Chapter Eight

Misrepresentation

Introduction

The misrepresentation provisions under the old *Immigration Act* provide that a permanent resident, where granted landing by reason of a false or improperly obtained passport, visa or other document pertaining to the person's admission, or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by that person or any other person, may be subject to the initiation of removal proceedings under s.27(1)(e) of the *Immigration Act*.

The materiality of misrepresentations under the *Immigration Act* has been the subject of numerous court decisions including the decision of the Supreme Court of Canada in *Canada (Minister of Manpower and Immigration) v. Brooks*, [1974] S.C.R. 850. *Brooks* held, among other things, that *mens rea*, or intention, was not an essential element for the misrepresentation. Chapter 5 of the Removal Order Appeals paper discusses the impact of the *Brooks* decision and misrepresentations in general.

The purpose of the misrepresentation provisions is to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada.[1]

The misrepresentation provisions under the *Immigration and Refugee Protection Act (IRPA)* can lead to a finding of **inadmissibility** (s.40) whether the person is inside Canada or abroad. An inadmissibility report prepared with respect to a permanent resident, may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. (s.44(1) & s.44(2)).

Inadmissibility for Misrepresentation

The misrepresentation provisions under the *IRPA* can lead to a finding of inadmissibility of a permanent resident (leading to a removal order) or a foreign national being refused sponsorship. Section 40 reads, in part, as follows:

> 40. (1) 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;

[1] Immigration Manuals, ENF 2, Evaluating Inadmissibility, section 9.

(b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

If a person is found to be inadmissible pursuant to section 40, that permanent resident or foreign national continues to be inadmissible for misrepresentation for a period of two years following a final determination of inadmissibility in a refused sponsorship, or the date the removal order is enforced for a determination in Canada.[2] A person who pursues their appeal rights following a determination in Canada will, in effect, extend the two-year period because the removal order would not be enforced until a later date.

A foreign national subject to the two-year period of continued inadmissibility must obtain the written authorization of an officer under Regulation 225(3)[3] in order to return to Canada within the two-year period.

A further qualification to section 40(1)(b) is found in section 40(2)(b). It provides that "paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case **justify** the inadmissibility" (emphasis added). It is not known at present how the Minister will exercise this "justification".

Possible Legal and Evidentiary Issues

Specific wording contained in section 40 of the *IRPA* will likely give rise to legal and evidentiary issues. For example, what is the meaning in s. 40(1)(a) of the *IRPA* of the phrase "… *directly or indirectly misrepresenting or withholding material facts…*"? Does it matter whether the person made the misrepresentation as opposed to someone else making the misrepresentation? (Under the former *Immigration Act*, the jurisprudence shows it did not matter.) Does this include giving untruthful or partial answers, or omitting reference to material facts (even if the person does not know what is material or was not asked)?

"directly or indirectly"

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[2] Section 40(2)(a) reads as follows:

> the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced;

[3] Reg. 225(3) reads as follows:

> A foreign national who is issued an exclusion order as a result of the application of paragraph 40(2)(a) of the Act must obtain a written authorization in order to return to Canada within the two-year period after the exclusion order was enforced.

In *Wang*[4] the IAD adopted the Immigration Division member's analysis and conclusion on indirect misrepresentation. He noted that under *IRPA* there was no longer a reference to a misrepresentation "by any other person". The new language is "directly or indirectly". The member held that "it is not immediately apparent by this language that "indirectly" means a misrepresentation by another person. Nonetheless I can find no other logical interpretation." The Federal Court approved this approach. 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 previous marriage.

"indirect misrepresentation"

An agent for the appellant obtained for him and submitted to CIC false or fraudulent documents relating to his education. This constitutes an indirect misrepresentation.[5]

Similarly, what is the meaning in s. 40(1)(a) of the *IRPA* of the phrase "… *material facts relating to a relevant matter that induces or could induce an error in the administration of this Act"*? How might we interpret "*an error in the administration of this Act*"? [Note: There is a difference in the wording in the French version which could influence interpretation – rather than saying *that induces* it says, *as this induces*.] Is there a timing element in this provision – does it catch persons who misrepresent any immigration related circumstances at any time? What might be included in this provision? For example, does this include an applicant or sponsor making misrepresentations, partial answers, omissions, etc.; applicants on humanitarian and compassionate considerations who became permanent residents; or applicants withholding information from the examining designated physician?

"could induce an error"

The Immigration Appeal Division found the words "could induce an error" as referring to the potential of causing an error at any time, not the actual causing of the error. It was meant to catch those who caused an error or misrepresented or withheld material (an attempt to deceive) that had a potential of causing an error. It does not speak from the time of the "catching" of the misdeed, but at the time of the misdeed itself.[6]

Two factors must be present for a finding of inadmissibility under s. 40(1). There must be misrepresentations by the applicant and those misrepresentations must be material in that they could have induced an error in the administration of the *IRPA.* There is no requirement in s. 40(1)(a) that the misrepresentations must be intentional, deliberate or negligent.[7]

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[4] *Wang, Xiao Qiang* v. *M.C.I.* (F.C., no. IMM-5815-04), O'Keefe, August 3, 2005; 2005 FC 1059. A question was certified but not answered on appeal: (F.C.A., no. A-420-05), Noel, Evans, Malone, October 24, 2006; 2006 FCA 345.

[5] *M.P.S.E.P.* v. *Zhai, Ning* (IAD VA6-02206), Ostrowski, March 6, 2007; application for leave and judicial review dismissed: (F.C., no. IMM-2035-07), Harrington, August 13, 2007.

