Federal Court  Cour fédérale

Date: 20120425

Docket: IMM-6852-11

Citation: 2012 FC 485

Ottawa, Ontario, April 25, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SONER CAGLAYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Caglayan, is seeking judicial review of the decision of a visa officer at the Embassy of Canada in Ankara, Turkey [visa officer], dated September 16, 2011, rejecting the applicant's application for permanent residence for failure to provide the additional documents sought for in a prior notice which was apparently sent to the applicant on July 13, 2011.

[2] For the reasons that follow, this application for judicial review should be dismissed.

FACTUAL BACKGROUND

[3] The visa officer received Mr. Caglayan's application for permanent residence under the investor class on June 27, 2011. On June 29, 2011, the applicant's consultant received a letter from the Embassy acknowledging receipt of the application. On September 16, the applicant's consultant received another letter informing him that the application was refused because the applicant had failed to respond to an earlier notice of the visa officer, dated July 13, 2011 [the Letter], asking him to submit, within the following 60 days, supporting documents with respect to his personal net worth statement, namely the title deeds of two commercial places of which he alleged being the owner.

[4] The applicant alleges that neither his authorized consultant, whose address was provided as the applicant's mailing address in the main application form, nor himself, received the Letter. The applicant submits that on September 29, 2011, i.e. two weeks after receipt of the refusal letter, his consultant sent an email to the Embassy stating that he never received any such request for additional documents and asked for a few days to comply with the requirement. The Embassy never replied to this email.

[5] The applicant states that he is unaware of whether the Letter was properly sent to him but there is no reason why he would not have received it if the Letter was properly addressed to his consultant. In fact, as the applicant's consultant attests in his affidavit, he has never had problems of this nature that could suggest a communication problem resulting from the way he manages his postal correspondence, or from the postal system, that could explain the non-reception of the Letter. The applicant's consultant also mentions that he never received the information through another

means of communication such as email or fax, all of which were working properly in his office between June 29 and September 27, 2011.

[6] Furthermore, the applicant contends that the address mentioned on the envelope that carried the refusal letter differs from the one that he provided as his mailing address, both in response to question 14 of his application form and in the authorization form for the applicant's consultant to act on his behalf. The authorization form also included a postal code which did not appear on the envelope.

[7] The Court notes that, in fact, the address of the applicant's consultant appears with slight changes in format on the Embassy's envelope. The applicant provided his address following the Turkish postal address format in which the building number and the apartment number, followed by the floor number, appear after the street name. However, in the Embassy's Global Case Management System (GCMS), this information was converted into the apartment-building-street format and the floor number is omitted.

[8] The respondent has filed a copy of the Letter and an affidavit of a Registry Clerk working at the Canadian Embassy in Ankara, attesting that she personally sent the Letter by regular mail, using a label printed off the GCMS. The Registry Clerk also attests that two notes appear on the paper cover containing the applicant's file: one from the visa officer stating "Pls send PF ltr" and one from the Clerk herself indicating the mention "sent" followed by her initials.

[9] The Registry Clerk states that the GCMS uses mandatory fields for all addresses although efforts are made to ensure that all of the required information is included in the addresses in a way that it makes sense for the Turkish postal service. The Registry Clerk mentions that the floor number and the postal code are not required information and that the same format is used in all correspondence sent to the address used by the applicant's consultant, including the acknowledgement letter of June 29, 2011 and the refusal letter of September 16, 2011, which the applicant did receive. The Registry Clerk lastly mentions that the Letter was never returned to the Embassy.

ISSUES AND STANDARD OF REVIEW

[10] The applicant submits that there is a breach of procedural fairness because there was a failure by the visa officer to provide the applicant with a meaningful opportunity to submit the required additional documents. Whether the respondent did or did not send the Letter, the refusal decision should be quashed, unless the respondent can demonstrate that the applicant has made a mistake which caused non-reception of the Letter. Conversely, the respondent contends that the Letter was properly sent to the applicant at the correct address. There is no indication of delivery failure. Therefore, the risk of non-delivery should rest on the applicant. Accordingly, there has been no failure to the duty to act fairly since the Letter clearly invited the applicant to produce additional documents.

