Federal Court  Cour fédérale

**Date: 20160607**

**Docket: IMM-4204-15**

**Citation: 2016 FC 628**

**Ottawa, Ontario, June 7, 2016**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**DAVID CRAIG KENNEDY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] challenging a decision of a Citizenship and Immigration officer [the Officer] refusing to continue processing the Applicant's permanent resident application under the Spouse or Common-Law Partner in Canada class [spousal sponsorship application].

[2] For the reasons that follow, the application is dismissed.

## I. Background

[3] The Applicant is a citizen of the United States. In 2011, the Applicant entered into a common law relationship with a Canadian citizen and applied for permanent resident under the Spouse or Common-Law Partner in Canada class.

[4] On February 10, 2014, Citizenship and Immigration Canada [CIC] received the Applicant's spousal sponsorship application.

[5] On June 1, 2015, CIC sent the Applicant a letter by way of email indicating that the Applicant had to submit an immigration medical examination within 30 days (July 1, 2015) in order for CIC to continue processing his spousal sponsorship application.

[6] The request went unanswered as the email was redirected to the Applicant's email spam folder.

[7] On September 1, 2015, CIC sent the Applicant a letter by way of email, which was not re-directed into his spam folder, indicating that CIC would no longer continue to process the Applicant's spousal sponsorship application for not having submitted his immigration medical examination.

[8] On the same day, September 1, 2015, the Applicant sent a reconsideration request to CIC asking for an additional 60 days to complete the immigration medical examination.

[9] On September 15, 2015, the Applicant filed an application for leave and judicial review of CIC's September 1, 2015 decision.

## II. Impugned Decision

[10] The Officer concluded that the Applicant did not meet the requirements to immigrate to Canada pursuant to subsection 16(1) of the Act as he failed to submit an immigration medical examination which CIC requested in a letter sent to the Applicant by way of email on June 1, 2015. The letter stated the immigration medical examination was required in order to assess the Applicant's spousal sponsorship application, failure of which could result in the refusal of the spousal sponsorship application. On September 1, 2015, there were no documents filed and as a result, the Officer refused the application.

## III. Legislative Framework

[11] The following provision of the Act is applicable in these proceedings:

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| **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 | **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 |

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| and documents that the officer reasonably requires. | éléments de preuve pertinents et présenter les visa et documents requis. |

## IV. Issue

[12] This application raises the sole issue of whether the Officer breached his or her duty of procedural fairness owed to the Applicant in processing the Applicant's spousal sponsorship application.

## V. Standard of Review

[13] The parties agree, and I concur, that the applicable standard of review for issues of procedural fairness in permanent resident applications is correctness (*Khan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 503 at para 12 [*Khan*]).

## VI. Analysis

[14] The Applicant submits that the Respondent breached its procedural fairness obligation towards the Applicant when it refused his application based on a June 1, 2015 email request that went unanswered because the email, unknowingly to the Applicant, was redirected to his spam folder.

[15] The case law surrounding issues of email miscommunication has developed into two lines of cases. Justice Boswell in *Chandrakantbhai Patel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 900 summarized the two trends at paragraphs 36 and 37 as follows:

> [36] Although some of the cases cited above have tried to reconcile the jurisprudence, the cases are not entirely consistent with each other. The first line of cases essentially holds that the Minister need only prove two things: (1) that the impugned communication was sent to an e-mail address supplied by the applicant; and (2) there has been no indication that the communication may have failed or bounced-back. If that is proven, then it does not matter if the applicant received the communication or not, since the respondent has satisfied the duty of procedural fairness (see: e.g., *Kaur* at paragraph 12; *Yang* at paragraphs 8 and 9; *Alavi* at paragraph 5; *Halder* at paragraph 48; *Patel* at paragraph 16; *Khan* at paragraph 13).
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> [37] However, in *Yazdani* and *Zare*, the Court was satisfied that the respondent Minister in those cases had sent the e-mails to the correct addresses and still allowed the judicial review applications. This was partly based on a fault analysis in *Yazdani*, but *Zare* went even further than that inasmuch as the Court determined that an e-mail request from a visa officer that goes astray is "not properly sent" (*Zare* at paragraph 49). This can also be seen in *Ghaloghlyan* when the Court said (at paragraph 8) that "upon proof on a balance of probabilities that a document was sent, a rebuttable presumption arises that the applicant concerned received it, and the applicant's statement that it was not received, on its own, does not rebut the presumption" (emphasis added). The implication of receipt being a rebuttable presumption is that it actually matters whether the applicant received the message, and that is the logic followed in *Grenville*.
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> [Emphasis in original.]

[16] In the case at bar however, whether the two-prong test or the fault analysis approach is applied, the result is the same i.e. the duty of procedural fairness is satisfied. If the two-prong test approach is applied, the first step is to determine whether the communication was sent to the Applicant's email, which it was. The second step is to determine whether the email failed to

deliver or bounce-back, which it did not because the Applicant received it. If the fault based approach is applied, there must be evidence that the document was sent (and there is) and the rebuttable presumption that the Applicant received the email is confirmed by the fact that the Applicant admits to having received the email communication. In both cases, there is no breach of procedural fairness.

[17] The Applicant relies on my decision in *Asoyan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 206 [*Asoyan*] for the proposition that when there is no mechanism in place such as the acknowledgement of receipt option for emails to reasonably ensure that an applicant received the communication, the respondent is required to employ it if the burden of procedural fairness is to be discharged. As such, the Applicant submits that since that mechanism was not employed, he was not accorded procedural fairness for the failure of the email not being brought to his attention.

[18] The *Asoyan* decision is distinguishable inasmuch as the email was delivered to the Applicant. In *Assoyan*, I indicated that the use of the receipt option was a means to confirm that the email had reached its destination. In that case the Applicant had no role to play in the failed communication being delivered, as opposed to being delivered but not read. In the case at bar, the Applicant did in fact receive the communication but through the use of a spam filter system, the email was redirected to the Applicant's spam folder (junk mail box). The responsibility of managing the Applicant's spam filtering system obviously rests with the Applicant, particularly as email programs indicate that there are items in the spam folder.

[19] Moreover, I am in agreement with the Respondent that the evidence is insufficient, or at least inconsistent, to demonstrate what actually happened to the email. There is no screen shot showing the email was in the spam folder or how the spam folder operated to filter out communications. There is also no explanation as to why the decision letter in September was not filtered out, while the email to the same address a few months earlier was.

[20] I continue to be of the view that procedural fairness concerning the transmission of emails entails that the Respondent should be "required to exhaust all reasonable mechanisms available on email programs to ensure receipt of their important transmissions" (*Asoyan*, para 24). As unfortunate as it is for an Applicant, in the last steps of his lengthy permanent resident application, to have his application refused as a result of email miscommunication, the facts remain that while the Respondent did not have a "send receipt" type of mechanism in place, this in of itself does not offset the fact that the communication was properly delivered by the Respondent and received by the Applicant. That is the purpose of the receipt option. It does not cover what amounts to fault on the part of the Applicant, in failing to read his emails.

## VII. Conclusion

[21] Accordingly, the application is dismissed and no question is certified for appeal.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4204-15 |
| **STYLE OF CAUSE:** | DAVID CRAIG KENNEDY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 2, 2016 |
| **JUDGMENT AND REASONS:** | ANNIS J. |
| **DATED:** | JUNE 7, 2016 |

**APPEARANCES:**

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|---|---|
| Gurpreet Singh Gill | FOR THE APPLICANT |
| Shaun Mellen | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Gurpreet Singh Gill<br>VLG Lawyers<br>Barristers and Solicitors<br>Edmonton, Alberta | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |