible when his father, who had an obligation to disclose his conviction, is not subject to an admissibility hearing and will not be unless he attempts to return to Canada.

[53] There needed to be some sort of tacit agreement or conspiracy to withhold information to give rise to a duty of candour on the part of the Respondent, the IAD held:

> [18] I also find that the duty of candour does not extend so far as to apply to someone in the circumstances of the respondent. Had the evidence established that there was some sort of tacit agreement or conspiracy by the respondent together with his father (and mother) to withhold information concerning his father's criminality in order to avert a finding of inadmissibility, then the duty of candour would likely compel the respondent to disclose his father's criminality. However, the testimony of the respondent was that he did not even know the information contained in his own forms let alone what was in his father's forms. Likewise, the respondent was interviewed at the port of entry separately from his father and his mother. He was not privy to his father's answers, had no obligation to provide information about his father's criminality and there is no evidence to support the notion that he knew or should have known that it was material. He was never asked questions about his father's criminality prior to becoming a permanent resident, only his own. He answered those questions truthfully.

[54] Section 15 of the IRPA authorizes immigration officers to proceed with an examination of an application under the IRPA. Section 16 of the IRPA provides that a person who makes an application must answer truthfully all questions put to them and must provide evidence and documents that the officer reasonably requires. Section 51 of the IRPR provides that foreign

nationals who hold permanent resident visas and are seeking to become permanent residents must, at the time of their examination, establish that they and their family members, whether accompanying or not, meet the requirements of the Act and the Regulations.

[55] The duty to disclose is fundamental to the proper and fair administration of the IRPA: *Bodine*, above, at paras 41–42; *Baro v Canada (MCI)*, 2007 FC 1299 at para 15 [*Baro*]; *Haque*, above. There is an exception to this general rule where the applicant was subjectively unaware that he was withholding information: *Medel v Canada (MEI)*, [1990] 2 FC 345, [1990] FCJ No 318.

[56] The Applicant submits that the Respondent was obliged by a duty of candour to disclose his father's criminal proceedings since (1) the Respondent relied on the information provided by his father as the principal applicant in the permanent residence application and (2) the Respondent was a dependant as an accompanying person on his father's application.

[57] In *Baro*, above, the Board found that the applicant was inadmissible on the basis that he misrepresented or withheld material facts from immigration authorities when his spouse sponsored him. The applicant previously became estranged from his first spouse and obtained a declaration from a court in the Philippines presuming her to be dead. The applicant did not mention these facts to the Canadian immigration officials. However, his second wife notified authorities after she learned, on a visit to the Philippines, that the applicant's first wife had reappeared.

[58] The applicant argued that his conduct should not result in a finding of inadmissibility since he was never specifically asked about his marital history: *Baro*, above at para 13. He was, therefore, under no duty to inform Canadian authorities of his previous marriage or the circumstances surrounding its dissolution: *Baro*, above at para 13. The question before the Court was whether the Applicant had a duty to disclose his marital history in the circumstances even in the absence of a specific request from Canadian authorities: *Baro*, above at para 14.

[59] The Court found that the applicant for permanent residence has a duty of candour which requires disclosure of material facts and that this duty extends to a variation in his or her personal circumstances, including a change of marital status: *Baro*, above at para 15. In its analysis, the Court cautioned that applicants cannot be expected to anticipate the kinds of information that immigration officials might be interested in receiving and that one must look at the surrounding circumstances to decide whether the applicant has failed to comply with s 40(1)(a): *Baro*, above at para 17. The Court then considered the surrounding circumstances in *Baro*, such as the fact that the application was based on a spousal sponsorship and that the immigration officials requested a "marriage check". The Court found that this request alerted the applicant to the fact that immigration officials wanted to know more about his marital history. The Court concluded that the IAD did not err when it found that the applicant failed to comply with s 40(1)(a) of the IRPA.

[60] In *Bodine*, the applicant was found inadmissible for a misrepresentation. She had failed to disclose that she had been denied entry earlier on the same day and that her Canadian boyfriend had separately entered with goods he had transferred from her car. The applicant argued, as in

the present matter, that she did not have a positive obligation to spontaneously inform an officer at the port of entry about material facts relating to the circumstances and purposes of her visit.

[61] The Court relied on *Baro*, above, and found that the surrounding circumstances are important for deciding what the duty to candour entails in a particular instance:

> [41] Although the Act, or section 40 specifically, does not require spontaneous disclosure of all information or evidence, there may be an obligation to disclose information or to produce relevant evidence in certain circumstances. Section 16(1) of the Act provides that "[a] person who makes an application must answer truthfully all questions put to them for the purpose of the examination and 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." In *Baro v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1299 at para. 15, the Court recognized that a foreign national seeking to enter Canada has a "duty of candour" which requires disclosure of material facts. The Court went on to state at paragraphs 15-17:
>
> > **15** …Even an innocent failure to provide material information can result in a finding of inadmissibility; for example, an applicant who fails to include all of her children in her application may be inadmissible: *Bickin v. Canada(Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1495(F.C.T.D.) (QL). An exception arises where applicants can show that they honestly and reasonably believed that they were not withholding material information: *Medel* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345, [1990] F.C.J. No. 318 (F.C.A.) (QL).
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> > […]
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> > **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*).

