Federal Court Cour fédérale

Date: 20180928

Docket: IMM-5473-17

Citation: 2018 FC 964

Ottawa, Ontario, September 28, 2018

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

YURIY SHEKHTMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application for judicial review raises a simple question: did the applicant, Mr. Yuriy Shekhtman, submit his application for a restoration of his lost temporary resident status within the prescribed 90-day period? An immigration officer working for Citizenship and Immigration Canada [CIC] concluded that he did not and thus found that Mr. Shekhtman was not eligible for

restoration of his status. Mr. Shekhtman states that he submitted his application in time, within 90 days of becoming aware of the decision refusing the extension of his temporary resident status. The dispute is essentially factual and revolves around the determination of the date of this refusal, which is the starting point of the prescribed regulated period to submit a restoration application.

[2] For the following reasons, Mr. Shekhtman's application will be granted in part. Having considered the evidence before the immigration officer and the applicable law, I conclude that the decision finding Mr. Shekhtman ineligible for restoration of his temporary resident status, because his application was submitted after the prescribed regulated period, is unreasonable. In my view, the evidence on the record could not reasonably allow the officer to determine that the decision refusing Mr. Shekhtman's request for extension was "made" on either of the two dates claimed by the respondent, the Minister of Citizenship and Immigration [Minister]. In the circumstances of this case, that is sufficient to push the decision outside the realm of possible, acceptable outcomes based on the facts and the law, and to justify this Court's intervention. I must, therefore, send the matter back for redetermination, in accordance with these reasons.

II. Background

A. *The factual context*

[3] Mr. Shekhtman is a Rabbi who was in Canada with a valid temporary resident status, authorized to perform religious duties. As his temporary resident status as a visitor expired on

September 30, 2015, Mr. Shekhtman applied for an extension of his status. He did so five days before the expiry of the period authorized for his stay.

[4] His request for extension of his temporary resident status was refused by the Canadian immigration authorities in a decision dated July 14, 2016 [Refusal Decision]. Arguably, this could be the starting point of the period prescribed in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] to submit a restoration application. Such application must be submitted within 90 days after losing permanent resident status, which in this case is 90 days after the day on which the decision refusing to extend the temporary resident status is "made". However, Mr. Shekhtman says that he only became aware of the Refusal Decision several months later, on December 7, 2016, when his counsel received it. The Refusal Decision that Mr. Shekhtman received on December 7, 2016 was dated July 14, 2016.

[5] On his part, the Minister claims that the Refusal Decision was sent twice to Mr. Shekhtman. First, on July 14, 2016, and then on November 30, 2016.

[6] On March 6, 2017, within 90 days of the date on which Mr. Shekhtman says he received the Refusal Decision, he applied for restoration of his temporary resident status. Before any decision was made on his restoration application, Mr. Shekhtman submitted an Access to Information and Privacy request. On November 22, 2017, he received the notes from his immigration file [ATIP notes], where he learned for the first time about the November 30, 2016 date on which the Minister claims that the Refusal Decision was re-sent to Mr. Shekhtman. The

ATIP notes were inputted on August 4, 2017 in the Global Case Management System [GCMS] maintained by CIC. They notably mention the following:

> REVIEW OF THE REFUSAL OF V307609562 INDICATES THE DATE OF THE REFUSAL OF THE APPLICATION AS 14JULY2016 WITH A LETTER WAS SENT THE SAME DATE HOWEVER THE NOTES IN V307609562 INDICATE A LETTER SENT VIA MAIL TO THE CLIENT 30NOV2016 UNABLE TO DETERMINE IF CLIENT WAS SENT THE LETTER ON 14JULY16

[7] I pause to observe that "V307609562" refers to the internal file number attributed by CIC to Mr. Shekhtman's request for extension of his temporary resident status which led to the Refusal Decision. As such, these ATIP notes were not part of the Certified Tribunal Record [CTR] in the present matter, which relates to the "V316671300" internal file of CIC. The ATIP notes were however submitted by Mr. Shekhtman as part of his application record filed with the Court.