[11] Neither party raised the question of the applicable standard of review. However, the issue whether an applicant has been given proper notice and a meaningful opportunity to respond by submitting additional documents before a negative treatment is given to his application for visa on

the basis of an apparent failure to comply with the notice is one of procedural fairness. Accordingly, the impugned decision should be assessed against the standard of correctness: *Yazdani v Canada (Minister of Citizenship and Immigration),* 2010 FC 885 at paras 23-25 [*Yazdani*].

ANALYSIS

[12] Before determining whether the respondent has satisfied its duty to provide the applicant with a meaningful opportunity to respond to the visa officer's concerns, the Court rejects the applicant's argument that the minor changes made in the GCMS to the mailing address as it appeared in the application form would have resulted in a delivery failure. If two other letters related to the applicant's case have been successfully delivered to the consultant's business address using the GCMS format, not to mention the letters that the consultant most probably receives from the Canadian Embassy for other clients that he represents, there is no reason to believe that this letter was exceptionally wrongly directed to another address.

[13] That said, according to the jurisprudence, the visa officer has a duty to prove that the notice was actually sent or "went on its way" to the applicant but has no duty to prove that the applicant received the letter. In practice, this means that the risk of a communication failure is borne by the respondent if it cannot be proved that the communication in question was sent by the visa officer or another person of the Embassy staff (*Ilahi v Canada (Minister of Citizenship and Immigration),* 2006 FC 1399 at para 8). On the other hand, once the respondent proves, on a balance of probabilities, that the communication was sent, it is the applicant who bears the risk involved in a potential failure to receive the communication (*Yang v Canada (Minister of Citizenship and Immigration)* 2008 FC 124 at para 8 [*Yang*]; *Kaur v Canada (Minister of Citizenship and*

Immigration), 2009 FC 935 at para 12; *Alavi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 969).

[14] In *Ghaloghlyan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1252, the Court recently addressed the question of what constitutes sufficient evidence to prove that the Letter was sent. The comments made by my colleague Justice Campbell at paras 8-10 are enlightening:

> Thus, by considering the decisions in *Kaur* and *Alavi* together, I find that the principle to be applied in communication cases is as follows: upon proof on a balance of probabilities that a document was sent, a rebuttable presumption arises that the applicant concerned received it, and the applicant's statement that it was not received, on its own, does not rebut the presumption.
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> Thus, the question becomes: what does it take to prove on a balance of probabilities that a document was sent? In my opinion, to find that a document was "correctly sent", as that term is used in *Kaur*, it must have been sent to the address supplied by an applicant by a means capable of verifying that the document actually went on its way to the applicant.
>
> For example, with respect to documents, proving that a letter went on its way is verified by sending it by registered mail and producing documentation that this was the manner of sending, or by producing an affidavit from the person who actually posted the letter. Proving that a fax went on its way is verified by producing a fax log of sent messages confirming the sending. 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". Other evidence that a document went on its way might suffice; the determination in each case depends on the evidence advanced.

[15] However, the jurisprudence has also established that when there is objective evidence that the correspondence was not received because of a proven communication failure, it is the

respondent who bears the risk. In other words, the respondent has not only the obligation to put the communication on its way to the addressee but also to choose a reliable and efficient means of communication. As Justice Mandamin stated in *Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024 at para 40, "the respondent has an obligation to deal with the Applicant fairly which goes beyond simply pressing the email send button."

[16] The case of *Yazdani*, above, involved six applications for a permanent resident visa filed by the applicants at the visa office at the Canadian Embassy in Damascus, Syria. The application files were subsequently transferred to the visa office at the Canadian Embassy in Warsaw, Poland. At issue before the Court was an email letter from the visa officer in Warsaw requesting further information about the applicants' work experience and other allegations they had made in their applications. The applicants claimed that the email request, to which they had not responded, was never received by their representatives.

