Federal Court  Cour fédérale

**Date: 20170630**

**Docket: IMM-623-17**

**Citation: 2017 FC 641**

**Toronto, Ontario, June 30, 2017**

**PRESENT: THE CHIEF JUSTICE**

**BETWEEN:**

**XIAOFEI CHI**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

**JUDGMENT AND REASONS**
**(Reasons delivered orally in Toronto, Ontario on June 29, 2017)**

[1] The issue raised in this Application is whether Mr. Chi's procedural fairness rights were breached by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, when it declined his request for an adjournment of the hearing of his appeal, and then determined the appeal to have been abandoned, pursuant to subsection 168(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Parties both submitted that the issue that has been raised is reviewable by this court on a standard of correctness. However, they also acknowledged that there was an important element of discretion involved in the IAD's decision to refuse the adjournment. Such decisions ordinarily attract deference (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 51; *Schurman v Canada*, 2003 FCA 393, at para 6; *Omeyaka v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 78, at para 13; *Philistin v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1333, at para 8). They further acknowledged that there is support in the jurisprudence for this Court reviewing the IAD's decision [the Decision] on the standard of whether the decision-making process followed by the IAD in reaching the Decision was unfair to Mr. Chi (*Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154, at para 14).

[3] In my view, nothing turns on the issue of the standard of review, as I find that the IAD's decision-making process was not unreasonable or unfair to Mr. Chi, and that, on the particular facts of this case, it was entirely appropriate.

[4] It is common ground between the parties that the Decision includes, and indeed largely consists of, the transcript of the IAD's hearing, which records the oral reasons that the IAD provided to Mr. Chi's counsel in refusing Mr. Chi's request for an adjournment.

[5] Mr. Chi submits that, in reaching its Decision, the IAD failed to consider all of the relevant factors, as it is required to do pursuant to subsection 48(4) of the *Immigration Appeal Division Rules*, SOR/2002-230. However, when the Court asked which relevant factors were not considered by the IAD in reaching the Decision, his counsel replied that the IAD failed to

consider that Mr. Chi's absence was justified by the fact that he was ill with the flu, pink eye and a fever. In support of this, Mr. Chi provided his counsel with a note from a Dr. Wong, dated January 17, 2017, which stated that he would be unable to work until January 23, 2017. That note was then provided by counsel to the IAD.

[6] Mr. Chi further submitted that the IAD only considered three of the factors identified in Rule 48(4), and failed to balance them against each other, or against the seven other factors set forth in Rule 48(4) which he alleges were not considered.

[7] I disagree.

[8] Rule 48(4) explicitly requires the IAD to consider any relevant factors, including the ten that are listed. It is readily apparent from the list of those ten factors that they may not all be relevant in any given case. For example, in this case, factor (e) was not relevant, as Mr. Chi had not requested more time to obtain information.

[9] In this case, the factors considered by the IAD were the following:

i. The fact that, after the IAD denied Mr. Chi's initial request for an adjournment of his appeal on April 21, 2016, which was based on the ground that the Minister's disclosure had not been provided more than 20 days prior to the hearing that had been scheduled for April 29, 2016, Mr. Chi then requested three separate, last-minute, adjournments for health reasons.

ii. The first of those adjournments was granted on April 28, 2016, following the IAD's receipt of a letter from a chiropractor stating that Mr. Chi was experiencing back pains. As a result, the hearing that had been scheduled for April 29, 2016, was rescheduled to September 8, 2016.

iii. The second of those adjournments was granted on September 8, 2016, at which time Mr. Chi's then counsel was present, waiting with the IAD for Mr. Chi to arrive. The IAD agreed to adjourn the hearing after a telephone call was received at the front desk from a friend of Mr. Chi, who stated that Mr. Chi was in the hospital.

iv. At that time, the IAD directed Mr. Chi by e-mail to provide it with a doctor's note detailing the reasons why he failed to attend his hearing. In that direction, the IAD put Mr. Chi on notice that if he failed to provide the requested doctor's note by September 16, 2016, his appeal may be declared abandoned. Mr. Chi was then requested to provide three alternate dates of availability, and he was informed that his appeal would be rescheduled on a peremptory basis once his doctor's note and the three alternate dates of availability had been provided. Ultimately, the hearing was rescheduled to January 20, 2017.

v. Notwithstanding that Mr. Chi had been put on notice of the peremptory nature of the hearing on January 20, 2017, and of the fact that his appeal may be declared abandoned, Mr. Chi once again failed to appear for his hearing.

