Date: 20080201

Docket: IMM-3152-07

Citation: 2008 FC 124

Ottawa, Ontario, February 1, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SHAOYONG YANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a citizen of China who lives and works in the United States as a web developer. In 2005, the Applicant retained an immigration consultant and submitted his application for permanent resident status in Canada under the Federal Skilled Worker Class.

[2] In a letter dated November 14, 2006 (the November 14 letter) to the Applicant's consultant, officials with Citizenship and Immigration Canada (CIC) requested that the Applicant and his wife obtain FBI clearance certificates, proof of settlement funds, and evidence of completed medical

examinations. Over the next months, although the Applicant was apparently actively fulfilling the application requirements, nothing further was sent to or received by CIC. On March 27, 2007, a further letter (the March 27 letter) was allegedly sent by an officer with CIC (the Officer) to the Applicant. The March 27 letter requested that all information be submitted within 60 days of the date of that letter and advised the Applicant that "[i]f you fail to provide the requested information, your application may be assessed on the basis of the information that we have and I may refuse your application". Upon the failure of the Applicant to deliver the requested materials within the designated time frame, the Applicant was advised by the Officer, in a letter dated June 1, 2007, that his application for permanent residence had been refused. The basis of the refusal was that the information requested in the November 14 letter had not been provided.

[3] The Applicant claims that his consultant never received the March 27 letter. Accordingly, the Applicant submits that there has been a breach of the Officer's duty of fairness and that the Officer's decision of June 1, 2007 should be overturned.

[4] The only issue in this application is whether there has been a breach of the Applicant's right to procedural fairness.

[5] There is no question that CIC must provide notice to a person affected by a decision before that decision is taken. In this case, prior to determining that the application was denied for failure to provide documents in a particular time frame, the Officer was required to provide notice to the

Applicant that failure to provide the documents would result in a dismissal. The question before me, on the facts of this case, is how far CIC or one of its officer's must go in providing that notice.

[6] In my view, the comments of Justice O'Reilly in the case of *Ilahi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1399 correctly describe the duty on the Respondent with respect to notice. In *Ilahi*, an applicant for permanent residence claimed that, because he never received notice of a scheduled interview, his application was unfairly dismissed. Justice O'Reilly held:

> I agree that officers have a duty to give notice of an interview. But I do not agree with Mr. Ilahi that the respondent must prove that he received his notice. However, the respondent does have to prove that the officer sent an interview notice to the applicant: *Canada (Attorney General)* v. *Herrera*, [2001] F.C.J. No. 120 (C.A.) (QL). (*Ilahi*, above at para. 7). [Emphasis added.]

[7] The application for judicial review in *Ilahi*, above, was ultimately granted as the respondent could not produce a copy of the letter sent to the applicant or any other direct evidence indicating that the notice had been sent to the correct address. A similar approach to the issue of the duty on an officer was also taken in two other permanent residence application cases; see, *Sawnani v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 206; *Shah v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 207.

[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.

[9] On these facts and consistent with the Court's reasons in *Ilahi, Shaw* and *Sawnani*, I am satisfied that there was compliance with the duty to give notice.

[10] The Applicant relies on the case of *Anwar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1202 in support of his position. In *Anwar*, the decision under review was a decision of a panel of the Immigration and Refugee Board, Refugee Protection Division declaring an application for refugee protection to have been abandoned. The applicant claimed that neither he nor his counsel received notice of the abandonment hearing. Justice Mosley weighed the evidence on the tribunal record, which indicated that the applicant had been served by "prepaid regular service", against an affidavit by the applicant, who attested he had not been served (*Anwar*, above at paras.18-19). Justice Mosley was unable to conclude, on a balance of probabilities, that the applicant had received adequate notice and set aside the decision of the Board. In doing so, Justice Mosley noted:

> There is no evidence on the tribunal record that notice of the hearing was actually received by either the applicant or his counsel despite inquiries made by the former counsel for the respondent. It is, perhaps, instructive that the applicant and his counsel reacted promptly when they received the Board's reasons for declaring the claim abandoned (*Anwar*, above at para. 21)

[11] The Applicant submits that his situation is exactly the same as that before the Court in Anwar. The Applicant is unable to discern a principled basis as to why the Court required proof of receipt of notice in *Anwar*, while the Court in *Ilahi, Sawnani* and *Shah* was satisfied with proof that the notice had been sent to the correct address.

[12] The Respondent distinguishes *Anwar* on the basis that the decision involved an abandonment hearing in the context of a refugee claim, whereas *Ilahi, Sawnani* and *Shah* involved an application for permanent residence.

[13] With respect to the Anwar decision, I make two observations. First, the Court in *Anwar* was considering a refugee abandonment proceeding. The concept of procedural fairness is "flexible and variable" (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22) and may well be different for an abandonment hearing than for an application for permanent residence.

[14] Secondly, there are good reasons for preferring the views of Justice O'Reilly on the facts of the case before me. One reason relates to the sheer volume of applications dealt with every year by multiple CIC offices. Ensuring that each notice was received would impose an impossible burden on CIC and would, without doubt, impact negatively on the ability of CIC to deal expeditiously with applications.

[15] In addition, the Applicant may immediately bring another application. While I am not attempting to discount the importance to the Applicant of losing another two years in his quest to come to Canada, beyond a delay and having to pay another processing fee, he has not presented the Court with evidence that he is prejudiced by this decision.

[16] Having concluded that the Officer met her duty with respect to the sending of a notice, there is nothing further to decide. Nevertheless, I wish to make it clear that I have considered the evidence of the Applicant that he did not receive the March 27 letter. Specifically, I have considered the statement of the Applicant's consultant that the March 27 letter was not received. Even if the evidence of the consultant is relevant, I have some difficulty with it. In particular, I can reasonably assume that the consultant would have many clients and would receive many pieces of correspondence related to his active immigration files every day. However, neither the Applicant nor the consultant provided information on the systems that the consultant has in place to ensure that mail does not go astray.

[17] There may well be situations where the evidence throws serious doubt on the Respondent's assertions that a notice was sent. That was not the case before me.

[18] In conclusion, this application for judicial review will be dismissed. The parties were informed orally of this decision and asked whether either of them proposed a certified question. Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Application for judicial review is dismissed; and

2. No question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3152-07
STYLE OF CAUSE:	Shaoyong YANG v. The Minister of Citizenship and Immigration
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