Federal Court  Cour fédérale

Date: 20180302

Docket: IMM-3671-17

Citation: 2018 FC 238

Ottawa, Ontario, March 2, 2018

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

VAN BAO CHUNG

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a decision by the Immigration Appeal Division [IAD] allowing the appeal of a visa officer's refusal of the permanent residence application of the Respondent's wife. The IAD found the marriage to be genuine.

The real issue in this case is the IAD's refusal, prior to the hearing date, to grant the Minister a postponement of the hearing due to a lack of available hearing officers.

II. Facts

[2] The governing rule for adjournments is contained in the *Immigration Appeal Division Rules*, SOR/2002-230 [*IADR*], in section 48:

48 (1) A party may make an application to the Division to change the date or time of a proceeding.	**48 (1)** Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
(2) The party must	**(2)** La partie :
(a) follow rule 43, but is not required to give evidence in an affidavit or statutory declaration; and	**a)** fait sa demande selon la règle 43, mais n'a pas à y joindre d'affidavit ou de déclaration solennelle;
(b) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.	**b)** indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.
(3) If the party's application is received by the recipients two working days or less before the date of a proceeding, the party must appear at the proceeding and make the request orally.	**(3)** Dans le cas où les destinataires reçoivent la demande deux jours ouvrables ou moins avant la procédure, la partie doit se présenter à la procédure et faire sa demande oralement.
(4) In deciding the application, the Division must consider any relevant factors, including	**(4)** Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(a) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances	**a)** dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le

for allowing the application;	changement;
(b) when the party made the application;	**b)** le moment auquel la demande a été faite;
(c) the time the party has had to prepare for the proceeding;	**c)** le temps dont la partie a disposé pour se préparer;
(d) the efforts made by the party to be ready to start or continue the proceeding;	**d)** les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(e) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	**e)** dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
(f) the knowledge and experience of any counsel who represents the party;	**f)** dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
(g) any previous delays and the reasons for them;	**g)** tout report antérieur et sa justification;
(h) whether the time and date fixed for the proceeding were peremptory;	**h)** si la date et l'heure qui avaient été fixées étaient péremptoires;
(i) whether allowing the application would unreasonably delay the proceedings; and	**i)** si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;
(j) the nature and complexity of the matter to be heard.	**j)** la nature et la complexité de l'affaire.

(5) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.	**(5)** Sauf si elle reçoit une décision accueillant sa demande, la partie doit se présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à poursuivre la procédure.

[3] These Rules have been supplemented by the *Chairperson Guideline 6: Scheduling and Changing the Date or Time of a Proceeding*, Guidelines Issued by the Chairperson, Pursuant to Paragraph 159(1)(h) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The applicable provisions are as follows:

3.2.2 In cases where an application is made a second time, having previously been denied, the IRB will have careful regard for the decision and reasons for the denial of the earlier application and will only allow the new application in exceptional circumstances and where such a change is justified (for example, based on new evidence).	3.2.2 Dans les cas où une demande est présentée une seconde fois, après avoir été rejetée précédemment, la CISR tiendra dûment compte de la décision rendue et des motifs qui ont motivé le refus de la demande précédente, et n'accueille la nouvelle demande que dans des circonstances exceptionnelles et lorsqu'un tel changement est justifié (par exemple, en raison de nouveaux éléments de preuve).
…	[…]
3.6.3 The IRB provides the parties with reasonable notice of the date and time of a proceeding in every case, which will vary according to the circumstances and the type of proceeding. The IRB therefore expects that counsel will be available and prepared to present the party's case on the date and time set by the	3.6.3 La CISR donne toujours aux parties un avis raisonnable de la date et de l'heure de la procédure, qui varie en fonction des circonstances et du type de procédure. La CISR s'attend donc à ce que les conseils soient disponibles et préparés à présenter le cas de la partie. Si, pour une raison quelconque, le conseil ne peut

IRB. Where, for any reason, counsel is unable to appear at a proceeding, counsel is expected to make the necessary arrangements to be replaced by another counsel who is prepared to proceed with the case on the scheduled date and time. If counsel does not appear, the IRB may decide to proceed without counsel or, if applicable, to start abandonment proceedings or to conclude that a case has been abandoned.

…

4.1 The IAD allows applications to change the date or time of a proceeding only in exceptional circumstances and where such a change is justified. When considering an application, the member considers all relevant factors, including those set out in IAD Rule 48(4), with an important consideration being whether or not the parties were consulted by the IAD and had agreed to the date and time. Where the parties have agreed to the date and time of a proceeding, that agreement will be regarded as an explicit and positive commitment to the IAD to be present and to be prepared to proceed at that date and time.

se présenter à l'audience prévue, il doit prendre les mesures nécessaires pour se faire remplacer par un autre conseil qui est prêt à poursuivre l'affaire à la date et à l'heure prévues. Si le conseil ne se présente pas, la CISR peut décider de poursuivre l'affaire en l'absence du conseil ou, s'il y a lieu, d'entamer la procédure de désistement ou de prononcer le désistement de l'affaire.

[…]

4.1 La SAI n'accueille les demandes de changement de la date ou de l'heure de la procédure que dans des circonstances exceptionnelles et seulement dans les cas où un tel changement est justifié. Lorsqu'il examine une demande, le commissaire prend en considération tous les facteurs pertinents, y compris ceux énoncés au paragraphe 48(4) des *Règles de la SAI*, en tenant compte d'un élément d'importance, à savoir si les parties ont été consultées par la SAI et si elles ont convenu de la date et de l'heure de l'audience. Lorsque les parties ont accepté la date et l'heure d'une procédure, cette entente doit être considérée comme un engagement explicite et réel devant la SAI à être présentes et prêtes à poursuivre l'affaire à la date et à l'heure fixées.

Section 162(2) of the *Immigration and Refugee Protection Act* [*IRPA*] is tangentially related:

162 (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	**162 (2)** Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[4] The Respondent is a Canadian citizen. Ms. Tran, the Respondent's wife, is a citizen of Vietnam. For purposes of this decision, the details of their meeting, subsequent contacts, and marriage are not necessary. They married in late 2012 and the Respondent applied to sponsor his wife as a permanent resident.

[5] Following a procedural fairness letter and interview of Ms. Tran, the visa was denied because the officer was not satisfied as to the genuineness of the marriage.

The Respondent appealed the refusal to the IAD.

[6] The hearing of the appeal was set for July 18, 2017.

[7] On July 7, 2017, the Applicant Minister determined that there were no hearing officers available to attend this hearing and requested that the hearing date be postponed for that reason. The Applicant requested that the hearing be rescheduled to sometime after August 11, 2017.

[8] The IAD denied the postponement, citing the IAD decision of *Ahmad v Canada (Citizenship and Immigration)*, 2017 CanLII 45644, 2017 CarswellNat 3395 (WL Can) (Imm &

Ref Bd (App Div)) which, a few days earlier, had similarly denied a postponement requested on the ground that there were no hearing officers available. The IAD went on to cite the factors in Rule 48(4) of the *IADR* and section 162(2) of *IRPA* and concluded that lack of resources were not an exceptional circumstance warranting a postponement.

[9] The hearing proceeded and the decision, having made reference to the denied postponement, concluded that the marriage was genuine and granted the visa application.

III. Analysis

A. *Standard of Review*

[10] As with many judicial reviews, the shifting sands of standard of review almost overcome the real issues in dispute.

[11] As recognized in *Chi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 641, 280 ACWS (3d) 828, there is mixed jurisprudence on whether in the case of adjournment the standard is reasonableness because the decision is discretionary, or correctness because an unreasonable decision creates a breach of procedural fairness.

[12] In my view, there is little to be served by dissecting this "how many angels can dance on the head of a pin"-type issue. This case is not amenable to an analysis of the sharp divide between the two standards. The decision at issue cannot be either unreasonable or unfair – one need not prove which is the greater evil.

B. *Decision to be judicially reviewed*

[13] The Respondent argued that the decision at issue is the postponement decision and therefore the application for judicial review is outside the time required under section 72(2)(b) of *IRPA*. The Applicant countered that the postponement decision is interlocutory and therefore the decision amenable to judicial review is the final decision on the merits of the visa decision and that postponement is an issue which can be raised in that decision.

[14] I agree in principle with the Applicant. The postponement decision was interlocutory, and, barring special circumstances, such decisions are not open to judicial review: *Canada (Minister of Public Safety and Emergency Preparedness) v Kahlon*, 2005 FC 1000, [2006] 3 FCR 493; *Szczecka v Canada (Minister of Employment and Immigration)* (1993), 116 DLR (4th) 333, 170 NR 58 (FCA). This is driven in part by judicial economy to avoid multiple judicial reviews during the process of an administrative matter, and in part by the requirement that the interlocutory decision has had more than an academic impact, which is usually only discernable after a decision on the merits.

C. *Postponement Decision*

[15] The Applicant claimed that past practice has been for the IAD to accommodate the reduced availability of hearing officers during winter and summer holiday periods by scheduling a reduced number of hearings and providing more flexibility in granting adjournments during these periods. However, the Applicant does not assert that this practice and reliance on it reach the level of a “legitimate expectation”.

[16] The Applicant also argued that the IAD focused almost exclusively on administrative convenience and failed to consider a number of Rule 48(4) factors, including that the Minister is not consulted in advance about dates, that he has no control over the case load, that the request was unopposed, timely, and for a short period, and that the Minister was not responsible for previous delays. The Applicant also points out that there is a significant public interest in not letting visa applications like this proceed unopposed and without scrutiny for fraud or other adverse effects on the immigration system. In this regard, the Minister points to the fact that there were some unexplained financial dealings which could be challenged and therefore the absence of the Minister's representation could have made a difference in the end result.

[17] This last point is a strong one and one of the factors a Court must consider in assessing the postponement decision. I note, however, that it is a ground for possible challenge to the visa application but there is no certainty that it would succeed. Therefore there is no reasonable basis for holding that the postponement decision facilitated a fraud or some adverse effect on the immigration system.

[18] In order for the Applicant to succeed here, it must show that not only did it claim not to have available resources or hearing officers, but also that it had no reasonable alternative other than postponement.

[19] There is no evidence that on the hearing date, there were no hearing officers available for other scheduled cases. If some hearing officers were available but insufficient for all scheduled

cases, it would be incumbent on the Minister to explain why the present case was selected as one for which there was no hearing officer.

[20] There was no evidence of how the Minister tried to manage the resources issue. It would not be the Court's role to second-guess the reasonable choices made by management, if there had been evidence that reasonable choices were made. There was not.

[21] Absent this type of evidence of justification for the Minister's action, the Applicant cannot show either unreasonableness or unfairness.

IV. Conclusion

[22] For these reasons, this judicial review will be dismissed.

[23] There is no question for certification.

JUDGMENT in IMM-3671-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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