Federal Court  Cour fédérale

Date: 20140731

Docket: IMM-1729-13

Citation: 2014 FC 766

Ottawa, Ontario, July 31, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

EKTA HASMUKH TRIVEDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application under s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of an Immigration Officer [Officer] at the High Commission of Canada in New Delhi, dated January 21, 2013 [Decision], which refused the Applicant's application for permanent residence under the Skilled Worker class.

BACKGROUND

[2] The Applicant is a citizen of India. She applied for a permanent resident visa as a Federal Skilled Worker in February 2010. At the time, the Applicant was working in the United States (US). However, the mailing address she listed on her application was in Mumbai, India, and this was never altered. The Applicant says her application was approved in principle on February 1, 2012. However, after Citizenship and Immigration (CIC) sent her a letter requesting certain required documents, and she failed to respond, the application was ultimately denied. The problem was that the letter was sent to her (by then former) residential address in the US rather than her mailing address in India, and she never received it. The Applicant says this resulted in procedural unfairness.

[3] The specific chronology of events is as follows. On June 25, 2012, an officer from the High Commission in New Delhi, identified in the Computer Assisted Immigration Processing System (CAIPS) notes as SSH, mailed a letter to the Applicant at her previous residential address in Evansville, Indiana. The letter requested that the Applicant provide, within 45 days, the following items: Right of Permanent Residence Fee (RPRF), medical exams and passport for the Applicant and her spouse, and proof of funds showing at least $13,837 in Canadian dollars. On August 7, 2012, the letter was returned undelivered. On August 22, 2012, the officer e-mailed the Applicant requesting that she update her mailing and residential addresses using the online form on the Minister's website.

[4] The Applicant says that she logged into the system and entered the same mailing address used previously, and clicked "submit." She claims that she received an automated message stating that her information would be updated within thirty (30) days.

[5] On January 28, 2013, the Applicant received a letter from the Respondent dated January 21, 2013 stating that she had failed to respond to the June 25, 2012 letter, and as such the application for permanent residence as a Skilled Worker was refused.

DECISION UNDER REVIEW

[6] In a letter dated January 21, 2013, the Officer refused the Applicant's application for permanent residence as a Skilled Worker. The Officer noted that under s. 16(1) of the Act, an applicant is required to answer truthfully all questions put to them for the purpose of the examination and must produce all relevant evidence and documents that the Officer reasonably requires. The Officer stated that on June 25, 2012 the Applicant had been asked to produce certain evidence and documents within 45 days in order to proceed further, and as of the date of the letter, no communication had been received from the Applicant. The Officer was therefore not satisfied that the Applicant met the requirements set out in s. 11(1) of the Act and refused the application.

ISSUES

[7] The Applicant raised the following issue in this application:

a. Did the Respondent unilaterally and arbitrarily alter the mailing address of the Applicant without providing a rationale, and if so, does this constitute a denial of procedural fairness?

STANDARD OF REVIEW

[8] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[9] The question of whether the Officer unfairly denied the Applicant an opportunity to respond to the request for evidence and information raises an issue of procedural fairness that is reviewable on a standard of correctness: see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100; *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53.

STATUTORY PROVISIONS

[10] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
[…]	[…]
Obligation — answer truthfully	Obligation du demandeur
16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16. (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis
[…]	[…]

ARGUMENT

Applicant

Procedural Fairness

[11] The Applicant says the CAIPS notes show that an officer denoted as SSH sent the Applicant a letter to the wrong address. When the letter was undelivered, the same officer solicited information from the Applicant in such a way that he or she would not be informed when the information was provided.

[12] The Applicant notes that the Court has previously held that applicants bear the responsibility in receiving mail, assuming that the respondent has properly sent this mail. She cites *Yang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 124 at para 8 [*Yang*], where Justice Snider held:

> [8] Having reviewed the record before me, I am satisfied that, on a balance of probabilities, the March 27 letter was sent, by regular surface mail, to the address indicated by the Applicant. A copy of the letter is contained in the file; **the address is correct;** and, the Computer Assisted Immigration Processing System (CAIPS) notes make explicit reference to the sending of the March 27 letter. While the Applicant has produced evidence that his consultant did not receive the March 27 letter, he does not present evidence that would lead me to doubt that the letter was sent to the **correct address** by reliable means.
>
> [Applicant's emphasis]

[13] The Applicant argues that she was not provided with any reason as to why the mail was sent to her residential address when she had listed in her application a mailing address that was

close to the visa office. The Applicant submits that such a failure to adduce reasons does not stand up to a "somewhat probing analysis": *Zheng v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 31, 5 Imm LR (3d) 208 (TD). Since the Respondent mailed the request for information letter to the wrong address, there is a reviewable error on the face of the Record.

[14] The Applicant says the analysis in *Hu v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16093, 193 FTR 148 (TD) is applicable here. In that case, the applicant had sent a form changing his mailing address to that of his new counsel. CIC instead sent correspondence – a notice to appear – to the applicant's mailing address. That address was out of date, and the applicant failed to appear at the interview. Justice Pinard found at para 16 that "it is a clear breach of the duty of fairness to wilfully ignore the applicant's duly signed change of mailing address and to instead insist on sending the letters requiring the applicant to appear for an interview elsewhere."

[15] If successful, the Applicant argues that she should be allowed her costs in the application on a solicitor and client basis. She submits that there is ample authority to award costs where the Respondent has failed to properly issue instructions to an applicant, and has refused to correct this error when it becomes known: *Dhoot v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1295 at para 19; *Paul v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1075 at paras 12-14.

Respondent

Risk of non-delivery rests with the Applicant

[16] The Respondent argues that once the Minister proves that a communication was sent to an applicant and the visa officer had no indication that the delivery of such communication failed, the risk of non-delivery rests with the Applicant: *Alavi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 969 at para 5 [*Alavi*]; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2009 FC 935 at para 12 [*Kaur*]; *Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024 at para 36 [*Zare*].

[17] The Respondent says the evidence before the Court establishes on a balance of probabilities that the letter of June 25, 2012 was properly sent to the Applicant's residential address, and that the visa officer had no indication that the communication had failed.

[18] In *Yang*, above, Justice Snider found similar evidence to be sufficient to conclude on a balance of probabilities that a letter was sent via regular mail, the Respondent argues. Thus, the Applicant bore the risk of a failure to receive the document.

There was no breach of procedural fairness

[19] The Court has held that procedural fairness in the context of visa applications does not require that visa offices confirm the receipt of letters, faxes or e-mails, as visa officers process a

large volume of applications: *Yang*, above, at para 14; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 75 at para 14.

[20] Furthermore, the Applicant was contacted by e-mail on August 22, 2012 when the letter of June 25, 2012 was not received, and was asked to update her mailing and residential addresses. The Applicant provided the same mailing address previously provided, but she has not said whether she updated her residential address. She also describes the address in Evansville, Indiana as her "previous residential address" in her submissions. Thus, accepting what the Applicant says, the Applicant failed to alert CIC to a change in her residential address in responding to the August 22, 2012 e-mail.

[21] In the Respondent's view, the Applicant has misunderstood the crux of the disagreement between the parties, which centres on the residential address. The Respondent does not dispute that the Applicant provided her mailing address in India to the Respondent as her current mailing address, but emphasizes that the Applicant's residential address changed and CIC was not made aware of the change. The Respondent says it is not an error for the Minister to rely on contact information provided by the Applicant, in particular when the person concerned had an opportunity to update the information and did not do so.

[22] Since no response was received to the August 22, 2012 e-mail, the Respondent says, the Officer could not correctly assess the medical and financial checks and the application was properly refused.

