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Case Commentary

Canada (Citizenship and Immigration and Public Safety and Emergency Preparedness) v. Kljajic, 2020 FC 570

DATE OF DECISION: 30 APRIL 2020 COMMENTARY DATE: 8 MAY 2020

Introduction

Applicants for status in Canada have an obligation to honestly disclose information required of them. The consequences of failing to do so are serious and could lead to deportation. One material misrepresentation or omission, regarding a significant point, even decades comprising many successes in Canada later, can result in a complete uprooting of an individual's life.

A recent decision by Chief Justice Crampton of the Federal Court, ***Canada (Citizenship and Immigration) v. Kljajic***, 2020 FC 570, shows the severe consequences of failing to be forthright when applying to enter Canada and sets a new precedent that will likely deter future applicants from making false declarations on their application forms.

Despite many years of law-abiding behaviour in Canada, a purposeful misrepresentation on an application may not be forgiven in Canada, no matter how old the deception.

Background

The defendant in this case, Cedo Kljajic, obtained permanent residence in Canada as a member of the refugee class in 1995. He became a Canadian citizen in 1999. During his 25 years in Canada, Mr. Kljajic had no issues with the law, was a contributing member of society, and had planted strong and deep roots.

Both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness, the plaintiffs in this case, alleged that Mr. Kljajic knowingly concealed important facts and made false representations when applying for status in Canada. More specifically, amongst other misrepresentations, he concealed his former

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high-ranking position of Undersecretary for Public Security of the Bosnian Serb Republic ("RS MUP"), a government known to have committed war crimes and crimes against humanity. On his application, Mr. Kljajic also denied any involvement in the commission of any war crime or any crime against humanity. The failure to honestly and accurately disclose will be the focus of this case commentary.

The Court found that Mr. Kljajic became a permanent resident of Canada by false representation or fraud or by knowingly concealing material circumstances. As a result, he was also presumed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances.

Mr. Kljajic was also found inadmissible to Canada pursuant to paragraph 35(1)(b) of the ***Immigration and Refugee Protection Act ("IRPA")*** because there were reasonable grounds to believe he was a prescribed senior official of a government that had engaged in systematic or gross human rights violations, genocide, war crimes and crimes against humanity, within the meaning of subsections 6(3) to (5) of the ***Crimes Against Humanity and War Crimes Act***. Further, he was found to be inadmissible pursuant to paragraph 35(1)(a) of the ***IRPA*** because he was complicit in the crimes against humanity perpetrated by the RS MUP against non-Serbs.

The Court's analysis of Mr. Kljajic's inadmissibility to Canada is beyond the scope of this case commentary. Instead, I wish to focus on the duty to disclose, and the duty to answer questions honestly and accurately. These joint duties have broad application to all refugee claims, and equally to all applications for immigration (i.e.. permanent resident status) and to citizenship.

Case Analysis

Chief Justice Crampton makes several important determinations in this seminal case regarding the duty to disclose information on a refugee application. Crampton applied the leading jurisprudence and adeptly synthesized the law in this area. These determinations will likely shape the legal landscape for future cases in this area, including permanent resident and citizenship applications.

Burden of proof

First, to demonstrate that a person became a permanent resident by false representation or fraud or by knowingly concealing material circumstances, the Court ruled that the government must simply demonstrate that the deception likely had the effect of averting further inquiries in respect of circumstances that could have had a material

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bearing on the assessment of the person's application. The standard of proof is the civil "balance of probabilities."

This finding is important because it would otherwise be a very heavy burden to prove that the application would have been rejected but for the deception. Proving that the deception or misrepresentation likely stopped further inquiries about material circumstances is a more reasonable endeavour. Put differently, it would be challenging, and therefore unnecessary, to definitively conclude how the application would have been decided if Mr. Kljajic had been honest. The evidence showed that he likely would have been screened out, but he also may have simply been subject to further questioning. It would place a heavy burden on the government to prove which outcome would have occurred; to some extent it would have depended on the individual reviewing the application.Therefore, this lower standard is appropriate in these circumstances.

Materiality

Second, the withheld or misleading information does not itself need to concern a decisive or potentially important issue. Withholding material information or providing a misleading answer that likely had the effect of averting further inquires are both considered concealment of material circumstances.

The facts that Mr. Kljajic omitted were material circumstances because if they had been disclosed his application would either have been screened out or further inquiries would have been made. It is very likely that he would not have been permitted to enter Canada given the circumstances at the time.

Intent to Mislead

Third, even if the omitted facts are material circumstances, the Court must determine if the individual intended to mislead those assessing his application. The Canadian government did not have to prove that Mr. Kljajic knew the circumstances were material, they simply had to show that there were reasonable grounds to believe that he had the intent of misleading those assessing his application.

Innocent misrepresentations, inadvertent omissions of immaterial information, and mere technical transgressions, are not included in the concept of knowingly concealing material circumstances, and are not therefore violations of the law. The very narrow and limited examples include innocently forgetting to include important information, mistakes due to honest translation errors, or omitting information that one genuinely believes to be inconsequential. However, willful blindness will not be excused.

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Mr. Kljajic indicated on his permanent residence application that he read and spoke English well and that no one assisted him in preparing his application. He also signed the standard declaration on the last page of the Canadian government form stating that the information provided was “truthful, complete and correct” and that he understood all of the statements in the declaration. Therefore, the Court determined that his concealment was not innocent.

Mr. Kljajic argued that he had concealed the information out of fear for the safety of himself and his family due to possible reprisals by his own nationals, and therefore he did not intentionally conceal it from Canadian immigration officials. However, the Court in this case held that even if the information is concealed due to fear, a judge cannot conclude that the deception was innocent. Mr. Kljajic specifically did not want anyone in the Canadian embassy to know about his links to the Bosnian security and intelligence operations RS MUP due to his alleged fear of other members in RS MUP and the paramilitary group Yellow Wasps. This was not an innocent misrepresentation because he did purposely hide the information. He knew this information was important or he would not have chosen to hide it.

Justifying Knowingly Concealing Material Circumstances

Fourth, knowingly concealing material circumstances can only be justifiable in very exceptional circumstances. Situations that may be justifiable include circumstances that amount to duress or where the defence of necessity applies. Since Mr. Kljajic’s application was completed of his own free will and he was not in urgent and imminent danger, these defences were not available to him.

As Chief Justice Crampton notes, a strict limitation on justifying knowing concealment of material circumstances is crucial to the integrity of Canada’s immigration and citizenship programs. He explained that without this protection, our programs would be very vulnerable as there might be a myriad of conceivable justifications for concealing material circumstances. Examples could include a desire to reunite with a spouse or family member, a desire to escape dangerous or threatening circumstances, or a desire to escape poverty and desolate circumstances. If we allow individuals to justify their deception with reasons such as these, the Court ruled, it would seriously undermine the rule of law. If Mr. Kljajic was excused from witholding material information on his application due to his fear, it could open the floodgates to many other deceptions from applicants. Our immigration system relies on honest declarations on important forms. Without such honesty, immigration officials cannot properly and fully assess whether to approve an application.

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Mr. Kljajic's excuses for his material omissions and pleas to stay in Canada were not appropriate justification for his actions. He argued that he had limited awareness of the war crimes and that the consequences he would have faced for leaving the RS MUP without official permission were severe. However, the Court found that the evidence did not support these claims. Mr. Kljajic also argued that the false representations were not intended to mislead Canadian immigration officials but instead to protect himself and his family from his superior at the RS MUP or a paramilitary group. He further testified that he sincerely believed that he had never been complicit in the commission of any war crimes.

Mr. Kljajic also testified about his work history in Canada, the absence of any troubles with the law in Canada during the last 25 years, and the fact that his children and grandchildren all live in Canada. Despite any sympathy one might feel for his situation, the Court ruled that that none of these factors justified his actions of concealment and misrepresentation.

Consequences

This case shows how serious the consequences of dishonesty on a permanent residence application can be. There is no limitation period when it comes to this type of violation. Even though Mr. Kljajic's concealment and misrepresentation was many years ago, it is still unlawful and will likely result in his deportation from Canada where he has built his life for the past 25 years.

Canada's strong stance on dishonesty is logical. Our courts have consistently ruled that if we were to allow individuals to deceive and misrepresent to gain status in Canada then forgive them later for this behaviour if they could hide it for long enough, it might encourage more people to misrepresent on their applications. What reason would someone have to tell the absolute truth when they could withhold information, or make false representations, thereby giving themselves a better chance to receive refugee protection, permanent resident status, and indeed citizenship?

This case appropriately sets an example that honesty in refugee and immigration applications is mandatory. No matter what your status is at the time the material misrepresentation is discovered – whether it be refugee status, permanent resident status, or citizenship – the consequences will likely be the same. Once an individual is found to have provided misleading information about a material circumstance, they may face deportation.

As Chief Justice Crampton wrote, "The light of the law must be allowed to shine on all of the circumstances..."

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