Federal Court Cour fédérale

Date: 20180727

Docket: IMM-5497-17

Citation: 2018 FC 795

Ottawa, Ontario, July 27, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

EHSAN MOHSENI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judicial review application, made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], concerns the decision of a visa officer (December 8, 2017) who denied a temporary resident visa to this applicant who wished to pursue studies in Montreal. For the reasons that follow, this application must be dismissed.

I. Facts

[2] The facts of this case as presented are simple and they are uncontested. The applicant first came to Canada from Iran in February 2013 in order to pursue his Ph.D. degree in chemical engineering at l'École de technologie supérieure in Montreal. On September 29, 2017, he applied for a temporary resident visa. It is unclear on this record why a visa was sought at that stage. At that time, he disclosed that he had previously applied for a Canadian student visa in 2012 as well as a Canadian student permit in 2016. He disclosed that he had travelled to the United States [U.S.] in 2015 and had previously been refused a visa for the "Schengen area".

[3] However, what the applicant had omitted to disclose is that he had been refused a visa to travel to the U.S. in 2016. Invited to attend The American Society for Nondestructive Testing Annual Conference 2016, from October 24 to 27, 2016, in order to submit a paper, his application for a non-immigrant visa to the US was submitted on June 26, 2016. By October 20, 2016, the applicant still had not received his U.S. visa and he was unable to ascertain when his request would be processed. At that stage, he cancelled his participation at the Conference. On April 18, 2017, he was notified by email that he had been found ineligible for a non-immigrant visa to the U.S. A month later, he received a second email to that effect. There was therefore a clear refusal on the record, and that is not denied.

[4] The visa officer who was processing his request to come to Canada noted that the applicant had not disclosed the refusal from the U.S. and advised the applicant that he would be

provided a period of time in order to provide additional information concerning the non-disclosure.

II. The decision

[5] The temporary resident visa for Canada application was dismissed because the applicant was said not to have met the requirements of IRPA and its regulations. The letter itself specifies that the applicant had been found inadmissible to Canada for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in administration of the IRPA. That is paragraph 40(1)(a) of IRPA that governs. It reads:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(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;	**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;

Follows from that decision that the applicant is inadmissible to Canada for misrepresentation for a period of five years.

[6] The Global Case Management System [GCMS] notes, which are part of the decision made, are more explicit as to the reasons why the finding of misrepresentation was made. The visa officer did not accept the explanation offered by the applicant that he had forgotten about the U.S. refusal in view of the length of time it had taken for the American authorities to process his application. As part of the explanation, the applicant was referring to the fact that he was working on his Ph.D. at the time and that he had cancelled his trip to the U.S. That was the sole explanation that was offered. No other issue was raised by the applicant.

[7] However, the officer notes that the refusal emails from the American authorities were recent in that the application for the Canadian visa was in September 2017, while the refusals from the American authorities were just a few months earlier, in April and May 2017. For the visa officer, "(t)he question is clear and the applicant understood the question as he mentioned his previous Schengen refusal. Given the above and considering the short period of time btw [between] his US refusal and his application for a temporary resident visa, the explanations provided by the applicant did not allay my concerns".

III. Standard of review and arguments of the parties

[8] It is not a matter of dispute between the parties that the standard of review applicable in a case like this is reasonableness. There is considerable case law which supports that position (*Li v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 87 [*Li*], *Sidhu v Canada (Citizenship and Immigration)*, 2014 FC 419 [*Sidhu*], *Goudarzi v Canada (Citizenship and Immigration)*, 2012 FC 425 [*Goudarzi*]).

[9] It follows that the applicant, in order to be successful, will have to show that the decision lacks the existence of justification, transparency and intelligibility within the decision-making process or that it does not fall within a range of possible, acceptable outcomes defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190, para 47).

[10] The applicant's argument boils down to having forgotten the refusal of his U.S. visa application. His memorandum of fact and law, in its very first paragraph under the title "Overview", speaks only of having forgotten, as constituting an honest mistake, which would make somehow the visa officer decision unreasonable. The applicant also raised the implications that flow from the inadmissibility finding to suggest that they should have been taken into account by the visa officer. From the moment he had withdrawn his paper for the conference, the applicant claims that he did not track his visa application in the U.S. He was, he says, preoccupied with his heavy workload. He argues that "(d)ue to this lengthy processing time of the US visa application and the stress of his studies, the Applicant simply forgot to mention the US visa application in his application forms" (Memorandum of facts and law of February 16, 2018, at para 17).

[11] The applicant contends that in order to apply, section 40 of IRPA requires a misrepresentation by an applicant and that the misrepresentation be material in that it could have induced an error in the administration of the IRPA. Relying seemingly on *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421, the applicant argues that an honest and reasonable mistake or a misunderstanding can fall outside of the scope of section 40 of IRPA.

Thus, the officer should have considered as a relevant factor that this constituted an honest mistake. The applicant declares that he had provided a sufficient explanation for failing to disclose the U.S. visa refusal and, accordingly, the decision of the visa officer was unreasonable. Having disclosed the refusal of a Schengen visa, the applicant suggests that he did not have any reason not to disclose the refusal of the U.S. visa, which would confirm that this was an honest mistake.

[12] The applicant also noted that the inadmissibility period of five years will preclude the applicant from pursuing post-doctoral studies in Canada, from applying for a post-graduate work permit and from seeking permanent residence in Canada as an economic immigrant. He suggests that the sanction that flows from the legislation ought to have been considered in the decision to find misrepresentations.

[13] The respondent basically asserts that the applicant is merely disagreeing with the decision that was made and he has not demonstrated the decision to be unreasonable. The significant deference that is owed to the decision-maker in these visa decisions requires there be a showing of unreasonableness in the decision taken. None was shown. Relying on recent case law (*Li*, *Sidhu*, and *Goudarzi*), the respondent argues that there is no requirement that the misrepresentation be intentional, deliberate or negligent. The visa refusal in the U.S. constitutes a misrepresentation on a material fact. It was therefore reasonable to conclude that the applicant's failure to disclose his very recent refusal could have induced an error in the administration of the Act.

[14] For the respondent, this applicant, who is highly educated, was notified just a few months before his application for a Canadian visa of a refusal in the U.S. that was significant. The officer did not neglect to consider the explanation given by the applicant. The explanation was considered and rejected. There was no obligation for the officer to accept an explanation simply because it had been advanced. It was for the visa officer to assess the explanation and make a decision. There has not been any demonstration that the decision made was unreasonable.

[15] In their further memorandum of fact and law, the respondent referred the Court to the decision in *Alalami v Canada (Citizenship and Immigration)*, 2018 FC 328 at para 16:

> [16] I accept all these propositions as a matter of law. The difficulty facing Mr. Alalami in advancing his position arises from the fact that the Officer did not accept his explanation that the omission of the US visa refusal was an unintentional oversight. If this explanation had been accepted, it may have been incumbent upon the Officer to consider the innocent error exception, to assess whether Mr. Alalami's belief that he was not withholding material information was not only honest but also reasonable, in light of the wording of the relevant question in the application form. However, the exception has no potential application in the absence of a conclusion that the error was indeed innocent. I cannot find that the Officer erred in failing to expressly consider the application of the exception when he or she concluded that Mr. Alalami had intentionally failed to disclose the US visa refusal.

IV. Analysis

[16] The argument made by the applicant in this case does not rise to the level of establishing that the visa officer's decision lacks reasonableness. It is not that the visa officer ignored evidence. He received the explanation that was given by the applicant following what is referred to as a "fairness letter" and did not accept it. The reasons constitute the justification,

transparency and intelligibility that make a decision reasonable. The US notices given to the applicant were barely four months old at the time the applicant sought a visa from the Canadian authorities and the applicant understood perfectly well the question which is at any rate clear. The applicant is highly educated and he has made visa applications in the past.

[17] The applicant in his memorandum of fact and law states that it was open to the respondent to accept his explanation. It may be. Unfortunately, this is not the test that must be satisfied on a judicial review application. If it is true that it could have been open to the officer to accept the explanation, a matter on which I do not opine, it was equally open for him to assess it and to deny the visa. The applicant had to show that the decision was not reasonable, which he has failed to do. He did not show a lack of justification, transparency and intelligibility in the decision-making process, and he implicitly concurs that one of the acceptable, possible outcomes was that the explanation was not believed.

[18] It is very much unclear what the applicant hopes to achieve by referring to the fact that he will be inadmissible to Canada for the next five years. This is not a discretionary sanction imposed by the officer, but it is simply what flows from the operation of the statute (subsection 40(2) of IRPA) from a finding that there were some misrepresentations that rise to the level that they could induce an error in the administration of IRPA. There was no demonstration made that not accepting the explanation given was unreasonable, the test that must be met.

