Date: 20060525

Docket: IMM-4803-05

Citation: 2006 FC 641

Ottawa, Ontario, May 25, 2006

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

AFSHIN KEYMANESH

Applicant(s)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant has challenged a decision made by an officer of the Respondent (Department) denying his application for permanent residency status because of a failure to obtain a pardon from a conviction for impaired driving in 1998. In the absence of a pardon, the Applicant was ineligible for landing and, in the result, subject to removal.

Background

[2] The Applicant came to Canada from Iran in 1992. Since that time, he has made significant cultural and social contributions to the community. Indeed, it was on the basis of those contributions that he was admitted for humanitarian and compassionate (H&C) reasons in 1996. The Departmental report recommending him for landing described him very positively:

> It is felt that Mr. Keymanesh has not only contributed significantly to the local Iranian community culturally, but to the Canadian community as a whole, and will continue to do so. Highly skilled Persian instrument maker who is self-supporting and would probably qualify under the self-employed category. He is highly respected within the Iranian community and well integrated within society. His work and music teaching does enrich the community and seen by the coomunity (sic) as an important part of maintaining the cultural heritage of the local Iranian community. If forced to return to Iran Mr. Keymanesh would suffer an undue hardship in that the music that is so much been part of his life, would probably be lost forever, or a (sic) the very best, he would be forced to practise his craft underground.
> -Mr. Keymanesh impressed me a t (sic) the interview and appeared to be a very honest and sincere individual.

[3] By letter dated June 12, 1996, the Department advised the Applicant that he had been approved in principle for a visa exemption but that landing would be subject to meeting other immigration requirements, including health and security assessments.

[4] When the Department learned of the Applicant's criminal conviction, it notified him of the need for both a pardon and a valid Iranian passport. It also advised him that he would not be eligible to apply for a pardon for three years. This extension of time afforded by the Department was generous because the Applicant could have been removed immediately on the basis of his criminal conviction. By letter dated March 20, 2001, the Department again advised the Applicant of the need for a pardon and a passport. It appears from the Record that that letter was not initially

received by the Applicant and it was re-forwarded to him at a new address in Harrison Hot Springs by covering letter of July 17, 2001. Also in the Record is a letter from the Applicant to the Department dated July 19, 2001, requesting a copy of the original letter confirming his approval in principle for admission to Canada which he advised had not been received.

[5] The Department's file indicates that the Applicant maintained fairly regular contact including advising it of his various changes of address over the years. Although the Applicant was reasonably diligent in keeping the Department advised of his whereabouts, he was not particularly attentive to meeting its outstanding request for a pardon. The only explanation offered by the Applicant for his failure to fulfil this requirement is that he was confused about the process. Nevertheless, the Record does indicate that he made some effort to attend to the Departmental requests for information. The problem is that he did not advise the Department of what he was doing and the Department, at one point, lost track of his whereabouts.

[6] The Department, quite rightly, was not prepared to hold the Applicant's case for landing in abeyance indefinitely. It wrote to him on January 6, 2002, at his Harrison Hot Springs address (which, in reality, was a forwarding address) giving him thirty (30) days to respond or run the risk of having his application for landing resolved in the absence of a pardon. It appears from the Record that this letter was returned by Canada Post to the Department as "undelivered".

[7] When it did not hear from the Applicant, the Department sent a "final notice" letter to him dated March 20, 2003 at the Harrison Hot Springs address and it, too, was returned as "undelivered".

[8] When nothing further was heard from the Applicant, the Department refused his application for permanent residence and attempted again to advise him of that determination by a letter dated April 28, 2003, sent to the Harrison Hot Springs address. On the same day the Department recorded the following reason for its decision:

> Applic refused for criminal and inadmissibility. Subject did not respond to our previous letters for evid of pardon or evid that he applied for same.

[9] The Applicant filed an affidavit in support of this application deposing that he had advised the Department of a change of address from Harrison Hot Springs to Chilliwack when he attended at the Department's office on Hornby Street. That affidavit does not indicate when the move occurred, or when the notification of the change of address was given to the Department; but there is no doubt that the move did occur. The Applicant's affidavit states that he did not receive any of the three (3) notification letters referenced above. He deposed that his Harrison Hot Springs address was that of former friends with whom he had had a falling out and who had apparently not bothered to forward his mail to his new Chilliwack address. He rather blithely assumed that any mail from the Department sent to him via Harrison Hot Springs would ultimately make its way to him in Chilliwack by virtue of the change of address information he says he had provided earlier to the Department. There is, though, no indication in the Record of any notification having been recorded by the Department with respect to the Applicant's new address in Chilliwack, albeit that the Department was aware that the Harrison Hot Springs address was no longer valid.