[6] *Zhai, supra,* footnote 5.

[7] *Bellido,Patricia Zevallous* v. *M.C.I.* (F.C., no. IMM-2380-04), Snider, April 6, 2005; 2005 FC 452.

In *Pierre-Louis*[8] the applicant married the appellant in 2001. He applied for a visitor's visa in Haiti and was refused. On that application he disclosed a child born in 1996. In 2002 he applied for permanent residence in Canada. At that time he said he had no dependent children. The visa officer rejected this application because of misrepresentations made during the interview. The applicant was inadmissible because of the misrepresentation about the child he had previously declared.

Finally, what is the meaning in s. 40(1)(b) of the *IRPA* of the phrase "*…for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation.*"? Does this put the sponsor at risk of removal for making misrepresentations? If yes, how far back may it go?

Asuncion[9] partly answers the first question. The appellant was sponsored to Canada by his mother as a dependent in 1998. Prior to leaving the Philippines he married his spouse in a civil ceremony, and knew that there would be some sort of reprimand if he failed to declare his new status. After he was landed in Canada he returned to the Philippines and he and his wife had a church wedding. In 2001 he applied to sponsor his wife and two children, which application was refused since they had not been examined at the time he became a permanent resident. An admissibility hearing led to a removal order, the appeal of which was dismissed. A result of the misrepresentation was that he made it impossible for him to sponsor his loved ones and also prohibited him from seeking to come back to Canada for a period of two years following the enforcement of the removal order.

Legislative Framework

Section 44 of the *IRPA*, reproduced in part below, sets out the procedure to be followed under section 40:

> 44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.
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> (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

[8] *Pierre-Louis, Cynthia* v. *M.C.I.* (F.C., no. IMM-7627-04), Beaudry, March17, 2005; 2005 FC 377.

[9] *Asuncion, Aristar Mallare* v. *M.C.I.*. (F.C., no. IMM-10231-04), Rouleau, July 20, 2005; 2005 FC 1002.

An inadmissibility report prepared with respect to a permanent resident may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. The effect of s.44(2) of the *IRPA* is that a removal order made against a permanent resident for misrepresentation must be made by the Immigration Division, not by the Minister (except in the case of not complying with the residency obligation). Therefore, the IAD will have a full record for an appeal against a removal order for misrepresentation.

Jurisdiction – Legislative Appeal Rights to the IAD

Parts of sections 63 to 65 of the *IRPA* are set out below:

> 63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.
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> 63. (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.
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> 63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.
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> 63. (4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.
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> 63. (5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.
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> 64. (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.
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> 65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Note that the effect of s.64(3) of the *IRPA* is that a spouse, common-law partner or child **does** have an appeal to the IAD, but other members of the family class, such as parents, **do not**

have an appeal to the IAD if found inadmissible for misrepresentation. In decisions[10] of the IAD where the applicant was **not** the sponsor's spouse, common-law partner or child, the IAD has dismissed the appeals for lack of jurisdiction. In none of these cases has the appellant sought judicial review.

In *Mathew*[11] the IAD allowed the appeal under s. 65 of the *IRPA* on humanitarian and compassionate grounds and then found the marriage to be genuine, overcoming the inadmissibility for misrepresentation. The Court held that Parliament's intent was clear that before waiving a breach of the Act (the misrepresentation) on H&C factors, the marriage, if challenged, as it was here, had to be determined to be genuine before applying the H&C factors. The Minister's application was allowed.

The requirements to sponsor a member of the family class are found in Regulation 130.

[10] *Warrich, Ghazananfar* v. *M.C.I.* (IAD TA3-20264), D'Ignazio, July 11, 2005; *Nazmus, Masoma* v. *M.C.I.* (IAD TA6-03843), Whist, September 18, 2006; *Anis, Kamran* v. *M.C.I.* (IAD TA7-01595), Waters, August 31, 2007.

[11] *M.C.I.* v. *Mathew, Marjorie Ellen* (F.C., no. IMM-6049-06), Lemieux, June 29, 2007; 2007 FC 685.

Transitional Issues

Section 192 of the *IRPA* provides as follows:

> 192. If a notice of appeal has been filed with the Immigration Appeal Division immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.

The *IRPA* came into force on June 28, 2002. In *Manzanares*[12] the refusal letter pre-dated the implementation date of the *IRPA* and was, therefore, a refusal under the *Immigration Act*. The Notice of Appeal, however, was dated and was thus filed after the *IRPA* was proclaimed. Pursuant to section 192 of the *IRPA*, the panel proceeded with the appeal under the *IRPA*.

At the outset of the hearing, the Minister raised a preliminary issue. He asked the panel to treat the refusal based on the ground of misrepresentation under section 40(1)(a) of the *IRPA*. The panel rejected this argument by the Minister. There had been a misrepresentation by the applicant (by filing false documents with the visa post) but it was not a refusal based on the ground of misrepresentation (such as a refusal under section 9(3) of the *Immigration Act*). Further, there was no application by the Minister to amend the ground of refusal and, therefore, there was no legal basis to treat the refusal as one based on misrepresentation.

General Offences

It should be noted that there are criminal sanctions in respect of misrepresentations in the *IRPA*. Because these offences are beyond the scope of this paper they are merely reproduced below for ease of reference.

126. Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

127. No person shall knowingly

(a) directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act.

[12] *Manzanares, Ma Christina* v. *M.C.I.* (IAD TA2-15088, Stein, June 9, 2003.

CASES