Federal Court  Cour fédérale

Date: 20150723

Docket: IMM-2786-14

Citation: 2015 FC 900

Ottawa, Ontario, July 23, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

DHARMENDRAKUMAR CHANDRAKANTBHAI PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction and Background

[1] The Applicant is a citizen of India. He applied for a permanent resident visa as a member of the federal skilled workers class on June 14, 2010, claiming to be a computer network technician (National Occupational Classification 2011, code 2281) and a computer and information systems manager (code 0213).

[2] The notes recorded in the global case management system [GCMS] indicate that the visa application was proceeding smoothly until August 20, 2013. On that date, Rakesh Goel, a program assistant at the High Commission of Canada in New Delhi, allegedly sent an e-mail to the Applicant asking him to submit a number of documents within 45 days, including updated application forms and police clearances. The Applicant denies receiving this e-mail and there is no copy of it in the certified tribunal record [CTR]. Mr. Goel did not attach a copy of the alleged e-mail to his affidavit.

[3] By letter dated February 12, 2014, a visa officer [Officer] refused the Applicant's application for permanent residence. After noting that subsection 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*] obligates applicants to produce all relevant evidence and documents which are reasonably required, the Officer noted that the Applicant had not supplied any of the documents allegedly requested on August 20, 2013. The Officer therefore refused the application pursuant to subsection 11(1) of the *Act*, stating in the refusal letter that "I am not satisfied that you are not inadmissible and that you meet the requirements of the Act."

[4] The Applicant's representative received the refusal letter on February 28, 2014. She testifies in her affidavit that she sent an e-mail to the visa office on March 3, 2014, saying that neither she nor her client had ever received any e-mail dated August 20, 2013. She also states that her office inquired about the status of the Applicant's application in October, 2013, and no outstanding issues were revealed. She therefore asked the visa office to re-open the application and permit her client to submit the requested information. There is nothing in the CTR to indicate any response to this request to re-open the application.

[5] Pursuant to subsection 72(1) of the *Act*, the Applicant now seeks judicial review of the Officer's decision to deny his application for permanent residence as a member of the federal skilled workers class. He asks the Court to set aside the Officer's decision and return the matter to a different visa officer for re-determination. He also requests an award of $5,000.00 in costs.

II. Issues

[6] This application raises the following issues which will be sequentially addressed below:

1. What is the applicable standard of review?
2. Did the Officer fail to observe a principle of natural justice, procedural fairness, or other procedure the Officer was required by law to observe?
3. Are costs warranted in this matter?

III. Analysis

A. *What is the applicable standard of review?*

[7] The Applicant submits that the correctness standard applies since the only issue is whether it was procedurally unfair that he was expected to supply information requested in an e-mail which he never received (citing e.g. *Trivedi v Canada (Citizenship and Immigration)*, 2014 FC 766 at paragraph 9, 29 Imm LR (4th) 131 [*Trivedi*]).

[8] The Respondent acknowledges that if the Applicant proves that there was a breach of procedural fairness, then correctness would be the applicable standard of review.

[9] I agree that the correctness standard applies in this case because the central issue is whether the process used to deny the Applicant's application for permanent residence was unfair (*Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502).

B. *Did the Officer fail to observe a principle of natural justice, procedural fairness or other procedure the Officer was required by law to observe?*

[10] The Applicant submits it was procedurally unfair to expect him to supply information requested in an e-mail he never received. The Applicant and his representative both testified in their respective affidavits that they never received any e-mail dated August 20, 2013. This being so, the Applicant says the onus is on the Respondent to prove that the e-mail was actually sent or "went on its way" to him (citing *Caglayan v Canada (Citizenship and Immigration)*, 2012 FC 485 at paragraph 13, 408 FTR 192 [*Caglayan*]). That, the Applicant says, is typically verified by producing a printout of the sender's e-mail sent box, showing that the message concerned was addressed to the correct e-mail address and that the e-mail did not "bounce back" (citing *Ghaloghlyan v Canada (Citizenship and Immigration)*, 2011 FC 1252 at paragraph 10, 5 Imm LR (4th) 307 [*Ghaloghlyan*]).