[8] On December 5, 2017, an immigration officer [Officer] refused to restore Mr. Shekhtman's temporary resident status [Restoration Decision], on the ground that his application was submitted after the regulated 90-day period. The Officer's letter denying Mr. Shekhtman's restoration application did not address the merits of his application.

B. *The Restoration Decision*

[9] The Restoration Decision is short. It simply states that he was "not eligible for restoration of [his] temporary resident status because [his] application was submitted after the regulated 90-

day period". No other reasons are given in the letter sent to Mr. Shekhtman. However, the notes on file in the GCMS are more detailed and provide further light on the grounds for the Restoration Decision. They were entered by the Officer on December 5, 2017, on the date of the Restoration Decision, and they form part of the Officer's reasons for that decision.

[10] The GCMS notes indicate that the Officer was satisfied that the initial Refusal Decision was sent to Mr. Shekhtman on July 14, 2016, but he still gave Mr. Shekhtman the benefit of the doubt. The Officer thus started counting the 90 days from November 30, 2016, when the Refusal Decision was re-sent, according to CIC. The GCMS notes further state that "[t]he Applicant is Applying for restoration as he indicates that refusal letter was sent on 2016/11/30 [sic]", that "another refusal letter was sent by mail on 2016/11/30" and that "Mr. Shekhtman was sent a refusal letter dated 2016/11/30". The Officer concluded that the 90-day period expired on February 28, 2017, and that the restoration application submitted by Mr. Shekhtman on March 6, 2017 was therefore late.

[11] Considering the issue in dispute before this Court about the timing of the Refusal Decision, it is useful to reproduce in their entirety the relevant extracts from the GCMS notes relating to the contentious July 14, 2016 and November 30, 2016 dates. They read as follows:

> (…)
>
> The Applicant is Applying for restoration as he indicates that refusal letter was sent on 2016/11/30.
>
> (…)
>
> A refusal letter was sent via Mr. SHEKHTMAN's Preferred correspondence channel on 2016/07/14. I am satisfied that on balance of probabilities the refusal was provided to the Applicant in a timely manner. The Applicant indicates that he never received

> the refusal, and another refusal letter was sent by mail on 2016/11/30.
>
> Notwithstanding that the initial refusal date may have been known to the subject, benefit of the doubt given to the Applicant. Mr. SHEKHTMAN was sent a refusal letter dated 2016/11/30 and 90 days from 2016/11/30 would mean that the Application for restoration would have to be received no later 2017/02/28.
>
> (…)

C. *The relevant provisions*

[12] The relevant provisions are found in sections 182 and 183 of the Regulations. They read as follows:

182 (1) On application made by a visitor, worker or student within <u>90 days after losing temporary resident status</u> as a result of failing to comply with a condition imposed under paragraph 185(a), any of subparagraphs 185(b)(i) to (iii) or paragraph 185(c), an officer shall restore that status if, following an examination, it is established that the visitor, worker or student meets the initial requirements for their stay, has not failed to comply with any other conditions imposed and is not the subject of a declaration made under subsection 22.1(1) of the Act.	**182 (1)** Sur demande faite par le visiteur, le travailleur ou l'étudiant dans les <u>quatre-vingt-dix jours suivant la perte de son statut de résident temporaire</u> parce qu'il ne s'est pas conformé à l'une des conditions prévues à l'alinéa 185a), aux sous-alinéas 185b)(i) à (iii) ou à l'alinéa 185c), l'agent rétablit ce statut si, à l'issue d'un contrôle, il est établi que l'intéressé satisfait aux exigences initiales de sa période de séjour, qu'il s'est conformé à toute autre condition imposée à cette occasion et qu'il ne fait pas l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi.
(…)	(…)
183 (…)	**183** (…)

(5) Subject to subsection (5.1), if a temporary resident has applied for an extension of the period authorized for their stay and a decision is not made on the application by the end of the period authorized for their stay, the period is extended until	**(5)** Sous réserve du paragraphe (5.1), si le résident temporaire demande la prolongation de sa période de séjour et qu'il n'est pas statué sur la demande avant l'expiration de la période, celle-ci est prolongée :
(a) the day on which a decision is made, if the application is refused; or	**a)** jusqu'au moment de la décision, dans le cas où il est décidé de ne pas la prolonger;
(b) the end of the new period authorized for their stay, if the application is allowed.	**b)** jusqu'à l'expiration de la période de prolongation accordée.
[my emphasis]	[mon soulignement]

[13] In essence, subsection 182(1) of the Regulations provides that an application for restoration must be made within 90 days after losing temporary resident status. Paragraph 183(5)(a) further prescribes when the temporary resident status is lost, for situations where a temporary resident has applied for an extension of his or her status and a decision is not made on such request for extension before the end of the period authorized for their stay: if the extension is refused, the temporary resident status will be lost on the day on which the decision was "made". Therefore, in these circumstances, the deemed starting date to make an application for restoration is the day on which a decision is "made" on the request for extension. In the interim timeframe between the end of the period authorized for their stay and the decision on the requested extension, temporary residents are deemed to reside in Canada on "implied status".

D. *The standard of review*

[14] The parties are in agreement, and the Court concurs, that the applicable standard of review is reasonableness. The jurisprudence has indeed established that the decision to restore a temporary resident status, including the interpretation of statutory and regulatory provisions by an immigration officer, is reviewable under the reasonableness standard (*Badhan v Canada (Citizenship and Immigration)*, 2018 FC 704 at paras 9-10; *Udodong v Canada (Citizenship and Immigration)*, 2018 FC 234 at para 5). When the standard of review is reasonableness, a reviewing court must show deference and refrain from substituting its own opinion for that of the decision-maker, provided that the decision has the attributes of justification, transparency and intelligibility within the decision-making process and that the decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47).

III. Analysis

A. *Reasonableness of the Restoration Decision*

[15] Mr. Shekhtman claims that the Restoration Decision is unreasonable because it is based on factual considerations that are not supported by the evidence. He submits that nothing in his file allowed the Officer to conclude that the Refusal Decision was communicated to him before December 7, 2016. Mr. Shekhtman also submits that the Officer breached the rules of procedural fairness in refusing his restoration application.

[16] On his part, the Minister argues that it was reasonable to refuse Mr. Shekhtman's restoration application, because the 90-day period started either on July 14, 2016, the date written on the Refusal Decision, or at worst on November 30, 2016, the date on which the Refusal Decision was re-sent to Mr. Shekhtman. Therefore, submits the Minister, the period during which Mr. Shekhtman had to submit his restoration application elapsed on February 28, 2017 at the latest, and Mr. Shekhtman's submission received on March 6, 2017 was obviously late.

[17] I disagree with the Minister. In my view, the evidence on the record does not support the conclusion reached by the Officer.

[18] It is not disputed that the written date appearing on the Refusal Decision is July 14, 2016. However, the record is inconclusive on the question of when the Refusal Decision was actually sent to Mr. Shekhtman by the Canadian immigration authorities. I find that, in view of the evidence of the record, the Officer could not reasonably conclude that the Refusal Decision was sent to Mr. Shekhtman on either of the two dates claimed by the Minister.

