

# MISREPRESENTATIONS IN CANADIAN IMMIGRATION LAW

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The Immigration and Refugee Protection Act (“IRPA”) <sup>1</sup> in force since June 28, 2002 contains a number of provisions dealing with misrepresentations made by foreign nationals or by other persons with respect to applications for immigration status. Applicants, sponsors, employers, and any other person who is a party to an application should be particularly careful to ensure that no misrepresentation is made to the authorities. The spectre of potential liability is very real under the current immigration legislation.

## 1. THE NATURE OF MISREPRESENTATIONS:

Section 40(1) of the IRPA states that:

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;

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

(c) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or

(d) on ceasing to be a citizen under paragraph 10(1)(a) of the Citizenship Act, in the circumstances set out in subsection 10(2) of that Act.

This provision is directed against an applicant attempting to misrepresent to gain any immigration status. In the recent noteworthy case of *Wang v. Canada*<sup>2</sup>, the

Federal Court held that the broad language of Section 40 (1)(a) of the IRPA includes inadmissibility for misrepresentations made by a third party, even where the third party was not making them knowingly. In that case, the applicant, Ms. Wang, came to Canada on a student visa. She married her husband several years prior to coming to Canada. Her husband, unbeknownst to her, was already married and had a son. When her husband applied for immigration status as an Entrepreneur, Ms. Wang was included as an accompanying spouse; however, her husband's previous relationship was never disclosed to immigration authorities. Both Ms. Wang and her husband became Permanent Residents of Canada. Several years later, Ms. Wang applied for Canadian Citizenship and around the time of being interviewed, her husband told her for the first time that he was previously married and had a son on his application for Permanent Residence. As a result of the husband's failure to disclose that he was already married and had a son, an exclusion order was issued against the husband for directly misrepresenting a material fact and also against Ms. Wang for indirectly misrepresenting a material fact as the accompanying spouse. The exclusion order against Ms. Wang was issued pursuant to paragraph 40(1)(a) of IRPA. Ms. Wang argued that she should not be held accountable for her husband's misrepresentation, as she was unaware of it at the time of the application for residency in Canada. The court rejected her argument.

In *Wang*<sup>3</sup> the question became whether the language in paragraph 40(1)(a) of the IRPA, "indirectly misrepresenting or withholding material facts" includes the situation of an applicant who was unaware of her husband's misrepresentation. After carefully examining the arguments, the court held that allowing a person to benefit from the misrepresentation of another would lead to a potential absurdity, in that an applicant could directly misrepresent and his accompanying spouse could then not be removable from Canada, if that person could argue that he or she had no knowledge of the misrepresentation. The court further held that the word "indirectly" can be interpreted to cover the situation where an applicant relies on being included in another person's application, even though he or she did not know that a misrepresentation was being made. The court stressed in its decision that the purpose of the provision was to eliminate abuse. Although the decision seems harsh, at first glance, its reasoning appears to be correct and in line with Parliament's legislative intent, as indicated by the court in its opinion citing the parliamentary debates prior to the passage of the IRPA.

In *Mendiratta v. Canada*<sup>4</sup>, the court dismissed the judicial review application brought by a 65 year old citizen of India who was the subject of a removal order. The applicant obtained Permanent Resident status under Humanitarian and Compassionate grounds, stating that she was a widow and had no relatives outside Canada, and resided with her Canadian citizen daughter, her son-in-law

and the couple's two children. After eight years in Canada, the applicant decided to return to India and spent over five months there. During her last stay, she was persuaded to resume her relationship with her husband from whom she was separated. Upon her return to Canada, she became the subject of a report indicating that she was inadmissible under Section 40(1)(a) of the Act for directly or indirectly misrepresenting or withholding material facts to a relevant matter that induces or can induce an error in the administration of Act. The authorities took the view that the person concerned, having previously indicated that she was widowed when she applied for Permanent Resident status, sought to sponsor her husband in India, where she also had one son as well as two daughters in that country. Her Record of Landing indicated her marital status as widowed, and the supplementary information provided to establish the existence of Humanitarian and Compassionate grounds also made extensive references to the fact that she had no other relatives in her country of origin. The Immigration Appeal Division ("IAD") upheld the validity of her removal order. The Federal Court reaffirmed the principle that the obligation to disclose information accurately ultimately rests on the applicant<sup>5</sup>.