Issue

[10] Did the Department owe a duty to give notice to the Applicant that it was intending to determine his application for permanent residence in the absence of proof of a pardon and, if so, did it fulfil that duty?

Analysis

[11] The issue raised on this application for judicial review is one of procedural fairness involving the duty to give notice. In such a case, the standard of review is one of simple correctness and does not require a pragmatic and functional approach: see *Ha v. Canada (Minister of Citizenship and Immigration)* 2004 F.C.A. 49, [2004] F.C.J. No. 174 (F.C.A.).

[12] Counsel for the Department argued that it had no legal obligation in this case to give any notice to the Applicant with respect to his potential risk of deportation. She points out, with some validity, that the Applicant was always subject to potential removal until he was approved for landing and that, once he was convicted, he was ineligible for landing because of inadmissibility. She says that the Applicant was aware of these issues affecting his status in Canada and that it was up to him to overcome the legal impediments that he faced.

[13] I do not accept that, in these circumstances, the Department had no legal obligation to notify the Applicant of the potential consequences of failing to produce a pardon. The Department, of course, attempted to give notice, albeit unsuccessfully. This could be seen as an acknowledgment that notice was legally required but I am not inclined to give it that much import. What is significant is that the Applicant had some legal status in Canada. Unlike a visa applicant who is

seeking status here, the Applicant had been lawfully in Canada since 1996 and he had been approved in principle for landing on H&C grounds since that time. He had also received authorization for employment in Canada and, even after his criminal conviction, the Department did not seek to declare him inadmissible. To its credit, the Department allowed the Applicant to remain in Canada and thereby gave him the time to obtain a pardon which would remove the legal impediment to landing.

[14] I agree with the Applicant's counsel that cases like the one at bar are very fact-specific and that any duty to give notice and the means by which notice is effected are contextual. This point is made by David J. Mullan in *Administrative Law* (2001) at page 233:

> It is one of the fundamentals of procedural fairness that those affected by decisions coming within its ambit should in general receive notice of the process about to be undertaken in a sufficient degree of detail and in a timely enough fashion to enable the effectuation of their participatory entitlements. However, what this involves is a very context-sensitive inquiry. Moreover, as will be seen a little later in this chapter, there are also rare emergency situations in which notice comes and hearing opportunities are provided after a preliminary or interim decision or action has been taken.

[15] The kinds of considerations identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (S.C.C.) apply with equal force to the obligation by an administrative decision-maker to give effective notice, bearing in mind, of course, that a failure to give any notice will deprive a person of the right to be heard. This is the crux of the issue in the case at bar: the right to make one's case in response to an administrative decision which carries serious consequences.

[16] Here, the Applicant had a clear indication that the Department required proof of a pardon before his application for landing would be finalized. That was fair to him as far as it went. However, when the Department began to contemplate the possibility of revoking his interim status, it did have a duty to inform him of that risk. Indeed, the Department's lengthy acquiescence may well have created some expectation in the mind of the Applicant that time was not of the essence and that he would be informed of any change in the Department's position.

[17] It is difficult to contemplate any decision by the Department which would have greater significance to the Applicant than the one taken here. The finalization of his application for permanent residency without the required pardon had only one possible outcome – deportation. The requirement that notice be afforded to the person affected by such a decision is fundamental to the achievement of fairness: it is the essential foundation of virtually all of the other procedural fairness protections.

[18] The obligation to give effective notice of a potentially adverse administrative decision is different than a situation involving the obligation to produce evidence or to meet a burden of proof. Cases like *Arumugam v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1360, 2001 FCT 985 (C.A.); *Bernard v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1474, 2001 FCT 1068; *Legault v. Canada (Minister of Citizenship and Immigration)* (2002), 212 D.L.R. (4th) 139 (F.C.A.), reversing 203 D.L.R. (4th) 450; *Tahir v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1354; and *Allee v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 468 – all cited by the Respondent – deal with the obligation to produce evidence to a decision-maker and correctly hold that the person affected ordinarily carries

that burden. With few exceptions, the decision-maker has no duty to make independent inquiries or to search out evidence that might have been identified through the inquiry or hearing process and which is available to the person affected. I believe however that effective notice is required, in cases like this one, where a person's status in Canada is effectively being revoked, and where the right to be heard hangs in the balance.

[19] The question remains as to where the responsibility lies where notice has not occurred because contact with the affected person has been lost. Here the Department attempted to give notice to the Applicant and the content of the letters it sent cannot be faulted. However, the critical notification letters – those which spoke of the potential consequences of failing to respond – were not received, and the Department knew that. There is no evidence that the Department did anything to locate the Applicant before it decided to revoke his interim status, despite the fact that he undoubtedly could have been found fairly easily through other references in the file.

[20] It is noteworthy that the Department's own policy guidelines (IP5 – *Immigration Application in Canada Made on Humanitarian and Compassionate Grounds*, section 17.3) suggest that where contact has been lost some effort should be made to locate the subject. Those guidelines indicate that where an Applicant does not respond to requests for information or fails to provide an updated address a decision can be taken "based on information on file as long as previous correspondence has informed the applicant of how and when to reply and included the consequences of failing to respond". Those guidelines go on to indicate that officers should indicate in their computer notes "any attempts to verify the applicant's current address such as looking in the local telephone directory, calling the most recent telephone number provided on the application

form or calling other persons listed as contacts or representatives". These recommendations imply that where the Department is aware that its notification letters have not been received there is some responsibility to make some inquiries with respect to whereabouts. This is particularly important here given the Department's history of dealings with the Applicant over the years which indicated that he had been quite consistent in keeping it apprised of his whereabouts and had not infrequently initiated contact.

[21] This case is also unique because the Applicant has deposed that he did notify the Department of his move to Chilliwack, but the Department continued to use his Harrison Hot Springs address. I have no reason to discount the validity of that evidence or his evidence of not receiving the Department's letters. It is indisputable that two notice letters were undelivered and there were at least two other documented, albeit unrelated, instances of correspondence between the Applicant and the Department which either went astray or which were overlooked. These are the kinds of errors that routinely occur in business environments involving the handling and exchange of large volumes of documents. The question, of course, is who should bear the consequences of an error of this sort: to my way of thinking, it is the party who makes the error and not the party adversely affected by it. This is particularly the case where the Department is aware that its notices have not been received, and yet does nothing to determine a person's whereabouts. From the Department's Record in this case, it is also not clear that the officer who decided to refuse the application for landing was even aware that its notification correspondence had been returned as undelivered.

[22] I do not mean to suggest by these reasons that the Department must exhaust every tracing possibility. But some effort to that end is essential in cases like this, at least to the extent recognized by the Department's own guidelines.

[23] In these particular circumstances, I am satisfied that the Department did not meet the duty of fairness owed to the Applicant with respect to the giving of effective notice. This failure was entirely inadvertent but does require that the decision to refuse the Applicant's application for permanent residence be set aside, with that matter to be remitted to a different decision-maker for reconsideration on the merits. The Applicant shall be given a fresh opportunity to make submissions to the Department with respect to the perfection of his application for permanent residency. I am, of course, assuming that any subsequent steps taken by the Department or by any other agency of the Government will be either reversed or held in abeyance pending this re-determination.

[24] I give both parties the opportunity to propose a certified question within seven (7) days of this decision with a right of reply within the following three (3) days.

JUDGMENT

THIS COURT ADJUDGES that:

1. this application is allowed and that the Respondent's decision to refuse the Applicant's application for permanent residence is hereby set aside, with the matter to be remitted to a different decision-maker for reconsideration on the merits; and
2. both parties shall have the opportunity to propose a certified question within seven (7) days of this Order with a right of reply within the following three (3) days.

"R. L. Barnes"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4803-05
STYLE OF CAUSE:	Afshin Keymanesh v. MCI
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APPEARANCES:

Mr. Zool K.B. Suleman	FOR THE APPLICANT
Ms. Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Suleman and Company Vancouver, B.C.	FOR THE APPLICANT
Mr. John H. Sims, Q.C. Deputy Attorney General of Canada Department of Justice Vancouver Regional Office	FOR THE RESPONDENT