Federal Court  Cour fédérale

Date: 20140910

Dockets: IMM-673-14
IMM-674-14

Citation: 2014 FC 856

Ottawa, Ontario, September 10, 2014

PRESENT: The Honourable Madam Justice Gagné

Docket: IMM-673-14

BETWEEN:

PRITESHKUMAR PR PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-674-14

AND BETWEEN:

JAYSHREE HETALKUMAR BHATTY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

Overview

[1] These applications for judicial review raise the question as to which of the sender or the recipient, in the context of email communications between an applicant and a visa officer, must bear the consequences of an email that was allegedly sent but allegedly not received.

[2] At the request of counsel for the parties, these cases were heard concurrently, as they raise the same issue. The facts of both cases are identical but for the fact that in *Bhatty* v *Canada (Minister of Citizenship and Immigration*), IMM-674-14 [*Bhatty*], when the applicant learned that his application was refused for having failed to reply to an email from the visa officer, he asked that visa officer to reconsider his decision, taking into consideration the missing information. The applicant, in *Patel* v *Canada (Minister of Citizenship and Immigration*), IMM-673-14 [*Patel*]), did not ask for a reconsideration of his permanent residence application.

[3] The applicants therefore challenge, under subsection 72(1) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], the decisions by two different visa officers [Officer or Officers] at the Immigration Section of the Canadian Consulate General in New Delhi, India, whereby their respective application for a permanent resident visa pursuant to the Federal Skilled Worker program were refused. The Officers found that the applicants simply failed to provide the requested documents. The applicants contend that their common immigration consultant did not receive the correspondence requesting further information. The immigration consultant

claims that in addition to these two files, the same factual outcome has occurred to a third case he was handling, from that visa office, during that time frame.

[4] For the reasons discussed below, these applications for judicial review will be dismissed.

Background of Mr. Patel's file

[5] Mr. Patel is an Indian citizen who hired Mr. Pranay Shah, member of the Immigration Consultants of Canada Regulatory Counsel with 13 years experience in the industry, for his application for permanent residence.

[6] On March 8, 2013, the Officer allegedly emailed the consultant requesting certain medical documents, passports, and right of permanent residence fees within 45 days in order to assess the application. There is a notation in the Global Case Management System [GCMS] notes from that day indicating that the Officer received confirmation that the email was sent. (Mr. Patel draws our attention to Operational Bulletin 327-July 18, 2011, which instructs, at page 5, that email that is "sent" (without necessitating proof of receipt) is to be automatically registered in the GCMS as "sent.")

[7] On January 18, 2014, the Officer reviewed Mr. Patel's file and noted in the GCMS that the requested information had not been provided by the applicant or his consultant.

[8] That same day, Mr. Patel was sent a letter denying his application based on the information that was available to the Officer at that time. It is clear from reading the letter that

the missing documentation was determinative to the Officer's decision. This is the impugned decision.

Background of Mr. Bhatty's file

[9] Mr. Bhatty is an Indian citizen who also hired Mr. Pranay Shah as his immigration consultant for his application for permanent residence.

[10] On March 9, 2013 (the day after the email was sent in Mr. Patel's file), the Officer allegedly emailed the consultant requesting certain documents including passports and medical examinations within 45 days in order to assess the application. The letter was sent by an assistant and a copy of the email is in the sent folder of the Immigration Section Unit (it is attached to the Visa Officer's affidavit). There is a notation in the GCMS notes from that day indicating that the Officer received confirmation that the email was sent. (Mr. Bhatty also draws our attention to Operational Bulletin 327-July 18, 2011).

[11] On December 9, 2013 the Officer reviewed Mr. Bhatty's file and noted in the GCMS that the requested information had not been provided by the applicant or his consultant.

[12] On February 13, 2014, the applicant was sent a letter denying his application based on the information that was available to the officer at that time. It is clear from reading the letter that the missing documentation was determinative to the Officer's decision. This is the impugned decision in Mr. Bhatty's file.

Common evidence

[13] In his affidavit, Mr. Pranay Shah contends that neither his clients nor his office received the emails of March 8 and 9, 2013 allegedly sent by the visa office, nor any other follow-up communication other than the refusal letters. It is his policy to respond to information requests from visa officials within one day of reception. He has never previously had email problems with respect to his immigration cases, nor has anyone reported sending him an email that was not received. He submits that he conducted a full investigation into whether there could have been an error in his email reception system (spam folders and the like), but found nothing to suggest that this was the case. All the more, he contends that he had three cases, including the present matters, during the same period, from the same office, refused because the applicants in question failed to provide updated information and documentation required by the Officer's alleged emailed requests.

Issue and standard of review

[14] These applications for judicial review raise the following issue:

- Did the Officer breach the duty of procedural fairness requirement by failing to provide the applicant with proper notice and a meaningful opportunity to respond to his request for updated information?

[15] The appropriate standard of review for issues of procedural fairness is correctness (*Caglayan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 485 [*Caglayan*]; *Yazdani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 885 at paras 23-25

[*Yazdani*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

Analysis

[16] The Court's case law on the conduct of foreign visa offices in handling email communication makes clear that the "risk" involved in a failure of communication is to be borne by the Minister if it cannot be proved that the communication in question was sent by the Minister's officials. However, once the Minister proves that the communication was sent, the applicant bears the risk involved in a failure to receive the communication (*Alavi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 969 [*Alavi*] at para 5). In *Ghaloghlyan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1252, Justice Campbell commented on the requirements for proving on a balance of probabilities that a document was correctly sent:

> [8] […] 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.
>
> [9] 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.
>
> [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". [...]

[17] The respondent has done all of this here. He has established on a balance of probabilities that the email was sent to the applicant, in that the GCMS notes contain a copy of the sent email (to the correct address of the applicants' representative), and that there is no evidence that the email was not delivered (it did not bounce back) or otherwise not properly sent. Both affidavits filed by the respondent reveal that the sent email is in the sender's email sent box, with the date on which it was sent, as well as its content.

[18] However, the applicants in the present cases rely on four decisions of this Court involving nine different applicants, all rendered in September and October 2010, where the applications for judicial review were all granted and the risk of lost emails put on the visa office (*Abboud v Canada (Minister of Citizenship and Immigration)*, 2010 FC 876, *Alavi, Yazdani* – six applications for judicial review were consolidated by Justice Mandamin - and *Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024). In all these cases, errant emails were being sent from the visa office in Warsaw which were not received by the applicants or applicants' representatives.

[19] All four of these decisions (nine applications) involve similar underlying facts, which are easily distinguishable from the cases at bar:

- All applications for permanent residence were originally filed at the Canadian Embassy at Damacus and subsequently transferred to the Canadian Embassy in Warsaw for processing;
- The lost emails were the first email communications between the Warsaw office and the applicants, whereby the applicants were informed of the transfer and

asked for additional documents; in the cases at bar, there is a history of previous successful email communications between the visa office and Mr. Pranay Shah; and

– The applicants were either unrepresented or represented by different consultants/counsels, therefore reducing the probabilities that the communication failure resulted from problems with the recipients' computers. In the present cases (and the third case referred to above), the applicants were represented by the same consultant.

[20] The unique circumstances of these cases triggered the following comments from Justice Mandamin in *Yazdani*, above at paras 51 and 52:

> [51] […] However, I do not see this as a completely no-fault case.
>
> [52] The fact is that the Respondent chose to unilaterally transfer the Applicant's files from the Damacus 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 open between itself and the Applicant's Consultant.

[21] Here, no fault has been put on the respondent and as indicated above, he did present sufficient evidence to convince the Court, on the balance of probabilities, that the emails were sent to the applicants' consultant.

[22] Again, Mr. Patel did not ask the Officer to reconsider his decision once he found out that his application for permanent residence was denied due to his failure to comply with an

information request contained in an email he did not receive. Mr. Bhatty did so but the Officer's decision not to reconsider was not challenged before this Court.

[23] Therefore, I can only reiterate Justice Martineau's conclusion in *Caglayan*. Though he denied the application, he did so with the following caveat:

> [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. [Emphasis added.]

Conclusion

[24] For the reasons discussed above, both these applications for judicial review will be dismissed. The parties have not proposed a question of general importance for certification and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in Court files number IMM-673-14 and IMM-674-14 are dismissed;

2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-673-14
STYLE OF CAUSE:	PRITESHKUMAR PR PATEL v THE MINISTER OF CITIZENSHIP, AND IMMIGRATION
AND DOCKET:	IMM-674-14
STYLE OF CAUSE:	JAYSHREE HETALKUMAR BHATTY v THE MINISTER OF CITIZENSHIP, AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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JUDGMENT AND REASONS:	GAGNÉ J.
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