However, in *Huang v. Canada*<sup>6</sup>, the Federal Court granted judicial review to an Investor applicant from China, who had made contradictory statements in his application for permanent residence concerning the provenance of his funds. In his characteristic colourful language, Harrington J. disagreed with the proposition that, while a finding of misrepresentation is subject to a patent unreasonableness standard of review, the "inducement" portion of Section 40 may be reviewed on a reasonableness simpliciter standard. In that case, Mr. Huang had applied to the Newfoundland Provincial Nominee Program, and when his file was considered, visa officers became concerned that his financial interests in a Chinese company were not readily verifiable. Mr. Huang submitted a verification report from an audit firm confirming that he had an 80% interest in his construction company. However, the document indicated that the commercial concern was a "sole proprietorship", a contradictory characterization of the venture. Apparently, the visa officers attempted to contact the audit firm, which unfortunately first claimed that his report was a fraud, and that it had no records of it in its files, but later recanted and indicated that it had been lost in the course of moving. This heightened the concern of the visa officers about Mr. Huang's business activities. Harrington J. referred to the evidence in the case, which suggested difficulties with the definition of "sole proprietorship" and "corporation" under Chinese law, and he also chastised the visa officers for lack of follow up and further inquiries to clear their doubts. Despite the positive outcome for the applicant in this case, it must be cautioned that it appears to have been decided solely on its facts. In addition, the decision is very brief and does not appear to be clearly reasoned.

The question has arisen as to whether or not a finding of misrepresentation renders a person inadmissible by reason of criminality. In *Lu v. Canada*<sup>7</sup>, a citizen of China made an application for Permanent Residence in Canada as a member of the Investor category. In his application, he included a number of asset and business valuations provided by a local accounting firm. Upon discovering a number of discrepancies, a visa officer questioned the applicant, who managed to explain them away. The officer was satisfied with the explanations and the Permanent Resident visas were printed and awaited delivery to the applicant. However, during a routine quality assurance check by the Migration Integrity Unit, the applicant's file was selected for review, and the matter of the discrepancies between the asset valuations and the information originally provided in the application came to light. Further investigations were conducted by immigration officers who contacted the accounting firm, and the authenticity of the accounting reports came into question. A visa officer concluded that the applicant had committed a misrepresentation pursuant to Section 40(1) and also indicated that he had reasonable grounds to believe that the applicant had submitted fraudulent documentation in support of the immigration application, amounting to a misrepresentation or withholding such material facts that induce or could have induced an error in the administration of the Act. The officer went further in his reasons for refusal and described the applicant as "criminally inadmissible" as being a person described in Sections 34 to 42 of the IRPA. The Court held that a person who misrepresents or provides conflicting evidence, or does not provide truthful answers to an immigration officer does not become "criminally inadmissible". The Court agreed with the reasoning in *Zhong v. Canada*<sup>8</sup>, where it was held that:

While it may have been open to the Officer, on the evidence, to find that conflicting and/or insufficient evidence has been presented to satisfy the Officer that the Applicant's net worth is derived from legal and legitimate sources, such a finding does not necessarily lead to a determination that the Applicant is a member of an inadmissible class of persons described in subsection 36(2) of the IRPA. A person does not become a member of the inadmissible class of persons described in subsection 36(2) for the sole reason that he has violated a prescription of the IRPA or the Regulations. (See Kang v. Canada (Minister of Citizenship and Immigration) [1981]2 F.C. 807 (F.C.A.) at paragraph (6). [Emphasis added]

Nevertheless, the Court held that the applicant did make misrepresentations in his Permanent Residence application, and that finding of fact was subject only to the review standard of patent unreasonableness. In that case, although the

applicant was not “criminally inadmissible”, his misrepresentations were sufficient to refuse the application and to apply the penalties associated with it.

The utterance of false or fraudulent documents in connection with immigration applications is a serious problem for visa offices overseas, and it extends not only to Investor applications, but also to the Skilled Worker category, where the production of false or fraudulently obtained degrees by applicants appears to be routine in some visa posts. In *Amin v. Canada*<sup>9</sup>, a Pakistani citizen was granted Permanent Resident status as a Skilled Worker on the basis that he had a Bachelor of Science and a Masters of Business Administration degree. However, the applicant had, in fact, failed a course at his university and never graduated with his Bachelors degree. Instead, he purchased a fraudulently obtained “pass mark” in order to be admitted to his Masters of Business Administrations course. The applicant had presented his pass mark and degrees to obtain Permanent Resident status in Canada. Upon discovery, after the applicant was granted Permanent Residency and landed in Canada, the matter was referred to the Immigration and Refugee Board based on the allegation that the applicant had misrepresented his qualifications and had provided false information in order to obtain his status. The Board initially held that the applicant had not misrepresented a “material fact” as required by Section 40(1) of the IRPA, because he had in fact obtained his Masters of Business Administration later. However, on appeal, the IAD held that such conclusion was incorrect, since the applicant never graduated from his Bachelors degree and, therefore, his Masters degree was invalid. The IAD ordered the applicant to be removed from Canada for misrepresentation and, in addition, held that he was also inadmissible for using a forged document contrary to the provisions of the Pakistan Penal Code equivalent to the offence of uttering a false document pursuant to the Criminal Code of Canada.

Perhaps the area where most of the misrepresentations arise is in the context of Sponsorship applications. Misrepresentations vary from the production of false documents to fake relationships. In *Malik v. Canada*<sup>10</sup>, the IAD had to decide a case where a twenty-five year old citizen of Pakistan was being sponsored by his father. In an interview with a visa officer, the applicant admitted to submitting false secondary and higher secondary certificates in support of his application. In order to qualify as a dependent child, the applicant had the onus to prove that he was a full time student and financially dependent upon his father. The visa officer decided that the applicant’s failure to provide mark sheets for three years of university indicated that certificates from his engineering program were fraudulent and denied the application on grounds that the applicant made a material misrepresentation contrary to Section 40(1)(a) of the IRPA. His father appealed the decision and, although he admitted that the

rejection of the application was legally valid, he sought relief based on Humanitarian and Compassionate grounds. The IAD allowed the appeal and held that the applicant's misrepresentation was essentially misguided but not motivated by deviousness, and that the father had been able to show that his son remained a full time student. In its reasons, the IAD considered the family reunification objectives under the Act, the relation of the applicant to the father and reasons of the sponsorship as positive factors in favour of a successful appeal, as well as the fact that the applicant's parents were aging and would benefit from emotional support from the son in Canada. The IAD also considered negative factors such as the seriousness of the legal refusal by the visa officer, the ease of travel to Pakistan by the parents and the lack of foreign hardship, but decided that the positive factors outweighed the negative ones, and allowed the appeal.

A more complex situation arose in *Zarghami v. Canada*<sup>11</sup>. In that case, the applicant was a citizen of Iran who resided in France and had married a man accepted as a refugee in that country. The applicant later divorced him and arrived in Canada on a Visitor Visa together with her children. She later married in Canada a man who obtained Convention Refugee status. However, the authorities were notified that the applicant's second husband might have misrepresented his identity to Canadian authorities when entering Canada in order to obtain Convention Refugee status and, in addition, that he may be the same man that the applicant first married in France. The applicant and her children were reported under Section 40 of the IRPA for having made a misrepresentation of a material fact, namely the identity of her husband. At the Admissibility Hearing, the Immigration and Refugee Board found on the balance of probabilities that the applicant and her children had indeed misrepresented the identity of the husband, and issued Exclusion Orders. The applicants appealed on a number of grounds, but the Federal Court upheld the deportation decision and the finding of misrepresentation, noting that the applicant had not presented any evidence to rebut the presumption that she had misrepresented and concealed her husband's identity.

An applicant's failure to disclose family members can also constitute grounds for a finding of misrepresentation. In *Ouk v. Canada*<sup>12</sup>, the applicant, a Canadian citizen, was married in a ceremony in Cambodia, and she then sought to sponsor her husband as a member of the Family Class. In the Sponsorship Questionnaire, the husband listed five siblings, but upon further investigation the visa officer determined that, in fact, the husband had seven siblings. The visa officer denied the application, in part based on his finding that the inconsistencies disclosed a contrived plan to bring family members to Canada. At a hearing before the IAD, the applicant gave evidence that the discrepancy

was primarily due to a family dispute and to the fact that the applicant did not consider a “half-sister” to be part of the family. The IAD dismissed the appeal. However, the Federal Court granted relief, and held that the IAD had a duty to inquire into the nature of the relationship, which it had failed to do. The Court held that if the marriage was entered primarily for the purposes of gaining entry to Canada, the IAD would have to show that its finding was based on evidence rather than speculation. Although it was open to the IAD to find that the husband was inadmissible for misrepresentation if the relationship was not genuine, it had to clearly indicate the purpose of its inquiry.

