Federal Court  Cour fédérale

Date: 20180423

Docket: IMM-949-17

Citation: 2018 FC 429

Ottawa, Ontario, April 23, 2018

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

GHASEM SHIRKHODAEI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ghasem Shirkhodaei is an Iranian citizen whose application for permanent residence as a member of the family class was rejected by a visa officer at the Canadian Embassy in Ankara, Turkey. The officer found Mr. Shirkhodaei to be inadmissible to Canada under section 34 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, for being a member of an organization for which there are reasonable grounds to believe has engaged in espionage.

[2] Mr. Shirkhodaei worked for many years for the Iranian Ministry of Foreign Affairs [MFA], and he does not dispute that he was a "member" of that organization. He does, however, challenge the officer's finding that there are reasonable grounds to believe that the MFA engages in acts of espionage contrary to Canada's interests.

[3] Mr. Shirkhodaei further asserts that the officer erred in finding that he was not entitled to be considered for humanitarian and compassionate relief in the event that he was indeed inadmissible to Canada. The officer found that Mr. Shirkhodaei had not requested H&C relief until after legislative amendments came into force disentitling those found inadmissible to Canada under section 34 of *IRPA* from seeking H&C relief. Mr. Shirkhodaei submits that even though his formal H&C request was not made until *after* these legislative amendments came into force, his initial permanent residence application was filed *prior* to the legislative changes and his request should therefore be processed under the former legislation.

[4] Finally, Mr. Shirkhodaei contends that he was treated unfairly in the assessment process. He says that he submitted documents supporting his application for permanent residence to the visa section in Ankara no less than three times, and yet these documents are not in the Certified Tribunal Record and appear not to have been considered by the visa officer. According to Mr. Shirkhodaei, this documentation was critical to his application, and the failure of the officer to consider it resulted in a fatally flawed decision.

[5] For the reasons that follow, I have concluded that Mr. Shirkhodaei was denied procedural fairness in the assessment of his application for permanent residence. Consequently, his application for judicial review will be granted. In light of my conclusion on the procedural fairness question, it is not necessary to address Mr. Shirkhodaei's remaining arguments.

I. How Mr. Shirkhodaei was Treated Unfairly in the Assessment Process

[6] Mr. Shirkhodaei's spouse is a Canadian citizen, and she submitted a sponsorship application for him in March of 2012. In February of 2013, the Canadian Embassy in Ankara wrote to Mr. Shirkhodaei requesting additional documents and information regarding his work with the MFA. Mr. Shirkhodaei sent the requested information to the Embassy by email on March 18, 2013.

[7] Mr. Shirkhodaei attended an interview at the Embassy in Ankara in August of 2013. During this interview the officer advised him that the visa post had not received his March 18, 2013 submissions. On August 29, 2013, Mr. Shirkhodaei once again sent the documents to the email address provided by the Embassy. He followed up with the Embassy a month later, asking for confirmation that the documents had been received, but got no response to his inquiry.

[8] On May 4, 2015, Mr. Shirkhodaei received a letter from the Embassy advising that there were concerns that he may be inadmissible to Canada because of his work with the MFA. Mr. Shirkhodaei responded to these concerns by email on June 2, 2015, denying the allegations and providing further information regarding his work with the MFA, and the effect of the separation on his family. Mr. Shirkhodaei provided additional documents to the Embassy in early October, 2015.

[9] On October 12, 2015, Mr. Shirkhodaei received a letter from the Embassy. This letter provided additional information with respect to the concerns relating to his potential admissibility. The letter further advised Mr. Shirkhodaei that the documents that he had submitted on March 18, 2013 and resubmitted on August 29, 2013 still had not been received, and that the visa post had also not received the documents that he had submitted in June of 2015.

[10] Mr. Shirkhodaei deposes in his affidavit that on November 11, 2015, his then-counsel once again resubmitted all of the documents that he had initially provided to the Embassy in March and August of 2013, as well as those submitted in June of 2015. He has produced a copy of this email and supporting material in his Application Record. Although there is no evidence from the Respondent alleging that the documents were not received by the visa post, they do not appear in the Certified Tribunal Record.

[11] Mr. Shirkhodaei retained his current counsel in November of 2015. On November 24, 2015, the visa post sent another procedural fairness letter to Mr. Shirkhodaei. In this letter the visa officer noted that Mr. Shirkhodaei's previous counsel had indicated in a September, 2013 letter that he had provided the visa post with a submission dated March 18, 2013. The officer went on to state that "I have searched our records and I was not able to locate any submission that would have been received from you or your counsel with a date of March 18, 2013. If you would like this submission to be considered, please provide it to our office within 60 days from the date of this letter". Importantly, there is no suggestion in this letter that the June, 2015 submissions were still missing from the file.

[12] Mr. Shirkhodaei's current counsel assumed that the Embassy would have received a copy of Mr. Shirkhodaei's March 18, 2013 submissions by late November, 2015, given that they had been resent to the Embassy by Mr. Shirkhodaei's former counsel on November 11, 2015. On January 22, 2016, Mr. Shirkhodaei's new counsel provided the visa office with detailed submissions addressing his admissibility under ss. 34(1)(a) and (f) of *IRPA*. In those submissions, counsel referred to the material in the March 18, 2013 submissions.

[13] In February of 2017, Mr. Shirkhodaei's application for permanent residence was refused.

[14] Even though Mr. Shirkhodaei sent his March 18, 2013 and his June 2, 2015 submissions to the visa section of the Canadian Embassy in Ankara on three separate occasions, neither set of submissions appear in the Certified Tribunal Record, suggesting that they were not before the visa officer when the decision was made refusing Mr. Shirkhodaei's application for permanent residence. Mr. Shirkhodaei asserts that this resulted in a breach of procedural fairness, as important documentation that was critical to his application was not considered by the visa officer in deciding whether his application for permanent residence should be granted.

[15] Where an issue of procedural fairness arises, the Court's task is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances, in other words, to apply the correctness standard: *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 34, [2018] F.C.J. No. 382; *Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502.

[16] The Respondent submits that counsel for Mr. Shirkhodaei was on notice that the March 18, 2013 submissions had not been received by the visa post, as he was specifically advised of this fact on November 24, 2015. Having failed to provide the visa office with the missing documents (for what, I note, would have been the *fourth* time), counsel says Mr. Shirkhodaei has to live with the consequences of his counsel's actions.

[17] I need not decide whether it was reasonable for counsel to have assumed that the March 18, 2013 submissions had been received by the visa post in Ankara in late 2015. Even if I were to accept the Respondent's argument on this point, and find that adequate notice had been given to Mr. Shirkhodaei that his March 18, 2013 submissions were still missing from his application file, I would still find that he was treated unfairly in the application process. This is

because neither Mr. Shirkhodaei nor his counsel were alerted to the fact that the June 2, 2015 submissions made by Mr. Shirkhodaei's previous counsel had not been received by the visa post.

[18] The visa officer was clearly aware that Mr. Shirkhodaei had made submissions with respect to his application in both March of 2013 and June of 2015, as both sets of submissions are mentioned in the Global Case Management System notes. However, while the officer alerted Mr. Shirkhodaei to the fact that the March, 2013 submissions were not in his file on November 24, 2015, no mention was made of the fact that his June, 2015 submissions had also gone astray.

[19] Mr. Shirkhodaei could not have been aware of this fact at the time that his application was under consideration, and he thus had no opportunity to remedy the deficiency in the record. Indeed, he only became aware of the fact that his June 2, 2015 submissions had never been provided to the visa officer when he received a copy of the Certified Tribunal Record, after commencing this application for judicial review.

[20] The Respondent concedes that Mr. Shirkhodaei's June 2, 2015 submissions never made it into his application file, and that they were not considered by the visa officer in arriving at the decision to refuse his application for permanent residence. The Respondent submits, however, that many of the documents provided with the June 2, 2015 submissions were found elsewhere in his application file, and that the information contained in the documents that were not already in the record was "substantially captured" in the detailed submissions that were provided by Mr. Shirkhodaei's new counsel in January of 2016.

[21] I cannot accept this argument.

[22] While it is true that some of the information contained in Mr. Shirkhodaei's June, 2015 submissions was discussed in counsel's January, 2016 submissions, other information was not. This included four letters from former colleagues of Mr. Shirkhodaei's at the MFA, who worked with him at Iranian diplomatic postings in Frankfurt, Bonn, New Delhi and Ottawa. While there is a tangential reference to the fact that these letters existed in counsel's January, 2016 submissions, the content of the letters (each of which describes Mr. Shirkhodaei's specific job responsibilities at the locations in question) was not discussed.

[23] Mr. Shirkhodaei's June, 2015 submissions also contain representations concerning the fairness of the process being followed that are not entirely echoed in counsel's January, 2016 submissions, as well as letters from Mr. Shirkhodaei and his wife discussing his job responsibilities, his political views and his family situation. It is, moreover, apparent from a review of counsel's January, 2016 submissions that portions of the submissions were clearly intended to highlight previous representations, rather than to serve as a substitute for those representations.

[24] I accept that visa officers are ordinarily presumed to have considered all of the evidence that is before them: *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.). However, the fact that none of this evidence in the Certified Tribunal Record, gives rise to a strong inference that the documents were never provided to the visa officer. Indeed, the Respondent concedes that they were never considered by the officer in arriving at the decision to reject Mr. Shirkhodaei's application for permanent residence. This was fundamentally unfair to Mr. Shirkhodaei.

II. Conclusion

[25] As I have previously noted, the Respondent has provided no evidence suggesting that the emails sent by Mr. Shirkhodaei to the Canadian Embassy in Ankara were addressed incorrectly. Indeed, a number of emails sent by Mr. Shirkhodaei or his counsel were received at the visa post, and appear in the Certified Tribunal Record, suggesting that he had the correct email address. The Respondent has not explained why documents and submissions that were repeatedly provided to the visa post by Mr. Shirkhodaei or his counsel kept going astray. The evidence in this case certainly suggests that there is a systemic problem within the visa post that gives rise to real concerns as to how visa applicants are being treated by Canadian officials in this location.

[26] For these reasons, the application for judicial review is allowed. I agree with the parties that the case is fact-specific and does not raise a question that is suitable for certification.

JUDGMENT IN IMM-949-17

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is remitted to a different visa officer for re-determination.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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