



IAD File No. / N° de dossier de la SAI: TB4-04931
TB4-04932
TB4-04933
Client ID No. / N° ID client: 6096-3986
6283-3066
6283-3121

2016 CanLII 95876 (CA IRB)

Reasons and Decision – Motifs et décision

REMOVAL ORDER

Appellant(s)	ALTAMASH ABDUL SAMAD MAHIMI NAYAAB ALTAMASH MAHIMI HANZALAH ALTAMASH MAHIMI	Appelant(e)(s)
and		et
Respondent	The Minister of Public Safety and Emergency Preparedness Le ministre de la Sécurité publique et de la Protection civile	Intimé(e)
Date(s) of Hearing	May 2, 2016 January 18, 2016	Date(s) de l'audience
Place of Hearing	Toronto, Ontario	Lieu de l'audience
Date of Decision	August 6, 2016	Date de la décision
Panel	T. Cheung	Tribunal
Counsel for the Appellant(s)	Jeremiah A. Eastman Barrister and Solicitor	Conseil(s) de l'appelant(e) / des appelant(e)(s)
Designated Representative(s)	N/A	Représentant(e)(s) désigné(e)(s)
Counsel for the Minister	Andrew Ross	Conseil du ministre

REASONS FOR DECISION

OVERVIEW

[1] These are the reasons for the decision in the appeals of Altamash Abdul Samad Mahimi (the Appellant or Mr. Mahimi), his spouse, Nayaab Altamash Mahimi, and his child, Hanzalah Altamash Mahimi (collectively, the Appellants) against Exclusion Orders made against them on May 26, 2014 following a hearing before Member Mokbel of the Immigration Division (ID).

[2] Member Mokbel determined that Mr. Mahimi committed a misrepresentation pursuant to section 40(1)(a) of the *Immigration and Refugee Protection Act* (the *Act*). Exclusion Orders were issued against the Appellants who were found to have attained their permanent resident status through Mr. Mahimi's direct misrepresentation of a non-genuine job offer as the basis of his permanent resident application.¹ The Appellants appealed the Exclusion Orders to the Immigration Appeal Division (the IAD).

DECISION

[3] Mr. Mahimi conceded to the legal validity of the Exclusion Orders for having committed a misrepresentation, although he disagrees on the scope and nature of the misrepresentation determined by Member Mokbel of the ID.

[4] Mr. Mahimi and his spouse, Nayaab Mahimi, testified at the IAD appeal. Based on the oral and documentary evidence, the Panel finds, on a balance of probabilities, that Mr. Mahimi misrepresented that a friend introduced Mr. Mahimi to the employer who sponsored him for immigration, when in actuality, it was an immigration consultant and an intermediary who introduced Mr. Mahimi to the employer. Accordingly, the Exclusion Orders are valid in law.

¹ Record, Transcript of an Admissibility Hearing, pp. 2-7.

[5] After consideration of the testimonies, documentary evidence, and written submissions, the Panel finds sufficient humanitarian and compassionate (H&C) grounds to allow the appeals for the reasons elaborated in this decision.

ISSUES AND LAW

Humanitarian and compassionate grounds

[6] The main issue in this appeal is whether there are sufficient H&C grounds to warrant special relief under section 67(1)(c) of the *Act* to allow the appeals, or under subsection 68(1) of the *Act* to stay the Exclusion Orders, after taking into consideration all the circumstances of the case, including the best interests of the children directly affected by the decision.

[7] The crux of this appeal lies in the sub-issue of whether the Appellant's misrepresentation consists of collusion with his former employer, M&G Food Market (M&G), to fabricate a non-genuine offer of employment for the purpose of the Appellants' immigration under the Ontario Provincial Nominee Program (PNP), or whether the misrepresentation is limited to Mr. Mahimi making a false statement to government authorities, that he was introduced to the employer by a friend, thereby concealing the role of an immigration consultant and intermediary who introduced Mr. Mahimi to the employer. The nature and scope of the misrepresentation is an aspect of the seriousness of the misrepresentation, which impacts the weighing of H&C considerations. The more serious the misrepresentation, the higher the threshold of H&C considerations required for special relief to be granted.

[8] The Federal Court of Canada endorsed the use of the *Ribic*² factors to assess whether there are sufficient H&C grounds to grant special relief in an appeal of a removal order for misrepresentation.³ The H&C factors to be considered include the seriousness of the misrepresentation; the remorsefulness of the appellants; the length of time the appellants have

² *Ribic, Marida v. M.E.I.* (I.A.B. 84-9623), D. Davey Benedetti, Petryshyn, August 20, 1985.

³ *The Minister of Citizenship and Immigration v. Harpreet Kaul Deo* 2009 FC 990 (de Montigny J.).

spent in Canada; whether the appellants have family in Canada and the impact of the removal on the appellants' family; family or community support; the degree of hardship to the appellants caused by the removal including the conditions in the country of removal; and, the best interests of the children directly affected by the decision. These factors are not exhaustive and the applicability and weight assigned to the factors vary depending on the circumstances of the case.

Mr. Mahimi's position on the misrepresentation

[9] At the first sitting of the IAD hearing, Mr. Mahimi challenged the legal validity of the Exclusion Orders. At the second sitting of the IAD appeal, Mr. Mahimi no longer challenged the legal validity of the ID's decision. Instead, Mr. Mahimi conceded to the misrepresentation of falsely stating that a friend introduced him to M&G, in an attempt to conceal the actual involvement of an immigration consultant, Mr. Singh, and an intermediary named "Chong", who introduced Mr. Mahimi to M&G.⁴ Mr. Mahimi maintains that all other information he provided in his permanent resident application is true.⁵

Respondent's position on the misrepresentation

[10] The Minister's counsel submitted that both Mr. Mahimi and the owner of M&G, Giuliano Longo (Mr. Longo), colluded to misrepresent the material fact of a job offer for employment for the purpose of facilitating Mr. Mahimi's application for permanent resident status. The Minister's counsel submitted that Mr. Mahimi was an active participant in the misrepresentation, and that Mr. Mahimi and Mr. Longo share culpability in misrepresenting the genuineness of the job offer that permitted Mr. Mahimi to attain immigration status.

