Federal Court  Cour fédérale

Date: 20190722

Docket: IMM-4354-18

Citation: 2019 FC 962

Ottawa, Ontario, July 22, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

ARLENE RILLON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Arlene Erojo Rillon, is a citizen of the Philippines who entered Canada in 2013 to perform religious work for The Kingdom of Jesus Christ - Canada [TKJC]. In July 2016, while still with valid visitor status, she applied to extend her visitor status in Canada to continue her work with the TKJC.

[2] In a decision dated August 21, 2018 an Officer at Immigration, Refugees and Citizenship Canada [IRCC] refused the Applicant's application to extend her visitor record. The Applicant has now applied under subsection 72 (1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the Officer's decision. She asks the Court to set aside the Officer's decision and return the matter for redetermination by a different officer.

I. Background

[3] Prior to the application to extend her visitor record in July 2016, the Applicant's visitor status had been extended on three occasions since her arrival in Canada. Approximately 10 months after submission of her fourth visitor extension application, the Applicant made a file status inquiry. A month or so later, she learned that her extension application had been refused because the officer did not find sufficient evidence of proof of funds or a letter of support from TKJC advising that she would continue to perform religious duties for TKJC.

[4] On September 14, 2017, which was within the 90-day period authorized under subsection 182(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, the Applicant applied for restoration of her visitor record. A letter from TKJC in support of this application stated:

> We want to keep our valuable religious workers like Arlene. We maintain their legal status as our missionary workers in Canada by seeing to it that their applications are submitted in a timely manner and supplied with all supporting documents such as the support letter with the guarantee that we will provide for all their needs during their stay in Canada. It was an oversight on our part in the performance of administrative duties that we failed to provide the

> required supporting documents in submitting Arlene's last visitor record extension application.
>
> Given that TKJC-Canada organization needs Arlene's dedicated services as our missionary worker we seek to have her status as a visitor restored. We ask that you kindly restore Arlene's visitor status. TKJC-Canada is committed to continue to provide financial support for Arlene as she stays in Canada to perform her religious duties with us. We provide her with food and housing accommodation, medical coverage, transportation allowance and $200.00 personal allowance. We would ask the Immigration authorieties [sic] to kindly extend Arlene's visitor status for another year or until September 2018.

[5] In a letter dated December 21, 2017 an officer at IRCC refused the restoration application because it had not been made within 90 days after the loss of temporary resident status. The Global Case Management System [GCMS] notes associated with this letter state:

> Client is applying for restoration and extension of VR. Client's previous VR application was refused on 03JAN2017. Although letter to client was not sent until 04AUG2017 final decision was made 03JAN2017. Therefore application was made outside of restoration period. Application refused.

[6] The Applicant sought judicial review of this refusal. On consent of the parties, the matter was returned to another officer for redetermination.

II. The Redetermination Decision

[7] Upon redetermination, the Officer refused the restoration application because the Applicant had failed to apply within 90 days after the loss of her visitor status on January 3, 2017.

[8] The GCMS notes associated with the August 21, 2018 refusal letter indicate that:

> Client initially entered Canada on 06 Jan 2013 as a religious worker. She has applied for and received extensions of her stay valid to 30 Aug 2016. The client submitted an application to extend her stay which was received on 26 August 2016 and refused on 03 Jan 2017. The refusal letter was created and e-mailed to the client and received by the client the same date. This was confirmed as the e-mail was tracked and was found to not have "bounced back" as undeliverable in the e-mail system that was used at the time to send letters to the client. The client states that they did not receive the refusal letter dated 03 Jan 2017 and contacted the call center to have the letter resent to them. It appears that the refusal letter was recreated on 04 Aug 2017 and resent to the client using that date instead of 03 Jan 2017. A review of both refusal letters show that the client was advised to leave "on or before the expiry of her current document and if the document was expired that they were to leave immediately." The fact that the 2nd letter was dated 04 Aug 2017 does not negate the fact that the application was refused on 03 Jan 2017 and this is the date the client's status expired. The application was refused on 03 Jan 2017 and as such the client had 90 days from the refusal date to apply for restoration.
>
> The restoration period ended 03 Apr 2017...
>
> This application was received on 14 Sep 2017, beyond the 90 day restoration period. Therefore the client is not eligible for restoration.