[19] That disposes of the case as presented in the memoranda of fact and law presented by the applicant. However, at the hearing of the case, a different kind of argument was presented.

Neither the respondent nor the Court were made aware of the new approach and the respondent was in no position to respond. In my view, the case was recast to include new elements.

V. New arguments

[20] The parties were offered, after new arguments were submitted at the hearing, the opportunity to present submissions on a possible discretion to entertain, at the hearing, arguments outside the scope of an authorized judicial review application and, if a discretion exists, how that discretion ought to be exercised by the Court.

A. *Is this a new argument?*

[21] For the applicant, it was argued that, in fact, what was presented at the hearing was not new arguments, but rather an elaboration on and an extension of the arguments presented in writing, both in the application for leave and the reply that was offered. The applicant submits that the issue before the Court is the reasonableness of the visa officer's decision concerning misrepresentation. Given that paragraph 40(1) of the IRPA requires materiality that would open the door to a much broader argument. It is contended that the reference to two cases in paragraphs 37 and 38 of the memorandum of fact and law supports the view that the "new argument" was already addressed and that the elaboration on and an extension of the argument find their source in those two paragraphs.

[22] As presented, the "new argument" consists in contending that the omission was not a material fact because the visa officer knew in September 2017 that the applicant had his study

permit, not his temporary resident visa, renewed. There were no issues when the permit was renewed; there could not have been any, reasonably, when he sought a new temporary resident visa.

[23] There are many problems with that contention. First, if the point was made in paragraphs 37 and 38 of the memorandum of fact and law, it was well hidden. There is simply not a hint of an allusion to the existence of a study permit that would have any relevance to the issue. The applicant made one argument: I did not disclose the visa refusal because I had forgotten about it. That was an honest mistake. Second, the two paragraphs are found under the rubric "Application to Case at Bar", which seeks to make the case that an honest mistake takes the matter outside of the scope of section 40.

[24] Third, stating that the issue is the reasonableness of the visa officer's decision is simply an invitation to argue anything that would go to the issue of reasonableness. Since the vast majority of judicial review issues must be decided on the standard of review of reasonableness, the contention leads inexorably to an open door policy of raising at any time new issues where the reasonableness of the decision is argued. One should not confuse the standard of review for an issue and the issue itself. Rather, the issue was whether the applicant made an honest mistake, an issue that is controlled by a superior court on a standard of reasonableness calling for deference.

[25] Fourth, the same can probably be said of the materiality of facts issue. Here, the applicant now contends that the misrepresentation (i.e. the omission to disclose the visa refusal in the U.S.)

is not material because he already had a study permit in Canada. That constitutes a new issue. We are not talking anymore about an honest mistake; the new argument is concerned with the materiality of the non-disclosure. Without any indication that the contestation includes the existence of a study permit renewal, it is impossible to respond to that argument that is in fact brand new. Without a modicum of an articulation of an argument, it cannot be said that there is merely an elaboration on anything. One cannot elaborate on something that has not been advanced.

[26] Fifth, the file as constituted for the purpose of the judicial review does not open the door to the argument that the study permit renewal is an element to be considered. That suggests that the argument was not contemplated. That is because the validity of the argument is a function of what was disclosed when the renewal was sought. To put it another way, was the U.S. visa refusal part of the disclosure for the study permit renewal? Neither the CTR nor the Applicant's Record had the application for renewal, as became painfully clear during the hearing. That missing part which is essential suggests that the new argument came well after the fact. Indeed, it may be surprising that the refusal was disclosed in the study permit renewal but forgotten in the resident visa application.

[27] Accordingly, the Court must conclude that the applicant sought to bring before the Court new arguments not raised before by the applicant in response to the "fairness letter", in the memorandum of fact and law in support of the application to be granted leave or in the reply to the Crown's factum.

B. *Should the argument be entertained?*

[28] The issue then to be addressed is that of the Court's discretion to entertain new arguments presented for the first time at the hearing of the case.

[29] The respondent argues that there is a long line of cases which have found, in the words of the Federal Court of Appeal in *Coomaraswamy v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 153; 213 DLR (4th) 285; [2002] 4 FCR 501, that "(s)ince this issue was not contained in the appellants' memorandum, counsel for the Minister had no opportunity to respond to it. Hence it would not be appropriate for the Court to decide it" (para 39). In *Kazi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 733, this Court was even blunter:

> [12] It is not open to the applicant to recast his arguments at the hearing. Where an issue is not contained in the applicant's memorandum, counsel for the respondent has no opportunity to respond and it is not appropriate for the Court to decide it: *Coomaraswamy et al v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 603. Accordingly, the arguments alleging a requirement to give notice to the applicant of his right to retain an interpreter will not be considered.

The same point was made in *Dave v Canada (Minister of Citizenship and Immigration)*, 2005 FC 510:

> [5] There were a number of arguments advanced in the written submissions that were abandoned at the hearing. However, counsel attempted orally to introduce new arguments that were not raised in his memorandum of fact and law, reply, or further memorandum. The respondent objected on the basis that it is not appropriate for the court to entertain arguments not contained in the memorandum when opposing counsel has not had notice or an opportunity to respond. See: *Coomaraswamy v. Canada (Minister*

> *of Citizenship and Immigration)*, [2002] 4 F.C. 501 (C.A.). I agreed with the respondent and did not permit the applicant to advance those arguments. I additionally denied the request for an adjournment for the purpose of amending his memorandum. The grounds identified and argued by Mr. Dave were:
>
> (a) that the IAD erred by failing to consider the Operations Memoranda OP03-19 (OP 2/OP 03-19/June 23, 2003) (the policy), and
>
> (b) that paragraph 117(9)(d) is inconsistent with section 7 of the *Charter*.

More recently, the issue was resolved in the same manner in *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 [*Abdulkadir*] at para 81 and *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754. Paragraph 81 of *Abdulkadir* encapsulates nicely the issue:

> [81] At the hearing of this application before me, the Applicant raised an issue based upon the RPD's finding that the Applicant and her parents fall into "the secondary category" under the 2004 Directive of the Ethiopian government referred to in the Decision. Respondent's counsel correctly pointed out that this issue had not been raised in written submissions, he was not in a position to deal with it, and the Court should not consider it at this stage. In reply, Applicant's counsel did not take issue with the Respondent's position. The jurisprudence of this Court is that, unless the situation is exceptional, new arguments not presented in a party's Memorandum of Fact and Law should not be entertained as to do so would prejudice the opposing party and could leave the Court unable to fully assess the merits of the new argument. See *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754 at paras 12-14 [*Del Mundo*]; *Mishak v Canada (Minister of Citizenship and Immigration)* (1999), 173 FTR 144 (TD). Here the Applicant has made extensive arguments about the reasonableness of the RPD's findings related to her parents' identity cards, the interpretation of Dr. Campbell's reports, and the application of the Chairperson's Guidelines. The argument that she and her parents do not fall into the "secondary category" under the 2004 Directive is not simply a more "fleshed out" version of these arguments and would not justify the exception allowed in *Del Mundo*. The Respondent would be prejudiced by the Court entertaining the

> Applicant's new argument at this late stage and the Court therefore declines to consider this line of argument.

[30] The applicant argues that there exists a discretion that should be exercised in his favour. He relies for that proposition on *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22 [*Al Mansuri*].

[31] In *Al Mansuri*, the issue was whether or not it should be entertained new arguments found in a <u>further memorandum of fact and law once leave had been granted</u>. The Court found that the discretion ought not to allow the issues to be argued. It is in the context of new arguments raised for the first time in a further memorandum that the Court considered a framework that could be used for guidance as the matter is to be examined on a case-by-case basis with the factors in the framework being a non-exhaustive list. As noted by the Court in *Lebedeva v Canada (Citizenship and Immigration)*, 2011 FC 1165:

> [27] One should not forget that in *Al Mansuri* these factors were enunciated with respect to a new argument raised in the applicant's further memorandum of fact and law. Where the new argument is raised for the first time at the hearing, thus giving no opportunity to the respondent to prepare a response to the new issue, the Court must be even more cautious when applying the suggested factors.

[32] Thus, the factors that could be considered, with appropriate caution in the circumstances of this case, are found at paragraph 12 of *Al Mansuri*:

> [12] Thus, for these reasons, I am satisfied that in every case it is for the Court to exercise its discretion as to whether to allow issues to be raised for the first time in a party's further memorandum of fact and law. Considerations relevant to the exercise of that discretion, in my view, include:

(i) Were all of the facts and matters relevant to the new issue or issues known (or available with reasonable diligence) at the time the application for leave was filed and/or perfected?

(ii) Is there any suggestion of prejudice to the opposing party if the new issues are considered?

(iii) Does the record disclose all of the facts relevant to the new issues?

(iv) Are the new issues related to those in respect of which leave was granted?

(v) What is the apparent strength of the new issue or issues?

