

Federal Court



Cour fédérale

**Date: 20111003**

**Docket: IMM-1522-11**

**Citation: 2011 FC 1126**

**Toronto, Ontario, October 3, 2011**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**MODUPE ADEDOYIN OSISANWO,  
CLADIUS ALABA OSISANWO AND  
OLAKUNLE OLUBUSAYO OSISANWO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant Modupe Adedoyin Osisanwo is the wife of the Applicant Cladius Alaba Osisanwo and the mother of the Applicant Olakunle Olubusayo Osisanwo. They are all citizens of and residents in Nigeria. Another son of Modupe, Kolowole, is a Canadian citizen. He filed a parental sponsorship application to admit his mother Modupe as the principal applicant, and her husband Cladius and son Olakunle as the other applicants, for permanent residence in Canada. That

application was refused on the basis that Olakunle was inadmissible on health grounds. That refusal is under appeal to the Immigration Appeal Division (IAD) and is not at issue here. It is expected that if the Applicant is ultimately successful in this application, including any appeal, that the IAD will continue with that appeal including granting any extensions as may be required.

[2] The application was refused at a later time, February 7, 2011, on another ground; namely, that of misrepresentation under section 40(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA) by Modupe. It is this decision that is the subject of this judicial review. For the reasons that follow, I find that the application is allowed and a question will be certified.

[3] The basis for the finding of misrepresentation can be simply stated. Modupe filed several documents in support of her application, and that of Cladius and Olakunle. Among them was a document entitled “Itire/Kate Local Government Registration of Birth, No. 13944” attesting to the birth of Olakunle on 2<sup>nd</sup> June, 2011 and that he was the child of Cladius and Modupe. The document bears a stamp and signature of the local Registrar of births. For some unstated reason, the officials at Citizenship and Immigration Canada were not satisfied with this document and required DNA testing. That testing was performed and led to the conclusion that Modupe was the mother of Olakunle, but Cladius was not the father. Without requesting an explanation, it appears that the officer determined that the registration of birth document was fraudulent and that Modupe had made material misrepresentation in her application in stating that Cladius was the father. Therefore, the application of all three was refused; hence, this judicial review.

[4] Modupe, in her affidavit filed with this Court in support of this application, states that she has been married to Cladius for 42 years. About 28 years ago, they were separated briefly, at which time she had intimate relations with another man one single time. She and Cladius reunited, the intimacy was disclosed, and they got on with their lives. Modupe states in her affidavit filed with the Court that she did not know that Cladius was not the biological father of Olakunle. She was not cross-examined nor has the Respondent challenged this evidence in any other way.

[5] The sole issue in this case is whether the Applicant Modupe made a “misrepresentation” as contemplated by section 40(1)(a) of the *Immigration and Refugee Protection Act* (IRPA), SC 2001, c. 27. That section provides:

*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;*

*40. (1) Empovent interdiction de territoire pour fausses déclarations les faits suivants:*

*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;*

[6] The meaning of the provision was recently considered by Justice Harrington in *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 378. In that case, the Applicant fathered a child out of wedlock, whom he later sought to sponsor to come to Canada. It is important

to note that the Applicant in that case was not found to be credible. I repeat a lengthy portion of Justice Harrington's reasons at paragraphs 16 to 22:

*16 Given that the word "knowingly" does not appear in Section 40, it follows, the submission goes, that knowledge is not a prerequisite to a finding of misrepresenting or withholding material facts. Undoubtedly, the existence of a child is a material fact.*

*17 I do not find this comparison helpful. Section 127 is in the "General Offences" section of IRPA. A misrepresentation could lead to imprisonment for a term of up to five years. If the word "knowingly" had not been employed, Parliament ran the risk of establishing an absolute liability offence, without the need for mens rea, and might have run afoul of the constitutional prohibition on imprisonment for absolute liability offences (see, e.g., R. v. Sault Ste-Marie, [1978] 2 S.C.R. 1299 and R. v. Raham, 2010 ONCA 206).*

*18 In this case the alleged misrepresentation was a misstatement of fact. Such misrepresentations may be fraudulent, negligent or innocent. A leading case in the tort context is Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd, [1964] A.C. 465, [1963] 2 All ER 575 (H.L.).*

*19 The Panel found that Mr. Singh was not credible. Even if he did not actually know he was Shilpa's father, the circumstances, i.e. his long sexual relationship with Shilpa's mother, while her husband was out of India, should, at the very least, have put him on inquiry. He had a duty of candour which required him to disclose, upon his arrival in Canada in 1993, the strong possibility that he had fathered a child.*

*20 In my opinion, the meaning of Section 40(1)(a) of IRPA was clearly explained by Mr. Justice O'Reilly in Baro v. Canada (Minister of Citizenship and Immigration), 2007 FC 1299, where he stated at para. 15:*

*Under s. 40(1)(a) of IRPA, a person is inadmissible to Canada if he or she "withholds material facts relating to a relevant matter that induces or could induce an error in the administration" of the Act. In general terms, an applicant for permanent residence has a "duty of candour" which requires*

*disclosure of material facts. This duty extends to variations in his or her personal circumstances, including a change of marital status: Mohammed v. Canada (Minister of Citizenship and Immigration), [1997] 3 F.C. 299 (F.C.T.D.) (QL). 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). [My emphasis.]*

**21** *Mr. Justice Russell applied the same reasoning in Boden v. Canada (Minister of Citizenship and Immigration), 2008 FC 848.*

**22** *The Panel's assessment of the facts was not unreasonable and so it follows that Mr. Singh, a permanent resident, is inadmissible for misrepresentation.*

[7] However, Justice Harrington in *Singh, supra*, set aside the decision of the Immigration Appeal Division on other grounds. Had this not been the case, he would have certified a question.

[8] The essential question is whether one takes an “objective” or “subjective” view as to whether what was done was “misleading”. Stated another way, is *mens rea* an essential ingredient?

[9] A review of some of the earlier case law is helpful. In *Hilario v Canada (Minister of Manpower and Immigration)* (1977), 18 NR 529 (FCA), the Federal Court of Appeal considered a situation where information had been withheld. Justice Heald for the Court said at the end of the first paragraph at page 530:

*To withhold truthful, relevant and pertinent information may very well have the effect of “misleading” just as much as to provide, positively, incorrect information.*

[10] This statement carries with it the implication of “withholding” and “providing”, which is to say, *mens rea* is involved.

[11] In *Mendel v Canada (Minister of Employment and Immigration)* [1990] 2 FC 345, a decision of the Appeal Division, an applicant’s sponsorship had been revoked, but she entered Canada anyway. The applicant claimed that she was aware of certain events, but was unaware of their effect. MacGuigan J.A. for the Court wrote at page 350:

*It seems to me that the same factors, looked at objectively, lead to the conclusion that she reasonably believed that at the border she was withholding nothing relevant to her admission. That was, in fact, precisely what she had been told by the Embassy, viz., that a correction was necessary to enable her to use the visa, from which she would have reasonably deduced that there continued to be no problem respecting her admission.*

[12] In *Bickin v Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1495, this Court dealt with a case where an Applicant failed to mention that she had a third child, a twin of one of the children disclosed. If one looks at footnote 2, it is seen that the Court found this failure to disclose to be deliberate, not an innocent mistake. It was held that there had been a deliberate misrepresentation. Again, *mens rea* is involved.

[13] In *Bodine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 848, an Applicant entered Canada by automobile in which there were a few of her personal effects, which she

declared. However, she had placed a number of other personal effects in another vehicle that came into Canada differently. She was held to have misrepresented the facts. Again, there is an element of *mens rea*.

[14] In the present case, the Applicant Modupe is clearly the mother of the child. A birth certificate attests to the father being Cladius. The uncontradicted evidence is that Cladius accepted the child and, with Modupe, raised the child as his own. He had no reason to believe otherwise. History is replete with children born to and raised by a married couple, believing it to be their own. Must an applicant seeking entry into Canada disclose every extra-marital relationship conducted at a time where there is any possibility that a child might have been fathered by someone other than the husband? Surely our society has not found itself at that point.

[15] Here, the husband and wife believed the child to be theirs; a birth certificate attests to that fact. There was no reasonable basis for concluding that there was any *mens rea* to mislead.

[16] I accept that this is a decision in which a question should be certified. I will certify a variant of the question put to Justice Harrington in *Singh, supra*:

*Is a foreign national inadmissible for misrepresenting a material fact if at the time of filing his/her application for permanent residence or at the time of granting permanent residence he/she had no knowledge of the material fact that constituted such misrepresentation?*

[17] There are no special reasons to award costs.

**JUDGMENT**

**FOR THE REASONS PROVIDED:**

**THIS COURT’S JUDGMENT is that:**

1. The application is allowed;
2. The matter is sent back for redetermination by a different officer;
3. The following question is certified:

*Is a foreign national inadmissible for misrepresenting a material fact if at the time of filing his/her application for permanent residence or at the time of granting permanent residence he/she had no knowledge of the material fact that constituted such misrepresentation?*

4. No Order as to costs.

“Roger T. Hughes”

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-1522-11

**STYLE OF CAUSE:** MODUPE ADEDOYIN OSISANWO, CLADIUS  
ALABA OSISANWO AND OLAKUNLE OLUBUSAYO  
OSISANWO v. THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 3, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** HUGHES J.

**DATED:** October 3, 2011

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