

Federal Court



Cour fédérale

**Date: 20151014**

**Docket: IMM-316-15**

**Citation: 2015 FC 1163**

**Ottawa, Ontario, October 14, 2015**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**MOHAMMAD REZA GHORBAN KARIMI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Mohammad Karimi has brought an application for judicial review of the decision of an immigration officer to refuse his request to re-open his application for a permanent resident visa. Mr. Karimi's application for permanent residence was refused due to his failure to provide

information requested in an e-mail message that was sent to his immigration consultant [the disputed e-mail message]. Mr. Karimi says that he never received the disputed e-mail message.

[2] For the reasons that follow, I have concluded that the Minister has met his burden of establishing that the disputed e-mail message was sent. However, Mr. Karimi has successfully rebutted the presumption that the disputed e-mail message was received. Mr. Karimi was not given a sufficient opportunity to meet the requirements of his application for a permanent resident visa, and accordingly the Minister's refusal to re-open his file was unreasonable. The application for judicial review is allowed.

## II. Background

[3] Mr. Karimi is a citizen of Iran. He sought permanent residence in Canada as a member of the Economic Class. Mr. Karimi submitted his application in early 2010 to the office of Citizenship and Immigration Canada [CIC] in Damascus, Syria. In December, 2011, the application was transferred to CIC's office in Warsaw, Poland due to the availability of additional resources at that location. On February 24, 2012, Mr. Karimi received a letter via e-mail informing him of the transfer.

[4] At all relevant times, Mr. Karimi was represented by the Ottawa-based immigration consultants West Pass. All communications between CIC and Mr. Karimi were sent by e-mail to West Pass, in keeping with their usual practice.

[5] On February 13, 2014, West Pass received three e-mail messages regarding Mr. Karimi requesting medical documentation to complete his application. Mr. Karimi maintains that he never received a fourth e-mail message on that date with a request for updated information concerning various other matters.

[6] Notes in the CIC file for that day recorded that “UPDATE REQUEST LETTER SENT. 60 DAYS TO COMPLY. MEDS X 3 SENT.” However, the Global Case Management System [GCMS] outgoing correspondence screen recorded only three e-mail messages with medical requests on February 13, 2014. Mr. Karimi provided the medical information that was requested in the three e-mail messages whose receipt is not in dispute.

[7] On November 26, 2014, CIC sent a letter by e-mail to West Pass advising that Mr. Karimi’s application had been refused due to his failure to provide the updated information requested in the disputed e-mail message. West Pass immediately informed CIC that the fourth e-mail message had not been received, and requested that the file be re-opened. The request was refused.

### III. Issue

[8] The sole issue raised in this application for judicial review is whether CIC’s refusal to re-open Mr. Karimi’s application was reasonable.

IV. Analysis

[9] Whether Mr. Karini was given a sufficient opportunity to meet the requirements of his application for a permanent resident visa is a question of procedural fairness, and is therefore subject to review by this Court against the standard of correctness (*Patel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 900 [*Patel*] at paras 7-9). CIC's refusal to re-open the application involved an exercise of discretion, and is therefore subject to review against the standard of reasonableness (*Kaur v Canada (Minister of Citizenship and Immigration)*, 2015 FC 674 at para 32).

[10] This case is largely governed by *Patel* and *Ghaloghlyan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1252. The burden is initially on the Minister to establish, on the balance of probabilities, that a communication was sent. This is not an onerous burden to meet (*Ghaloghlyan* at para 10):

Proving that an email went on its way is verified by producing a printout of the sender's e-mail sent box showing the message concerned was addressed to the e-mail address supplied for sending, and as no indication of non-delivery, the e-mail did not "bounce back".

[11] Once the Minister has met the initial burden, a presumption arises that the communication was received by the intended recipient. This presumption may be rebutted, but it requires more than the recipient's mere assertion that the communication was not received (*Ghaloghlyan* at para 8). In *Yazdani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 885 [*Yazdani*], for example, the applicant's immigration consultant gave evidence that he

ordinarily responded to all CIC correspondence within one business day, and provided documentation to corroborate this. The consultant also demonstrated the steps he had taken to verify that the e-mail message had not been accidentally deleted or filtered out as “spam”. The consultant also deposed that no other incidents of failed delivery had been brought to his attention.

[12] In this case, I am satisfied that the Minister has met the initial burden of establishing that the disputed e-mail message was sent. The Minister filed the affidavit of Ms. Dabrowska-Duba, who confirmed that the disputed e-mail message was sent and attached a copy. Although no print-out of the sender’s e-mail sent box was provided, the copy of the e-mail message clearly stated the date and time when it was transmitted to West Pass’ e-mail address.

[13] However, I am also satisfied that Mr. Karimi has rebutted the presumption that the disputed e-mail message was received. As a preliminary matter, I note that CIC’s own records are not consistent. The disputed e-mail message did not appear in the outgoing correspondence screen of the GCMS notes, although three other messages with the same date were duly recorded. Only the CIC file notes confirmed that the fourth message had been sent. The Minister did not provide an explanation for this apparent inconsistency.

[14] Mr. Karimi responded promptly to the three other requests that were sent to him via West Pass on that day. There was nothing about the fourth e-mail message to distinguish it from the others, nor any incentive for Mr. Karimi to wilfully disregard it. He was represented by an

experienced immigration consultant who was clearly working to ensure the success of the application.

[15] Mr. Karimi filed the affidavit of Shirin Gilani of West Pass. Mr. Gilani deposed that West Pass has not experienced any difficulty with the receipt of e-mail messages from CIC in the past. Mr. Gilani uses the same e-mail address for all correspondence with CIC, and given the nature of his business it is reasonable to infer that missing or undelivered e-mail messages would soon be detected if this were a recurring problem. The three other e-mail messages that were sent by CIC on that day regarding Mr. Karimi all arrived without incident. Mr. Gilani confirmed that he checked his inbox and spam folders to ensure that the disputed email was not overlooked.

[16] The fact that the disputed e-mail message went missing shortly after the transfer of the file from Damascus to Warsaw may have a bearing on this case. As noted by Justice Mandamin in *Yazdani*, and quoted by Justice Gagne in *Patel*:

[52] The fact is that the Respondent chose to unilaterally transfer the Applicant's files from the Damascus visa office to the Warsaw visa office. There is of course no question the Respondent is entitled to do so especially considering it was doing so to address a backlog in processing of visa applications. However, the visa section in Warsaw did not separately notify the Applicant of the transfer nor did it otherwise verify that email communications was [*sic*] open between itself and the Applicant's Consultant.

[17] In this case, Mr. Karimi did receive notification that his file had been transferred from Damascus to Warsaw. However, the disputed e-mail message was one of the very next communications to be sent by CIC regarding Mr. Karimi. This, combined with the

inconsistencies in the Minister's records and Mr. Karimi's responsiveness to CIC's other requests for information, leads me to the conclusion that the disputed e-mail message was never received by Mr. Karimi. He was therefore not given a sufficient opportunity to meet the requirements of his application for a permanent resident visa. In these circumstances, CIC's refusal to re-open his file was unreasonable.

[18] I end these reasons with a short excerpt from Justice Mandamin's decision in *Yazdani*:

[57] In my view, applicants turning away from email usage would frustrate the Protocol objective of enhanced operational efficiency and would be contrary to the IRPA statutory objective of prompt processing to attain government immigration goals.

[58] The solution therefore does not seem to lie in cautioning or discouraging applicants from using email, but in finding a strategy to deal with the occasional email error, especially when an applicant has done everything on his or her end to accommodate email communication.

[19] For the foregoing reasons, the application for judicial review is allowed. Neither party proposed the certification of a question for appeal, and none arises in this case.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the matter is remitted to CIC for reconsideration by a different visa officer. No question is certified for appeal.

“Simon Fothergill”

---

Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-316-15

**STYLE OF CAUSE:** MOHAMMAD REZA GHORBAN KARIMI v THE  
MINISTER OF IMMIGRATION AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 14, 2015

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** OCTOBER 14, 2015

**APPEARANCES:**

Vinay K. Sarin

FOR THE APPLICANT

Amina Riaz

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Baker Law Firm  
United Centre  
Barristers & Solicitors  
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney  
Deputy Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT