Federal Court  Cour fédérale

Date: 20190604

Docket: IMM-1827-18

Citation: 2019 FC 781

Ottawa, Ontario, June 4, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

FATIH YUZER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicant, Fatih Yuzer, is a citizen of Turkey. He was born in October 1989. He graduated in 2016 from the Faculty of Architecture and Design at Kocaeli University in Turkey. He lives in the city of Tatvan with his parents. (In addition to his parents, six siblings also live in Turkey.) The applicant plans to pursue further studies in architecture, to go into practice in Turkey, and perhaps even establish his own firm there. He wants to develop his English skills

because this would be a professional asset for him, especially in being able to communicate with international clients. According to the applicant, there are no programs which teach professional English in Turkey. The programs which are available there teach only basic English comprehension and conversation skills.

[2] The applicant says he needs more than this. He has found a suitable program at the Canadian Language Learning College [CLLC] in Halifax, Nova Scotia. He would benefit from a fully immersive experience in an English milieu. The applicant also states that studying in Halifax would have the added benefit of allowing him to be with his brother, Emrullah, who lives in Pictou County, Nova Scotia. Emrullah is married to a Canadian citizen and is himself a permanent resident of Canada. The applicant and Emrullah have a very close relationship. Emrullah and his spouse are willing to host the applicant while he studies in Canada, which would mean both lower costs and being in a supportive family environment while far away from home.

[3] In October 2016, the applicant was admitted to a two-year program at CLLC. In November 2016, he applied for a study permit. This application was refused. The applicant applied three more times. As time passed, he adjusted his goals and applied for a permit to attend a one-year program at CLLC instead. All the applications were refused. The last application was refused on April 6, 2018.

[4] The applicant now applies for judicial review of the April 6, 2018 decision under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. He

contends that the decision does not comply with the requirements of procedural fairness and that it is unreasonable. For the reasons set out below, I do not agree that the requirements of procedural fairness were breached but I do agree that the decision is unreasonable. Accordingly, the decision will be set aside and the matter remitted to another decision-maker for redetermination.

II. DECISION UNDER REVIEW

[5] The refusal of the study permit application was communicated to the applicant in a letter from the Visa Section of the Canadian Embassy in Ankara, Turkey. The letter is a form letter which states, by way of checked boxes, that the visa officer was not satisfied that the applicant would leave Canada at the end of his stay, having particular regard to the purpose of the visit. Additionally, the letter states that the applicant's proposed studies "are not reasonable" in light of the applicant's employment, qualifications, previous studies, level of establishment, the availability of other educational opportunities, and his future prospects and plans.

[6] In the Global Case Management System [GCMS] notes pertaining to the application, the officer noted that "similar programs & courses are readily available in the region and for much lower costs." Additionally, the officer noted that he or she did not consider that the proposed trip to Canada "is a reasonable or affordable expense." The officer concluded as follows: "In view of the foregoing reasons, I consider that the incentive to remain in Canada may outweigh the applicant's ties to their country of residence. For this reason, I am not satisfied that the applicant will depart Canada at the end of the period authorized for their stay. Refused."

III. STANDARD OF REVIEW

[7] The parties submit that on judicial review questions of procedural fairness are to be determined on a correctness standard of review. There is some doubt as to whether it makes sense to speak of a standard of review in this context but, in essence, I agree with the parties. As a practical matter, what the correctness standard of review means is that no deference is owed to the decision-maker on this issue. I must determine for myself whether the process the decision-maker followed satisfied the level of fairness required in all of the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Canadian Pacific Railway Co. v Canada (Attorney General)*, 2018 FCA 69 at paras 33-56; *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31).

[8] The parties also submit, and I agree, that the substance of the decision on a study permit application is reviewed on a reasonableness standard (*Patel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 602 at para 28). Deference is owed to the officer because of his or her presumed expertise with respect to the applicable criteria and the largely fact-based nature of this kind of discretionary decision (*Ngalamulume v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1268 at para 16; *Akomolafe v Canada (Citizenship and Immigration)*, 2016 FC 472 at para 12; *Omijie v Canada (Citizenship and Immigration)*, 2018 FC 878 at para 10 [*Omijie*]).

[9] Under the reasonableness standard, the reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process"

and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). A visa officer is not required to give extensive reasons but the reasons must be sufficient to explain the result (*Pacheco v Canada (Citizenship and Immigration)*, 2010 FC 347 at para 36; *Ogbuchi v Canada (Citizenship and Immigration)*, 2016 FC 764 at paras 10-13 [*Ogbuchi*]; *Omijie* at paras 22-28). The reviewing court should intervene only if the reasons given, viewed in the context of the record, fail this test. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Khosa* at paras 59 and 61).

IV. ISSUES

[10] As I will explain, while the applicant challenged the decision on a number of grounds, in my view the refusal of the study permit application turned on the visa officer's finding that "[s]imilar programs [and] courses are readily available in the region and for much lower costs." I will organize my discussion of this finding around two issues:

a) Were the requirements of procedural fairness observed?

b) Is the officer's decision unreasonable?

V. ANALYSIS

A. *Were the requirements of procedural fairness observed?*

[11] As stated above, I must determine whether the procedures afforded to the applicant were fair having regard to all relevant circumstances.

[12] The applicant argues that he was denied procedural fairness in several respects. For present purposes, it suffices to focus on the officer's conclusion that similar programs are available in the region. The applicant submits that this conclusion was based on speculation or extrinsic knowledge and that the officer should have given him a chance to respond to this finding before making the decision.

[13] Before addressing the applicant's submission, it may be helpful to say a little more about the duty of procedural fairness in the context of study permit decisions.

[14] The common law duty of procedural fairness is "flexible and variable" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22 [*Baker*]). Several factors must be considered in determining what is required in the specific context of a given case, including: (1) the nature of the decision being made; (2) the nature of the statutory scheme under which the decision is made; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the party challenging the decision; and (5) the procedures followed by the decision-maker itself and its institutional constraints (*Baker* at paras 21-28).

[15] The scope of the procedural duties owed must be considered pragmatically due to the sheer volume of applications that officers must assess. In this regard, Justice Evans in *Khan v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 345 stated (at para 32) that,

> when setting the content of the duty of fairness appropriate for the determination of visa applications, the Court must guard against imposing a level of procedural formality that, given the volume of applications that visa officers are required to process, would unduly encumber efficient administration. The public interest in containing administrative costs and in not hindering expeditious decision-making must be weighed against the benefits of participation in the process by the person directly affected.

[16] Applying all of these factors, courts have consistently found that the requirements of procedural fairness in applications for study permits are "relaxed" and fall on the low end of the spectrum (*Li v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 791 at paras 45 to 50; *Singh v Canada (Citizenship and Immigration)*, 2012 FC 526 at para 34 [*Singh*]; *Hakimi v Canada (Citizenship and Immigration)*, 2015 FC 657 at para 14). While an applicant must be afforded a fair process by the officer, what is required for the process to be fair is attenuated by the fact that what is at issue is an application for a study permit. Thus, for example, a visa officer has no legal obligation to warn an applicant about the deficiencies of his or her application before making a decision when those deficiencies relate to legal preconditions that must be met for the application to succeed (*Solopova v Canada (Citizenship and Immigration)*, 2016 FC 690 at para 38).

[17] That being said, it would be a breach of procedural fairness for a visa officer to rely on extrinsic evidence without affording an applicant an opportunity to respond (*Do v Canada (Citizenship and Immigration)*, 2017 FC 1064 at para 17; *Cheema v Canada (Citizenship and*

Immigration), 2016 FC 1170 at para 12). At the same time, it can be difficult to determine whether "extrinsic" evidence has been relied on or not. Visa officers are expected to draw on their own particular expertise about local conditions when making decisions on study permit applications. As stated by Justice Russell in *Singh* at para 52,

> What applicants can reasonably anticipate is that officers will bring their own experience and expertise to bear upon the application and will draw inferences and conclusions from the evidence that is placed before them without necessarily alerting applicants on these matters. The onus is upon applicants to put together applications that are convincing and that anticipate possible adverse inferences contained in the evidence and local conditions and address them.

[18] In my view, the officer in the present case did what was expected and drew on his or her particular expertise about local conditions in determining whether the applicant's proposal to study English in Canada was reasonable in all the circumstances (cf. *Duc Tran v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1377 at para 32). This was not a matter of drawing on extrinsic evidence or, even less, speculation. While I do not agree with the respondent that the officer simply relied on an "obvious fact" which did not necessitate an opportunity to respond on the part of the applicant, it cannot have taken the applicant by surprise that the officer would consider the availability of suitable programs locally when evaluating the application. The officer did not breach the duty of procedural fairness in concluding that the applicant had failed to establish that because there were no suitable local programs, studying English in Canada was a reasonable option.

[19] Whether the officer's reliance on this finding is reasonable is another question. I turn to it now.

B. *Is the officer's decision unreasonable?*

[20] As discussed above, a visa officer is not required to give extensive reasons. In the present case, the officer's reasons are very brief but they will pass review as long as they are sufficient to explain why the application for a study permit was rejected. The applicant contends that they are not. In one key respect, I agree with the applicant.

[21] The determinative question in the study permit application was whether the applicant had satisfied the officer that he would leave Canada at the end of his authorized stay. In deciding whether the applicant had discharged the onus on him in this respect, the officer had to weigh several different factors. Those factors are identified in the April 6, 2018 decision letter and in the GCMS notes. A key factor the officer relied on was the availability of similar programs locally. There is no dispute that this is a relevant consideration. The applicant had attempted to make the case that the local English programs were inadequate for his specific needs. In assessing this claim, the officer was entitled to draw on his or her knowledge of local conditions, as discussed above. The problem with the officer's reasons is that the bald statement that "[s]imilar programs [and] courses are readily available in the region and for much lower costs" leaves me unable to determine whether this is a reasonable finding of fact or not. There is no explanation for how the officer came to this conclusion (cf. *Ogbuchi* at paras 10-13; *Omijie* at para 22). Even simply mentioning some examples of what the officer considered to be similar local programs could have helped. While I am expected to defer to the officer's knowledge and experience, the application of a reasonableness standard of review does not require blind

submission to the officer's assessment (*Lake v Canada (Minister of Justice)*, 2008 SCC 23 at para 41).

[22] Visa officers have wide discretion in assessing the evidence and coming to a decision, as long as the decision is based on reasonable findings of fact (*Zhang v Canada (Minister of Citizenship and Immigration*), 2003 FC 1493 at para 7). Leaving me, as it does, unable to determine whether a key finding of fact is reasonable or not, the officer's decision in this matter lacks justification, transparency and intelligibility. As a result, it must be set aside.

[23] Finally, I should note that the applicant's affidavit in support of this application for judicial review sworn June 12, 2018, supplements in some material ways the information that was before the visa officer. The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18). The decision-maker decides the case on its merits. The reviewing court can only review the overall legality of what the decision-maker has done. This general rule admits of exceptions (as stated in *Access Copyright* at para 20 and *Bernard* at paras 19-28) but none apply here. As a result, I have not placed any reliance on the new information contained in the applicant's affidavit.

VI. COSTS AND OTHER RELIEF

[24] The applicant has requested his costs on this application.

[25] Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, provides that no costs shall be awarded in matters such as this unless special reasons warrant it. While the applicant's experiences since 2016 in attempting to obtain a study permit have doubtless been frustrating and stressful, the only decision before me on this application for judicial review is the April 6, 2018, decision. There is nothing in respect of that decision or my reasons for setting it aside that justify an award of costs.

[26] Further, the applicant requested in oral submissions at the hearing of this matter that, should the application be allowed, I direct that the application for a study permit be considered by a different visa post than the one in Ankara. In my view, it is sufficient that his application be reconsidered by a different decision-maker. I have no reason to think that that person, even if he or she is based at the Canadian Embassy in Ankara, will not assess the applicant with an open mind or determine it on the basis of the information submitted and the applicable law.

VII. CONCLUSION

[27] For these reasons, the application for judicial review is allowed, the visa officer's decision dated April 6, 2018, is set aside, and the matter is remitted for redetermination by a different decision-maker.

[28] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-1827-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the visa officer dated April 6, 2018 is set aside and the matter is remitted for redetermination by a different decision-maker.
3. No question of general importance is stated.
4. No costs are awarded.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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