[19] With respect to the date of July 14, 2016, the GCMS notes of December 2017 state that the refusal letter "was sent via Mr. SHEKHTMAN's Preferred correspondence channel" on July 14, 2016, leading the Officer to affirm that he was "satisfied that on balance of probabilities the refusal was provided to [Mr. Shekhtman] in a timely manner". I underline that these GCMS notes were not written contemporaneously with the events that occurred in July 2016, but more than 16 months later in December 2017, and a few months after the ATIP notes. In addition, while the Officer who wrote the GCMS notes was the immigration officer who handled the

restoration application of Mr. Shekhtman in December 2017, there is no indication that he was the officer in charge of Mr. Shekhtman's request for extension which led to the Refusal Decision dated July 14, 2016. No notes entered in the GCMS at the time of the Refusal Decision on July 14, 2016 form part of the CTR. Furthermore, the ATIP notes of August 2017 expressly acknowledge that the author of those notes is "unable to determine" if the Refusal Decision was sent to Mr. Shekhtman on July 14, 2016. In light of the evidence in the ATIP notes (coming from another CIC officer, made just four months before the Restoration Decision) which directly contradicts the Officer's affirmation that the letter was sent on July 14, 2016, I find that it was unreasonable for the Officer to simply affirm in December 2017, with no other evidence to support it, that he was "satisfied that on balance of probabilities the refusal was provided to [Mr. Shekhtman] in a timely manner". Nothing in the CTR provides support for that. I add that the cryptic words "in a timely manner" – as opposed to an actual date – further contribute to the confusion.

[20] With respect to the date of November 30, 2016, the GCMS notes of the Officer entered on December 5, 2017 refer to it at three places. Two of those references are boldly inaccurate. The GCMS notes first state that Mr. Shekhtman "<u>indicates</u>" that the refusal letter was sent on November 30, 2016 and add later that Mr. Shekhtman was "sent a refusal letter <u>dated</u> 2016/11/30" [my emphasis]. Both of these statements are not supported by the record. In fact, the evidence directly contradicts each of them. First, contrary to the GCMS notes, Mr. Shekhtman never indicated that the Refusal Decision was sent on November 30, 2016; he only stated that he received it on December 7, 2016. The affidavits of Mr. Shekhtman and of his counsel leave no doubt whatsoever on this point: Mr. Shekhtman did not become aware of the elusive November

30, 2016 date until he saw the ATIP notes, about eight months after having submitted his restoration application. Second, the Refusal Decision was dated July 14, 2016, not November 30, 2016. Again, there is nothing on the record suggesting that the Refusal Decision was ever dated November 30, 2016, even when it was allegedly re-sent by CIC.

[21] The third reference to the November 30, 2016 date in the GCMS notes is a statement made by the Officer saying that “another refusal letter was sent by mail on 2016/11/30”. I observe that the ATIP notes contain a similar affirmation, but I can find nothing in the CTR to provide support for this statement. I underline again that the GCMS notes from the Officer are not notes entered into the GCMS contemporaneously with the events that unfolded at the end of November 2016. They were entered in December 2017. No notes entered in the GCMS at the time the Refusal Decision was allegedly re-sent on November 30, 2016 form part of the CTR. Since the December 2017 GCMS notes are plagued by two other unsupported statements directly contradicted by the record regarding the November 30, 2016 date, I cannot give much weight to this third general affirmation by the Officer which was closely tied to the two unsupported ones, and for which there is no supporting evidence in the record. The Officer could perhaps have relied on materials from Mr. Shekhtman’s immigration file regarding the Refusal Decision having been sent on November 30, 2016 – the ATIP notes suggest that there might be –, but there is no such evidence in the CTR and the Minister has not adduced any in the proceedings before this Court. In those circumstances, however generous and deferential I can be towards the findings of the Officer, his conclusion that the Refusal Decision was sent (or re-sent) to Mr. Shekhtman on November 30, 2016 is off the mark, and falls outside the range of possible, acceptable outcomes defensible in respect of the law and the facts of this case.

[22] The evidence on the record before the Officer could therefore only establish that: 1) the Refusal Decision bears the date of July 14, 2016 written on it, and 2) Mr. Shekhtman received the Refusal Decision on December 7, 2016. Aside from that, the record could not reasonably allow the Officer to conclude or assume that the Refusal Decision was sent by the Canadian immigration authorities to Mr. Shekhtman, either on July 14, 2016 or on November 30, 2016. One could imagine that CIC might have entered a note in the GCMS, contemporaneously with the events that occurred in July 2016 and in November 2016, stating that the Refusal Decision was indeed sent on these claimed dates. However, there is no such evidence in this file. If that evidence exists, it was not adduced by the Minister, and it would be speculative to assume its existence.

[23] Now, in those circumstances, when was the Refusal Decision "made"? Can the written date of July 14, 2016 appearing on the Refusal Decision itself be sufficient to conclude that the decision was "made" on that date, in the absence of evidence demonstrating that it was sent? I do not believe so.

[24] It is difficult to fathom how a decision refusing a request for extension under subsection 183(5) of the Regulations could be considered to be "made" (the "moment de la décision" in the French version) if there is no evidence that the decision is <u>communicated</u>, in one way or another, to the temporary resident whose rights are affected. When temporary residents are on implied status because they are waiting for a decision on their request for extension, they do not know and cannot know when a decision will be made on their request. Such a decision could occur at any time, meaning that, in the case of a refusal, the delay triggering the 90-day regulated period

to submit a restoration application under subsection 182(1) of the Regulations could start at any moment.

[25] I agree with Mr. Shekhtman that it would lead to absurd and unreasonable results if a decision on a request for extension of temporary resident status could be considered to have been "made" if its existence is not communicated to the affected temporary resident, in one way or another. Any other interpretation of paragraph 183(5)(a) would lead, in my view, to absurd and unreasonable results. As rightly stated by Mr. Shekhtman, it is unreasonable to expect a temporary resident to apply for restoration for his or her status until they are informed that their request for extension has been refused and that restoration is required. Simply having a date stamped on a decision refusing a request for extension is not sufficient to conclude that a decision has been "made".

[26] It is a well-established principle of legislative interpretation that the legislature does not intend to produce absurd consequences. An interpretation can be considered absurd "if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 27). I consider that it would be absurd, illogical and unreasonable if the "implied status" conferred to temporary residents by the *Immigration and Refugee Protection A*ct, SC 2001, c 27 [IRPA] and the Regulations could terminate when the decision refusing their requests for extension is rendered by the Canadian immigration authorities, even though the decision is not communicated to the temporary residents. If it were the case, it would mean that a temporary resident could be in

Canada without status and without knowing about it because he or she has not been informed of it. I note that, in the context of a pre-removal risk assessment decision, this Court has determined that it is reasonable to consider that a decision is not made until notice of the decision "has been delivered" to the applicant, and until the date "that its existence [is] communicated to the applicant" (*Chudal v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1073 at para 19). A comparable approach should prevail in the case of a decision governed by subsection 183(5) of the Regulations.

[27] In sum, the only reasonable interpretation of paragraph 183(5)(a) of the Regulations is that a decision cannot be considered "made" until it is communicated in one way or another to the temporary resident. It is CIC's responsibility to inform the temporary resident of the fact that his or her request for exclusion has been refused. Arguably, a decision under paragraph 183(5)(a) could be considered to be <u>communicated</u> in several different ways. It could be when the refusal letter is sent by CIC to the temporary resident, assuming that the Canadian immigration authorities have the required evidence to prove it on a balance of probabilities. It could also be when the temporary resident is deemed to have received the refusal letter, or when he or she actually receives it. In the absence of regulations specifying the moment on which a decision is deemed to have been made under subsection 183(5) of the Regulations (as opposed, for example, to what is set out in section 182.1), the determination of the date on which a decision has actually been communicated under that provision will depend on the evidence available in each situation.

[28] In the case of Mr. Shekhtman, I do not have to decide whether that date is the day on which the Refusal Decision was sent, received, or deemed received. Here, for the above reasons,

there is no evidence allowing to reasonably determine that the Refusal Decision has been sent by the Canadian immigration authorities on either July 14, 2016 or November 30, 2016. There is only evidence of the Refusal Decision having been received by Mr. Shekhtman. The evidence on the record about a date on which the Refusal Decision was communicated to Mr. Shekhtman is December 7, 2016, when Mr. Shekhtman received it. This means that Mr. Shekhtman's restoration application was not filed late.

[29] I accept and acknowledge that the role of this Court is not to reweigh the evidence on record and to substitute its own conclusions to those of immigration or visa officers. I also do not dispute that immigration officers have broad discretionary powers in the decisions they make under the IRPA and the Regulations, and that their decisions are entitled to considerable deference by the Court given their specialized expertise. I furthermore agree that the reasons for an administrative tribunal's decision do not have to be perfect or comprehensive, and that the decision-maker can provide brief or limited reasons.

[30] However, even under the deferential standard of reasonableness, the fact remains that the reasons for a decision must allow the reviewing court "to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reasons must be adequately supported and sufficiently clear to allow the reviewing court to find that they provide the justification, transparency and intelligibility required of a reasonable decision (*Agraira v Canada (Public*

Safety and Emergency Preparedness), 2013 SCC 36 at para 89; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3).

[31] While a reviewing court must resist the temptation to intervene and usurp the specialized expertise that Parliament has opted to confer to an administrative decision-maker like the Officer, it cannot show "blind reverence" to a decision-maker's interpretation and assessment of the evidence (*Dunsmuir* at para 48). In the context of a review for determining the reasonableness of a decision, it is the Court's role to detect "irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction", such as "the presence of illogic or irrationality in the fact-finding process" or in the analysis, or the "making of factual findings without any acceptable basis whatsoever" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99, rev'd on other grounds 2015 SCC 61; *Dandachi v Canada (Citizenship and Immigration)*, 2016 FC 952 at para 23). Applying the reasonableness standard still requires the findings of fact and the overall conclusion of a decision-maker to withstand a "somewhat probing examination" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 63). Where the findings of a decision-maker do not flow from the evidence, a decision will not withstand a probing examination. More specifically, the case law recognizes that a conclusion for which there is no evidence before the decision-maker can be set aside by a reviewing court because that conclusion would have been reached without regard to the material brought before the administrative tribunal (*Canadian Union of Postal Workers v Healy*, 2003 FCA 380 at para 25). Indeed, factual findings for which a tribunal has no evidence fall under the grounds set out at paragraph 18.1(4)(d) of the *Federal Courts Act,* RSC 1985, c F-7 [FC Act] to

justify the Court's intervention in an application for judicial review (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 34-40).

[32] Admittedly, this type of situation is rare and exceptional in the context of judicial reviews, but the Officer's decision in Mr. Shekhtman's case regrettably falls in this category. There was no evidence on the record capable of supporting the conclusions reached by the Officer that the Refusal Decision received by Mr. Shekhtman was dated November 30, 2016, or that Mr. Shekhtman himself indicated that it was sent on that date. Furthermore, whether it was July 14, 2016 or November 30, 2016, I am not satisfied that the evidence could reasonably support a conclusion that the Refusal Decision was sent on either of those dates. However broad the range of possible and reasonable outcomes or the Officer's latitude may be, the Officer's finding on the date on which the Refusal Decision was "made" tumbles outside of it.

B. *Remedies*

[33] What should I then order in terms of remedy? Mr. Shekhtman asks the Court to overturn the Officer's Restoration Decision and to refer the matter to another immigration officer so that his restoration application can be considered on its merits. He further seeks a declaratory relief as well as costs.

(1) Refer the matter to another immigration officer

[34] Given the evidence on the record, can I remit the matter back to CIC with instructions to determine that Mr. Shekhtman's restoration application was submitted within the regulated 90-day period and to consider it on its merits? In my view, the answer is yes.

[35] Paragraph 18.1(3)(b) of the FC Act provides that the Court may, on judicial review, "…quash, set aside or set aside and refer back for <u>determination in accordance with such directions as it considers to be appropriate</u> […] a decision, order, act or proceeding of a federal board, commission or other tribunal" [my emphasis]. However, the Court should exercise considerable restraint in issuing directions that amount to a directed decision, because it gives rise to concerns about the Court accomplishing indirectly what it is not authorized to do directly, namely substituting its own decision for that made by the administrative decision-maker by compelling the decision-maker to reach a specific conclusion. The possibility of rendering a "directed verdict" (sometimes also referred to as an ordered or imposed verdict) "is an exceptional power that should be exercised only in the clearest of circumstances" and where the case is straightforward and the decision of the Court would be dispositive of the matter (*Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14).

[36] Some exceptional circumstances that open the door to specific directions from the Court are situations where the outcome of the case is a foregone conclusion, in other words where the evidence can lead only <u>to one result</u> (*D'Errico v Canada (Attorney General)*, 2014 FCA 95 at paras 16-17). The Federal Court of Appeal recently reiterated that, while it is impossible to

categorize all of the situations that may constitute exceptional circumstances for which a particular remedy may be ordered, the discretion should be exercised solely when there is only one reasonable outcome open to the decision-maker (*Canada (Procureur général) c Allard*, 2018 CAF 85 at paras 44-45; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at para 14).

[37] I am satisfied that this application for judicial review constitutes such an exceptional situation. In light of the evidence on the record, only one reasonable interpretation was possible on the acceptability of Mr. Shekhtman's restoration application: namely, that the date on which the Refusal Decision was "made" was December 7, 2016 and that, consequently, Mr. Shekhtman's restoration application was submitted within the regulated 90-day period.

[38] The Court's judgment will therefore order accordingly.

(2) Declaratory relief

[39] In terms of remedies, Mr. Shekhtman also asks the Court to more generally declare that, under paragraph 183(5)(a) of the Regulations, the day on which "a decision is made" is the day the decision is received by an applicant. He submits that, for restoration applications as well as several other provisions in the Regulations, the absence of a declaratory relief could deprive applicants of remedies or leave them without status for a long period in the event that the Minister fails to inform them of a decision.

[40] I do not agree with Mr. Shekhtman on this point. True, a declaratory relief is one of the remedies available for judicial reviews, pursuant to paragraph 18(1)(a) of the FC Act. I am also mindful that, according to the Supreme Court of Canada, "[a] court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it" (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46). These principles were reaffirmed by the Federal Court of Appeal in *Canada (Indian Affairs) v Daniels*, 2014 FCA 101 at paragraph 64, rev'd on other grounds 2016 SCC 12. However, it must be remembered that remedies are discretionary. Thus, the Court must consider whether to exercise its discretion in favour of a remedy, and if so, what sort of remedy and on what terms (*Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at para 28).

[41] In my view, this is not a situation where the Court should exercise its discretion to issue a declaratory relief. There is simply no need to do so in this case, in light of my conclusions on the unreasonableness of the Officer's Restoration Decision and on the remedial order to be issued by the Court. In the case of Mr. Shekhtman, the decision does not hold because it is not supported by the evidence on the record, and there is no need for an additional declaratory relief to ensure that Mr. Shekhtman's situation will be adequately remedied.

(3) Costs

[42] Mr. Shekhtman claims costs under Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. He argues that special reasons exist to award costs since the Officer: (i) acted in an unfair, oppressive or improper manner; (ii) had an

unreasonable position and manifested rigidity; (iii) lacked sensitivity and responsiveness to his interests; and (iv) stated erroneous information in the Restoration Decision.

[43] I do not agree. Costs are not ordinarily granted in immigration proceedings in this Court, as Rule 22 provides that "[n]o costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders". While each case turns on its own particular circumstances, the threshold for establishing the existence of "special reasons" is high (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 45; *Ibrahim v Canada (Citizenship and Immigration)*, 2007 FC 1342 at para 8). In *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at paragraph 7, the Federal Court of Appeal summarized what can be considered "special reasons" meriting an award of costs under Rule 22. It includes, for example, an immigration officer circumventing an order of the Court, an immigration officer engaging in a misleading or abusive conduct, cases of unreasonable and unjustified delay, or the Minister opposing an obviously meritorious judicial review.