[23] The Respondent submits as well that costs should not be ordered. Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, SOR/93-22 provides that no costs should be awarded on immigration matters unless the Court is satisfied that there are special reasons for doing so. The Respondent says there are no special reasons for awarding costs here. Even if the Court finds that the Officer made errors in law, these do not constitute special reasons in the absence of bad faith. Bad faith is a very serious allegation and the test is very stringent: *Guccione v Alberta Veterinary Medical Association*, [1997] AJ No 918 (Alta QB) at paras 6-7; *Newfoundland and Labrador Housing Corp v Clarke*, [1993] NJ No 6, 105 Nfld & PEIR 11, (Nfld CA). The reasons in this case are defensible in light of the relevant jurisprudence, and there is therefore no basis upon which costs might be awarded: *R v Sheppard*, [2002] 1 SCR 869, at paras 33, 46, and 53; *R v Kendall*, [2005] OJ No 2457 at para 44, 75 OR (3d) 565 (CA); *Via Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25,[2000] FCJ No 1685 (CA); *Townsend v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 371; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA); *Woolaston v Canada (Minister of Manpower and Immigration)*, [1973] SCR 102; *Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437, 63 FTR 81 (TD); *Pehtereva v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1491, 103 FTR 200 (TD).

Applicant's Reply and Further Submissions

[24] The Applicant says the Respondent's argument hinges on the assumption that CIC may query an applicant on their preferred method of correspondence but then ignore this information for no reason and without informing the applicant. She never instructed the Respondent to use her residential address, and never expected to receive mail there. She had supplied the visa office

with two self-addressed mailing labels bearing her mailing address. She says she moved often due to work requirements, sometimes staying at the same address for as little as two weeks.

[25] The Applicant says the form she submitted asked for a mailing address, and included a box to check if the applicant's residential address is different from their mailing address. She notes that there are many reasons for different addresses, such as wanting correspondence to go directly to counsel, confidentiality issues at home, or the lack of a fixed address due to travel plans. She says the form clearly asked "what is your mailing address?" and "what is your residential address if different than the mailing address?" A reasonable English-speaking person would assume the mailing address would be used when mailing information to her.

[26] The cases stating that an applicant bears the risk of non-delivery of correspondence are distinguishable on their facts, the Applicant argues, because in those cases the correct address was used.

[27] As for costs, the Applicant argues that while the Officer may have erred in good faith, the Respondent opposed the application for leave and judicial review even when a clear error was presented, and has presented arguments that not only lack merit but "[contradict] the meaning of words and [offend] good sense."

[28] The Applicant says the affidavit of the Appeal and Litigation manager at the High Commission in New Delhi, Jyotsna Sethi, describing general procedures in the visa office, does

not provide a valid rationale for unilaterally altering the method of correspondence implicitly agreed upon by the Applicant. The affidavit states:

> 8. Although there is no doubt that her current mailing address on eCAS is described as being located in India, there is also no doubt that the Applicant provided the Minister with a residential address in the USA and she did not update it.
>
> 9. Consequently, we used the address in the US to contact the Applicant.

The Applicant says this is a description of the error rather than an explanation of why the letter was sent to her residential address.

Respondent's Further Submissions

[29] In its further submissions, the Respondent argues that there is no evidence that the Applicant responded to the August 22, 2012 e-mail requesting an update to her residential and mailing addresses. It appears from the Applicant's submissions and affidavit that she is unsure which address she attempted to provide in response to the August 22, 2012 e-mail, and in any event there is no objective evidence that she provided any information in response to the e-mail.

[30] Furthermore, as stated by Jyotsna Sethi in his affidavit, the link embedded in the August 22, 2012 e-mail was not a means to change a residential or mailing address but rather a link to facilitate communication between an applicant and the High Commission in New Delhi.

[31] Even if one accepts that an error was committed when the June 25, 2012 correspondence was sent to the Applicant's residential address in the US rather than the mailing address in

Mumbai, the Respondent argues, the refusal of the application would have been avoided if the Applicant had simply responded to the August 22, 2012 e-mail. The CAIPS notes show that the application was refused because the visa post did not receive a response to that e-mail. If the Applicant had responded, she would have received a second request for the requisite information and would presumably have provided it.

ANALYSIS

[32] The Applicant says that, as a result of procedural unfairness, she was deprived of the opportunity to provide the information required to complete her application for a permanent residence visa.

[33] I think it is clear that the Officer made a mistake in attempting to communicate with the Applicant by way of her residential address rather than her mailing address. I accept the Applicant's argument that a mailing address is provided for a purpose, and it is not procedurally fair to use a residential address when a mailing address has been provided. Had the attempts by the High Commission to communicate with the Applicant stopped at this point, then the case for procedural unfairness would be clear.

[34] However, when it became obvious that the initial request for additional information had not reached the Applicant, attempts to reach her by e-mail were made, and the August 22, 2012 e-mail from Delhi Immigration requested the Applicant's current residential and mailing addresses. The Applicant was not told why this request was made, but it was clear that, for whatever reason, Delhi Immigration needed a response that provided the current addresses.

[35] There is no dispute that the Applicant received this e-mail, and no suggestion that this was not an appropriate way to communicate with the Applicant; she had provided her e-mail address for this very purpose. The August 22, 2012 e-mail says that "all mail correspondence" with the Delhi Officer should use the link referred to, and that correspondence by e-mail should "always include the applicant's full name, date of birth, and file number in your message."

[36] The Applicant says that she responded to the August 22, 2012 e-mail and provided the information required. In her affidavit for the present application she says that

> On August 22, 2012, I received an email from the visa office asking for my mailing address to be updated. This email contained a link to an online form on the Respondent's website. I logged in using my application credentials and input the same mailing address used previous and clicked submit. The dialogue on screen stated that my information would be altered within thirty (30) days.

[37] So, at the very least, she says she provided her "mailing address" by entering that address on the online form on the Respondent's website. The CAIPS notes show that the Respondent received "NO RESPONSE" from the Applicant to the August 22, 2012 e-mail. This suggests some kind of break-down in communication. However, Jyotsna Sethi, the Appeals and Litigation Unit Manager at the Canadian High Commission in New Delhi swears that

> The same e-mail contains a link to our webform enquiries: https://dmp-portal.cic.gc.ca/enquiries-renseignements/case-cas-eng.aspx?mission=new%20delhi.
>
> It is important to note that this is not a means to change an address online. Rather, it is a means to communicate to our mission.

[38] Ian Smart, the Senior Programs Advisor at the Department of Citizenship and Immigrations in Ottawa, swears that

> I have been provided with a copy of the Applicant's affidavit and can attest that the webpage attached to the affidavit is an extract of her Information In Electronic Client Application Status (e-CAS). e-CAS allows clients to check the status of their applications for certain Permanent Resident and Citizenship lines of business online.
>
> In order for clients to access e-CAS, they must first log-in. Upon logging-in, clients are able to view limited information specific to their application process. Most messages pertain to notifying clients when requested information has been received or when notices have been sent.
>
> CIC, however, does enable certain applicants to update their address online. Electronic Change of Address (e-COA) allows applicants to electronically advise CIC of an in-Canada address change. I can advise that in August 2012, the CIC website instructed overseas applicants to contact the visa office to update/change their address. The e-COA system did not allow overseas applicants to update their address online. I verily believe that this link was in place at the time the Applicant indicates to have updated her address online: http://web.archive.org/web/20120826150933/http://www.cic.gc.ca/english/information/change-address.asp
>
> I have read the email the mission sent to the Applicant and can advise that the link provided in the email is not the one for our online change of address system (e-COA). The link directs the Applicant to a web-based enquiry form. There are no specific fields on the enquiry form to update a mailing or residential address; however, a client could request a change of their address using this enquiry form by typing the request into the enquiry box: https://dmp-portal.cic.gc.ca/enquiries-renseignements/case-cas-eng.aspx?mission=new%20delhi

[39] In sum, the Respondent's evidence is that no response was received to the Respondent's August 22, 2012 e-mail and that the system in place at the time would not have allowed the Applicant to update her address online in the way she says she did. Rather, overseas applicants were advised to contact the visa office to update or change their address.

