Federal Court Cour fédérale

Date: 20211020

Docket: IMM-886-20

Citation: 2021 FC 1104

Ottawa, Ontario, October 20, 2021

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

CARL ANDERSON ADAMS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Carl Anderson Adams, seeks judicial review of a January 22, 2020 decision [Decision] of an Officer of Immigration, Refugees and Citizenship Canada [IRCC] that refused his application for permanent residence as a member of the Spouse or Common-law Partner in Canada class, on the basis of inadmissibility for criminality under paragraph 36(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The issue before the Court is whether the Applicant was denied procedural fairness. The Applicant asserts that a request for an extension of time to file a rehabilitation application was properly made, but was not considered by the Officer who made the Decision.

[3] For the reasons that follow, I find that the evidence does not support a finding that a request for an extension of time was pending before the Officer when the Decision was made or that there has been any breach of procedural fairness. As such, the application is dismissed.

I. Background

[4] The Applicant, a citizen of Barbados, entered Canada as a visitor on March 3, 2016. He did not extend his temporary resident permit, which expired on May 30, 2017, and remained in Canada without authorization. The Applicant married his sponsor on February 12, 2017 and applied for permanent residence in Canada under the Spouse in Canada class on July 18, 2017.

[5] On December 7, 2019, the Applicant received a procedural fairness letter [PFL] informing him of his potential inadmissibility due to prior convictions in Barbados from 2001 and 2004. The Officer equated these convictions to indictable offences under the *Criminal Code*, RSC 1985, c C-46 and indicated that the Applicant would not be eligible for deemed rehabilitation, although individual rehabilitation might be possible. The PFL gave the Applicant 30 days to submit a rehabilitation application. The PFL indicated that if the Applicant did not apply for rehabilitation or make any further submissions, then a decision regarding the Applicant's compliance with the *IRPA* would be made based on the information on file, and might result in a refusal of the permanent residence application.

[6] On January 6, 2020, the day of the deadline under the PFL, the Applicant sent an email to the IRCC asking for leniency and reconsideration of his application in view of the lapse of time since his offences and his more recent circumstances and behaviour, including his family situation.

[7] On January 22, 2020, the Officer issued the Decision. The Officer considered the January 6, 2020 email, but found that as no rehabilitation application had been filed, the Applicant was inadmissible. Although not specifically requested, the Officer also went on to consider that there were insufficient grounds to justify granting an exemption for Humanitarian and Compassionate reasons.

[8] The Applicant has submitted an affidavit in this judicial review proceeding, contending that he sent a letter by email attachment to IRCC on January 2, 2020, requesting an extension of time to obtain the documents required for a rehabilitation application. The Applicant argues that the failure of the Officer to acknowledge and consider his request for an extension of time constitutes a breach of procedural fairness.

[9] The Respondent disputes that any extension letter was received by the IRCC and has submitted an affidavit from an Operations Manager of the IRCC [Thyriar Affidavit] stating that a search of the general inbox was made, but that no email was received. The Thyriar Affidavit relies on information and belief from the Officer who rendered the Decision and from the supervisor of the Officer's unit.

II. Issues and Standard of Review

[10] The sole issue raised by this judicial review is whether the Applicant has been denied procedural fairness. To address this issue, the Court must determine whether there was a request for an extension of time to submit a rehabilitation application before the Officer that went unanswered.

[11] The standard of review for questions of procedural fairness is best reflected by the correctness standard, although they are not strictly speaking subject to a standard of review analysis. Instead, such questions are to be reviewed from the perspective of whether the procedure followed by the decision-maker was fair and just: *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 at para 13.

III. Analysis

[12] The parties agree that where a reasonable and timely request for an extension of time has been made and is pending before an Officer, the request should be considered before a decision is made (*Venkata v Canada (Citizenship and Immigration)*, 2017 FC 423 at paras 75-76; *Hussain v Canada (Citizenship and Immigration)*, 2012 FC 1199 at paras 6-11; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCR 817).

[13] The Applicant contends that his affidavit evidence is sufficient to establish that a request for an extension of time was sent to the IRCC. As such, it should be presumed that the request was received and pending.

[14] The Applicant refers to *Karimi v Canada (Citizenship and Immigration)*, 2015 FC 1163 at paragraphs 10-11 and *Ghaloghlyan v Canada (Citizenship and Immigration)*, 2011 FC 1252 at paragraphs 8-10, which dealt with the issue of the burden placed on the respondent to establish email correspondence was sent from an officer to an applicant where there was an assertion from the applicant that the communication was not received. In those cases, once it was shown that the email correspondence was sent to the address on file and was "on its way", it was presumed to be received, unless rebutted and established otherwise by the evidence.

[15] The Respondent asserts that the Applicant has not met his burden to establish that an extension request was before the Officer.

[16] It relies on *Asoyan v Canada (Citizenship and Immigration)*, 2015 FC 206 [*Asoyan*]. In *Asoyan*, at paragraph 24, it was recognized that email communication does not lend to the same reliability of receipt as facsimile. As such, it was proposed that the sender's obligations should be broader and should include exhausting reasonable mechanisms on email programs to ensure email transmissions are received (see also *Patel v Canada (Citizenship and Immigration)*, 2015 FC 900 at para 34).

[17] In *Asoyan*, at paragraphs 18-19, it was recognized that subsequent correspondence between the parties in question may be informative as to whether email correspondence has been received. Where there is an indication that it has not, it may require follow-up by the sender.

[18] The correspondence in question here is from the Applicant to the Respondent. It was not included by the Respondent in the Certified Tribunal Record [CTR] as being a document that was before the Officer who rendered the Decision.

[19] It is well established that where a document does not appear in the CTR, the Court will presume that the document was not before the immigration officer, unless there is evidence from the applicant establishing the contrary. A bare assertion is not enough. The burden lies with the applicant to demonstrate that the document was before the decision-maker (*Adewale v Canada (Citizenship and Immigration)*, 2007 FC 1190 at para 11; *El Dor c Canada (Citoyenneté et de l'Immigration)*, 2015 FC 1406 at para 32; *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16).

[20] In this case, the Applicant has submitted an affidavit, which states that an extension request letter was sent as an attachment by email on January 2, 2020. The affidavit attaches as an exhibit a printout from the Applicant's spouse's Gmail account, showing an unlabelled message from January 2, 2020 at 08:42 to the IRCC email address.

[21] Unlike other correspondence sent by the Applicant, there are no identifiers on the email to indicate what the message is about or that it pertains to an active IRCC file, and there is no

content to the email. The printout shows only that the message has a document attachment, but the document is not labelled with any identifier. It appears on the printout as "Document (5)" only.

[22] The exhibit includes as a separate page a copy of an extension request letter that the Applicant states corresponds with the document that was attached to the message on January 2, 2020. I agree with the Respondent, that neither the email printout nor the document itself indicate that this letter is "Document (5)".

[23] The January 2, 2020 email is not accompanied by an acknowledgement of receipt or confirmation of read receipt and there is no printout from the email inbox to show that there was no bounce-back to the message. It is unclear from the printout whether it is a printout of the message from an email sent box. The affidavit does not speak to this issue.

[24] Other evidence from the record suggests that any January 2, 2020 message was not properly received and was not pursued in follow-up by the Applicant.

[25] First, the Applicant acknowledges that he did not receive any response to the proposed January 2, 2020 email. In contrast, he attaches a confirmation of receipt received from the IRCC five days later, on January 7, 2020, to the separate email submission made on January 6, 2020.

[26] The lack of identifiers on the January 2, 2020 email and the fact that it was not acknowledged, when the separate email response sent four days later was acknowledged the very

next day, casts serious doubt that any earlier message was recognized and properly received by the IRCC.

[27] Second, the Applicant's January 6, 2020 response is not written in a manner that would suggest that the Applicant is continuing to pursue an extension. The Applicant's January 6, 2020 email informally responded to the PFL without any mention of the January 2, 2020 correspondence, a requested extension, or any continuing efforts by the Applicant to obtain documents from Barbados for the purpose of compiling a rehabilitation application.

[28] Third, there is no evidence that the Applicant did any follow-up with the IRCC as to the status of any pending extension request either before or after the Decision. Some follow-up from the Applicant would have been expected in these circumstances, particularly where the extension was of such importance and no response to the request was received.

[29] The Respondent asserts that it did not receive the Applicant's January 2, 2020 email. It submits the Thyriar Affidavit in support of this assertion. The Applicant argues that the Thyriar Affidavit should be struck, or in the alternative afforded little weight, as it is largely based on hearsay evidence. While I agree that the Thyriar Affidavit can only be given limited weight in view of inconsistencies and its reliance on information and belief, in my view this is of no moment. The Applicant has not met his burden of establishing that an extension request was before the Officer at the time of the Decision. As such, there is no basis for finding a breach of procedural fairness.

[30] As there was no argument raised that the Decision was otherwise unreasonable, these findings are sufficient to dismiss the application.

IV. Conclusion

[31] The application is dismissed.

[32] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-886-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-886-20
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