> [42] It is clear that a duty of candour exists and that the surrounding circumstances are important for deciding what that duty entails in any particular instance. This case presents the question of the extent to which an applicant must disclose information when not expressly asked for that information by an examining officer. I do not find that section 40 of the Act requires that a person must spontaneously disclose *any* fact that could *possibly* be relevant. Instead, to determine whether the withholding of information constitutes a misrepresentation under the Act, it is necessary to consider the surrounding circumstances in each instance.

[62] The Court further noted that even silence can be a misrepresentation, relying on *Mohammed v Canada (MCI),* [1997] 3 FC 299 and that the facts in *Bodine* went well beyond mere silence. The Court found that, considering the specific facts of the matter, there was an obligation on the part of the applicant to fully disclose the number of articles she was bringing into Canada: *Bodine,* above at paras 46-47.

[63] Relying on these cases, the Applicant submits that the Respondent and his father had a duty of candour to notify the port of entry officer of the arrest, charges and conviction which had not been divulged when their visas were issued.

[64] The issue in this case is not whether the father had such a duty. It is clear that the father, the principal applicant, had a duty of candour to provide accurate and truthful information regarding his criminal convictions. Question 9 of the Schedule 1 Background / Declaration form ask the applicants the following question:

> Have you or, if you are the principle applicant, any of your family members listed in your application for permanent residence in

> Canada, ever been convicted of, or are you currently charged with, on trial for or party to a crime or offence, or subject of any criminal proceedings in any other country?

[65] In checking off the "no" box beside this question and signing the form, the father clearly breached his duty of candour and committed a misrepresentation intended to induce an error in the administration of the Act. Similarly, had the Respondent been asked at any time by the Canadian immigration authorities whether he or any other member of the family had a history of criminal charges, it would be clear that he was under a duty of candour to disclose what he knew about that history.

[66] The question here is the extent to which the duty of candour compels an applicant to voluntarily share information as a dependant of the principal applicant when he is not directly asked to provide that information. The parties agree that one must look at the surrounding circumstances to decide whether the applicant has failed to comply with the duty: *Baro*, above at paras 15, 17; *Bodine*, above at para 42. They disagree on how this applies in the present instance. The Applicant contends that the only reasonable conclusion is that the surrounding circumstances imposed a duty of candour on the Respondent. This is fiercely disputed by the Respondent.

[67] The surrounding circumstances in this instance include that the Respondent was an adult - aged 23 when the applications for visas were completed and 25 at the time of entry. The Respondent was aware of his father's conviction and jail sentence; that the father's first appeal had been denied just 83 days before they sought entry to Canada and that his father was on parole from his sentence of life imprisonment.

[68] In his interview at Chandigarh and his evidence before the ID, the Respondent stated that he believed his father to be innocent and would be ultimately absolved. At Chandigarh, he stated that unlike the other accused, his father's travel while on bail or parole had not been restricted and his passport not confiscated.

[69] The Respondent's evidence before the ID was that he did not know what was in the form completed in India, although he had signed it, as it was prepared by travel agents based on information provided by his father and was in English. He had signed it as instructed by his father. At the Vancouver Airport, he was given a form with questions in the Punjabi language to be answered by ticking off "yes" or "no" and answered those to the best of his knowledge. One of those questions, he says, was whether he had committed any criminal activity in India or had been arrested, which he answered truthfully. He did not know how his father had answered the questions, as they were examined separately, and did not ask him. He was not asked by an immigration officer whether his father had been charged, convicted or imprisoned for any criminal offences. The Port of Entry forms with the questions translated into Punjabi were not part of the record and the Respondent's evidence is uncontradicted.

[70] In these circumstances, the Respondent argues, it would be unjust to impose a duty on him to voluntarily disclose his father's criminal history. The duty of candour does not create a positive obligation for him to "spontaneously notify the port of entry officer(s) of his father's criminal history." He could not be expected to anticipate the kinds of information that immigration officials might be interested in receiving at the Port of Entry. He was given no indication of their interest in his father's history until the 2014 interview at Chandigarh.

[71] It was not necessary, in my view, for there to be evidence of a tacit agreement or conspiracy by the Respondent and his father in order for a duty of candour to be established. As the jurisprudence cited above demonstrates, the duty may be found to arise from the surrounding circumstances which can include a broader range of facts. An inference can be drawn from the evidence of actions and omissions by the applicant that point to an obligation to disclose material facts.

[72] I agree with the Respondent, however, that the circumstances in this matter are not such as to compel the conclusion that he was subject to a duty to disclose his father's criminal history on the visa application form or when they were examined at the Port of Entry.

[73] This is not a case such as *Bodine*, above, where it was clear from the circumstances that the applicant had a duty to disclose information about her prior attempt to enter Canada. The applicant in *Bodine* had herself taken steps to circumvent the prior denial of entry. This was calculated to induce an error in the administration of the statute. Nor is this matter similar to *Baro*, above, where the applicant was put on notice that there were concerns about his marital history. He could not in those circumstances stand mute.

[74] In this instance, the applicant was presented with forms that required him to disclose his own criminal history, if any, and not that of anyone else in his family group. Only the principal applicant was required to disclose whether any of the dependant applicants had such a history, to his knowledge, in addition to himself.

[75] I find, therefore, that it was within the range of defensible outcomes on the facts and the law for the IAD to conclude that the Respondent bore no duty of candour to inform on his father at the Port of Entry. The reasons for the decision are transparent, justified and intelligible. That said, I do not agree with the IAD's analysis that in order for a duty of candour to be found there needed to be some evidence establishing that there was a tacit agreement or conspiracy by the respondent and his father.

VII. Conclusion

[76] For the reasons given above, the application is granted and the matter will be remitted for redetermination by the IAD in accordance with these reasons.

VIII. Certified questions

[77] The Applicant Minister proposes the following two questions for certification pursuant to r 18(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The first question is the same as that certified by Justice O'Keefe in *Wang.*

> 1. Under s. 40 (1) (a) of the Immigration and Refugee Protection Act, which reads: 'A permanent resident or a foreign national is inadmissible for misrepresentation (a) 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 this act'…is a permanent resident inadmissible for indirectly misrepresenting a material fact if they are landed as a dependent of a principal applicant who misrepresented material facts on his application for landing; and
>
> 2. Does the duty of candour under the IRPA extend so as to apply to someone in the circumstances of the Respondent, specifically a duty to provide material facts of which he is aware concerning a

> family member in the process of becoming a permanent resident of Canada?

[78] The Respondent submitted the following question for certification:

> Is a permanent resident, who became a permanent resident as an accompanying dependent of the principal applicant, and who has not himself/herself committed a misrepresentation, insulated from any inadmissibility under s. 40 (1) (a) of the IRPA for misrepresentation by the principal applicant by virtue of the wording of s. 42 (1) (b) of the IRPA, which expressly excludes permanent residents?

[79] The Applicant opposes certification of the Respondent's question on three grounds:

1. It inaccurately states within it that the Respondent has not committed any misrepresentation;
2. The wording of s. 42 (1) (b) would not be dispositive of an appeal in this case concerning s. 16 and 40 (1) (a) of the IRPA; and
3. In any event, at the time the misrepresentation happened, the Respondent was a foreign national accompanying his father who would have been found inadmissible if not for the misrepresentation; indeed, the existence of s. 42 (1) (b) illustrates that misrepresentation did induce an error in the administration of the IRPA.

[80] In *Torre v Canada (MCI)*, 2016 FCA 48 at para 3, the Federal Court of Appeal restated the principle that, "to be certified, a question must be dispositive of the appeal and transcend the interests of the immediate parties to the litigation due to its broad significance" for appeals pursuant to s 74(d) of the IRPA. In other words, the question must have an impact on the result of the litigation.

[81] I agree with the Applicant that the Respondent's proposed question would not be dispositive of an appeal in this case. The matter turns on whether the misrepresentation by a third party, a principal applicant, can be attributed to an accompanying dependent as an "indirect misrepresentation" within the meaning of s 40 (1)(a) of the IRPA. That question transcends the interests of the parties and would be dispositive of an appeal.

[82] I do not consider it necessary to certify the Applicant's second proposed question as it turns on the specific facts of this case. The law that there is a duty of candour on applicants for permanent residence is well established. How that is to be applied will depend on the facts of each case

JUDGMENT IN IMM-3817-17

THIS COURT'S JUDGMENT is that:

(1) the Applicant is granted an extension of time for service of the Notice of Application;

(2) the Application is granted and the matter will be remitted to the Immigration Appeal Division for redetermination by a different Member in accordance with the reasons provided; and

(3) The following question is certified:

> Under s. 40 (1) (a) of the Immigration and Refugee Protection Act, which reads: 'A permanent resident or a foreign national is inadmissible for misrepresentation (a) 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 this act'…is a permanent resident inadmissible for indirectly misrepresenting a material fact if they are landed as a dependent of a principal applicant who misrepresented material facts on his application for landing.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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