[44] I do not find that the circumstances of this case are similar or close to those situations which have justified an order of costs. Special reasons do not arise merely because the Minister elected to exercise his statutory right to challenge an application for judicial review of a decision and is not successful. Neither do they include an immigration officer making an erroneous decision, which was the case here. I am therefore not persuaded that "special reasons" exist to justify an order of costs, and I decline to make such an order.

IV. **Certified question**

[45] Mr. Shekhtman asks the Court to certify the following question for the Federal Court of Appeal: "[i]n applying for restoration pursuant to sections 182 and 183 of the Regulations, is the date a decision is "made", and whereby the 90 days to file for restoration starts to run, the date the applicant is made aware of the existence of a decision on his/her application?"

[46] I have considered the submissions of Mr. Shekhtman and the response of the Minister and, for the reasons that follow, I do not find that the proposed question meets the strict requirements for certification developed by the Federal Court of Appeal. According to paragraph 74(d) of the IRPA, a question can be certified by the Court if "a serious question of general importance is involved". To be certified, it is now well established that the question must be a serious one that (i) is dispositive of the case, (ii) transcends the interests of the immediate parties to the litigation, and (iii) raises an issue of broad significance or general importance (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 [*Mudrak*] at paras 15-16; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 [*Zhang*] at para 9). As a corollary, the question must have been dealt with by the Court and it must arise from the case (*Mudrak* at para 16; *Zhang* at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at para 29). Furthermore, if the judge decides that a question need not be dealt with, it is not an appropriate question for certification (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12).

[47] I decline to certify the question proposed by Mr. Shekhtman as it does not need to be dealt with in the particular circumstances of this case and would therefore not be dispositive of the appeal. I do not dispute that, as formulated, the question appears to raise an issue of broad significance or general importance as its determination could impact other future restoration applications, and possibly subsequent applications for leave and judicial review. Here however, due to the specific facts of this case and the evidence on the record, the only reasonable date at which the regulated 90-day period could have started to run for Mr. Shekhtman is December 7, 2016. In light of the evidence before him, it was unreasonable for the Officer to conclude that the Refusal Decision could have been "made" on any other date. I therefore do not have to decide whether the starting date of the 90-day period to file for restoration starts to run from the date an applicant is made aware of the existence of a decision on his or her application, or from another point in time.

V. Conclusion

[48] The Officer's decision to reject Mr. Shekhtman's application for restoration on the basis that it was submitted after the regulated 90-day period is not a reasonable outcome in respect of the applicable law and the evidence on the record. Under the reasonableness standard, the Court must intervene if the decision under judicial review falls outside the range of possible and acceptable outcomes in respect of the facts and law. That is the case here. Therefore, I must allow Mr. Shekhtman's application for judicial review and refer his restoration application back to the Minister so that it can be re-determined on its merits by another immigration officer, in accordance with these reasons. In light of the foregoing, it is not necessary to deal with Mr. Shekhtman's claims of breach of procedural fairness.

[49] However, I agree with the Minister that there is no need for the declaratory relief sought by Mr. Shekhtman and that no order of costs is justified in the circumstances. No question of general importance is certified.

JUDGMENT in IMM-5473-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted in part.

2. The December 5, 2017 decision of the immigration officer in Application V316671300 rejecting Mr. Shekhtman's application for restoration of his temporary resident status is set aside.

3. The matter is referred back to Immigration, Refugees and Citizenship Canada so that Mr. Shekhtman's application for restoration be considered to have been submitted within the 90-day regulated period, and that it be re-determined and considered on its merits by a different immigration officer, in accordance with these reasons.

4. No costs are awarded on this application.

5. No serious question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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