[11] The Applicant points out that the Respondent has not even supplied a copy of the supposed e-mail, let alone any printouts showing such an e-mail in Mr. Goel's sent box. The Respondent presented only Mr. Goel's mere assertions that he sent the e-mail and did not receive any notification that transmission of the e-mail failed; this, the Applicant argues, is not sufficient. The Applicant relies on *Asoyan v Canada (Citizenship and Immigration)*, 2015 FC 206 at paragraph 24 [*Asoyan*], where Mr. Justice Peter Annis stated that the Respondent is "required to

exhaust all reasonable mechanisms available on email programs to ensure receipt of their important transmissions."

[12] The Applicant therefore submits that there was a breach of procedural fairness. Since he never received the e-mail allegedly sent to him on August 20, 2013, his failure to supply the requested documentation should not have been held against him under either subsection 11(1) or subsection 16(1) of the *Act*. The Applicant further submits that because he made status inquiries in October, 2013, this should have prompted the visa office to realize he had never received a request for documents and to resend the e-mail. Also, the Applicant complains that the visa office should have accepted his request to re-open the application upon being told he had not received the alleged e-mail (citing *Caglayan* at paragraph 23).

[13] According to the Respondent though, the Applicant has not proven that he probably never received the August 20, 2013, e-mail. The Respondent points out that the GCMS notes indicate that the e-mail requesting updated documents was sent on August 20, 2013, to "info@entrypointcanada.com", which was the e-mail address previously used to successfully communicate with the Applicant. The Respondent also notes that there had not been any notification that delivery of the e-mail was unsuccessful. Mr. Goel confirms this in his affidavit, the Respondent says, and the Applicant chose not to cross-examine him. Thus, the Respondent submits that the Applicant probably received the e-mail and the application should be dismissed.

[14] Mr. Goel's notes in the GCMS dated August 20, 2013, state, in part, as follows:

> Electronic file reviewed without paper file. File appears ready for medical and generic document request letter. Request letter and

> medical forms emailed to updated email ID this date. The following items requested 1. Updated IMM8. 2. Updated Schedule 1 for applicant and all family members over the age of 18. 3. Updated 5406 for applicant and all family members over the age of 18. 4. Educational documents and Educational History Form for dependents (if over the age of 22 at the time of application) 6. Updated Proof of funds 7. Updated Police Clearances for all family members over the age of 18 covering the period of time since last PCC. 8. Travel History for applicant and all family members over the age of 18. 9. Three (3) photos for each applicant 10. Indian Mailing address along with information for Nepal residents CIIP information also sent to pa. Confirmation of email is pasted below: From: DELHI (IMMIGRATION) Sent: August 20, 2013 9:38 AM To: 'info@entrypointcanada.com' Subject: FILE: B057760835 NAME: PATEL, DHAMENDRAKUMAR CHANDRAKANTBHAI

[15] However, upon review of the CTR, there is no copy of any e-mail dated August 20, 2013, and there also is no copy of any "request letter" bearing such date. In addition, the refusal letter dated February 12, 2014, refers to a "letter dated 20 August 2013". Assuming that this is the letter referred to in Mr. Goel's notes, its absence from the CTR tends to substantiate the evidence of the Applicant and his representative that neither of them received an e-mail dated August 20, 2013. It is troublesome, to say the least, that no copy of the e-mail allegedly sent to the Applicant's representative is in the CTR. I also infer that no electronic copy of this e-mail could be found in Mr. Goel's sent box or anywhere else, since none was attached to the affidavit of Mr. Goel.

[16] Even when the duty of procedural fairness owed by an administrative decision-maker is fairly minimal, as is the case here with respect to the Officer's decision, persons directly affected by an administrative decision are usually entitled to sufficient notice that they can meaningfully participate in the process (*Public Service Alliance of Canada v Canada (AG)*, 2013 FC 918 at

paragraphs 58-60, 439 FTR 11; *Canada (AG) v Mavi*, 2011 SCC 30 at paragraph 45, [2011] 2 SCR 504; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 22, 174 DLR (4th) 193). The precise content of the notice required will vary depending on the type of decision. At a minimum though, the notice should usually ensure that the affected individuals "possess sufficient information to enable them '(1) to make representations on their own behalf; or (2) to appear at a hearing or inquiry (if one is held); and (3) effectively to prepare their own case and to answer the case (if any) they have to meet' " (Donald JM Brown & the Honourable John M Evans, *Judicial Review of Administrative Action in Canada*, vol 2 (Toronto: Thomson Reuters, 2014) (loose-leaf updated 2014), ch 9 at 1, citing Henry Woolf, Jeffrey Jowell & Andrew Le Sueur, *De Smith's Judicial Review*, 6th ed (London: Sweet & Maxwell, 2007) at 380).

[17] In this case, there is no question that the Applicant was entitled to notice that his application would be refused if he did not update it, and the visa office allegedly fulfilled that obligation by sending him an e-mail. The main questions for determination, therefore, are what must be done to prove that an e-mail was properly sent by a visa office and who bears the risk of a failed e-mail communication. These questions are informed by the law on failed communications generally, so it is insightful to review some of the pertinent case law.

[18] It is convenient to start with *Anwar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1202, 260 FTR 261 [*Anwar*]. *Anwar* does not concern a visa application, but it offers an example of a similar communication problem in the context of a refugee hearing. In *Anwar*, the Refugee Protection Division had declared a refugee claim abandoned because the applicant had

not shown up for the hearing, and the applicant complained that he had never received notice of the hearing. Although notice had been sent to the refugee claimant's last known address, the Court allowed the application for judicial review because there was "no evidence on the tribunal record that notice of the hearing was actually *received* by either the applicant or his counsel despite inquiries made by the former counsel for the respondent" (*Anwar* at paragraph 21, emphasis in original).

[19] The approach in *Anwar* can be contrasted with that taken for visa applications in *Ilahi v Canada (Citizenship and Immigration)*, 2006 FC 1399, 58 Imm LR (3d) 52 [*Ilahi*], where an applicant for a visa complained that he never received notice of an interview which the electronic notes said had been mailed to him. In *Ilahi*, the Court found (at paragraph 7) that the Minister of Citizenship and Immigration [Minister] did not need to prove that the notice was received. However, the Minister was required to prove that the notice was sent, and the Court (at paragraph 8) set aside the decision because the Minister could not produce a copy of the alleged letter and did not present any direct evidence of the address to which it was sent.

[20] *Ilahi* was followed in *Sawnani v Canada (Citizenship and Immigration)*, 2007 FC 206, 60 Imm LR (3d) 154 [*Sawnani*], and in *Pravinbhai Shah v Canada (Citizenship and Immigration)*, 2007 FC 207 [*Shah*], but to the opposite result. In each of *Sawnani* and *Shah*, the Court dealt with faxed notices of interviews that were allegedly never received, yet the facsimile transmission sheets confirmed that the documents had been received at the correct number. The Court dismissed the applications in *Sawnani* and *Shah*, finding that any failure in communication was the fault of the recipients.

[21] A similar situation arose in *Yang v Canada (Citizenship and Immigration)*, 2008 FC 124, 79 Admin LR (4th) 195 [*Yang*], where an applicant's visa application was refused because he did not supply information that had been requested in a letter. The applicant in *Yang* relied on *Anwar* to argue that the Minister was required to prove that he had actually received the request letter, but the Court distinguished *Anwar* on the basis that it dealt with a refugee claim. The Court determined (at paragraphs 13-15) that it would be overly burdensome to impose the same requirements on visa offices due to the heavy volume of applications, and also because applicants for a visa can immediately re-apply as soon as their applications are refused.

[22] The jurisprudence cited above was applied to e-mail communications in *Kaur v Canada (Citizenship and Immigration)*, 2009 FC 935 [*Kaur*]. Similar to the present case, the visa application in *Kaur* had been refused because the applicant never responded to an e-mailed request for more information. In dismissing the application for judicial review, the Court stated as follows:

> [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 [her counsel] 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.

[23] *Kaur* was followed in *Zhang v Canada (Citizenship and Immigration)*, 2010 FC 75 at paragraphs 13-14, 362 FTR 277, where the Court inferred that the failure to receive an e-mail was the fault of the applicant and her counsel.

[24] The next significant cases to note are *Abboud v Canada (Citizenship and Immigration)*, 2010 FC 876 [*Abboud*], *Yazdani v Canada (Citizenship and Immigration)*, 2010 FC 885, 324 DLR (4th) 552 [*Yazdani*], *Alavi v Canada (Citizenship and Immigration)*, 2010 FC 969, 92 Imm LR (3d) 170 [*Alavi*], and *Zare v Canada (Citizenship and Immigration)*, 2010 FC 1024, [2012] 2 FCR 48 [*Zare*] [collectively, the Warsaw cases]. The facts in each of these cases are similar; visa applications were transferred from a visa office in Damascus, Syria, to one in Warsaw, Poland, and the first e-mail from the Warsaw office to each applicant was a request for information. None of the applicants received these e-mails, and their applications were refused because they did not respond.

[25] The Court found in *Abboud* (at paragraphs 13 and 16) and in *Alavi* (at paragraphs 10-11) that the e-mails had not been properly sent, and consequently allowed the applications on that basis. The Court arguably went further in *Yazdani* and *Zare*.

[26] In *Yazdani*, the Court found (at paragraphs 35 and 48) that, while the e-mails were sent to the correct addresses, the messages were not received because the e-mail communication system failed for unknown reasons. After reviewing many of the cases cited above, the Court stated that

they turned on whether the sender or recipient of the e-mail was found at fault. In allowing the application, the Court in *Yazdani* determined that the applicant was not at fault and that the respondent Minister had chosen to send important e-mails from a new office for the very first time without putting any safeguards in place. Noting that the use of e-mail is efficient and it would be inappropriate to discourage its use, the Court concluded in *Yazdani* that the Minister should bear the risk of this particular communication failure.

[27] In *Zare*, the Court followed *Yazdani* and summarized the law as follows:

> [48] …When a visa officer sends an email to an applicant who has provided an email address, there is a presumption that the email message has been conveyed to the intended recipient. However when the applicant proves with credible evidence that the email was not received, the presumption is displaced and more is required to establish the email request has been communicated or properly sent.
>
> [49] Section 16 of *IRPA* contemplates a visa officer's request is made to an applicant. An email request that goes astray is not a request made to an applicant as contemplated by section 16. One might say…it was not properly sent.

[28] The next notable case is *Ghaloghlyan*, which concerned an application under subsection 25(1) of the *Act* that was refused because the applicant never responded to a letter purportedly mailed to him. In *Ghaloghlyan*, the Court considered *Kaur* and *Alavi* and concluded (at paragraph 8) that, "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." The Court went on to say the following:

> [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] 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. [Emphasis in original]

[29] The jurisprudence concerning failed communications was further considered in *Caglayan*, where the Court dealt with a mailed letter which was not received by an applicant through no fault of his own. After reviewing the case law, the Court stated (at paragraph 15) that "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." Once that was established though, the Court confirmed (at paragraph 19) that it was the applicant who bears the risk of non-receipt and also rejected any interpretation of *Yazdani* that could suggest otherwise. The Court therefore dismissed the application in *Caglayan*, although it encouraged the respondent to reconsider the application.

[30] A situation similar to *Caglayan* arose in *Halder v Canada (Citizenship and Immigration)*, 2012 FC 1346, 14 Imm LR (4th) 289 [*Halder*], and again the Court confirmed (at paragraph 48) that "the risk of a failure of communication shifts to the Applicant if the Respondent is able to

show that, on a balance of probabilities, the communication was sent and, secondly, that the Respondent had no reason to think that the communication had failed."

[31] The facts were slightly more complicated in *Trivedi* than in most of the cases noted above. In *Trivedi*, an immigration officer had sent a request for further information to the applicant's former residential address instead of her mailing address, and the letter was returned undelivered. The officer therefore e-mailed the applicant and asked her to update her addresses, though the directions on how to do so were ambiguous. The applicant tried to update her addresses, but failed to do so correctly. Nevertheless, the Court held that it was improper for the officer to have sent the letter to the applicant's residential address instead of her mailing address, and the request for an updated address did not cure the error because it did not inform the applicant that she needed to send in new documents. In making this finding, the Court cautioned (at paragraph 53) that it does not matter if "the refusal of the application would not have occurred 'but for' the Applicant's failure to properly respond to the August 22 e-mail, when it is the Respondent's duty to provide notice of the substantive requirement that is at issue." The Court considered awarding costs to the applicant and was critical of the respondent Minister's "choice to litigate the matter to its conclusion based on principle…rather than simply acknowledging its error" (*Trivedi* at paragraph 60). However, the Court in *Trivedi* refused to grant costs because "it cannot be said that the law was completely settled on this point" (*Trivedi* at paragraph 61).

[32] In *Patel v Canada (Citizenship and Immigration)*, 2014 FC 856 [*Patel*], the Court dealt with two cases where visa applications were refused because e-mailed requests for information

were never received. The Court dismissed these applications for judicial review since the Minister had proven that the e-mails were sent in accordance with the guidelines set out in *Ghaloghlyan* (at paragraphs 8-10), and the Warsaw cases were distinguishable since the respondent was not at fault for any communication failure.

[33] In addition to *Asoyan*, *Caglayan* and *Ghaloghlyan*, the Applicant relies on an unreported decision of this Court in *Grenville v Minister of Citizenship and Immigration* (1 December 2014), Ottawa IMM-1642-14 (FC) [*Grenville*]. Following *Zare* and *Ghaloghlyan*, among other cases, the judgment in *Grenville* set out a two-part test for whether a failure in communication is a breach of procedural fairness:

> [F]irst, the respondent must establish on a balance of probabilities that the communication was correctly sent to the applicant or "went on its way", which, if proven, raises a rebuttable presumption that the applicant received the communication; and, second, this presumption may be rebutted by the applicant if she or he shows that the communication was not received.

This judgment also states that, while a mere statement that an e-mail was not received is not enough to rebut the presumption, the presumption could be rebutted "if the applicant in addition files proof from his or her computer, attaching a screen shot of the inbox and trash or deleted box to show that the email was not received". The applicant in *Grenville* had done that, and the respondent had not supplied any proof that the e-mail was sent. The application for judicial review was therefore allowed in *Grenville*, but costs were not awarded to the applicant for the same reasons as in *Trivedi*.

[34] In *Asoyan*, the Court questioned some of the law on the issue of failed e-mail communications. The visa office in that case had sent the applicant two e-mails about a month

apart, the first acknowledging that her application had been received and the second asking for more documentation. The applicant never received either e-mail. Within the time allotted for a response to the second e-mail, however, she asked the visa office for an acknowledgment that her application had been received, to which the first e-mail was again forwarded to her. Her application was eventually denied by the visa officer for failure to comply with the second e-mail, but her application for judicial review was allowed. The Court decided (at paragraphs 17-19) that the fact the applicant asked for an acknowledgment of receipt after one had already been sent should have indicated to the visa office that its e-mails were not being received, and responsibility for the communication failure therefore fell on the respondent in line with *Kaur*. However, the Court went further in *Asoyan* (at paragraphs 20-26) and questioned the idea that the recipient of an e-mail should bear the risk of communication failure. As in *Yazdani* and *Zare*, the Court found that the rule was unduly harsh when the applicant was not at fault, and made two additional comments. First, the general rule at common law was that the sender needed to prove that a letter reached its recipient, and that only changed with the advent of fax machines because receipt would be confirmed by the receiving fax machine. No similar guarantee exists with respect to e-mail communication. Second, the Court noted that e-mail programs like Microsoft Outlook have mechanisms which can require recipients to acknowledge receipt of an e-mail, and the Court opined that visa offices should use such mechanisms.

[35] The most recent case to note is *Khan v Canada (Citizenship and Immigration)*, 2015 FC 503 [*Khan*]. This was another case where an applicant never received a letter asking for more documentation, and the Court essentially followed *Kaur* and *Yang* when dismissing the application for judicial review. One complicating factor in *Khan* was that the applicant had been

advised by telephone about one of the required documents, and in her cover letter supplying it she had asked the visa office to: "Please let me know if there is anything else that I need to provide you with" (*Khan* at paragraph 6). The Court found this request by the applicant was not enough to indicate that the original letter had not been received, and thus concluded that the applicant had not "rebutted the presumption that she received the documents" (*Khan* at paragraph 19).

[36] Although some of the cases cited above have tried to reconcile the jurisprudence, the cases are not entirely consistent with each other. The first line of cases essentially holds that the Minister need only prove two things: (1) that the impugned communication was sent to an e-mail address supplied by the applicant; and (2) there has been no indication that the communication may have failed or bounced-back. If that is proven, then it does not matter if the applicant received the communication or not, since the respondent has satisfied the duty of procedural fairness (see: e.g., *Kaur* at paragraph 12; *Yang* at paragraphs 8 and 9; *Alavi* at paragraph 5; *Halder* at paragraph 48; *Patel* at paragraph 16; *Khan* at paragraph 13).

[37] However, in *Yazdani* and *Zare*, the Court was satisfied that the respondent Minister in those cases had sent the e-mails to the correct addresses and still allowed the judicial review applications. This was partly based on a fault analysis in *Yazdani*, but *Zare* went even further than that inasmuch as the Court determined that an e-mail request from a visa officer that goes astray is "not properly sent" (*Zare* at paragraph 49). This can also be seen in *Ghaloghlyan* when the Court said (at paragraph 8) that "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" (emphasis added). The implication of receipt being a rebuttable presumption is that it actually matters whether the applicant received the message, and that is the logic followed in *Grenville*.

[38] *Caglayan* attempts to reconcile these two lines of cases by saying that the Minister bears the risk "when there is objective evidence that the correspondence was not received because of a proven communication failure" (*Caglayan* at paragraph 15); but, ultimately, the Court in *Caglayan* concluded (at paragraph 19) that the applicant bears the risk of failure where there is no fault on either side. That could possibly reconcile the fault-based approach in *Yazdani*, but is still contrary to at least some of the comments in *Zare*.

[39] Finally, it should be remarked that, while the decision in *Asoyan* follows the first approach, the *obiter* comments clearly align with the second approach.

[40] In view of the foregoing, it appears that the majority view in this Court places the risk of failure on a recipient in respect of an e-mail communication; yet, the policy-based arguments in *Yazdani* and *Asoyan* suggesting an opposite approach also appear compelling. The primary rationale for placing the risk on the recipient was stated as follows in *Yang*:

> [14] …there are good reasons for preferring the views of Justice O'Reilly [in *Ilahi*] on the facts of the case before me. One reason relates to the sheer volume of applications dealt with every year by multiple CIC offices. Ensuring that each notice was received would impose an impossible burden on CIC and would, without doubt, impact negatively on the ability of CIC to deal expeditiously with applications.