vi. Mr. Chi also did not retain his current counsel until the day prior to the hearing.

vii. On the date of the hearing, Mr. Chi's current counsel informed the IAD that Mr. Chi had been charged with domestic assault and that the outcome of his criminal proceeding could have an impact on the IAD's decision.

viii. In each case, Mr. Chi was provided with plenty of time to prepare for the appeal.

ix. Mr. Chi's appeal was filed the day he was issued a removal order, and had been outstanding for approximately two and a half years.

x. While no one can predict when he or she will be sick, Mr. Chi had not made a single attempt to appear for his appeal during that entire period.

xi. The appeal was from a removal order based on misrepresentation.

xii. It was not clear how long the criminal matter would take to be resolved, or what relevance it might have for Mr. Chi's appeal before the IAD.

xiii. There should be some finality in appeals.

xiv. The IAD has backlogs.

xv. The fact that Mr. Chi had made no attempt to appear in over two years was "not right."

xvi. There is a large volume of cases in the IAD's Central Region.

xvii. It would be a miscarriage of justice to postpone Mr. Chi's hearing yet again.

xviii. Mr. Chi had not provided sufficient evidence that he was pursuing his appeal.

[10] Based on the foregoing, the IAD declined Mr. Chi's fourth request for an adjournment, and declared his appeal to be abandoned.

[11] Mr. Chi submits that, in reaching its decision, the IAD focused primarily on its own backlog of cases, without considering Mr. Chi's illness, and without ever challenging his credibility or the genuineness of the doctors' notes that he provided in support of his second, third and fourth requests for an adjournment.

[12] I disagree. I am satisfied that the IAD considered the totality of the circumstances, and reached an entirely appropriate decision that was not unreasonable or unfair to Mr. Chi.

[13] Even though the IAD did not challenge Mr. Chi's credibility or the genuineness of his doctors' notes, the circumstances strongly suggested that he had ulterior motives for wanting to delay his hearing before the IAD. In addition to the facts that were identified by the IAD, I note his written submission that his appeal of the removal order, while pending, stayed the loss of his permanent resident status.

[14] In any event, considering that Mr. Chi had filed numerous requests for an adjournment and had not made a single appearance after filing his appeal, the IAD's decision was not unfair or incorrect. As his counsel acknowledged during the hearing before this Court, at some point a series of requests for an adjournment becomes inappropriate and unreasonable.

[15] In my view, the IAD did not violate Mr. Chi's rights to procedural fairness by deciding that that point had been reached on January 20, 2017, when he failed to appear for his hearing for the third time, and once again on very short notice.

[16] I will simply add for the record that, pursuant to subsection 168(1) of the IRPA, the IAD may determine that an appeal has been abandoned if it is of the opinion that the applicant is in default of the proceedings, including by failing to appear for a hearing. In addition, pursuant to subsection 162(2), the IAD is required to deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

Conclusion

[17] For the reasons set forth above, this Application will be dismissed.

**JUDGMENT in IMM-623-17**

**THIS COURT'S JUDGMENT** is that this Application is dismissed.

"Paul S. Crampton"
Chief Justice

## APPENDIX 1 — Relevant Legislation

| *Immigration and Refugee Protection Act*¸ SC 2001 c 27 | *Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27) |
|---|---|
| Sole and exclusive jurisdiction | Compétence exclusive |
| 162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction. | 162 (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en matière de compétence — dans le cadre des affaires dont elle est saisie |
| Procedure | Fonctionnement |
| (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. | (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. |
| Abandonment of proceeding | Désistement |
| 168 (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so. | 168 (1) Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication. |
| Abuse of process | Abus de procédure |
| (2) A Division may refuse to allow an applicant to withdraw from a proceeding if it is of the opinion that the withdrawal would be an abuse of process under its rules. | (2) Chacune des sections peut refuser le retrait de l'affaire dont elle est saisie si elle constate qu'il y a abus de procédure, au sens des règles, de la part de l'intéressé. |

| *Immigration Appeal Division Rules*, SOR/2002-230 | *Règles de la section d'appel de l'immigration* (DORS/2002-230) |
|---|---|
| Factors | Éléments à considérer |
| 48 (4) In deciding the application, the Division must consider any relevant factors, including | 48 (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 for allowing the application; | 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 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.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-623-17 |
| **STYLE OF CAUSE:** | XIAOFEI CHI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JUNE 29, 2017 |
| **JUDGMENT AND REASONS:** | CRAMPTON C.J. |
| **DATED:** | JUNE 30, 2017 |

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