[11] The Minister's counsel asserted that Mr. Mahimi worked for M&G after attaining permanent resident status "to ward off any suspicions of misrepresentation", particularly after

⁴ Record, Transcript of an Admissibility Hearing, pp. 52-53.

⁵ Appellants' written submissions dated May 16, 2016.

Mr. Mahimi found out his nomination was withdrawn, and his case was referred to Canada Border Services Agency (CBSA) for further investigation.⁶ This assertion is the same as the finding of Member Mokbel of the ID.⁷

[12] The Respondent submitted that “the manner of how the employment was obtained is a key factor in the misrepresentation”, noting that as early as July 21, 2011, Mr. Mahimi misrepresented to a PNP officer that a friend introduced him to M&G.⁸ The Minister’s counsel submitted that Mr. Mahimi could not reasonably explain why it was necessary to repeatedly misrepresent to government officials how employment was obtained, if the job offer was legitimate.

Law on misrepresentation in the immigration context

[13] A summary of the principles of misrepresentation in the immigration process bears repeating as a guide to determining the nature and scope, and seriousness of the misrepresentation. A misrepresentation under section 40(1)(a) of the *Act* is broadly defined as any relevant matter that induces or could induce an error in the administration of the *Act*. A misrepresentation has two elements: it must have been made by the appellant; and the misrepresentation must be material. A misrepresentation is material when it affects the final decision or impacts the process undertaken in the administration of the *Act*.⁹ A material misrepresentation need not have a *mens rea* element or a deliberate mental intent, as an innocent misrepresentation can be material.¹⁰ The totality of the evidence must be considered in determining where there is a misrepresentation.

⁶ Respondent’s written submissions dated May 30, 2016, paragraph 22.

⁷ Record, p. 4, Transcript of an Admissibility Hearing.

⁸ Respondent’s written submissions dated May 30, 2016, paragraphs 16 – 17; Record, pp. 277, Case Notes of Ontario PNP (July 21, 2011).

⁹ *Dao-Min Koo v. The Minister of Citizenship and Immigration* 2008 FC 931 (de Montigny J.) quoting *Bellido v. Canada (MCI)* 2005 FC 452 (Snider J.).

¹⁰ *Brooks* [1974] SCR 850.

[14] This Panel has previously articulated the following non-exhaustive factors to be considered in the assessment of the seriousness of the misrepresentation:

- the nature and complexity of the misrepresentation, including the multiplicity of steps required to commit the misrepresentation;
- the deliberateness of the misrepresentation;
- the level of complicity of the Applicant or the person facing removal; and,
- the impact of the misrepresentation on the integrity of the immigration system.¹¹

[15] Whether the Appellant and his previous employer colluded in fabricating a non-genuine job offer for the purpose of the Appellants' immigration is a question of whether a fraud was committed on the immigration system. It is instructive to refer to the four elements of civil fraud set out by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 SCR 126, that is based on a review of the jurisprudential history of civil fraud. A finding of civil fraud requires: "(1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss."¹²

ANALYSIS AND FINDINGS OF FACT

Nature of the misrepresentation

[16] The first issue in contention between the Appellant and the Minister's counsel is the nature of the misrepresentation, and its impact on the seriousness of the misrepresentation. The circumstances surrounding the job offer and employment need to be examined to determine whether the misrepresentation is confined to the concealment of the immigration consultant and

¹¹ *Yu v Canada (Public Safety and Emergency Preparedness)*, 2015 CanLII 97776 (CA IRB).

¹² *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 SCR 126, paragraph 21.

intermediary, or whether the misrepresentation involves Mr. Mahimi colluding with Mr. Longo to misrepresent a non-genuine job offer as *bona fide* employment for the purpose of obtaining permanent resident status for Mr. Mahimi and his family.

Events leading to the granting of permanent resident status on the Appellants

[17] Mr. Mahimi entered Canada in January 2009 on a student visa to study at Centennial College. He commenced work at Gemma Communications in November 2009 on a one-year work permit. The position involved telemarketing telecommunications products to consumers. Mr. Mahimi wanted to stay permanently in this country, so he asked Gemma about the possibility of sponsoring him for immigration. He was advised that Gemma does not assist employees in this manner.

[18] Mr. Mahimi persisted to seek avenues to immigrate to Canada. He applied for permanent resident status under the Federal Skilled Worker program (FSW), but his application was unsuccessful because the program eliminated marketing as a category of skilled immigration.

[19] Upon realization that he does not qualify for immigration under the FSW program, Mr. Mahimi contacted Arvinder Singh, an immigration consultant. The intermediary, Chong, was present during Mr. Mahimi's meeting with Mr. Singh in May 2010. Mr. Singh advised Mr. Mahimi that he would be in touch for job prospects that would lead to immigration under the Ontario PNP. Mr. Singh advised that if Mr. Mahimi was offered employment, he can apply for permanent resident status as an international student through the Ontario PNP.¹³ Mr. Mahimi left his résumé with Mr. Singh.

[20] Shortly after their first meeting, Mr. Singh informed Mr. Mahimi that a grocery store named M&G was seeking a food promotion specialist. Mr. Mahimi testified that he attended a 45-minute interview with Mr. Longo (owner of M&G), and his son, Marco. At the interview, Mr.

¹³ Record, p. 157, "Applying as an International Student with a Job Offer".

Longo told the Appellant that M&G catered primarily to the Italian community, and he wanted to expand the market to serve the Mexican and Indian communities, as well as to open a second location. The position entailed the marketing and re-branding of the current store, as well as the introduction of new food products to appeal to new customers from those communities. Mr. Mahimi testified that he brought his portfolio of marketing projects he had worked on in India to the interview, and he conveyed to Mr. Longo his work experience in Canada and the various marketing positions in India, as reflected in his résumé.¹⁴

[21] Mr. Mahimi testified that on July 15, 2010, he learned from Mr. Singh that M&G would make him an offer of employment with a salary of \$57,600 per annum.¹⁵ The Minister's counsel asserted that the delay in starting work with M&G after the job offer is an indication that the job offer is not genuine.¹⁶ Mr. Mahimi testified that he did not start work immediately after the job offer, because Mr. Longo did not want him to commence employment on an open work permit with only two-and-a-half months remaining.

[22] Following the job offer, Mr. Singh completed the PNP applications to attain approval for the employer and the nomination for Mr. Mahimi. Mr. Mahimi's nomination was approved on July 29, 2011.¹⁷ At the time of the approval of his nomination, Mr. Mahimi was enrolled in an accounting program that would be completed by December 23, 2011.¹⁸

[23] Mr. Mahimi applied for permanent resident status as an international student through the PNP. In October 2011, pending the approval of the permanent resident application, Mr. Mahimi applied for a temporary work permit to work at M&G. Mr. Mahimi testified that he called Mr. Longos to inform him of the issuance of the work permit on December 29, 2011. Mr. Mahimi testified that shortly thereafter, the Canadian High Commission in India requested Mr. Mahimi's

¹⁴ Record, pp. 346 - 348, Appellant's résumé.

¹⁵ Record, p. 195, Offer of employment dated July 15, 2010.

¹⁶ Respondent's written closing submissions dated May 30, 2016, paragraph 20.

¹⁷ Record, pp. 196 to 200, PNP Nomination Certificate dated July 29, 2011 and letter dated July 29, 2011; p. 373, PNP Nomination Certificate for Mr. Mahimi's wife and child.

¹⁸ Record, p. 360, letter from Canadian International Academy of Business and Technology dated June 9, 2011.

passport in order to process his permanent resident application, which prompted Mr. Mahimi to return to India on January 30, 2012 to prepare his family for landing in Canada. Mr. Mahimi and his family landed in Canada on March 11, 2012.¹⁹

[24] Given the chronology of the foregoing events and the supporting documentary evidence, the Panel accepts Mr. Mahimi's explanation for not starting employment with M&G immediately after the job offer on July 15, 2010, as reasonable and plausible.

[25] Prior to returning to India, Mr. Mahimi obtained a "Vacation approval letter" from M&G, signed by Mr. Longo,²⁰ to assist Mr. Mahimi's return to Canada in the event he was questioned at Canadian customs. The letter was labeled "Vacation approval letter", which is misleading because Mr. Mahimi had not yet started employment with the employer. The letter acknowledged that Mr. Mahimi needed to return to India to respond to the request by the Canadian High Commission in India to submit his passport as soon as possible. Notwithstanding the misleading reference line of "Vacation approval letter", the letter suggests that Mr. Mahimi had not yet commenced working for M&G, and that the owner of M&G awaited his return to "join" the company:

...the terms and conditions of Altmash's position as Promotional Specialist with our organization remain valid and we eagerly anticipate his return to join us as a member of our team.²¹

[26] On February 17, 2012, an officer of the Ontario PNP was investigating M&G concerning a job offer made to another nominee by the name of Sagar Chitale.²² The PNP officer called M&G to inquire about Mr. Chitale and the start date of employment. According to an email by the PNP officer, Mr. Longo advised that his wife handles all human resource issues, including hiring and recruitment. According to the email, Mr. Longo handed the phone to a "Mariana

¹⁹ Record, pp. 247 to 250, Mr. Mahimi's passport; Record, p. 397, Confirmation of Permanent Residence, FOSS record.

²⁰ Record, p. 246, letter dated January 20, 2012.

²¹ Record, p. 246, letter dated January 20, 2012.

²² Record, p. 272, email of PNP officer dated June 21, 2012.

Longo” who told the PNP officer that the company had never made a job offer to Mr. Chitale; that M&G had not recruited recently; and that she had never heard of Mr. Chitale or Mr. Mahimi.²³ As a result of this information, the PNP withdrew the nomination of Mr. Mahimi on March 5, 2012.²⁴

[27] Between January 30, 2012 and March 11, 2012, while Mr. Mahimi was in India making arrangements for his family to land in Canada, a letter from the Ontario Ministry of Citizenship and Immigration dated March 5, 2012 was mailed to his immigration consultant, Mr. Singh. This letter informed Mr. Mahimi of the withdrawal of his PNP nomination.²⁵ Mr. Mahimi claims that the immigration consultant did not immediately inform him of this letter withdrawing his nomination for permanent resident status until after he returned to Canada. Notwithstanding the revocation of the nomination, Mr. Mahimi commenced unpaid on-the-job training with M&G after he landed in Canada.

[28] The following chronology summarizes the events leading to the Appellants’ landing in Canada:

- Mr. Mahimi entered Canada on a work permit issued January 22, 2009 and expiring on May 13, 2010 to study at Centennial College.²⁶ A certificate from Centennial College was granted in August 2009.²⁷
- The Appellant was issued an open work permit on October 7, 2009 and expiring October 6, 2010 to work for any employer.²⁸
- A written job offer dated July 15, 2010 was made by M&G to Mr. Mahimi.²⁹

²³ Record, p. 272, email dated June 21, 2012; p. 274, letter from PNP officer to Canada Border Services Agency dated April 3, 2012; Record, p. 130-134, *44(1) Report – Misrepresentation*.

²⁴ Respondent’s written closing submissions dated May 30, 2016; Record, p. 275, letter from Ontario Ministry of Citizenship and Immigration dated March 5, 2012.

²⁵ Record, p. 275, letter from Ontario Ministry of Citizenship and Immigration dated March 5, 2012.

²⁶ Record, p. 330, Work Permit.

²⁷ Record, p. 337, Centennial College certificate.

²⁸ Record, p. 329, Work Permit issued October 7, 2009 and expiring October 6, 2010.

²⁹ Record, p. 195, Offer of employment dated July 15, 2010.

- An Employer Pre-screen Application dated July 29, 2010 was submitted on behalf of M&G to the Ontario PNP for the recruitment of an international student for a Promotional Specialist position. Revenue Canada T-4 summaries and financial statements for the past three fiscal years were also submitted as requested.³⁰
- The Appellant was issued a study permit on September 22, 2010 and expiring November 30, 2012 to study at any post-secondary technical or trade school.³¹
- M&G was approved as an employer in the PNP on March 10, 2011.³²
- Mr. Mahimi filed a PNP nominee application on or about April 12, 2011.³³
- As of June 9, 2011, Mr. Mahimi was a student at the Canadian International Academy of Business and Technology for an accounting diploma with an anticipated completion date of December 23, 2011.³⁴
- An officer at the Ontario PNP contacted Mr. Mahimi on July 21, 2011 to ask whether he will terminate his studies and work immediately if nominated, or how he would manage both work and full-time study. Mr. Mahimi responded that his course work is scheduled for exams and a final paper starting mid-October 2011 to November 2011. If his nomination is approved, he would immediately apply for a work permit, to be issued by October 2011, which permits him to start work while finishing his studies.³⁵
- A PNP Nomination Certificate was issued on July 29, 2011 for the Appellants.³⁶
- Mr. Mahimi filed an application for permanent residence in Canada dated September 12, 2011.³⁷

³⁰ Record, pp. 168-172, Employer Pre-screen Application; pp. 353 – 355, T4 Summary of Remuneration Paid for 2008, 2009 and 2010; pp. 356 – 358, Income Statement Information for 2009 and 2010.

³¹ Record, p. 328, Study Permit issued September 22, 2010 and expiring November 30, 2012.

³² Record, p. 173, Employer Pre-screen Approved Position.

³³ Record, pp. 175 to 196, cover letter dated April 12, 2011, application processing fee, PNP Nominee dated March 21, 2011, representative authorization form, Joint Verification form, PNP Employer Pre-screen Approved Position, offer letter from the employer dated July 15, 2010.

³⁴ Record, p. 360, letter from Canadian International Academy of Business and Technology dated June 9, 2011.

³⁵ Record, pp. 277, Case Notes of Ontario PNP (July 21, 2011).

³⁶ Record, pp. 196-200, PNP Nomination Certificate dated July 29, 2011 and letter dated July 29, 2011; p. 373, PNP Nomination Certificate for Mr. Mahimi's wife and child.

³⁷ Record, pp. 201-223, cover letter, Generic Application Form For Canada dated September 12, 2011.

- In October 2011, Mr. Mahimi applied for a temporary work permit to work for M&G, pending the approval of his permanent resident application.³⁸ The work permit was issued in December 29, 2011.³⁹
- Mr. Mahimi returned to India on January 30, 2012, and returned to Canada on March 11, 2012.⁴⁰
- On March 5, 2012, while Mr. Mahimi was in India, a manager at the Ontario Ministry of Citizenship and Immigration informed Mr. Mahimi (by way of letter care of his immigration consultant, Mr. Singh) that Mr. Mahimi's nomination is being withdrawn based on information that Mr. Mahimi misrepresented the existence of a *bona fide* job offer, when there was no job offer by M&G to foreign students.⁴¹
- On March 12, 2012, Mr. Mahimi and his wife and child landed as permanent residents of Canada under the Ontario PNP.⁴²

Mr. Mahimi's employment at M&G

[29] Despite the withdrawal of his PNP nomination, Mr. Mahimi proceeded to start work at M&G after his landing. Mr. Mahimi testified that the first month of work at M&G was unpaid training: he shadowed the owner's son, Marco, and learned to handle the paperwork related to promotions and flyers. Together they visited a competitor's store serving the South Asian community to check their food products.

[30] Mr. Mahimi commenced paid employment with M&G on April 29, 2012. M&G issued bi-weekly salary statements, a T-4 statement stating \$18,304 was paid to Mr. Mahimi as salary, and a Record of Employment confirming Mr. Mahimi's employment with M&G from April 29, 2012 to September 14, 2012.⁴³ The Appellant submitted his bank statements showing deposits

³⁸ Record, p. 225, letter from Ontario Ministry of Citizenship and Immigration dated July 29, 2011.

³⁹ Record, p. 226, work permit dated December 29, 2011.

⁴⁰ Record, pp. 247-250, Appellant's passport.

⁴¹ Record, p. 275, letter from Ontario Ministry of Citizenship and Immigration dated March 5, 2012.

⁴² Record, p. 397, Confirmation of Permanent Residence, FOSS record.

⁴³ Record, pp. 407-411, salary statements, T4 statement, Record of Employment.

that match the bi-weekly salary.⁴⁴ Mr. Mahimi testified that during the course of his employment, he was required to research and contact food distributors to introduce new food products appealing to the South Asian community; he also created and arranged advertising for bus shelters, flyers, local newspapers, and store signage. These responsibilities are consistent with the job responsibilities described in the offer of employment and the PNP Employer Pre-screen Application.⁴⁵

[31] Mr. Mahimi testified that in July 2012, Marco informed him that his father had heart problems which necessitated heart surgery. Given Mr. Longo's health problems, M&G revoked its plan to open a second store, as Mr. Longo did not trust anyone else but himself to run the business. Upon learning this information, Mr. Mahimi decided to seek other viable employment to ensure he can financially support his family, because his wife was not working. Mr. Mahimi voluntarily gave notice of his resignation in August 2012.

[32] Mr. Mahimi testified that he responded to an advertisement from Sears Canada for a customer complaints resolution position. He accepted this position, despite the lower hourly rate, because he thought employment with Sears provided more opportunity for advancement. He was employed at Sears for several weeks⁴⁶ before moving to another job at a telecommunications company where he continues to work since December 2013.

[33] When Mr. Mahimi contacted Mr. Longo to gather evidence in preparation for his ID hearing, he learned that M&G closed in 2013, approximately six months before the ID hearing in December 2013. Mr. Longo did not co-operate when contacted by Mr. Mahimi.

Analysis of the events leading to the granting of permanent resident status

⁴⁴ Record, pp. 412 to 417, bank statements.

⁴⁵ Record, p. 167, offer of employment dated July 15, 2010; pp. 168-169, PNP Employer Pre-screen Application.

⁴⁶ Exhibit A-2, p. 8, T-4 Statement.

[34] The explanation for not starting work at M&G immediately after the job offer is plausible, because the evidence confirms only two-and-a-half months remaining on his open work permit, followed by his enrollment in a course of study. The documentary evidence is uncontroverted that Mr. Mahimi applied for a work permit to work at M&G which was granted in December 2011. The application for a work permit is an indication that Mr. Mahimi was willing to work at M&G, had it not been for the request from the visa office to submit his passport in India for the purpose of granting the permanent resident visa. It is a reasonable and plausible explanation that Mr. Mahimi did not use the work permit issued in December 2011 because he needed to return to India between January 30, 2012 and March 11, 2012 to get his family ready for landing, and to submit his passport for the granting of permanent resident visas to the Appellants. Given Mr. Mahimi's testimony, the delay in starting work at M&G does not, in and of itself, support a finding of collusion to fabricate a non-genuine job offer.

[35] The documentary evidence supports a finding, on a balance of probabilities, that the Appellant worked for M&G between April 29, 2012 and September 14, 2012. The T-4 statement, Record of Employment, bi-weekly salary statements, and Mr. Mahimi's bank statements showing the deposits of the bi-weekly salary are *prima face* proof of valid employment. To dispel the possibility that Mr. Mahimi may have paid his own salary, and the notion that these documents could have been fabricated,⁴⁷ two enforcement officers from CBSA attended at M&G on June 21, 2012 and found Mr. Mahimi at the business.⁴⁸ The CBSA officers interviewed Mr. Longo and his son, Marco, who described Mr. Mahimi's responsibilities at the store as consistent with the job description submitted to the PNP for pre-approval.⁴⁹

[36] The T-4 statement and Record of Employment indicate that the person in charge of payroll is Matilda Longo, and not Marianna Longo, which suggests that the investigation was not

⁴⁷ Record, p. 31, Transcript of an Admissibility Hearing.

⁴⁸ Record, p. 139, Notes To File dated June 19, 2012.

⁴⁹ Record, p. 137-138, Notes To File dated June 19, 2012; Record, pp. 168-172, Employer Pre-screen Application.

infallible to errors.⁵⁰ At the IAD hearing, Mr. Mahimi maintained that he has never heard of “Mariana Longo”, and that he dealt with Matilda Longo (Mr. Longo’s wife) who was responsible for payroll and operations at M&G. Since Mr. Mahimi had not yet started employment with M&G at the time of the PNP officer’s phone call, it is plausible that Matilda Longo was unaware of the job offer made to Mr. Mahimi. After all, it was Mr. Longo who interviewed Mr. Mahimi and offered him the job, and Mr. Longo did not deny the offer of employment to Mr. Mahimi.

[37] Mr. Longo and his spouse, Marianna Longo, were issued summons to testify as witnesses at the ID hearing on March 7, 2014. However, neither of them was available to testify due to Mr. Longo’s heart surgery.⁵¹ Hence, neither of them was able to clarify the controversy surrounding “Mariana Longo” and her alleged denial of a job offer to Mr. Mahimi.

[38] It was the investigative phone call that documented “Marianna Longo” denying the recruitment of Mr. Mahimi that triggered the withdrawal of the nomination, and the referral to CBSA for investigation. The totality of the evidence counterbalances the negative inference flowing from this phone call. The findings *vis-à-vis* Mr. Mahimi does not mean that there was a *bona fide* offer of employment to Sagar Chitale who was the original person under investigation. The evidence only supports a finding that Mr. Mahimi did not collude to fabricate a non-genuine job offer by M&G.

[39] The lack of independent corroborative evidence concerning the cancellation of the second location due to Mr. Longo’s heart condition was not due to the Appellant’s lack of efforts: Mr. Longo and his wife were unwilling or unable to testify, and medical evidence would not be obtainable by Mr. Mahimi given the privacy concerns.

[40] The lack of evidence corroborating Mr. Longo’s heart condition as the reason for the change of plans for the store expansion lessens the persuasiveness of Mr. Mahimi’s testimony

⁵⁰ Record, pp. 353-355, T4 Summary Of Remuneration Paid for 2008 2009 and 2010; p. 411, Record Of Employment, dated November 11, 2013.

⁵¹ Record, pp. 9, Record of an Admissibility Hearing (March 7, 2014).

that he resigned from M&G because of the cancellation of the second store due to Mr. Longo's health issues. Hence, there is uncertainty over the reason why Mr. Mahimi resigned after working at M&G for four months. However, what is known is that M&G is now out of business, and Mr. Longo and his wife declined to testify at the ID hearing due to Mr. Longo's alleged heart condition which has not been proven.

Conclusions on the nature of the misrepresentation

[41] Notwithstanding the uncertainty over the reason for the store closure, the totality of the evidence does not support a finding that Mr. Mahimi was an active participant in colluding with Mr. Longo to produce a non-genuine job offer to facilitate Mr. Mahimi's immigration. Mr. Mahimi fulfilled the essential conditions of the PNP by commencing employment after he landed in March 2012. The presence of Mr. Mahimi at the store when the CBSA enforcement officers visited in July 2012 rebuts the suggestion that the documents related to salary, T-4 filings, and bank deposits may have been part of a larger fabrication of non-genuine employment. Therefore, the evidence falls short of a finding that Mr. Mahimi colluded with Mr. Longo to misrepresent a non-genuine job offer.

[42] Mr. Mahimi's application for a work permit to work for M&G, while his permanent resident application was pending, indicates an intent to work at M&G; and Mr. Mahimi has a reasonable explanation as to why he never used the work permit prior to the investigation, which is supported by reliable documentary evidence set out in the chronology.

[43] An employment relationship is a contractual agreement for the provision of personal services which can be terminated by either parties, subject to employment standards legislation. Hence, Mr. Mahimi's termination of employment after four months, without more, falls short of an inference that his employment was primarily for immigration. Mr. Mahimi's performance on the job for four months likely provided a service to M&G in exchange for a regular salary paid to Mr. Mahimi for his work. Consequently, it cannot be said that the job offer and employment was exclusively for the Appellants to gain the privilege of permanent resident status. This is because

Mr. Mahimi performed a service for an employer who was approved under the PNP, and the employer paid a reasonable salary for the employee's service. Therefore, the duration of a little over four months on the job is insufficient to infer that the offer of employment to Mr. Mahimi is not genuine, particularly given the plausible explanation for his resignation, and the closing down of the business shortly thereafter.

[44] To sum up, the Panel finds, based on the evidence on a balance of probabilities, that the misrepresentation consists of Mr. Mahimi's false statement that a friend introduced him to M&G, when in actuality, it was an immigration consultant and intermediary who introduced him to the employer who sponsored him for immigration.

Seriousness of the misrepresentation

[45] Having regard to the four elements of civil fraud set out in *Bruno Appliance and Furniture, Inc. v. Hryniak*,⁵² the misrepresentation in this case does not constitute fraud, because it did not cause permanent resident status to be conferred on the Appellants. The misrepresentation is less serious than a deliberate fraud on the immigration system, given the lack of direct evidence of Mr. Mahimi committing a multiplicity of steps to knowingly defraud the system to obtain immigration status.

[46] By contrast, the misrepresentation in this case does not reach the severity, for instance, of a misrepresentation flowing from a marriage of convenience for immigration, whereby at least one of the parties performed a multitude of steps to enter into the non-genuine marriage to dupe the immigration system, while cognizant that the marriage is a sham, and the rogue party never intended to stay in the marriage once permanent resident status for the foreign national is attained. In the present case, Mr. Mahimi performed the service in the employment offer that is the basis of his permanent resident application; and he offered a plausible explanation for his resignation, which is consistent with the eventual closing of the business.

⁵² *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 SCR 126, paragraph 21.

[47] What can be ascertained from the misrepresentation of the non-disclosure of the immigration consultant and intermediary is that Mr. Mahimi was apprehensive that the job offer and employment would be viewed as primarily for Mr. Mahimi's immigration, and not to fulfill a need of the employer to recruit for a position that could be filled by an international student. Mr. Mahimi's apprehension drove him to hide the fact that an immigration consultant and intermediary introduced him to the employer.

[48] The difficulty is that Mr. Nick Chronopolous, the witness from the PNP at the ID hearing, testified that the involvement of an immigration consultant is not "completely illegitimate", but would spur additional questions to the employer about the employer's intentions and why it would subcontract recruitment to someone outside the company.⁵³ Mr. Chronopolous was a processing officer at the time who dealt with the approval of Mr. Mahimi's PNP application. This means that the involvement of the immigration consultant and intermediary in the introduction of the applicant to the job is not, in and of itself, illegitimate.

[49] It is favorable for this appeal that Mr. Mahimi carried out employment at M&G, as corroborated by the deposits into his bank account matching the bi-weekly salary, and the officers found Mr. Mahimi working at M&G. Mr. Mahimi's testimony of the services he performed to expand the market of M&G to other communities, and the payment of a reasonable bi-weekly salary for such services indicate, on a balance of probabilities, that M&G received a valuable service from Mr. Mahimi in exchange for his compensation. Therefore, the involvement of an immigration consultant and intermediary is insufficient to support a negative inference that the offer of employment was exclusively for Mr. Mahimi's immigration, as it is plausible that M&G derived a benefit from Mr. Mahimi's services.

⁵³ Record, p. 30, Transcript of an Admissibility Hearing.

[50] Therefore, the misrepresentation falls short of fraud, but is more serious than an inadvertent and indirect misrepresentation, because Mr. Mahimi deliberately sought to avoid scrutiny of his immigration motives by concealing the involvement of an immigration consultant and intermediary.

Remorse

[51] Initially at the first sitting of the ID hearing, Mr. Mahimi continued to conceal the involvement of the immigration consultant and intermediary who introduced Mr. Mahimi to M&G. It was only at the resumption of the ID hearing that Mr. Mahimi changed his testimony to disclose the actual individuals who arranged the job interview.⁵⁴ It is to his credit that Mr. Mahimi eventually admitted the misrepresentation at the ID hearing. Consequently, the continuation of the non-disclosure throughout the investigation and at the outset of the ID hearing is counterbalanced by the subsequent admission at the ID hearing, thereby rendering remorse a neutral consideration.

Length of time in Canada

[52] Mr. Mahimi entered Canada in January 2009 on a student visa. Three years later, he became a permanent resident in April 2012, along with his wife and child. The three prior years that Mr. Mahimi was in Canada on a student visa carries little weight, because the temporary nature of the student visa held out no promise of permanency. The four years that the Appellants have been permanent residents in Canada is a short period of time, and therefore is not a favourable consideration for special relief to be granted.

Establishment in Canada

[53] For Mr. Mahimi, his establishment is essentially his employment history. He started a part-time job at Rogers Communications in April 2012. He worked briefly for Sears Canada before taking a full-time sales position at Rogers Communications in January 2013. Mr.

⁵⁴ Record, p. 53, Transcript of an Admissibility Hearing.

Mahimi's employment has enabled him to make investments in a RESP.⁵⁵ The Appellants rent their accommodations and do not own a home. Although Mr. Mahimi's establishment is not substantial, it is to his credit that he has maintained a continuous employment history since his landing in 2012.

[54] Mr. Mahimi's spouse, Nayaab Mahimi, has negligible economic and social establishment in Canada, given the short amount of time of four years that she has lived in this country. Ms. Mahimi previously worked as a lunch supervisor at the local school board, but had to stop working due to the birth of a child in December 2013 and resulting health issues that persisted. Given the evidence, establishment is not a favourable consideration for Ms. Mahimi.

[55] The seven-yearold child, Hanzalah Altamash Mahimi, has attended school in Canada for most of his childhood. His integration into the school system constitutes favourable social establishment.

Hardship and dislocation to the Appellants caused by removal

[56] Mr. Mahimi testified that he has disposed of his assets in India, including his previous accommodations, in order to use the funds for his settlement in Canada. He testified that he has no house to return to, and it is not feasible for him and his wife and children to live with his parents because his parents' accommodations are small. He testified that his parents and other extended family members are unable to support him financially, if he and his family return to India, because his father no longer runs the family business due to health problems, and his parents' economic circumstances have declined. Mr. Mahimi testified he would have to send his children to private school. Since he has no immediate job prospects in India, it would be nearly impossible for him to afford the living expenses in India that would include accommodations and private school.

⁵⁵ Exhibit A-2, pp. 9 to 11, RESP statements.

[57] Mr. Mahimi testified that he would have to start from the beginning to enter the job market in India. Mr. Mahimi testified that he has only returned to India for two short visits in the past five years. Therefore, he does not have immediate knowledge of the job market in India, and he has not re-established contact with his friends.

[58] It is difficult to accept Mr. Mahimi's submission that he will experience hardship in India: the evidence does not suggest hardship when he had lived there for the majority of his life prior to immigration. Moreover, Mr. Mahimi has in excess of five years of marketing experience in India, and he has shown a high proficiency in the English language, which he acknowledges are an advantage in the Indian job market.

[59] Mr. Mahimi's wife testified that she will experience hardship if she returns to India, due to the gender inequality condoned by her parents-in-law. Ms. Mahimi stated that her life as a woman in India is beneath that of a man. She testified that because they have to live in close proximity to her parents-in-law, the impact of the gender inequities that are condoned by her parents-in-laws will be exacerbated. Such was her experience when she lived with her in-laws under their authority prior to immigration, and when she stayed with her in-laws during the last visit to India from February to April 2016. Ms. Mahimi gave examples of the restrictive treatment that she will experience from her in-laws in India, such as constraints on her freedom to leave the house to meet her friends. She testified that her freedom was limited to visits to see her mother once a week. Under cross-examination, Ms. Mahimi revealed that she attended private school and completed 12 years of education. Notwithstanding her education, she was discouraged by her husband's family from working outside the home.

[60] The Panel accepts Ms. Mahimi's testimony of the differential treatment she experiences based on her gender, and the restrictions on her freedom to exercise her own choices in conducting her life. Her testimony is supported by documentary evidence of country conditions

from a reputable source documenting a significant gender gap in the opportunities and the treatment of men and women in India.⁵⁶ Accordingly, the Panel finds hardship to be a favourable factor for Ms. Mahimi.

Family ties in Canada

[61] The Appellants' only family ties in Canada are each other. The family unit includes a Canadian-born child who is not a party to this appeal. The Appellants have no extended family members in Canada. Mr. Mahimi's extended family, namely, his parents and siblings, are in India. I find family ties are a positive factor given the existence of the Canadian citizen child who is dependent on her parents.

Best interests of the children

[62] Mr. Mahimi and his wife have two children, born in 2013 and 2009, who are directly impacted by this decision.⁵⁷ The 7-year-old child was born in India and is an Appellant in this appeal. The 2-year-old child was born in Canada and is a Canadian citizen. The 7-year-old child attended school in Canada for kindergarten and grade 1.⁵⁸ Neither of the children was complicit in the misrepresentation.

[63] The Panel is "alert, alive and sensitive" to the best interests of the children,⁵⁹ while bearing in mind that the best interests of the children are not determinative of the issue of removal.⁶⁰ The *Kanhasamy*⁶¹ decision from the Supreme Court of Canada endorsed the

⁵⁶ Exhibit A-1, pp. 28-29, refworld UNHCR, "Human Rights and Democracy Report – Case Study: India – Women's Rights" (12 March 2015).

⁵⁷ Exhibit A-1, p. 4, Statement of Live Birth; Record, p. 333, Birth certificate.

⁵⁸ Exhibit A-1, pp. 5-13, Elementary Progress Report Cards and school certificates.

⁵⁹ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817.

⁶⁰ *Hawthorne v. Canada (Minister of Citizenship and Immigration)* (C.A.), 2002 FCA 475, [2003] 2 F.C. 555, paragraphs 2, 32.

⁶¹ *Kanhasamy v. Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 (CanLII).

following principles in *Hawthorne*⁶² to be applied to the assessment of the best interests of the child:

- The concept of “unusual and undeserved hardship” is not applicable to the assessment of the hardship invoked by a child to support an application for H&C relief, because children will rarely, if ever, be deserving of any hardship; and
- Children may experience greater hardship than adults faced with a comparable situation, hence, circumstances which may not warrant H&C relief for an adult, may nonetheless entitle a child to relief.⁶³

[64] The practical implication of the *Kanhasamy* case is that it is essential to the H&C analysis to bear in mind that the child’s best interests cover greater scope than the assessment of hardship. The best interests of the child must assess the dual considerations of the *benefit* of non-removal to the child, as well as any hardship to the child, as per Justice DéCary J.A. writing for the majority in *Hawthorne*:

[4] The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.⁶⁴

[65] The seven-year-old child in this appeal has lived in Canada for the majority of his childhood, and appears to be integrated in his school since 2012. Given his age and social integration in Canada, and the period of re-adjustment that the child would experience, if he is to return to India, I find that the best interests of the child are in his favour.

[66] Bearing in mind the dual considerations of the benefit of non-removal to the child, as well as hardship to the child upon removal, I find that it is also in the best interests of the two-year-old child, who is a Canadian citizen, to remain in Canada and to be raised by her parents.

⁶² *Hawthorne v. Canada (Minister of Citizenship and Immigration)* (C.A.), 2002 FCA 475, [2003] 2 F.C. 555.

⁶³ *Kanhasamy*, paragraph 38-41.

⁶⁴ *Hawthorne v. Canada (Minister of Citizenship and Immigration)* (C.A.), 2002 FCA 475, [2003] 2 F.C. 555.

Although the two-year-old child has lived in Canada for only a short period of time, and therefore will presumably adjust to India so long as she is with her parents, she is nevertheless a Canadian citizen who would benefit from remaining in Canada and cared for by her parents. I bear in mind the testimony of Ms. Mahimi and the country condition documents⁶⁵ that speak of greater gender inequities in India that the child would not face in Canada. Hence, the best interests of the child are favourable to the two-year-old child.

CONCLUSION

[67] Mr. Mahimi fulfilled the essential conditions of the PNP by performing the services consistent with the responsibilities stated in the PNP Employer Pre-Screen Application, which was approved for the nomination of Mr. Mahimi for immigration.⁶⁶ Mr. Mahimi provided a service of value to M&G, in exchange for a reasonable salary commensurate with his responsibilities. Hence, short of direct evidence of Mr. Mahimi paying his own salary, and the fabrication of the T-4 and salary documents, it cannot be said that the job offer and employment was exclusively for the Appellants to gain the privilege of permanent resident status.

[68] The application for a work permit to work for M&G, pending the permanent resident application, indicates Mr. Mahimi's intent to work at M&G. There is a plausible explanation, supported by documentary evidence, as to why Mr. Mahimi did not work immediately after the job offer. The totality of the evidence falls short of a finding that Mr. Mahimi colluded with Mr. Longo to misrepresent a non-genuine job offer for immigration.

[69] The threshold for granting special relief is assessed in proportion to the seriousness of the misrepresentation falling on the less serious end of the spectrum. The misrepresentation of the concealment of the immigration consultant and intermediary is less severe than a deliberate fraud

⁶⁵ Exhibit A-1, pp. 28-29, refworld UNHCR, "Human Rights and Democracy Report – Case Study: India – Women's Rights" (12 March 2015); pp. 39-44, Rohini Pande, "Keeping Women Safe" *Harvard Magazine*.

⁶⁶ Record, p. 173, Employer Pre-screen Approved Position.

on the immigration system, because the misrepresentation did not cause the Appellants to be granted permanent resident status, and Mr. Mahimi performed the employment services that were essential conditions of the PNP nomination. Without condoning the misrepresentation, the Panel finds on a balance of probabilities, that the evidence does not point to a severe breach of the integrity of the immigration system: Mr. Mahimi's actions did not constitute a multiplicity of steps to dupe the immigration system.

[70] The misrepresentation is more serious than an inadvertent and indirect misrepresentation, because Mr. Mahimi deliberately made a false statement to avoid scrutiny of his immigration motives in accepting the job offer. However, the involvement of the immigration consultant and intermediary in the introduction of the applicant to the prospective employer, in and of itself, is insufficient to support a negative inference that the offer of employment was exclusively for Mr. Mahimi's immigration, as it is plausible that the employer derived a benefit from Mr. Mahimi's services, which is in line with the purpose of the PNP for international students.⁶⁷ It is plausible that Mr. Mahimi's resignation from employment after four months was motivated by a real concern over the viability of the employer, in light of the subsequent closing of the business.

[71] Four years in Canada is a short period of time that does not favour special relief. However, credit is given to Mr. Mahimi's continuous employment history since his landing. Family ties in Canada are a positive factor for the Appellants, given the existence of the Canadian citizen child.

[72] Mr. Mahimi will not likely suffer hardship, if he is to return to India, because he has lived there for the majority of his adulthood, and his high level of English proficiency and prior work experience are to his advantage in his re-establishment in India. Hardship is a favourable factor for Ms. Mahimi, in light of her testimony of the gender inequities she will face if she returns to India.

⁶⁷ Record, pp. 155-159, Opportunities Ontario: Provincial Nominee Program – International Students with a Job Offer.

[73] The best interests of the children are favorable for both children, given the social establishment of the older child in school, and the benefit to the younger child, who is a Canadian citizen, to be raised in Canada by her parents.

[74] The moderate severity of the seriousness of the misrepresentation is borne in mind when assessing the weight to be assigned to the best interests of the children. The lack of a deliberate fraud means that greater weight is assigned to the best interests of the children and other positive H&C factors. The result is that the positive considerations outweigh the unfavourable factors of the short period of time in Canada and the lack of hardship for Mr. Mahimi. Given the nature and seriousness of the misrepresentation falling on the less severe end of the spectrum, there are sufficient H&C considerations to allow the appeals.

[75] The appeals are allowed.

IAD File No. / N° de dossier de la SAI: TB4-04931
TB4-04932
TB4-04933
Client ID No. / N° ID client: 6096-3986
6283-3066
6283-3121

26

NOTICE OF DECISION

The appeals are allowed. The removal orders are set aside. The Immigration Appeal Division finds that the Appellants have not lost their permanent resident status.

“T. Cheung”

T. Cheung

August 6, 2016

Date

Judicial Review – Under section 72 of the Immigration and Refugee Protection Act, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.