[17] The Court found that the automatically generated Delivery Status Notification (DSN) which indicates that the message has been successfully *relayed* to the recipient does not mean that the message has been *delivered* because the notification itself mentions that the message may not be generated by the destination but from an intermediate server. Moreover, at para 52 of the decision, Justice Mandamin mentioned that although there did not appear to be any fault on the part of the visa officer who sent the emails (save for a misunderstanding of the DSN message), the respondent could be faulted for having unilaterally decided to transfer the applicants' files from one country to another without notifying the applicants of the transfer and without taking the necessary steps to

verify that email communications were open and functioning between the visa office in charge of the files and the applicants' consultants.

[18] Similarly, in *Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024, which presented very similar facts to *Yazdani*, the application for judicial review was granted on the basis of evidence of failed email communication, including an expert opinion, although the Court was satisfied that the visa officer has acted in good faith.

[19] In the case at bar, I am ready to accept that the applicant's consultant adequately managed his postal correspondence and is not at fault for the non-delivery of the notice. However, contrary to what happened in *Yazdani* or in *Zare*, above, I am unable to find any fault or shortcoming on the part of the respondent or any evidence or indication of failed delivery. The simple fact that the applicant has produced evidence that his consultant did not receive the Letter must be weighed with the other evidence on record, and I am satisfied here, on a balance of probabilities, that there was compliance by the respondent to the duty to give notice (*Yang*, above, at paras 8-9). Moreover, I respectfully disagree with the applicant's reading of *Yazdani*, above, suggesting that whenever there is no evidence of fault of any party the respondent must assume the risk of non-delivery. This amounts to assume that the respondent has not only to prove that the mail was sent to the applicant, but also that it was eventually received by the latter. Such proposition or interpretation would be contrary to past jurisprudence of the Court.

[20] In final analysis, I am satisfied that, on a balance of probabilities, the Registry Clerk did put the Letter on its way to the applicant, using the correct address and a reasonably reliable means of

communication. Moreover, I find that the applicant has not rebutted the presumption by demonstrating that there has been an indication or a risk of delivery failure, or otherwise. Therefore, in absence of a duty bearing on the respondent to establish receipt of the Letter by the addressee, I must find that there has been no breach of procedural fairness in the circumstances, and this, despite the allegation that the applicant's consultant did not receive the Letter.

[21] For all these reasons, the present application for judicial review must be dismissed, but it appears necessary to make a number of additional comments in order to secure the just, most expeditious and least expensive determination of the suit to this proceeding.

[22] The Court notes that the visa officer who made the impugned decision is already seized of a request for reconsideration, which was left unanswered, most likely because of the evidence of the present judicial review proceeding. However, in practice, because of the short delays, the applicant was forced to institute the present judicial review proceeding. Certainly, there could have been a prompt administrative and less expensive solution than this judicial proceeding. The sought documents had been finally provided to the agent and there was certainly a reasonable excuse for not having sent same earlier. However, it would have been simpler and less costly for both sides if the visa officer had simply addressed the merit of the visa application following the applicant's prompt request for reconsideration.

[23] In other words, while the visa officer may have acted in the strict legality in rendering the impugned decision at the time it did so, the requirement that justice must not only be done but also appear to be done is such that the immigration system can function only with the collaboration of

eminently reasonable beings. The maintenance of an appropriate equilibrium in the immigration system goes beyond formal justice and this is where equity comes into play. Visa applications are not court proceedings and visa officers are not tribunals tasked with the mandate to finally decide opposing claims. The *functus officio* principle should not be applied strictly in this case. Accepting that the applicant is not at fault, it would be highly unfair and unjust today that his visa application file be simply closed, that he be required to pay another processing fee, and that he has to suffer unnecessary delays in the treatment of a fresh application. Accordingly, it would only be fair and just in the circumstances that the visa officer reconsider its earlier decision in light of the new documentation tendered with the reconsideration request. In dismissing the present application on the basis that, technically speaking, there has been no breach of the duty to act fairly, I can only urge the Minister to be sensitive to this reality.

[24] Neither party has proposed a question of general importance for certification and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question of general importance is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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