Misrepresentations can be common in the context of refugee claims. In *Calixto v. Canada*<sup>13</sup>, a citizen of Mexico was granted refugee protection in Canada and applied for Permanent Residence. At an interview with the Canadian Security and Intelligence Service, the applicant was confronted with information that he had lied about his past activities, which included a criminal record in the United States that arose while the applicant claimed in his story that he was being persecuted in Mexico. The applicant admitted that he had misrepresented and his refugee status was vacated after a hearing, and deportation proceedings commenced. In a somewhat convoluted argument, the applicant contended that the provisions of Section 40(1)(c) did not apply because he did not represent himself on “final determination” to vacate his refugee status and he had admitted his misrepresentation. The Court held that the correct interpretation of Section 40(1)(c) was that the term “misrepresentation” should be read as denoting states of fact which operate to make a person inadmissible and that, if any of the events mentioned in the Section are proved to have occurred, the person is considered or deemed inadmissible for misrepresentation.

## 2. CONSEQUENCES OF A FINDING OF MISREPRESENTATION

Section 40(2) allows the authorities to consider an individual to be inadmissible for a period of two years following the final determination of the application, after the misrepresentation is discovered and the decision communicated to the applicant:

“The following provisions govern subsection (1):

(a) 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; and

(b) paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.”

In *Kaur v. Canada*<sup>14</sup>, the applicant, a citizen of India, lived in California and apparently filed a failed refugee claim in the United States prior to coming to Canada, where she claimed that she married a Canadian citizen in a religious ceremony. She had two children, who were born in the United States. Later, the applicant and her children entered Canada illegally to join her husband, and she made a claim for Protected Person status. At the time, she filed information background forms, and at her interview, she indicated her marital status as “separated” from a man whom she claimed was an Indian citizen arrested by the Indian police and who had never been seen for many years. There were numerous inconsistencies in the information provided by the applicant, whose refugee claim was eventually rejected. She then married her second husband in a civil ceremony and attempted to have the marriage considered under the existing spousal policy. The authorities alleged that she committed a misrepresentation of a material fact by giving false information to support her refugee claim and her current relationship. However, due to a discrepancy between the officer’s reasons provided to the applicant and his notes, it became clear that the officer had confused the fact that the applicant was not eligible to apply under the spousal policy and that she had misrepresented her marital status and claims of persecution. In the circumstances, the Court decided that judicial review should be granted in part, and held that the harsh consequences of Section 40(2) should not apply, although the application for consideration as a spouse still failed.

### 3. COUNSELLING MISREPRESENTATION

A different provision, but one that may affect all applicants more directly is found in Section 127 of IRPA which states:

“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;

(b) communicate, directly or indirectly, by any means, false or misleading information or declarations with intent to induce or deter immigration to Canada”

(c) refuse to be sworn or to affirm or declare, as the case may be, or to answer

a question put to the person at an examination or at a proceeding held under this Act.

This broad language appears to be a deliberate attempt to encompass almost any form of misrepresentation or withholding of information by anyone, including an applicant, employer or third party representative. However, the use of the qualifying word “knowingly” would suggest a high threshold to be met in any prosecution.

Counselling or aiding misrepresentation, directly or indirectly, or withholding material facts relating to a relevant matter that “induces or could induce an error in the administration of the Act” is an offence under Section 126, and can lead to very serious consequences for those found guilty of a breach:

“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.”

The matter arose in *R. v. Tongo*,<sup>15</sup> a case dealing with organizing the entry of illegal immigrants into Canada, where the provisions of Section 127 of the IRPA were considered. In that case, a British Columbia Provincial Court judge held that the IRPA establishes a number of general offences to discourage persons from engaging in activities such as employing illegal migrants or withholding relevant information. The accused pleaded guilty to misrepresentation of a material fact under Section 127(a) of IRPA, the material fact in fact case was concealing the presence of three Chinese illegal migrants on board a ship. Although the case dealt with transporting illegal migrants, it is noteworthy that the court chose to make a general statement endorsing Parliament’s policy goal of attempting to curtail illegal immigration and misrepresentation and combating organized crime and human smuggling.

In *R. v. Parmar*<sup>16</sup>, the accused, Ms. Parmar was charged under Section 127 (b) of IRPA, that she falsely told Canadian immigration officers that she wished to visit Canada, while in reality she wanted to immigrate from India to be with her husband. Apparently, as soon as she arrived in Canada, she and her relatives were subjected to demands for financial payment by her husband in exchange for sponsoring her as a dependent, and her plan collapsed. Ms. Parmar was convicted at trial and sentenced to four months imprisonment. However, the conviction was quashed on appeal by the Alberta Court of Queen’s Bench, based on their interpretation the evidence presented at trial, as the opposing parties had made numerous contradictory statements. In the words of the court, “it could not

be determined who was telling the truth". Despite the ultimate acquittal, the case should be a warning sign to those who misrepresent their true intentions when applying for any type of visa.

In *R. v. Lin*<sup>17</sup>, the accused was charged by indictment with five counts of counselling, inducing, aiding or abetting, five Chinese nationals to directly or indirectly misrepresent or withhold material facts relating to a matter that could induce an error in the administration of the Act, contrary to the provisions of Section 126 of IRPA. The charges arose in connection with a well organized and planned venture to transport the said five individuals to Canada on board the cruise ship *Star Princess*, claiming to be Korean nationals and tourists. Mr. Lin apparently counselled them as to the false statements that would support their bogus identities and, since he was the only one in the group who could speak English, he made representations on their behalf when questioned by immigration officers. It was later discovered that Mr. Lin was part of an organized crime ring moving individuals surreptitiously to Canada. The court convicted him and referred to the case of *R. v. Tongo*<sup>18</sup>, but disagreed with the sentence and based on the factual situation, imposed a higher sentence of one year's imprisonment in a penitentiary.

Relying on advice from a third party and passing on that advice to another person may also attract charges of counselling misrepresentation. In *R. v. Ajuebor*<sup>19</sup>, the accused held two PhD's and was a post-doctoral fellow at the University of Calgary. She attended at a border crossing with her brother and advised the officers that they were there to be landed. She presented Permanent Resident documentation with a handwritten notation she had made, identifying her brother as an accompanying family member. Her brother only had a valid passport and valid Student Visa. The applicants were landed. However, thirteen months later, the accused was charged with directly or indirectly misrepresenting or withholding material facts within the meaning of Section 127(a) of the IRPA, and she was convicted of attempting to commit the offence with which she was charged, rather than the offence itself, because the Judge concluded that immigration officials could not be misled. The accused had testified that she had sponsored her brother and that she had handwritten her brother's name on the form based on email advice from the Canadian Consulate General in Buffalo, NY, which had issued her confirmation of Permanent Residence. Upon appeal, the accused was acquitted, based on the trial Judge's erroneous assumptions that it was not possible for the accused to receive an email from the Canadian Consulate General in Buffalo advising her to make the notation. Although the accused was ultimately acquitted, the case highlights the fragile balance between proceeding on the basis of advice by a third party and committing a misrepresentation.

In *R. v. Zderic*<sup>20</sup>, the accused was charged with a number of criminal fraud offences but also with using a false passport to obtain a Canadian visa, using a fraudulently obtained visa to enter Canada and obtaining a false Canadian passport. During the preliminary hearing, the Crown dropped some of the charges but new information gathered disclosed offences contrary to Section 127 of the IRPA. Based on the evidence before the Judge, Mr. Zderic was committed for trial. This case highlights the possibility that information obtained in the course of other criminal investigations could be used to support a charge pursuant to Section 127 of the IRPA.

The Ontario Superior Court of Justice had to deal with the very serious matter of child trafficking in the case of *R. v. Dhalla*<sup>21</sup>. In that case, the accused arrived at the airport with a nine year old boy from India. Customs investigators determined that the accused had counselled the boy to provide a false name and a false passport in order to gain entry into Canada. The accused claimed that he was a pawn in a scheme created by a third party associate and that he was lured to India with a false promise and subsequently put into a compromising position. He also claimed that he was asked to accompany the child and that this scheme was apparently concocted by the child's family. At trial, he was convicted of counselling, aiding or abetting contrary to Section 126 of the IRPA. The trial judge found that there were two categories of offenders: sophisticated child traffickers, and those who smuggle family members for humanitarian reasons. The trial judge concluded that the accused fell into the category of the less serious offenders because of his story about being put in a difficult situation and that his explanation may reasonably be true, and imposed a fine of \$5,000. The Crown appealed the sentence but the Court dismissed the appeal. The Court held that the fine appropriately held the principles of deterrence and that it was in the appropriate range given the nature and gravity of the offence and the particular circumstances of the case. At the time of sentencing, the accused had been on bail for one and a half years with restrictive conditions that limited his mobility and impeded his ability to continue to earn his livelihood. The Court held that although child trafficking is a very serious offence, offences involving misrepresentations to border authorities also raise concerns about legitimate migrants, national security and decreased liberty for all citizens.

#### 4. SPECIAL PROVISIONS AFFECTING REFUGEE CLAIMS

Several provisions in the IRPA deal with organizing the entry of undocumented migrants, uttering false documents, and deferring prosecution for those who make refugee claims. The relevant Sections are:

*117(1)* No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

*122(1)* No person shall, in order to contravene this Act,

(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;

(b) use such a document, including for the purpose of entering or remaining in Canada; or

(c) import, export or deal in such a document.

*133.* A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

In *Uppal v. Canada*<sup>22</sup>, Mr. Uppal traveled to Spain using a valid Indian passport issued in his name. After spending approximately two weeks in Spain, he claimed to have been smuggled to France and two weeks later, to Britain. From 1995 until 2004, Mr. Uppal lived in the U.K. In the year 2000, he obtained a British passport in the false name "Gian Singh". Later, he applied for a British driver's license using that passport as identification. He obtained his driver's license after completing a driver training program. Mr. Uppal also used the fraudulently obtained passport to travel twice to India. Meanwhile, Canadian authorities had been notified that the said passport had been obtained fraudulently. When Mr. Uppal presented himself at Pearson International Airport, he was confronted with the notification from British authorities whereupon he identified himself as Harminder Singh Uppal and stated that his true purpose in coming to Canada was to make a refugee claim. The applicant was issued a Section 44 (1) report, which alleged that he was inadmissible by reason of criminality, as there were reasonable grounds to believe that he had committed an act outside of Canada which, if committed in Canada would be equivalent to the criminal offence of uttering a false document pursuant to Section 368, and impersonation pursuant to Section 403 of the Criminal Code. At the Admissibility Hearing before the Immigration Division, there were two primary issues: the first was whether the equivalency

between the British and Canadian offences was satisfied, and the second was whether it was open to the Minister to rely on section 403 of the Code in the face of section 133 of the IRPA. Referring to the decision of this court in *Vijayakumar v. Canada*<sup>23</sup>, the Immigration Division ("ID") noted that a refugee claimant, by virtue of being protected from criminal charges for having used a false passport to come to Canada, cannot be said to have committed an offence in that respect and therefore "cannot be determined to be criminally inadmissible to Canada on that account". Accordingly, the ID found that section 403 of the Criminal Code was not applicable to Mr. Uppal, as a refugee claimant, with respect to obtaining the fraudulent British passport. Thus, he was not inadmissible under paragraph 36(1)(c) of the IRPA on that basis. Nonetheless, the ID determined, in relation to the driver's license, that Mr. Uppal applied for it using the false name Gian Singh with a birth date matching that on the fraudulent passport. He signed his application as "Gian Singh" and he used the Singh passport as identification. He obtained the driver's license using fraudulent means, and that *Vijayakumar* applies to the acquisition of the passport but has no application to the driver's license. Since section 133 of the IRPA applies only with respect to conduct in relation to coming into Canada and since there was no evidence that Mr. Uppal's acquisition of the driver's license had anything to do with his journey to Canada, he could not benefit from the protection of section 133 of the IRPA. Mr. Uppal applied for judicial review and argued that the protection of Section 133 should extend to all documents, not just passports. The Federal Court disagreed and held, in strong language:

“ Applying the reasoning in *Vijayakumar* in relation to inadmissibility, section 133 provides shelter, to refugees and refugee claimants, for possessing and using false documents. However, it does not provide carte blanche immunization. On a plain reading of the provision, the protection extends to documents "in relation to the coming into Canada of the person". The intent is to allow bona fide refugees and refugee claimants to use false passports and supporting documents obtained by them for the purpose of making their way into Canada and to shelter them from a finding of inadmissibility for holding and using those documents. The English version of the pertinent portion of the provision is in harmony with the French version: "à la condition que l'infraction ait été commise à l'égard de son arrivée au Canada" (subject to the condition that the infraction was committed with reference to his or her arrival in Canada).

In examining the question of inadmissibility, the ID determined that an individual could be sheltered from a finding of inadmissibility only in relation to a fraudulent document that was obtained for the purpose of entering Canada. In my view, that interpretation is correct. To hold otherwise would be to ignore the

plain meaning of the text and would not accord with the previously noted general objectives of the IRPA in the context of immigration, and more specifically, inadmissibility.

Interpreting section 133 in the manner suggested by Mr. Uppal (it should exempt any and all offences which fall within the ambit of section 403 of the Code) would completely distort the intent of the provision when read in its ordinary sense and in conjunction with the scheme and object of the IRPA. Mr. Uppal's proposed interpretation yields the potential (and undesirable) result of permitting individuals, who have committed the offences enumerated in the section, for purposes wholly unrelated to fleeing persecution, to enter Canada."

In some cases arising in the context of organizing, aiding and abetting the entry of refugee claimants into Canada, where there is not enough evidence to proceed with a charge pursuant to Section 117(1) of the Act, the Crown may elect to proceed with charges pursuant to Section 126 of the Act, as the threshold for convictions appears to be lower. Such was the case in *R. v. Dinter*<sup>24</sup>, where the accused, a citizen of Spain, aided and abetted two Colombians making a refugee claim in Canada. The accused knew two Colombian cousins who procured false Mexican passports and decided to travel to Canada to make refugee claims. The accused claimed that his role was only that of interpreter and that he was helping the Colombian cousins without any compensation. However, the evidence disclosed that his involvement appeared to be much broader: while travelling on a flight to Canada, the accused offered to dispose of the false Mexican passports and it became apparent that he knew the Colombian cousins for some time, and that they may even have paid for his flight. Upon arrival at the airport in Canada, the accused was detained and charged with counselling misrepresentation. The Court noted that the evidence in the case fell short of proving beyond reasonable doubt an offence under Section 117(1) of the Act and that the Crown was proceeding under Section 126. The Court found that by "agreeing to eliminate" the forged passports in the possession of the cousins, the accused aided and abetted them by first concealing and then destroying the documentation used to gain entry into Canada, and by withholding that evidence from Canada Border Services Officers in order to avoid their possible prosecution under other sections of the IRPA. It is noteworthy that the Court held that the exemption from immediate prosecution of refugee claimants found in possession of false documentation in Section 133 of the IRPA does not extend to a person who aides and abets in the commission of a misrepresentation. The Court held that:

“The fact that the cousins subsequently admitted to Canada Border Services officers that they had used forged passports, upon being asked, is irrelevant to their initial attempt to hide the fact that they had been in possession of such documents which constituted a withholding of a material fact. The fact that they misrepresented to the officers that they had destroyed the documents rather than implicate the defendant who was standing a few steps away in possession of the documents, for all they knew, was a further misrepresentation or withholding of a material fact as contemplated by s.126.

Although there is an exemption from prosecution under s.133 for the refugee claimants while their claim is being processed and if they are successful in their claims, this exemption does not extend to one who aids and abets a person who has violated the Act. See *R. v. Dirie*, supra.

By taking possession and subsequently disposing of the passports the defendant compromised any investigation which could have been taken and led to charges at some future time under section 122. This action "could induce an error in the administration of this Act.

In addition, any investigation to determine whether the airline had complied with its obligation to ensure that persons have proper documentation under s.148 could be compromised by concealing and destroying those documents and thus induce an error in the administration of the Act.”

## 5. CONTRAVENTIONS OF THE ACT AND DUE DILIGENCE DEFENCE

The broad description of the offences under the IRPA is found in Section 124 of the Act:

124(1) Every person commits an offence who

(a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;

(b) escapes or attempts to escape from lawful custody or detention under this Act; or

(c) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.

(2) For the purposes of paragraph (1)(c), a person who fails to exercise due diligence to determine whether employment is authorized under this Act is deemed to know that it is not authorized.

(3) A person referred to in subsection 148(1) shall not be found guilty of an offence under paragraph (1)(a) if it is established that they exercised all due diligence to prevent the commission of the offence.

Lawyers and their staff should be especially careful to ensure that they do not participate, knowingly or unwittingly, in assisting an applicant or a third party to an application (e.g. an employer or a sponsor) in making any misrepresentation or withholding any material facts, or they may find themselves embroiled in potential litigation or facing criminal charges. It remains to be seen how aggressive prosecutions will be in this area.

Employers in particular should be cautious when assigning a foreign worker to perform specific duties within the organization. Section 124(1)(c) of the IRPA states that it is a contravention of the Act to “employ a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed”. It is therefore critical that employers who intend to reassign foreign workers to different duties or positions within the organization obtain legal advice prior to doing so, and take active steps to file the appropriate documentation to obtain changes to the terms and conditions attached to the Work Permit or Labour Market Opinion, if one was obtained.

Applicants and their lawyers may find solace in the fact that the legislation recognizes a defence of “due diligence” and states that no one can be found guilty of an offence for a contravention if reasonable steps were taken to prevent it. That situation arose in an obscure reported case in the Northwest Territories; *R v. Perez*<sup>25</sup> where a person who had an expired visitor’s visa and an application pending for permanent residence in Canada had also applied for an extension of a Work Permit, but had not received it before continuing his employment. Immigration officers visited the workplace and the accused was charged with working without authorization, but was acquitted because the court recognized that he had “honest and reasonable belief” that he was not working without authorization. The court noted in that case that the accused took reasonable care in the circumstances to avoid committing an offence and, therefore, was not liable.

However, the British Columbia Court of Appeal was less inclined to be forgiving in *R. v. John Doe* (also cited as *R. v. Mohammed Rafik Kahan*),<sup>26</sup> where the appellant pleaded guilty to three indictable offences relating to misrepresentation

of his identity as he attempted to enter the country using a forged Canadian passport. The evidence in that case disclosed that the appellant was a “fraud artist” who had also obtained a false United Kingdom passport. He was convicted of misrepresentation and use of false documents and sentenced to twenty three months in jail. In a strongly worded judgement, the court determined the sentence to be a fit one and even somewhat in the low range.

## 6. CONCLUSION

The misrepresentation provisions of the legislation highlight the duty of care and due diligence that applicants and their lawyers must exercise in the context of immigration representation. Those who grossly exaggerate the qualifications of potential applicants, or misrepresent their circumstances, financial records, documentary evidence, family status, and employment offered, or any other material fact, may expose themselves to liability and serious penalties. Exercising caution and obtaining the appropriate legal advice is the most prudent course of action in situations involving immigration applications.

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<sup>1</sup> S.C. 2001, c.27

<sup>2</sup> (2005) F.C. 1059

<sup>3</sup> Supra

<sup>4</sup> 2005 F.C.293

<sup>5</sup> See Mohammed v. Canada [1997] 3 F.C. 299 (Fed. T.D.), cited with approval

<sup>6</sup> 2005 F.C. 1615

<sup>7</sup> 2007 F.C. 159

<sup>8</sup> 2004 F.C. 1636, p. 24

<sup>9</sup> 2007 WL 2319923 (Imm. & Ref. Bd.(App.Div.)),

<sup>10</sup> [2005] I.A.D.D. No. 509

<sup>11</sup> 2006 FC 151

<sup>12</sup> 2007 FC 891

<sup>13</sup> 2005 FC 1037, 49 Imm. L.R. (3d), 276 F.T.R. 161

<sup>14</sup> 2007 FC 268

<sup>7</sup> (2002) BCPC 463

<sup>16</sup> 44 Imm. L.R. (3d) 136

<sup>17</sup> 2005 W.L. 3118447 (NFLD. Prov.) ct

<sup>18</sup> Supra

<sup>19</sup> 2006 ABQB 15, [2006] A.W.L.D. 972

<sup>20</sup> 2007 ONCJ 214, 64 Imm. L. R. (3d) 10

<sup>21</sup> 63 Imm. L.R. (3d) 49

<sup>22</sup> 2006 FC 338, Imm. L.R. (3d) 284, 289, F.T.R. 196

<sup>23</sup> (1996), 33 Imm. L.R. (2d) 176 (Fed. T.D.)

<sup>24</sup> 2007 ONCJ 132 61 Imm. L.R. (3d) 210

<sup>25</sup> (2002) NWTTC A13

<sup>26</sup> (2004) BCCA 143, 196 B.C. A.C.16, 322 W.A.C. 16