(vi) Will allowing new issues to be raised unduly delay the hearing of the application?

[33] In my view, there ought to be little doubt that an examination of the factors listed in *Al Mansuri* favours the respondent. In order to advance any argument concerning the existence of a study permit renewal in September 2017, there is the need to, at least, establish what was disclosed for the purpose of the renewal. The record does not include that information, which was available at the time the application for leave was made. Obviously, that is an important fact relevant to the issue the applicant now wishes to raise.

[34] This causes a prejudice to the respondent as the evidence required is deficient and the issue now raised was not advanced earlier. Fairness requires that issues to be raised on judicial review be identified with a measure of precision. The applicant cannot find refuge behind an argument that he challenged the reasonableness of the decision and showed an interest in the materiality of the misrepresentation. I agree with the respondent that the applicant reframed his

case at the hearing, going well beyond the issues for which leave had been granted. The original case was one where the refusal to accept that the omission was an honest mistake, where the consequences flowing from the omission are significant, was unreasonable; the new argument focuses on the materiality of the misrepresentation in view of a study permit renewal about which the record says nothing other than a study permit was renewed.

[35] In this case, the facts and matters relevant to the new issue were known when the application for leave was made. The record does not disclose the facts needed to address the new issue; that is because the new issue does not relate to the issues for which leave was granted. This caused the respondent a significant prejudice.

[36] Having reviewed the submissions, I have come to the conclusion that the discretion ought not to be exercised in favour of the applicant in this case. Fundamentally, this would be unfair to the respondent in that the matter has been argued on one basis and, once before the Court, new bases are brought forward, thus depriving the respondent an opportunity to prepare and assist the Court.

[37] It is also a disservice to the administration of justice if an applicant is allowed to depart from the case he was authorized to bring before the Court. This provides an incentive to take the other side by surprise and gain a tactical advantage or force the Court to grant an adjournment. Indeed, IRPA establishes that time is of the essence as section 74 requires that the hearing take place no later than 90 days after leave was granted. In my view, unless there are truly

extraordinary circumstances, the Court ought not to allow for cases to be derailed through new arguments being entertained the day of the hearing.

C. *Further observations*

[38] Nevertheless, I wish to add some observations concerning the argument brought late by the applicant. He contends essentially that the judicial review should succeed because the misrepresentation is not "material" because a study permit was issued.

[39] The applicant contended that the misrepresentation must be material. That may leave the impression that the test for inadmissibility is relatively high. It is not as accurate as it should be. The IRPA speaks rather of withholding material facts that relate to a relevant matter that could induce an error in the administration of IRPA. Here, the material fact withheld is the refusal of a visa in the U.S. When one wishes to get a Canadian visa, undoubtedly constitutes a relevant matter that could be investigated further to know why there was such refusal. The question is quite obvious: Why was the person denied a visa just a few months prior? In turn, that could induce an error in the Administration of the Act. That omission does not allow the visa officer an opportunity to investigate about a fact that is material.

[40] A mere reading of paragraph 40(1)(a) of IRPA makes it clear that there must be a misrepresentation by an applicant. It is also clear that it is not "materiality of misrepresentations" writ large that must be considered, but rather that what is prohibited is misrepresenting facts that are material with respect to a relevant matter in that an error in the administration of the Act

could be induced, not that they have induced such an error (*Koo v Canada (Citizenship and Immigration)*, 2008 FC 931; [2009] 3 FCR 446, at para 20).

[41] In the case at hand, the applicant sought a temporary resident visa. The refusal of a visa to attend a conference in California in October 2016 is directly relevant to a visa application in Canada. In *Haque v Canada (Citizenship and Immigration)*, 2011 FC 315, the Court found that the fact that information is not supplied may have prevented an investigation that could have had the effect of inducing an error in the administration of the Act. The application in this case disclosed a visit to El Paso, Texas, in December 2015 – January 2016, which was certainly favourable to the applicant, yet a visa refusal to go to California a few months later is omitted. It is certainly a misrepresentation that avoided the very relevant question, why was the applicant denied a visa in the United States as the Canadian government must decide to grant him a visa? Surely such misrepresentation <u>could induce</u> an error in the administration of the Act by preventing an investigation or further inquiries. The very nature of the omission, that a visa had been denied recently, is material for an application to succeed to be granted a temporary resident visa. The refusal of a visa is material within the meaning of paragraph 40(1)(a) because it would signal to the authorities asked to issue a visa that they may wish to investigate or conduct some verification about something significant or important (*Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153, at para 38 and 39). The three elements are present: the material fact (omission to disclose a visa refusal), relating to a relevant matter (the issuance of a visa) that could induce an error in the administration of IRPA (inquiring further about the refusal).

[42] The applicant relied mostly on *Karunaratna v Canada (Citizenship and Immigration)*, 2014 FC 421. With all due respect, that decision is of no assistance to the applicant. Not only were the misrepresentations of a different order or severity (para 19 and 20), but the visa officer had an easy access, in the file, to the complete information, and explanations could not be so easily dismissed. The circumstances in this case are simply completely different. The visa officer afforded the applicant an opportunity to explain the omission because the omission was a material fact. There was never any indication that a study permit was a complete or even partial explanation. I note that, at any rate, a different view was taken in *Goburdhun v Canada (Citizenship and Immigration)*, 2013 FC 971 where the Court did not even accept that the availability of the immigration history was an issue or that corrections be made after the fact (para 43-44).

[43] On the other hand, the Court found in *Diwalpitiye v Canada (Citizenship and Immigration)*, 2012 FC 885 reasonable an inadmissibility finding following a misrepresentation about a temporary resident visa refusal in Canada where the applicant ticked the box “no”, on a form to seek permanent residence as a skilled worker, in answer to a question about having been refused status in Canada. That suffices to constitute misrepresentation if it is not true. Following a fairness letter, he explained that the omission was with respect to a refusal for a temporary resident visa and that it was followed by a subsequent successful application. A first officer considered the misrepresentation not sufficiently serious to warrant a refusal by reason of misrepresentation. The actual decision-maker disagreed. The Court was satisfied on judicial review that the misrepresentation was material, stating that the conclusion was reached “because the application being reviewed was based on work experience in Canada, and thus the omission

of his immigration history affected the analysis of both admissibility and eligibility" (para 9). In other words, there was a nexus strong enough between the misrepresentation and seeking permanent residence as a skilled worker.

[44] The case also illustrates vividly the point that reasonableness implies deference to the findings made by the authority mandated by Parliament to make decisions on misrepresentations. The court's role is to control the legality of decisions made, not to substitute its conclusion on the merits.

[45] The same was found in *Oloumi v Canada (Citizenship and Immigration)*, 2012 FC 428 concerning language tests submitted as part of an application for permanent residence as a skilled worker. The fraudulent language test could have induced an error as the nexus was present. The same can be said in our case.

[46] Finally, one recent case of this Court confirms that it suffices that could be induced an error, not that an error was induced. The comment at paragraph 37 of *Kazzi* appears to be particularly apposite:

> [37] Looking first at the wording of paragraph 40(1)(a), it expressly uses the terms "induces or could induce" an error in the administration of the IRPA. The French version speaks of a misrepresentation "qui entraîne ou risque d'entraîner" such an error. The provision thus contemplates a forward-looking exercise and implies that, at the time the assessment is made, the application under the IRPA is not yet completed. This Court has indeed indicated in *Inocentes* that the point in time when the ID should determine whether a misrepresentation could cause an error in the administration of the IRPA is at the time of the false statement, not afterwards at the admissibility hearing. I am not persuaded that the success or failure of the underlying application changes the

> interpretation that paragraph 40(1)(a) should receive and that the *Inocentes* case can be distinguished on that basis.

I repeat. The omission to disclose the visa refusal is a material fact. That material fact relates to a relevant matter, especially when the person seeks a visa in Canada. That omission deprives the authorities of information that could lead to investigations or further verifications. It follows that an error in the administration of IRPA could thereby be induced.

[47] This nexus is stronger where the misrepresentation concerns a visa refusal when what is sought is a visa. The visa officer could certainly have been more articulate and specific. However, this is not fatal (*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33, at para 29):

> [29] Reasonableness review requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 48 (emphasis added); see also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 11). Reviewing courts "may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 52, quoting *Newfoundland Nurses*, at para. 15). In our view, the Benchers came to a decision that reflected a proportionate balance.

[48] The decision to refuse to issue the temporary resident visa in view of the material facts relating to a relevant matter that could induce an error in the administration of IRPA was reasonable.

VI. Conclusion

[49] The applicant has not discharged his burden and, as a result, the application for judicial review must be dismissed.

[50] There is not a serious question of general importance that should be stated, as per subsection 74 (d) of IRPA. The parties were consulted and no question was proposed.

JUDGMENT in IMM-5497-17

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. There is no serious question of general importance.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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