

Date: 20090430

Docket: IMM-3634-08

Citation: 2009 FC 440

Toronto, Ontario, April 30, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ALI FAKHARIAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ali Fakharian is a citizen of Iran who applied for a study permit to allow him to attend college in Canada. His application was rejected, as he failed to satisfy the visa officer assessing his application that he was a *bona fide* student, or that he would leave Canada following the completion of his studies.

[2] For the reasons that follow, I am satisfied that the officer's decision was unreasonable. As a consequence, the application for judicial review will be allowed.

The Weight to be Afforded to the Visa Officer's Affidavit

[3] Before examining the reasonableness of the visa officer's decision, I should note that the officer has supplemented the reasons provided in the CAIPS notes with an affidavit explaining her decision to refuse Mr. Fakharian's visa application in considerably more detail.

[4] I have previously commented on the practice of filing affidavits from visa officers explaining or elaborating on their reasons for their decisions, explaining why such affidavits should be given little weight: see, for example, *Bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, at paras. 12-15, and *Alam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 182, at para.19.

[5] In this case, the visa officer's affidavit was sworn some five and a half months after she made the decision in issue. In the intervening months, the officer undoubtedly dealt with many other visa applications, which would inevitably have had a negative impact on her ability to recollect the specifics of Mr. Fakharian's case, and the precise thought process that she went through in arriving at her decision.

[6] Moreover, it is evident from the affidavit that the officer was aware that her decision was under judicial review, and that she had in fact reviewed Mr. Fakharian's memorandum of fact and law prior to swearing the affidavit. Her affidavit is essentially a point-by-point rebuttal to the arguments raised by Mr. Fakharian. In some respects, the affidavit provides entire lines of reasoning that are not reflected anywhere in the CAIPS notes.

[7] In these circumstances, I prefer to rely on the officer's contemporaneous reasons for her decision, as those reasons are recorded in the CAIPS notes.

Was the Visa Officer's Decision Unreasonable?

[8] Given that the visa officer's decision turned on findings of fact, I agree with the parties that the decision is to be reviewed against the standard of reasonableness.

[9] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47.

[10] I have several reasons for concluding that the decision in issue does not meet this standard.

[11] Firstly, the visa officer found that Mr. Fakharian had family ties to Canada and only "limited" family ties to Iran. While it is true that Mr. Fakharian has a sister living in this country, the officer's characterization of his family ties in Iran as "limited" is hard to understand. Mr. Fakharian is married. His wife was not accompanying him to Canada, and would have remained behind in Iran. Moreover, both of Mr. Fakharian's parents live in Iran, as do several of his siblings. Clearly, his family ties to Iran are substantial.

[12] The officer also found that Mr. Fakharian had “no sufficient funds to support himself in [Canada]”. Over \$10,000 in tuition had already been paid for Mr. Fakharian’s studies in Canada. Moreover, Mr. Fakharian’s sister and brother-in-law had undertaken to support Mr. Fakharian while he pursued his education in Canada. The sister is a medical doctor practicing in the city of Toronto. Not only does she have a substantial income, she and her husband also have significant savings and other assets. No consideration appears to have been given to any of this evidence.

[13] Finally, the officer says that there was “no compelling reason to study in [a] related field of previous university studies at college level”. Mr. Fakharian had explained that even though he had already obtained a university degree in his field, “hands-on”, applied training was available at Canadian colleges that differed from the academic studies that he had pursued in Iran. Mr. Fakharian’s employer also explained the company’s need for foreign-trained professionals to assist with the proposed expansion of the company. While we know that the officer did not find this explanation to be compelling, we do not know why, and the decision therefore lacks the justification, transparency and intelligibility required of a reasonable decision in this regard.

Conclusion

[14] For these reasons, the application for judicial review is allowed.

Certification

[15] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a different visa officer for re-determination; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3634-08

STYLE OF CAUSE: ALI FAKHARIAN v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Mactavish J.

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