[9] As the above GCMS notes indicate, the Applicant claims she did not receive the refusal letter dated January 3, 2017 sent via e-mail. The certified tribunal record, however, contains a copy of this letter together with an e-mail dated January 3, 2017 attaching the letter. Although the GCMS notes contain no notations that this e-mail was sent, the affidavit of the officer who refused the restoration application in December 2017 contains an Outlook archiving report confirming that the e-mail was sent on January 3, 2017. This officer states in her affidavit that, in

response to the Applicant's request in late June 2017 for an update on the status of her application, an officer re-sent the original refusal letter but changed the date on the letter to reflect the response date of August 4, 2017.

III. Standard of Review

[10] The primary issue raised by this application for judicial review is whether the Officer's decision, refusing the Applicant's application to restore her visitor record, was reasonable.

[11] The Court agrees with the parties that the applicable standard of review concerning a decision to restore temporary resident status is reasonableness (*Badhan v Canada (Citizenship and Immigration)*, 2018 FC 704 at para 10; *Udodong v Canada (Citizenship and Immigration)*, 2018 FC 234 at paras 5to 6; *Shekhtman v Canada (Citizenship and Immigration)*, 2018 FC 964 at para 14 [*Shekhtman*]).

[12] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). Those criteria are met if "the reasons 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).

IV. The Applicant's Submissions

[13] The Applicant says the Officer erred by determining that the Applicant was ineligible to apply for restoration of her immigration status because the application had not been made within the prescribed time limits. According to the Applicant, she was eligible to apply for restoration of status within 90 days of August 4, 2017, which was the date when she learned she had lost her temporary resident status as a visitor. In considering when the 90-day restoration time limit began, the Applicant further says the Officer was required to consider all relevant facts and determine when the decision to refuse her visitor extension application had been made to determine when her visitor status expired.

[14] In the Applicant's view, it was unreasonable for the Officer to find that the 90-day time limit to apply for restoration began on January 3, 2017 because there was clear evidence that she was not given notice that her visitor extension application had been refused until August 4, 2017. According to the Applicant, in the circumstances of this case it would not have been possible for her to file a restoration application before she received notice on August 4, 2017. It is significant, the Applicant says, that the Officer's decision was made within one day of receiving her supplemental submissions and this strongly indicates that no consideration was given to these submissions before refusing to process the restoration application.

[15] The Applicant criticizes the Respondent's position that, if there is some evidence a refusal letter was sent to an applicant seeking to remain in Canada, then the 90-day restoration period begins immediately irrespective of whether there is any evidence that an applicant never

received notice of the refusal. In the Applicant's view, applying the 90-day rule in this manner would prohibit restoration applicants from applying through absolutely no fault of their own in cases where an immigration officer comes to the decision to refuse an extension application, but the applicant never receives notice of it.

[16] The Applicant says it is immaterial that she waited 10 months to follow-up on the status of her visitor extension application and the fact the follow up enquiry was not made until 10 months after the application had been submitted should not be held against her. In the Applicant's view, she should have no responsibility for following up on the status of the application because she has no control over what happens to the application once it has been submitted or when it will be finalized.

V. The Respondent's Submissions

[17] According to the Respondent, the Applicant must bear some responsibility for seeking information about the status of an application that was purportedly pending for such an extended period. It would lead to an absurdity, the Respondent says, if an applicant could simply claim they had never received notice of a refusal, in the absence of any evidence, in order to benefit from an extended period of implied status, rather than face the consequences of a refusal or in order to extend her eligibility period for restoration.

[18] In the Respondent's view, there is no merit to the argument that the Officer did not review the Applicant's submissions because the decision followed the submissions by only one day. The Respondent points out that the GCMS notes indicate the Officer was specifically

waiting for the submissions, and that the Applicant has not demonstrated that any of her submissions and evidence was not considered. The Respondent notes that underlying the Officer's refusal of the restoration application was a finding that the refusal had been communicated to the Applicant in January 2017.