[40] The cases cited by the Respondent (and several others identified in the jurisprudence) all deal with the question of who bears the risk where CIC has sent a notice to an applicant who claims that they did not receive it. The relevant legal principles are succinctly stated in *Alavi*, above, at para 5:

> The principle to be derived from these cases, all dealing with communications from the Embassy processing the application to the applicant or applicant's representative, is that the so-called "risk" involved in a failure of communication is to be borne by the Minister if it cannot be proved that the communication in question was sent by the Minister's officials. However, once the Minister proves that the communication was sent, the applicant bears the risk involved in a failure to receive the communication.

[41] To this, the Court added in *Caglayan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 485 at para 15 [*Caglayan*]:

> However, the jurisprudence has also established that when there is objective evidence that the correspondence was not received because of a proven communication failure, it is the respondent who bears the risk. In other words, 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. As Justice Mandamin stated in *Zare v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1024 at para 40, "the respondent has an obligation to deal with the Applicant fairly which goes beyond simply pressing the email send button."

[42] The situation in this case differs from those above in that it is an alleged communication from the Applicant to CIC, in response to a CIC request for an update, that was allegedly not received. Thus, the Respondent is asking the Court to extend the principles just cited to new circumstances.

[43] If this were all there was to the matter, there would be no difficulty in doing so. It would be a simple matter of applying the principles just stated in a symmetrical fashion (or with parity). CIC bears the burden of showing that it sent correspondence to an applicant through valid means. By the same logic, that applicant bears the burden of showing that they sent correspondence to CIC through valid means.

[44] On this logic, the present application would undoubtedly fail, since the Applicant has not demonstrated that she sent her address update to CIC through valid means. The Respondent's evidence is not so definitive that it is possible to say that the Applicant did not access an online form she thought would enable her to update her address; but nor has she provided convincing evidence of what she in fact did and whether it was a valid means of corresponding with the Respondent. For example, she has not provided a print-out of the dialogue she says appeared on screen after she clicked "submit," telling her that her information would be altered within 30 days.

[45] But that is not all there is to the matter. There are, in my view, additional facts that distinguish this case from those cited by the Respondent. First and foremost, the Respondent's request for further evidence and documents, the failure to respond to which was the basis of the refusal, was never sent to the Applicant through valid means.

[46] This matters because the principle of procedural fairness at issue is the duty to provide notice: see *Yang*, above, at para 9. In *Yang*, it was the duty to give notice of a hearing. In the

present case, it was the duty to give notice that additional documents and evidence were required before the decision on the Applicant's application could be finalized.

[47] Notably, though there is no dispute that the Applicant received the Respondent's e-mail of August 22, 2012, she did not know where she stood with respect to her application. A request for further documents had been sent that she (through no fault of her own) knew nothing about, and a failure to respond to that request would (and did) mean the refusal of her application. After the August 22 e-mail, she continued to be completely in the dark about this, and this was due to the Respondent's mistake, not her own. Unlike in *Halder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1346 where the applicant received requests for further documents, failed to fully comply, and then complained that further correspondence on the matter was not sent through sufficiently reliable means, the Applicant in this case had no idea the documents had been requested.

[48] I also think the Respondent's communication to the Applicant requesting an address update was ambiguous as to the method to be used in responding. It did not say "please provide your current address using the link below" or "please provide your current address using the enquiries form, to which a link is provided below." Rather, the body of the message (which is attached to the affidavit of Jyotsna Sethi) simply stated:

> PLEASE ADVISE US WITHIN 20 DAYS OF THIS E-MAIL OF YOUR CURRENT RESIDENTIAL AND MAILING ADDRESS

Then, at the foot of the message, after the signature block and a listing of CIC websites, the message included the following notation:

> **For all e-mail correspondence with our office, we request you to use the enquiries form at:** [url link] **Always include the applicant's full name, date of birth, and file number in your message**

[49] One could surmise from this that the enquiries form linked at the bottom of the message was the appropriate means to update the address. But this is by no means the only reasonable way to read the message. The two thoughts are disconnected in the message, and separated by the signature block and a list of websites. The instruction did not even say "please respond by email and provide your current address," which would at least have logically connected the two thoughts. The message simply said "please advise us," without specifying the appropriate means to do so. As such, it would be just as reasonable for the Applicant to read the message as an instruction to update her address through the normal means (which could quite reasonably be interpreted to include an online electronic change of address form if available), and a standard notation that if, for any reason, the Applicant should need to correspond with the visa office by e-mail, she should do so using the enquiries form.

[50] In *Kaur*, above, the respondent sent the request for further information through valid means (the e-mail address provided by the applicant), and there was no indication that the request was not properly sent. Here, by contrast, there is no dispute that the request for additional documents – the failure to respond to which was the basis for refusal – was never sent to the Applicant through valid means.

[51] The Court stated in *Shah v Canada (Minister of Citizenship and Immigration)*, 2007 FC 207 at para 9 and *Sawnani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 206 at

para 7 that "[t]he Court must be satisfied that the notice was properly sent" (emphasis added). At issue in both *Shah* and *Sawnani* was a notice of a scheduled interview with a visa officer. In the present case, it is a notice that additional documents and evidence were required that is at issue. There is no suggestion that the application was refused because of the failure to provide an update on the Applicant's address, and it is not at all clear that this could have been the basis for a refusal, particularly when CIC had the correct address all along (see s. 16(1) of the Act). Rather, the refusal was due to the failure to respond to the June 25, 2012 request for documents. "The notice" in question is the June 25, 2012 request, and it is common ground that it was never sent to the Applicant through valid means. As such, the Respondent never fulfilled its duty to provide notice to the Applicant that further documents were required (see *Zare*, above, at paras 39, 49, 60).

[52] Because of the Respondent's failure to provide notice through valid means, the Applicant was unaware that a request that could form a basis for the refusal of her application had been made. She was aware only of a request for an address update, to which she says she tried to respond (albeit unsuccessfully). In these circumstances, it is difficult to see that the Respondent's error had been "cured" such that the Applicant must bear the consequence of a refused application due to failed communication in response to the August 22 request for an address update. The Applicant still did not have notice of the substantive requirement at issue, and this was the Respondent's fault, not her own.

[53] It is not merely a matter of following the chain of causation. It does not avail the Respondent to argue that 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.

[54] The fact that the Respondent may, at that point, not have been aware of its own previous mistake is irrelevant to the question of who, as between the Applicant and the Respondent, should bear the risk of the failed communication.

[55] The situation might be different if the evidence showed that the Applicant had never provided the proper address in the first place, or simply ignored attempts by CIC to verify her address, but neither is the case here.

[56] This reasoning also accords with the "fault-based" analysis outlined by Justice Mandamin in *Yazdani v Canada (Minister of Citizenship and Immigration)*, 2010 FC 885 at paras 45-52 and 61-62 [*Yazdani*]:

> [45] In the above cases, the issue turns on a finding of fault by one of the parties. Where the visa officer could not prove that he had sent notice, the Respondent is to bear the risk for missed communications. Where the visa officer had proved that he had sent the notice, but the communication was missed due to an error on the part of the applicant (such as a change of email address or blocking by spam filter), the applicant is to bear the risk.
>
> [46] The Applicant's case, however, is factually different. In the case at hand, the Applicant established the Consultant's email address was valid and operating properly.
>
> [47] This is not a case where applicants failed to provide updated email addresses, nor is it a case where an applicant failed to take all necessary precautions to prevent email delivery failure. This is not a case where there is a lack of evidence on the steps the applicant's representative took to establish whether his email systems were not the cause of the failed email communication. There is simply no evidence in this case that the Applicant is at

fault for the failed email communication. Unlike in *Zhang*, it is not possible for me to infer from the evidence that the Applicant is the cause of the failed communication.

[48] I draw an inference from the evidence in this case that the email communication system has failed for undetermined cause or causes.

[49] In the circumstances of the Applicant's case, it seems unduly harsh to place the risk on Applicant, who have properly submitted her application for permanent residence for processing, provided a valid email address with no evidence of malfunction, and who was simply waiting for further instructions when she discovered that her application had been rejected without an assessment of the merits.

[50] The question turns to whether the Respondent should bear the risk. The Applicant acknowledges that there does not appear to be any fault on the part of the Visa Officer at the Warsaw visa office save for a misunderstanding of a DSN messages received. The Applicant does not make much of this misunderstanding. I agree that this error is of little significance.

[51] There is no indication that the Visa Officer sent the email to the wrong address or communicated by email when the Applicant had indicated that they did not wish to receive communication in that manner. However, I do not see this as a completely no-fault case.

[52] The fact is that the Respondent chose to unilaterally transfer the Applicant's files from the Damascus visa office to the Warsaw visa office. There is of course no question the Respondent is entitled to do so especially considering it was doing so to address a backlog in processing of visa applications. However, the visa section in Warsaw did not separately notify the Applicant of the transfer nor did it otherwise verify that email communications was open between itself and the Applicant's Consultant.

[…]

[61] In the case at hand, there had been no prior successful email transmission between the Warsaw visa office and the Consultant's office. Nor does the CTC Protocol on Email Communications contemplate and provide safeguard measures for email transmission failures (such as alternate follow up by mailing the letter). Finally, the visa application system does not provide for reconsideration in such circumstances.

> [62] The Respondent chose to send an important and crucial notice to the Applicant via email without safeguards in place. Having regard for the foregoing, I conclude the Respondent bears the risk of an email transmission failure when it sent the crucial request to the Applicant.

[57] In *Yazdani*, the CIC was at fault because it transferred the application to another visa post, which then sent important documents by e-mail without verifying that e-mail communication was open between itself and the applicant and without putting safeguards in place. In the present case, the fault element is much greater. The Respondent sent the request to the wrong address, and then sent an ambiguous communication requesting an address update without giving the Applicant any sense of the precarious position in which she stood with respect to her application – a position that was the result, it must be emphasized, of the Respondent's error.

[58] In these circumstances, I find that the Respondent has breached the Applicant's procedural fairness rights and should be required to give proper notice of what remains outstanding on the Applicant's application and to process it without delay.

[59] I would also echo the words of Justice Martineau in *Caglayan*, above, at paras 22-23 to the effect that a little bit of common sense on the Respondent's part – here, when the error was discovered, and there, when the applicant asked for reconsideration – could have provided a much more prompt and less expensive solution than a judicial proceeding. Those words apply with even greater force here, since Justice Martineau in *Caglayan* dismissed the application because he found that CIC "acted in the strict legality" in issuing the decision it did.

[60] It may be that the Respondent was not aware of its error until the judicial review proceeding was already under way, but its choice to litigate the matter to its conclusion based on principle (a principle that turns out to be wrong in my view) rather than simply acknowledging its error and agreeing to process the application, has caused unnecessary delay and expense.

[61] Despite these observations, I do not find that there are special reasons justifying costs. Given the unique circumstances of the case, it cannot be said that the law was completely settled on this point, and the Respondent was within its legal rights to pursue the litigation.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer;
2. There is no question for certification;
3. No order is made as to costs.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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