Date: 20080619

Docket: IMM-3475-07

Citation: 2008 FC 767

Ottawa, Ontario, June19, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

HAMID GHOFRANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In April 2004, the Province of Québec accepted Mr. Ghofrani's application to immigrate to the Province as a skilled worker. In such circumstances, the Minister's responsibility is limited to an assessment of Mr. Ghofrani's admissibility to Canada and, if he is not inadmissible, to issue a permanent resident visa.

[2] In the unique circumstances of this case, it is my view that the Respondent's decision denying Mr. Ghofrani's application for permanent resident status must be set aside. In doing so, I wish to make it clear that, absent the unique circumstances set out below, the failure of the Applicant to attend a scheduled interview to satisfy admissibility concerns would otherwise have entitled the officer to reject the application.

I. BACKGROUND

[3] Mr. Ghofrani was born September 10, 1971, in Mashad, Iran. He received a Bachelor's degree from Amirkubir University in Tehran in 1995. He enrolled at the Illinois Institute of Technology in Chicago and received a Master's degree in 1999. He then enrolled at Frederick Taylor University in California in a further Master's program and his counsel asserts that he is currently enrolled in a Ph.D. program in finance and applied statistics at the University of California at Santa Barbara. He has also been gainfully employed in the hi-tech industry during much of the time he has been pursuing his graduate studies in the U.S.A.

[4] The history of Mr. Ghofrani's application is recorded in the Respondent's Computer Assisted Immigration Processing System (CAIPS). Unfortunately, the entries are not completely understandable by counsel or by the Court. Nonetheless, they disclose the following relevant facts.

- June 21, 2004 – Application noted and first entered into CAIPS.

- August 18, 2004 – A visa officer notes that there are a few gaps in personal history and gaps in residence history. Mr. Ghofrani was asked to provide the relevant information for

the missing time periods. It was also noted that an updated medical and an FBI check were required. In addition, this visa officer recorded the following entry in the CAIPS Notes:

> NO APPARENT CONCERNS
>
> DOCS APPEAR RELIABLE
>
> RECOMMEND WAIVER OF INTERVIEW
>
> (capitals in original)

- January 14, 2005 – A visa officer notes that the office has received the background information for the time periods requested from Mr. Ghofrani and the other requested information and indicates that the file is being pulled for a "SECDEC". There was no explanation provided in the record or at the hearing as to the meaning of "SECDEC".

- On January 19, 2005 - The CAIPS notes indicate that a background check is required and on January 21, 2005, that request is sent electronically to "EDE TEAM".

- February 11, 2005 – A status inquiry is received from Mr. Ghofrani and a reply sent stating:

> Your application involves consultation with other visa offices, government departments or agencies. We regret being unable to provide a specific time frame, but will reply as soon as possible.

- July 13, 2006 – Mr. Ghofrani sends a further email inquiring as to the status of this application. He writes:

> My medical exam expired on August 24, 2005. It has been two years since I took my first medical exam. The background check process

> has become so lengthy that it has affected everythink (sic) in my life. I don't know if I should continue my Phd at UC santa barbara or not. I have had admission from Concordia University as well and I have postponed my arrival 3 times so far. I know there is a huge number of files to process but I have never heard that something takes 2 years after the medical exam. I would greatly appreciate if you could give me feedback of why my case has taken so long. I appreciate any help in this regard.

There is nothing on Respondent's file indicating that any response was ever given to Mr. Ghofrani.

- October 3, 2006 – There are two entries this date which indicate that the request for a background check, made in January 2005, was not received or was not acted upon. No background check as requested in January 2005.

- January 19, 2007 – A visa officer notes "B INTVW REQUIRED FOR SUBJ". It is of some significance that after two and a half years with no notable change in the information concerning the Respondent, a visa officer only now considers that a background interview of Mr. Ghofrani is required.

- February 23, 2007 – An interview with Mr. Ghofrani is scheduled for April 20, 2007.

- April 16, 2007 – Mr. Ghofrani emails advising that he has an examination scheduled for the interview day and he requests that the interview be rescheduled. The same day the visa officer responds rescheduling the interview for June 28, 2007.

- June 5, 2007 – A note states that Mr. Ghofrani will not attend the interview scheduled for June 28, 2005 and that he has given no reason for not attending.

- July 17, 2007 – The visa officer notes:

> PI was scheduled x2 for B interview. He advised that he was unable to attend April 2007 appt due to his exam schedule. He was reschduled (sic) for June 2007. Although he advised us that he was unable to attend, he did not provide a reason. He is resident in the U.S – obtaining a USNIV is not/not an issue for him therefore.
>
> As he has failed to attend, I cannot be satisfied that he is not inadmissible, and that he meets the requirements of the Act. As a result, this application must be refused. N/S refusal ltr sent today. RPRF not paid, so no refund due.

[5] On July 17, 2007, the Citizenship and Immigration Canada officer issued a one page letter decision on the application for permanent residency. The relevant portion reads as follows:

> Your request for a rescheduled date was granted, and by letter of April 16, 2007, you were required to attend a interview on June 28, 2007. In that letter you were notified that, if you failed to attend the interview as scheduled, the examination of your application would be completed based on the material available in your application. You failed to appear despite the request made pursuant to subsection 15(1). I have received no reasonable explanation for your failure to attend.
>
> The letters requesting your attendance informed you that an examination was required to assess whether you were inadmissible and whether you met the requirements of the Act. … Following an examination of the material that was available, I am not satisfied that you are not inadmissible and that you meet the requirements of the Act. I am therefore refusing your application pursuant to subsection 11(1). [emphasis added]

II. JUDICIAL REVIEW APPLICATION

[6] The Applicant advances the following three grounds of review:

1. The visa officer breached the duty of procedural fairness by not providing the factual and legal basis for the visa refusal;

2. The visa officer breached the duty of procedural fairness by failing to advise the Applicant in the notice of interview that he may be inadmissible for admission to Canada; and

3. The visa officer breached the duty of procedural fairness in failing to provide him with the decision to refuse to reschedule the interview prior to refusing the application.

III. STANDARD OF REVIEW

[7] The Applicant asserts that he was denied procedural fairness by the visa officer. Questions of procedural fairness by a visa officer in this process are to be reviewed on the standard of correctness: *Lak v. Canada (Minister of Citizenship and Immigration*), 2007 FC 350.

IV. ANAYLSIS

[8] I turn first to the issue of the rescheduling of the interview.

[9] I find nothing improper in the conduct of the Officer with respect the circumstances surrounding the rescheduled interview. The Officer provided a rescheduled date immediately upon being informed that the first date conflicted with an examination Mr. Ghofrani was taking.

[10] The Applicant complains that the Officer failed to provide his reasons for denying the second adjournment. In fact, there is nothing in the record that indicates that Mr. Ghofrani ever informed the Officer why he was unavailable on that date. All the record indicates is that he sent back the appointment form having checked the box next to the phrase “No, I will not appear as scheduled”.

[11] Mr. Ghofrani provided an affidavit with his application for judicial review attesting that he faxed the consulate on June 4, 2007, advising that a conflict prevented him from attending and requesting that the interview be rescheduled. No such fax is contained either as an exhibit to the affidavit or in the official record. Had such a letter been sent one would expect Mr. Ghofrani to have followed up when no response was received in light of the fact that his earlier request for a new date received an immediate response. The Respondent thus acted properly based on the materials before it.

[12] Similarly, with respect to the second issue, I find that in this instance there was nothing unfair in the notice of interview failing to advise Mr. Ghofrani that the purpose of the interview was to assess his admissibility to Canada. As previously noted, in situations where the Applicant has been accepted by the Province as a skilled worker, the only role of the federal authority is to determine admissibility.

[13] However, it is fair to say that the form letter sent to persons such as this Applicant is not a model of clarity and transparency in this regard. That the purpose of the interview relates to issues of admissibility is more likely to be understood by a lawyer than a potential immigrant, even a skilled one. The form states the following as the reason for the interview: “an interview has been scheduled for you at our office to assess your application for permanent residence in Canada”.

[14] It is also troubling that the letter rejecting the visa application arguably misstates the content of the form letter. The rejection letter states: “The letters requesting your attendance informed you that an examination was required to assess whether you were inadmissible and whether you met the requirements of the Act”. As noted, the interview letters make no reference to the examination being required to assess whether the applicant was inadmissible – except inferentially as that is the federal authority’s role. Nonetheless, while the Respondent would be well advised to redraft the interview letter to reflect the wording used in the rejection letter, it cannot be said that the wording used created procedural unfairness to the Applicant.

[15] It was also argued that procedural fairness required that the interview letter specify the areas of concern with respect to the Applicant’s admissibility. In this respect, I concur with Justice O’Reilly who in *Lehal v. Canada (Minister of Citizenship and Immigration),* 2003 FC 1110 observed:

> In some contexts, fairness requires that a decision-maker give advance warning of a particular concern. This ensures that an adverse decision is made only on a full understanding of the facts.

[16] In *Lehal*, the applicant was interviewed to ascertain whether or not he was a genuine student. The questions asked of him were questions a student should be easily able to answer and Mr. Justice O'Reilly held, in that context, no advance notice was required.

[17] The difficulty in Mr. Ghofrani's case is that we have no indication whatever as to which of the several possible grounds of inadmissibility concerned the officer as there is nothing in the interview letter or the CAIPS notes that reflects the reason why the officer determined that an interview was required to satisfy his admissibility concerns.

[18] The interview letter in this case may be contrasted with that in *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642. The visa officer wrote to Mr. Chiau asking him to present himself for a personal interview and stated that there were reasons to believe that he may be a person described in paragraph 19(1)(c.2) of the *Immigration Act*, R.S.C. 1985, c. I-2, as amended. That provisions provided that members of organized crime were inadmissible to Canada. The letter specifically provided "the aim of the interview will be to ascertain if you have maintained any links with triads or other organized criminal elements".

[19] On judicial review Mr. Chiau argued that he had been denied procedural fairness in that the officer had not been provided with a summary of the information the officer had and thus had not been told the case against him. That submission was dismissed by Justice Dubé. In holding that the applicant had been accorded procedural fairness, he stated at paragraph 15:

> In my view, the visa officer fulfilled all the requirements of procedural fairness in the circumstances. Mr. Chiau was duly

> informed in advance, by letter before the interview, of the case he had to meet. The information provided by visa officer Delisle was sufficient to enable him to prepare himself for the interview and to disabuse visa officer Delisle of his concerns that he may be a member of an organization engaged in criminal activity. The letter refers specifically to paragraph 19(1)(c.2) and to Mr. Chiau's "links with triads".

[20] In this case, on the basis of the record one must question why the officer thought an interview was necessary. Justice Dawson considered the law with respect to reviewing decisions to require an interview in *Qazi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1177. She did so prior to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, however, in my view her observations and conclusions remain valid:

> [16] …[T]he current legislative regime continues to vest a discretion in an officer to require attendance at an interview. In determining the standard of review to be applied to the exercise of that discretion, it is necessary to consider the four factors that comprise the pragmatic and functional analysis (the existence of a privative cause, relative expertise, the purpose of the provision and the Act, and the nature of the question). Having regard to those factors:
>
> > (1) The requirement of leave to judicially review an officer's decision suggests that Parliament intended a limited right of review (see: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 31).
> >
> > (2) Expertise is a relative concept, and the expertise must be assessed in the context of the specific issue before the decision-maker. Officers will acquire expertise determining when an interview is required. The Court has no greater expertise in respect of this fact-based decision. This factor counsels deference.
> >
> > (3) The purpose of the provision is to facilitate the production of complete and accurate information. It

> does not require the balancing of the interests of various constituents. This factor suggests a stricter standard of review.
>
> (4) The decision whether to require interview is highly discretionary and fact-based. However, subsection 16(1) of the Act requires an applicant to produce "all relevant evidence and documents that [an] officer reasonably requires". This means that the decision to require information is not completely open-ended. It suggests an intent that there be some review of an officer's decision. [emphasis added]

> [17] In my view, these factors lead to the conclusion that the decision should be reviewed on the standard of reasonableness *simpliciter*. Review on this standard does not entitle the reviewing court to ask what the correct decision would have been. Rather, "[a]pplying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a 'margin of error' around what the court believes is the correct result". See: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 50.

[21] In *Qazi*, Justice Dawson noted that two different officers had both determined that further information was required and that an interview was required. On this basis and on a review of the CAIPS notes she found that it was not unreasonable to request that Mr. Qazi attend an interview “so as to provide further information so that an assessment could be made whether Mr. Qazi met the requirements for admission”.

[22] The facts in Mr. Ghofrani’s case differ from that of Mr. Qazi. The first officer who reviewed Mr. Ghofrani’s application was of the view that an interview was not required and recommended that it be waived. Further, unlike *Qazi*, all documents and information requested by

the Respondent were provided by Mr. Ghofrani in a timely manner. Lastly, there is no indication in the CAIPS notes at all as to why the second officer was of the view that an interview was required or anything to indicate why the materials on file were insufficient to satisfy him that Mr. Ghofrani was not inadmissible to Canada. This is largely where the problem arises in this case – the failure of the record provide any explanation for the decision to require an interview and, accordingly, the absence of any basis to understand why the officer was not satisfied that Mr. Ghofrani was not inadmissible to Canada.

[23] There are many reasons why an applicant for permanent residency may be inadmissible to Canada. These, broadly speaking, include: the potential burden that the person may impose on health or social services in Canada (s. 38) or that the applicant is unable or unwilling to support himself or herself (s. 39), or that the person poses a danger to the public due to medical condition (s. 38) or because of previous criminal activity (s. 35 and 36) or because of membership in an organized crime group (s. 37), or that the applicant is a person inadmissible on security grounds (s. 34), or the applicant is inadmissible because of misrepresentation or abuse of the immigration process (s. 40 and 41).

[24] In this instance, there is nothing in the CAIPS notes or in the letter requesting an interview or in the letter denying residency status that sets out directly or from which one may infer the basis on which the officer questioned whether Mr. Ghofrani was admissible. Accordingly, there is no basis on which the Applicant or this Court can determine why the officer made the decision that an interview was necessary. One might assume that it was the same reason that a background check

was requested some two and one-half years before, however, neither the Applicant nor the Court should be left to engage in speculation.

[25] In some cases, such as *Qazi*, the reasonableness of the interview request will be evident from the record, as where documents have been requested but not provided, or where there are unexplained gaps in the Applicant's history, or where more than one officer, reviewing the same material form the same opinion. Here, all requests made to the Applicant for information and documents were satisfied very promptly. There were no gaps in history. Two officers reviewed the file and only one concluded that an interview was necessary.

[26] I am troubled that an officer felt a background check was required and asked that one be conducted but the requested check was never received. The request for a background check was the reason this application languished for so long. One cannot help but sense that the perceived need for an interview of the Applicant made in January 2007, had more to do with the unexplained two and one-half year delay in processing this application than it did with the real need for a personal interview.

[27] In light of all of these facts, it is my view that the decision to request an interview was not reasonable – based on the record, it appears to have been made capriciously. This conclusion should not be interpreted to suggest that another officer on a review of the Applicant's application cannot determine that a personal interview is required. It does mean that he or she should indicate in the CAIPS notes or elsewhere the basis for reaching that decision.

[28] In this case, had the officer indicated the basis for the requested interview, or if the officer had stipulated in the letter indicating that an interview was necessary and the area or areas to be covered in the interview then one could determine the basis of the decision made and it would be unlikely that an application for judicial review would have succeeded.

[29] Further, the Respondent's decision denying the application cannot stand.

[30] As indicated in the rejection letter, once the Applicant failed to attend the interview, the officer had to assess the application based on the materials before him. In this case, as indicated previously, there was nothing in the application or the record of the Respondent, nor any note of the officer indicating in any way why he was not satisfied that the Applicant was not inadmissible. While the officer's decision is entitled to considerable deference, it is, in my view, an error of law to reject an applicant for a permanent resident visa on the basis that the officer is not satisfied that the Applicant is not inadmissible if there is no indication either directly by way of a statement from the officer, or indirectly from information in the record, as to the basis of that decision. To allow a decision to stand in such circumstances would permit officers to make arbitrary and capricious decisions as to admissibility, without any challenge.

[31] Accordingly, I am allowing this application for judicial review and remitting the application back for a redetermination before another officer. In all of the circumstances, including the fact that this application has been outstanding, through no fault of the Applicant, for three and one-half years,

I urge the Respondent to give the application priority and, if an interview is deemed necessary, that it attempt to have it done at a location closer to the Applicant's current residence, if possible.

[32] It was agreed during the hearing that the reasons for judgment would be provided to counsel before the issuance of a formal judgment so as to give them an opportunity to propose questions to be certified. Both indicated to the Court that no questions were certifiable. I agree.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed and the Applicant's application for a permanent resident visa is to be determined by a different visa officer in keeping with the Reasons for Judgment; and
2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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