[19] In order to establish the reasonableness of the Officer's decision, the Respondent says the issue of which party bears the onus of communication should be determined. According to the Respondent, there are two lines of cases in this regard. The first line of cases holds that the Minister must prove two things: (1) that the communication was sent to an e-mail address supplied by an applicant; and (2) that there has been no indication that the communication may have failed or bounced back. If both conditions are proven, it does not matter if the communication was received by an applicant or not because the Minister would have satisfied the duty of fairness.

[20] The second line of cases turns on a finding of fault by one of the parties. Where an officer proves, on a balance of probabilities, that a document was sent, a rebuttable presumption arises that the applicant received it and the applicant bears the risk for the missed communication. According to the Respondent, the Minister has met the burden of establishing that the communication was sent on its way in this case and the Applicant has not rebutted the presumption that the January 3, 2017 letter was sent.

VI. Analysis

[21] The Court's jurisprudence concerning e-mail miscommunication has been succinctly summarized in *Cruz v Canada (Citizenship and Immigration)*, 2016 FC 1114 at para 15 [*Cruz*]:

> [15] …the jurisprudence surrounding issue of email miscommunication…has developed into two lines of cases. The first holds that the respondent Minister needs to prove two things: (1) that the communication was sent to an e-mail address supplied by the applicant; and (2) that there has been no indication that the communication may have failed or bounced-back. If both conditions are proven, then it does not matter if the communication was received by the applicant or not because the respondent would have satisfied the duty of fairness. The second line of cases turns on the finding of fault by one of the parties. Specifically, where the visa officer proves, on a balance of probabilities, that a document is sent, a rebuttable presumption arises that the applicant received it, and the applicant bears the risk for the missed communication: see also Patel v Canada (Minister of Citizenship and Immigration), 2015 FC 900 at para 36. [Citation omitted].

[22] Much of the Court's jurisprudence in this regard has been summarized in *Patel v Canada (Citizenship and Immigration)*, 2015 FC 900 at paras 18 to 35 [*Patel*]. Since *Cruz*, there have been several cases concerning e-mail miscommunications.

[23] For example, in *Kennedy v Canada (Citizenship and Immigration)*, 2016 FC 628, the Minister sent a letter by way of e-mail indicating that the applicant had to submit an immigration medical examination within 30 days. The applicant did not receive this e-mail as it went into a spam folder, but the applicant successfully received subsequent e-mails. In dismissing the application for judicial review, Justice Annis stated he continues to be of the view that

procedural fairness concerning the transmission of e-mails entails that the Minister should be required to exhaust all reasonable mechanisms available on e-mail programs to ensure receipt of important transmissions.

[24] In *Yuchen v Canada (Citizenship and Immigration)*, 2017 FC 1029 [*Yuchen*], an officer sent an e-mail to the applicant in mid-October 2015 requesting additional information concerning renewal of his permanent resident card. This e-mail informed Mr. Yuchen that if he failed to submit the requested material within 180 days, his application would be deemed abandoned. In response to his inquiry about the status of his application in February 2017, Mr. Yuchen received an e-mail dated February 28, 2017, advising that his application had been deemed abandoned for non-compliance with the request for additional information. Mr. Yuchen conceded that the Minister had established on a balance of probabilities that the e-mail requesting additional information was sent and did not bounce back. Mr. Yuchen argued that the fact he asked about the status of his application in February 2017 showed he did not receive the e-mail in October 2015. Justice Simpson concluded that the presumption of receipt had not been rebutted and, consequently, dismissed the application for judicial review.

[25] In *Wu v Canada (Citizenship and Immigration)*, 2018 FC 554 [*Wu*], an immigration officer requested in a letter sent by e-mail that the applicant attend an interview in connection with her application for permanent residence. After the applicant failed to attend the interview, her application was assessed on the basis of the material available on file and the decision rejecting her application was communicated to her consultant using the same e-mail address as the one used to request the interview. Justice Roussel found that the respondent had met its

burden of establishing, on a balance of probabilities, that the e-mail requesting the interview had been correctly sent. The applicant failed to rebut the presumption that the e-mail communication was received. In this regard, Justice Roussel stated:

> [13] … I have considered the Applicant's statement that she did not receive the e-mail requesting her attendance. However, it is insufficient to merely state that the e-mail in question was not received (*Chandrakantbhai Patel* at para 33). The Applicant did not adduce any evidence, including from her Consultant, that the e-mail address was unreliable, inactive or malfunctioning. In other words, there is nothing on the record that would leave me to believe that the e-mail communication was not received by her Consultant.

[26] In *Shekhtman v Canada (Citizenship and Immigration)*, 2018 FC 964, the applicant applied for restoration of his lost temporary resident status in September 2015. His application was refused in a decision dated July 14, 2016 (the decision was re-sent to the applicant on November 30, 2016). Mr. Shekhtman claimed he only became aware of the refusal several months later in early December 2016. The applicant and his counsel submitted an affidavit which left no doubt whatsoever he did not become aware of the refusal decision until he saw the GCMS notes. In allowing the application, Justice Gascon found there was no evidence to reasonably determine that the refusal decision had been sent on either July 14, 2016 or November 30, 2016.

[27] In *Lu v Canada (Citizenship and Immigration)*, 2018 FC 1149, the applicants failed to respond to a procedural fairness letter allegedly sent to them via e-mail in connection with their application for permanent residence. The officer refused to reopen the application after having received declarations to the effect that the procedural fairness letter had never been received by the applicants. Justice Shore found the Minister's evidence was not conclusive as to when the

letter was sent, which then led to the question of whether the letter had actually been sent. Justice Shore concluded that, because the Minister had not demonstrated that the letter had been sent to the applicants, procedural fairness had been breached.

[28] In view of the foregoing jurisprudence, I conclude that once the Minister has established, on a balance of probabilities, that an e-mail has been sent and there is no indication that the communication may have failed or bounced back, a rebuttable presumption arises that the applicant received it, and the applicant bears the risk for the missed communication.

[29] The affidavits filed by the Minister as well as the GCMS notes in this case establish, on a balance of probabilities, that the January 3, 2017 e-mail was sent. The question becomes whether the Applicant has established that she did not receive this e-mail.

[30] In my view, the Applicant has not rebutted the presumption that the January 3, 2017 e-mail was sent. She has not sworn an affidavit to explain why she may not have received the e-mail, nor has she provided a snapshot of her e-mail spam filter. She did not adduce any evidence that the e-mail address was unreliable, inactive, or malfunctioning.

[31] The fact she contacted IRCC 10 months after her application had been received, and almost a year after it had been submitted, does not establish that she did not receive the January e-mail. Her claim or assertion that it was not received does not, without more, rebut the presumption (*Yuchen* at paras 8 to 12; and *Patel* at para 33).

[32] In short, because the Applicant has not demonstrated with credible evidence that she did not receive the e-mail, the presumption that the January 3rd e-mail was correctly sent or went on its way prevails.

[33] Once the Officer determined that the refusal had been sent out and received in January 2017, and that the application for restoration was therefore outside the 90-day restoration period, the Officer reasonably refused the restoration application.

VII. Conclusion

[34] The Officer's decision in this case was reasonable. The Applicant's application for judicial review is, therefore, dismissed.

[35] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

[36] The Respondent has been incorrectly named in the Notice of Application as the Minister of Immigration, Refugees and Citizenship. According to the federal Registry of Applied Titles, the applied title for the Department of Citizenship and Immigration is Immigration, Refugees and Citizenship Canada. The correct Respondent to this application for judicial review is the Minister of Citizenship and Immigration by virtue of subsection 4(1) of the *IRPA* and subsection 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. Accordingly, the style of cause will be amended, with immediate effect, to name the Minister of

Citizenship and Immigration as the Respondent in lieu of the Minister of Immigration, Refugees and Citizenship Canada.

JUDGMENT in IMM-4354-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; no question of general importance is certified; and the style of cause is amended, with immediate effect, to name the Minister of Citizenship and Immigration as the Respondent in lieu of the Minister of Immigration, Refugees and Citizenship Canada.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4354-18
STYLE OF CAUSE:	ARLENE RILLON v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 15, 2019
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	JULY 22, 2019

APPEARANCES:

Victor Ing	FOR THE APPLICANT
Kim Sutcliffe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sas and Ing Immigration Law Centre Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT