Federal Court  Cour fédérale

Date: 20100121

Docket: IMM-3250-09

Citation: 2010 FC 75

BETWEEN:

LIPING ZHANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

BARNES J.

[1] Once again the Court is faced with the problem of a failed e-mail communication between the parties leading to a failure to respond and to the rejection of an application for a permanent residence visa. The question for determination is whether the Applicant had created a reasonable expectation that important written communication would only be conducted by regular mail.

I. Background

[2] Ms. Zhang applied for a permanent residence visa on September 10, 2006. Her application was made under the simplified process which initially consisted of a three-page form (IMM0008) outlining basic personal information and a Use of a Representative form (IMM5476). In the application form, Ms. Zhang provided her residential address in China and the postal address for her Vancouver lawyer, Lawrence Wong. She offered no personal e-mail address in the space provided. The application form contained the following caveat with respect to the designation of a postal address:

> All correspondence will go to this address unless you indicate your e-mail address below thereby authorizing correspondence, including file and personal information to be provided to the specified e-mail address.

[3] In the Use of a Representative form Ms. Zhang provided the postal address for Mr. Wong along with his e-mail address.

[4] The record establishes that on December 7, 2006, the visa officer sent an acknowledgement of Ms. Zhang's application to Mr. Wong by e-mail. That letter came with an explicit statement that, with some limited exceptions, further correspondence would not be accepted until requested. Those exceptions included changes of address or contact information such as a change of e-mail address. Mr. Wong took no issue at the time with this method of communication although he has since deposed that "we believed that any important communication, especially one requiring response, would be sent to us" by regular mail. Mr. Wong's affidavit indicates that he found it "strange" that this initial communication came to him by e-mail, but that he saw no need in the

circumstances to provide clarifying instructions to the Canadian Embassy in Beijing, China (Embassy).

[5] On August 15, 2008, a generic e-mail was generated by the Embassy addressed to Mr. Wong's e-mail address. It requested documents in support of Ms. Zhang's visa application. A copy of that e-mail is attached as an exhibit to the affidavit of Daniel Unrau, First Secretary (Immigration) at the Embassy and it sets out the date and time of sending and Mr. Wong's correct e-mail address. The visa officer's CAIPS notes also state that this e-mail was sent on the date stated to Mr. Wong's e-mail address. It was this e-mail that was never answered, and on March 19, 2009, Ms. Zhang's visa application was refused.

[6] Mr. Wong's affidavit does not state that the e-mail of August 15, 2008 was not received in his office; only that he was not aware of receiving it and that he may have inadvertently deleted it or that it may have been automatically filtered out as spam.

[7] In contrast, Mr. Unrau deposed that e-mail is a preferred method of communication because it is "reliable, timely and convenient for both the client and our office." He also stated that no report was received by the Embassy that this e-mail to Mr. Wong was not delivered as intended.

II. Issue

[8] Did the visa officer breach a duty of fairness by communicating with the Applicant's counsel by e-mail?

III. Analysis

[9] Notwithstanding Ms. Chun's very capable submissions and the unfortunate consequences that have befallen her client, I am unable to conclude that the visa officer's handling of Ms. Zhang's visa application breached the duty of fairness.

[10] I do agree that the language of the visa application form and the Use of a Representative form could be clearer with respect to the potential use of e-mail communication. Nevertheless, when those documents are considered together, no reasonable expectation could arise that the Embassy would not use e-mail to communicate with Mr. Wong; and even if such an expectation could arise it was surely displaced when Mr. Wong received an e-mail from the Embassy and did nothing about it at the time. Indeed, if Mr. Wong found it strange that an e-mail had been sent to the e-mail address provided by his client or himself, it is stranger still that he neglected to advise the Embassy not to use that method again. The Embassy did, after all, advise him that changes in contact information would be accepted and acted upon.

[11] It is also of some significance that Mr. Wong did not say that the Embassy's e-mail was not received in his office. The evidence supplied by the Respondent establishes that it uses e-mail to communicate with visa applicants and representatives in accordance with Citizenship and Immigration Canada's (CIC) e-mail protocol and that the protocol was followed in this case. The Embassy also had no indication that its e-mail was not received.

[12] Mr. Unrau was not cross-examined on his affidavit with a view to testing his assertion about the general reliability of e-mail communication to and from the Embassy. I also do not know if Mr. Wong took any steps to determine whether this e-mail was blocked or inadvertently deleted after receipt nor does his affidavit speak to the steps he took to ensure that e-mails from the Embassy were not impeded or treated as spam. Indeed, he offered no evidence concerning the sensitivity of his system for blocking unwanted e-mails or his propensity for deleting e-mails before reading them.

[13] The inference I draw from the evidence before me is that the August 15, 2008 e-mail request to Mr. Wong was received in his office and either inadvertently blocked or deleted.

[14] Against this factual background I can only conclude that responsibility for the communication breakdown that occurred rests with the Applicant and her counsel. It was Ms. Zhang and her counsel who provided the e-mail address to the Embassy through CIC's Use of a Representative form and they took no issue with the Embassy's initial use of e-mail to acknowledge receipt of the visa application. An e-mail address provided on the face of a Use of a Representative form is, in my view, an open invitation to the Embassy to use that methodology. It is well-known to experienced immigration counsel like Mr. Wong that embassies, consulates, and high commissions regularly use e-mail to communicate, and as noted by Justice Judith Snider in *Yang v. Canada (Minister of Citizenship and Immigration)* (2008), 2008 FC 124, 79 Admin. L.R. (4th) 195 at para. 14 the sheer volume of visa applications handled by CIC offices must be considered when assessing its business practices on fairness grounds. If there is a concern that the receipt of e-mail is

unreliable because of automatic filtering or the like, all that counsel need do is to withhold the e-mail address. To my thinking this case is indistinguishable from the decision in *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 935, [2009] F.C.J. No. 1530 (Q.L.), where I held the following at paras. 11-12:

> **11** Mr. Hayer's assumption that the High Commission would continue to communicate by regular mail was, as the facts attest, a dangerous one. It was not reasonable for him to expect the High Commission to figure out from the absence of an e-mail address on his last communication that his e-mail was no longer functioning. This was a risk which Ms. Kaur and Mr. Hayer could have avoided by the simple step of advising the High Commission that the previously identified e-mail address was no longer valid, just as Mr. Hayer had done for his postal address. E-mail is, after all, a standard method of business communication. It is fast, efficient and reliable and it was not unreasonable or unfair for the High Commission to have relied upon it. In these circumstances the failed e-mail delivery was solely caused by Mr. Hayer's unwarranted assumption and by the failure to provide complete and accurate contact information to the High Commission.
>
> **12** In summary, when a communication is correctly sent by a visa officer to an address (e-mail or otherwise) that has been provided by an applicant which has not been revoked or revised and where there has been no indication received that the communication may have failed, the risk of non-delivery rests with the applicant and not with the respondent. […].

[15] In the result this application will be dismissed. The parties requested an opportunity to propose a certified question and the Applicant will have seven (7) days to do so. The Respondent will have seven (7) days thereafter to respond. The Court's judgment will then issue.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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