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January 17, 2005

Mr. Neil Cochrane
Director, Legislative and Regulatory Policy
Citizenship and Immigration Canada
300 Slater Street
Ottawa, Ontario
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Dear Mr. Cochrane,

RE: PROPOSED IRPR AMENDMENTS CONCERNING MISREPRESENTATION

I am writing on behalf of the National Citizenship and Immigration Law Section of the Canadian Bar Association (the CBA Section), in response to correspondence of November 4, 2004 from Caroline Melis, Director General of the Admissibility Branch, on a proposed regulatory amendment concerning IRPA s. 40 – the misrepresentation provision.

The proposal would deem that "a person's name, date of birth, nationality and the details of their family members, including spouse, common-law partner or conjugal partner, should always be relevant and material facts which could induce an error in the administration of IRPA, for the purposes of A40".

The CBA Section is opposed to this proposal on several grounds:

1. The proposed regulation further limits IAD appeal rights.

2. General deeming provisions cannot be applied with any degree of fairness, accuracy or consistency, given the nature of immigration processing;

3. Alternatively, deeming factors which are always material and relevant will inevitably lead to interpretation that misrepresentation in those cases was, in fact, committed;

4. Decisions on materiality and relevance for purposes of determining misrepresentation should be made on a case by case basis;

5. The evidentiary standard for an officer determining a misrepresentation must be a balance of probabilities and must be based on an applicant's intent to mislead;

6. Guidelines through Manual directions are more appropriate to deal with the application of IRPA s. 40.

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1. Further limit on IAD appeal rights

Section 40(1)(a) requires a determination of whether there has been:

- direct or indirect misrepresentation or withholding;
- of material facts;
- relating to a relevant matter;
- that induces or could induce an error in the administration of [the] Act.

At the moment, a sponsor has the right to appeal a decision denying an application for permanent residence of a family member under s. 63(1). This appeal is denied to those who, by virtue of s. 64(3), are inadmissible due to misrepresentation. Spouses, partners and children are excepted from this exclusion.

The proposed regulation would expand the potential class of applicants and sponsors caught by s. 64(3), by expanding the definition of misrepresentation. In doing so, the right of appeal to the IAD is also removed.

Rather than dealing with the possible misrepresentation as a matter of discretion in the IAD, the parties will end up arguing the more limited jurisdictional issue based on whether the case falls within s. 64(3). In other words, it is likely that fewer appeals will be heard on the merits by the IAD.

2. General deeming provisions inhibit fair, accurate or consistent interpretation

Despite the attempt by the proposed regulation to standardize what will be considered material or relevant, many examples do not fit properly into the proposal. Some of the more obvious include:

(i) Non-disclosure of multiple nationalities

A person may have multiple nationalities but not be aware of whether a nationality has crystallized or their right to citizenship has been exercised. A person may have multiple nationalities, but choose to rely on one for travel purposes to avoid security measures that apply to the other.

It is not clear from the proposal when reliance on one valid nationality to the exclusion of another might give rise to misrepresentation through omission. The omission could be deemed relevant or material by one officer and not by another, causing discriminatory application of the Act and its regulations.

(ii) No-fault errors in names

In some cultures there can be wide variations in names, with the legal name not reflecting the individual's documentation or the name generally used. In India, for example, there are a multitude of cultural variations in names. In our experience, some Indian passports provide a single name that is neither a family nor given game.

We have seen situations where the first and last names have been inadvertently transposed, or where official documentation used throughout the applicant's life is at wide variance from the birth certificate and passport.

The former occurs frequently in Spanish cultures where the individual's last name consists of both father's and mother's family names. Yet the individual uses only one name day-to-day. There is often confusion about the order of these names and usage of either or both of them.

To deem errors in an individual's name always to be a relevant and material fact inducing misrepresentation holds countries to a standard of administrative efficiency that is unreasonable to expect and which, even in Canada, is difficult to attain.

(iii) Incorrect birth date accepted in country of origin

In some circumstances, such as with holocaust survivors, birth dates were officially, but arbitrarily, set for want of official records or for survival purposes. In other circumstances, original documents have been lost or destroyed by fire or civil war. These exceptions are too frequent to be ignored by a deeming provision in the regulations.

(iv) Legal terms not understood

"Common law partner" and "conjugal partner" are legal terms defined in IRPA. They are either not in general usage by an immigrant population, or may have connotations far different from the definitions in the Act. Individuals cannot be expected to know when it is appropriate to name partners and when it is not. Live-in partners may be temporary, non-committed or non-exclusive. Girlfriends and boyfriends may come and go. To find individuals always misrepresenting in a material or relevant way for ignorance of Canadian law and usage is unfair and unreasonable.

(v) Reversal of birth month and birthday or insertion of current year as birth year

The current guidelines recognize this as not generally constituting misrepresentation. The proposed regulation shifts the burden of proof.

(vi) Confusion of civil status

Widowed or divorced individuals declaring themselves as single is not incorrect for many aspects of the Canadian legal system.

These examples are not exhaustive but do set out instances where the proposed regulation would defeat an otherwise innocent mistake and workable discretionary practice. They are examples of unintended errors or misunderstandings that, without more, do **not** constitute misrepresentation.

As an aside, we question whether such deeming provisions would comply with s.7 of the *Charter*, where an applicant could show that the liberty or security of the person is at stake.

3. Deeming situations as always material and relevant will lead to hard and fast interpretations

Notwithstanding assurances that officers would retain discretion to determine misrepresentation on a case-by-case basis, the proposed regulation would set a convenient standard from which officers would be reluctant to deviate. CIC's rationale is testament to this:

> "The policy objective of encouraging honesty through meaningful consequences for misrepresentation is strengthened if misrepresentation of such basic information is ALWAYS grounds for inadmissibility" (emphasis added).

This statement belies the assurance that officer discretion will distinguish between appropriate and inappropriate misrepresentations concerning "such basic information". Its effect is to brand all errors or personal data as material and relevant misrepresentation, forcing applicants with limited appeal and review rights to justify their actions.

This is neither fair nor justified given Parliament's statutory intention and the Department's stated principles.

Currently, the guidelines include in misrepresentations of "limited relevance" an applicant who fails to disclose the birth of a child given up for adoption. Under the proposed regulation, would non-disclosure of this "family member" be deemed a relevant and material misrepresentation? A birth parent can no more assert a claim to a child given up for adoption than can adoptive parents deny that the child is theirs. Our legal system treats an adopted child as no longer the birth parent's child. Why then would the birth of this child be of **any** relevance whatsoever?

Except perhaps in a rare case where an applicant is claiming the child either as an accompanying or non-accompanying dependent, the requirement to disclose the birth of a child given up for adoption is irrelevant and indeed may be a matter of personal confidentiality and sensitivity.

The proposed regulation is troublesome because it leads officers to accept that misrepresentation could be based on questions and answers that are of no relevance whatsoever. It invites inappropriate questioning and the possibility of a misrepresentation assertion as a consequence.

4. Decisions on materiality and relevance should be made on a case-by-case basis

Deeming all basic personal information to be relevant and material for the purposes of IRPA s.40 will lead to the disappearance of case-by-case assessments and use of common sense in processing legitimate immigration applications. The resulting findings of misrepresentation will lead to applications being inappropriately refused, and being tarnished with the significant consequences of a two-year inadmissibility or even enforcement proceedings.

Case-by-case analysis ought to be automatic in situations involving failure to disclose a criminal record. Currently, the guidelines suggest these situations "would generally constitute misrepresentation". There is no reference in the guideline to consideration of whether the individual has been the beneficiary of rehabilitative legislation, a conditional discharge, a pardon or an expungement.

Other jurisdictions have various sentencing and rehabilitation provisions that can result in a criminal conviction being expunged from a record. In some cases the expungement is complete, allowing the individual to deny a prior conviction or prior charge. In other cases the expunged conviction is partial, clearing the record but not allowing the individual to deny the prior conviction.

In these situations, both the officer and applicant may be mistaken about the effect of the rehabilitative legislation. Mere failure to disclose the prior conviction or charge should not, on its own, determine intentional misleading. The applicant's correct or honestly mistaken belief that they are lawfully entitled to deny a charge or conviction is relevant to the question of intentional

misleading. Officers should be guided to exercise caution on a case-by-case basis before determining this as misrepresentation.

5. Standard must be balance of probabilities and based on intent to mislead

The CBA Section notes the absence of a proper evidentiary burden relating to intent in the guidelines and the discussions. Intent separates deliberate from mistaken or technical misrepresentations. References to limiting the use of the misrepresentation authority to cases where the officer is satisfied on the balance of probabilities that there is intent to mislead must be inserted into the current guidelines and any proposed regulations.

6. Guidelines more appropriate to deal with application of IRPA s. 40

The existing guidelines for assessment for misrepresentation set out that:

- A very high standard of fairness is to be applied in this provision.
- Honest errors and misunderstandings sometimes occur in completing application forms and, while a misrepresentation might be technically made, reasonableness and fairness are to be applied in assessing these situations.
- There are varying degrees of materiality, so fairness should be applied in assessing each situation.
- Misrepresentations are sometimes made to conceal sensitive personal information to avoid embarrassment. The concealed fact may be of limited relevance and should not affect the outcome of the application.

These guidelines and the principles on which they are based are generally acceptable to assist in determinations of misrepresentation. The principles suggest that officers should be cautious in making a determination of misrepresentation. The guidelines suggest officers should make every effort to be reasonable and fair. The proposal would shift this high standard of fairness.

Given the breadth of the misrepresentation provision in IRPA s. 40 and the wide range of information that must be disclosed, applicants and accompanying dependents can easily provide incorrect information inadvertently or unintentionally. This is compounded when the individual is not a native speaker of French or English or has no experience with application processes.

If the purpose of the IRPA is to capture intentional and fraudulent misrepresentation, which the CBA Section believes is the case, then it is inappropriate to say that errors of personal data always constitute relevant and material misrepresentation.

Recommendations

The CBA Section recommends that:

1. The application of IRPA s. 40 continue to be determined on a case-by-case basis without regulatory attempts to deem what is relevant and material.

2. Manual provisions be updated as follows to guide officers in these determinations:

   a) The principles set out in Manual s. 9.3 should emphasize the distinction between deliberate and inadvertent misrepresentation, including a discussion of intent. Officers

must be made aware of and trained in the importance of determining the facts underlying an apparent misrepresentation and how to assess an applicant's intent.

b) Examples should be amended to encompass the situations set out above.

c) Manual s. 9.10 should be changed to reflect that innocent errors or misunderstandings, as outlined above, **do not constitute misrepresentation**, rather than referring to situations that "would not generally constitute misrepresentation". Situations defined in s. 9.10 of the Manual that "would generally constitute misrepresentation" should be presented as situations **"that might constitute misrepresentation**".

We would be pleased to discuss these matters with you at greater length.

Yours very truly,

{Original signed by Tamra L. Thomson on behalf of Wendy Danson}

Wendy Danson
Chair
National Citizenship and Immigration Law Section