[41] *Yang*, however, was a case about regular mail, not e-mail, so the costly alternative being contemplated was registered mail. The costs of proving receipt of an e-mail are much lower than traditional mail, and the suggestion in *Asoyan* that visa offices should use mechanisms in e-mail programs to require recipients to acknowledge receipt of an e-mail would entail virtually no cost whatsoever and, also, could be automatically programmed.

[42] In this case, though, it is not necessary to choose between the two lines of cases discussed above. The Respondent has not even supplied a copy of the alleged e-mail, and Mr. Goel's affidavit does not include a printout of his sent box which could confirm that any e-mail was sent to the correct address (*Ghaloghlyan* at paragraphs 10-11). Mr. Goel's affidavit explains the notes that he made in the GCMS, but even in *Ilahi (*at paragraph 8), the Court confirmed that the Respondent cannot simply rely on electronic notes to prove that a document has been sent to the correct address. Since the Respondent has not proven that the e-mail was sent, it is a breach of procedural fairness under either line of cases.

C. *Are costs warranted in this matter?*

[43] The Applicant argues that he is entitled to costs in the circumstances of this case. In his view, the procedural error was obvious following the status inquiries, and the visa office should have just re-opened the application rather than forcing the Applicant through an expensive judicial review (citing *Trivedi* at paragraphs 59 and 60).

[44] The Respondent says that costs are discouraged by section 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, and submits that there are

no special circumstances which would justify departure from that rule (citing e.g. *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at paragraph 7, 423 NR 228).

[45] However, in this case it is clear that the Applicant learned his application had been refused on February 28, 2014, and his representative promptly advised the Officer three days later that no letter or e-mail dated August 20, 2013, had been received by him or the Applicant and requested that the application be re-opened so the required information could be submitted.

[46] The evidence in this case establishes that this letter or e-mail was never sent to the Applicant or to his representative. While it may be reasonable to imagine that there will be mistakes made by immigration officers when dealing with thousands of visa applications from around the world, where the evidence readily shows that there has been a mistake, it should be rectified. The Respondent here should have done that by re-opening the application to receive the required documentation.

[47] The Respondent should not have opposed the Applicant's application for judicial review. The Applicant presented clear evidence that he did not receive the alleged e-mail or letter requesting the additional documentation. Since no copy of this alleged e-mail could be found, the Respondent should have recognized that this e-mail or letter was not properly sent as soon as the Applicant's representative advised the visa office that no letter or e-mail was received. If the application had been re-opened as requested by the Applicant and as this Court has exhorted the Respondent to do on several occasions (*Caglayan* at paragraphs 22-23; *Patel* at paragraph 23; *Trivedi* at paragraph 59), this hearing before the Court would not have been necessary. For this

reason there are special circumstances to award legal costs to the Applicant (see *Dhoot v Canada (Citizenship and Immigration)*, 2006 FC 1295 at paragraph 19, 57 Imm LR (3d) 153). Furthermore, this case is not like *Trivedi* or *Grenville*; the former involved a somewhat novel causation issue, and in the latter no clear precedent governed the result. In contrast, the result in this case was dictated by *Ilahi* and *Ghaloghlyan*. Accordingly, costs shall be awarded to the Applicant in a fixed lump sum of $3,000.00, inclusive of all disbursements and taxes.

IV. Conclusion

[48] In the result, therefore, the application for judicial review is hereby allowed and the matter is returned for re-determination by a different visa officer. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter returned for re-determination by a different visa officer; no serious question of general importance is certified; and the Applicant is awarded his costs associated with this application in a fixed lump sum of $3,000.00, inclusive of all disbursements and taxes.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2786-14
STYLE OF CAUSE:	DHARMENDRAKUMAR CHANDRAKANTBHAI PATEL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 29, 2015
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 23, 2015

APPEARANCES:

Karen Kwan Anderson	FOR THE APPLICANT
Christopher Crighton	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Pace Law Firm Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT