Federal Court  Cour fédérale

Date: 20211110

Docket: IMM-1694-20

Citation: 2021 FC 1224

Ottawa, Ontario, November 10, 2021

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

XIUFENG SHAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Xiufeng Shan, seeks judicial review of a decision of the Immigration Appeal Division [IAD], dated January 30, 2020 [Decision], dismissing her appeal of two exclusion orders [Exclusion Orders] for lack of jurisdiction. The IAD decided that it did not have jurisdiction to consider the appeal under subsection 63(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because the Applicant's permanent resident visa was no longer valid as it had expired before the Exclusion Orders were made.

[2] For the reasons that follow, I find that the Decision was reasonable and that there has been no breach of procedural fairness. The application is therefore dismissed.

I. Background

[3] The Applicant is a foreign national and citizen of China. On October 24, 2016, the Applicant's husband applied to sponsor the Applicant for permanent residence status in Canada. The Applicant was issued a six-month permanent resident visa on June 28, 2017.

[4] The Applicant's spouse died on September 3, 2017 prior to her landing in Canada.

[5] The Applicant arrived in Canada on November 23, 2017 and informed an officer that she had contacted the visa office about her husband's death. She was admitted, but was asked to return for a follow up interview by a Canada Border Services Agency officer on December 2, 2017. A second interview was conducted on December 20, 2017 to allow the Shanghai and Hong Kong visa posts to be contacted by Canadian immigration officers.

[6] On December 28, 2017, the Applicant's permanent resident visa expired.

[7] On January 9, 2018, a first report was issued under subsection 44(1) of the IRPA on the grounds of section 41(a) of the IRPA and a failure to comply with section 51(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. As a result of her husband's death, the Officer found that the Applicant was unable to establish that there was still a valid undertaking in effect as required by section 127 of the IRPR or that her spouse met the

requirements for a sponsor under section 133 of the IRPR. The Applicant was referred for an admissibility hearing under subsection 44(2) of the IRPA.

[8] On April 17, 2018, a second report was issued under subsection 44(1) of the IRPA on the grounds of section 40(1)(a) of the IRPA. The Officer considered there to be reasonable grounds to find the Applicant inadmissible for misrepresentation for failing to inform Canadian immigration officials of her sponsor's death prior to arriving in Canada and allowing the visa to remain valid when there was no longer a valid sponsorship in place. The Applicant was again referred for an admissibility hearing.

[9] On June 18, 2018, an admissibility hearing took place before the Immigration Division [ID]. On September 6, 2018, the ID found the Applicant inadmissible to Canada on the grounds identified in both subsection 44(1) reports. The ID issued the Exclusion Orders on the same day.

[10] An appeal of the Exclusion Orders was filed on September 13, 2018 and on November 12, 2019, the Respondent applied to dismiss the appeal for lack of jurisdiction. The preliminary application was denied and the Applicant was permitted to provide written and oral submissions on the issue. The IAD dismissed the appeal for lack of jurisdiction on January 30, 2020.

[11] In reaching the Decision, the IAD considered two issues: 1) whether the visa was void because of "frustration or impossibility of performance of a condition on which the visa issued",

thus leading to a loss of standing; and 2) whether the expiration of the visa prior to the admissibility hearing deprived the Applicant of standing to appeal.

[12] The IAD found that the death of the Applicant's husband did not render the visa void, despite his sponsorship no longer being possible. However, the IAD determined that the expiration of the visa before the ID issued the Exclusion Orders deprived the Applicant of standing to appeal the orders to the IAD.

[13] The IAD considered whether the delay between the date the Applicant arrived in Canada and the date she was referred for an admissibility hearing was an abuse of process, but concluded that any delay was not attributable to the Respondent.

II. Issues and Standard of Review

[14] There are two issues raised by this application:

a) Was there a breach of procedural fairness?

b) Did the IAD err in finding that the Applicant did not have standing to appeal because the visa had expired before the Exclusion Orders were made?

[15] I agree with the Respondent that the standard of review of the Decision is reasonableness as the IAD was required to interpret its home statute (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 25, 115 and 116; *Momi v Canada*

(Citizenship and Immigration), 2019 FCA 163 at para 21; *Pepa v Canada (Citizenship and Immigration)*, 2021 FC 348 [*Pepa*] at para 16).

[16] In exercising this standard, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). A reasonable decision bears the hallmarks of justification, transparency, and intelligibility (*Vavilov* at para 99).

[17] Questions of procedural fairness are best addressed by the correctness standard, although they are not strictly speaking subject to a standard of review analysis. Instead, such questions are to be reviewed from the perspective of whether the procedure followed by the decision-maker was fair and just (*Canadian Pacific Railway Company* v. *Canada (AG)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Sangha v. Canada (Citizenship and Immigration)*, 2020 FC 95 at para 13).

III. Analysis

A. *Was there a breach of procedural fairness?*

[18] The Applicant argues that her visa only expired prior to the referral order because of delays by the Respondent. She asserts that the impact of this delay should have been considered as a matter of procedural fairness by the IAD instead of as an issue of abuse of process. The Applicant asserts that to establish an abuse of process requires a higher threshold than to

establish a breach of procedural fairness. The Applicant asserts that the analysis should not focus on whether the administrative body intended to delay, but rather on who the delay is attributable to.

[19] In the Decision, the IAD concluded that there had been no abuse of process by the Respondent because any delay was not attributable to the Respondent. It found the delay was the result of the factual circumstances and the Applicant's late arrival to Canada. Thus, the IAD considered the issue from the perspective argued by the Applicant.

[20] It is noted that to justify a remedy for a delay in administrative proceedings under an abuse of process or procedural fairness, an applicant must show that the delay was unreasonable (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 106, 115 and 121).

[21] In this case, an unreasonable delay in issuing the subsection 44(1) reports has not been established by the Applicant or on the record. I see no error in the IAD's assessment of the elapsed time. As noted by the IAD, the time period was the product of "i) the determination that more information needed to be secured from both the [Applicant] in a second interview and from the Hong Kong and Shanghai visa posts to allow the immigration officers to "come to a fair and just conclusion", and ii) the [Applicant] not flying to Canada until November 23, 2017 only five weeks before her visa was due to expire."

[22] Further, I agree with the Respondent, any argument that there was a breach of procedural fairness associated with the timing of the subsection 44(1) reports or referrals relates to an earlier stage of the administrative process. The Applicant has not brought a judicial review of the ID's decision.

[23] A party is required to raise an issue of procedural fairness at the first opportunity (*Hashim v Canada (Citizenship and Immigration)*, 2021 FC 676 at para 17). The Applicant did not raise any alleged breach of procedural fairness associated with the timing leading up to the referrals before the ID. It is not appropriate for the Applicant to raise this issue now.

[24] Further, the only argument of procedural fairness raised by the Applicant before the IAD related to the timing and manner of handling the jurisdiction issue.

[25] In my view, the Applicant was provided with a full opportunity to address the issue of the jurisdiction of the IAD and her alleged right of appeal, through written and oral submissions. The process for addressing the issue was procedurally fair.

[26] The Applicant notes in its written submissions that the ID stated in its reasons that the Applicant had a permanent resident visa and maintained a right of appeal to the IAD. In my view, the Applicant cannot claim a breach of procedural fairness because of this statement.

[27] The ID's role was limited to determining whether the Applicant was inadmissible on the grounds raised. There is no basis to suggest from the ID's decision that the ID's conclusion was influenced by a belief that the Applicant would be appealing the Exclusion Orders.

[28] Further, to the extent the Applicant is arguing that there were legitimate expectations that an appeal would be heard because of the ID's statement (and her filing a notice of appeal); this argument is not supported by law. While the legitimate expectations of an applicant may determine what procedures the duty of fairness requires in a given circumstance, it cannot create substantive rights outside the procedural domain (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 840). The right to appeal to the IAD is a substantive right. Where there is no longer a right of appeal by statute, one cannot be created based on an erroneous statement made by the ID or a voluntary filing.

[29] The Applicant has not demonstrated that there has been a breach of procedural fairness.

B. *Did the IAD err in finding that the Applicant did not have standing to appeal because the visa had expired before the Exclusion Orders were made?*

[30] Further, in my view it was reasonable for the IAD to find that the Applicant did not have standing to appeal, as she no longer had a valid permanent resident visa because the visa had expired before the Exclusion Orders were made. This reasoning accords with both the language of subsection 63(2) of the IRPA and the jurisprudence.

[31] Subsection 63(2) of the IRPA states that:

63(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**63(2)** Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

[32] This Court has held that the word "holds" is intended to be present tense. The purpose of the provision is to provide those with valid visas a right of appeal (*Zhang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 593 at para 10-14). The word "holds" in subsection 63(2) of the IRPA indicates that a valid visa must be currently held by an applicant to give rise to the right of appeal. The arrival at a port-of-entry does not constitute a cut-off point after which the validity of the permanent resident visa cannot be assessed. As stated at paragraphs 19 and 20 of *Ismail v Canada (Citizenship and Immigration)*, 2015 FC 338 [*Ismail*], which was referenced in part by the IAD:

> [19] I agree, therefore, with the IAD that foreign nationals who are found to be inadmissible at the port-of-entry or at a deferred examination will have a right of appeal to that tribunal only when their inadmissibility does not relate to the absence of a permanent resident visa. Such will be the case where there has been a change in circumstances since the visa was issued, for example, as a result of a criminal conviction or of a new medical condition. In those circumstances, an exclusion order will be appealable before the IAD, and humanitarian and compassionate factors may then be taken into consideration. When the inadmissibility relates to the absence of a permanent resident visa (whether a permanent resident visa has never been issued or has been revoked), however, the only recourse will be an application for judicial review in this Court.
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> [20] It goes without saying that visa and immigration officers are presumed to act in good faith. In the unlikely event that a visa was revoked to thwart Parliament's intention and to preclude the

> possibility of a legitimate appeal pursuant to subsection 63(2), this Court could be called upon to intervene on judicial review and could quash the decision to revoke a visa for improper or impermissible motives.

[33] The Applicant argues that *Ismail* does not apply in this case as the facts are distinguishable: the visa in this case was not subject to revocation as it was in *Ismail*. However, as held in *Canada (Minister of Citizenship and Immigration) v. Hundal*, [1995] 3 FC 32, [1995] FCJ No 918 (QL) [*Hundal*] at paragraphs 14 to 19, there are four exceptions to the presumption of validity of a visa:

a) when there is a frustration or impossibility of performance of a condition on which the visa is issued;

b) when a condition of the visa was not met before it was issued;

c) when a visa expires; and,

d) when a visa is revoked by a visa officer.

[34] The determination of whether an applicant holds a valid permanent resident visa is not limited to whether the visa was revoked, but includes consideration of whether the visa has expired. As noted by the IAD, the third exception of *Hundal* applies to this case.

[35] The IAD referred to the decision in *Far v Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 90984 (CA IRB) [*Far*], which relied on *Ismail*. In *Far*, the IAD

found that where a permanent resident visa expires before the ID issues a removal order, there is no longer any right to appeal. As noted at paragraphs 56-58 of *Far*:

> [56] Though the Federal Court did not specifically address whether Immigration officers could run a back door admission policy by sending people to examinations, and then letting the expiry date of the visa run, the spirit of this argument is addressed in paragraph 20 of *Ismail*, which is set out above.
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> [57] Applying the reasoning in *Ismail* that a permanent resident visa can be revoked by the visa post after a foreign national applies to enter Canada at the POE holding a permanent resident visa, I find that a permanent resident visa can expire after a foreign national applies to enter Canada at the POE holding a permanent resident visa.
>
> [58] The reasoning of *Ismail* with respect to a revoked visa should apply to an expired visa, when the expiration took place after the appellant was sent to further examination; he was not holding a valid permanent resident visa "at the time the exclusion report is issued" because it expired. *Hundal* and *Ismail* stand for the principle that the POE examination permits the assessment of the validity of the permanent resident visa taking into account the 4 exceptions stated in *Hundal*.

[36] This same reasoning was recently applied in *Pepa*, which was issued after the Decision. At paragraphs 52-53 of *Pepa*, Justice Roussel, relying on *Ismail*, held that an Applicant who once held a permanent resident visa no longer "holds" a permanent resident visa if the visa is expired at the time the exclusion order is issued:

> [52] ... In my view *Ismail* confirms that, whether the exclusion order is issued at an examination or by the ID after an inadmissibility hearing, for the application to have a right of appeal to the IAD, their visa must be valid when the exclusion order is issued.
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> [53] Subsection 63(2) of the IRPA only applies to one "who holds" a permanent resident visa. As stated by this Court *in Zhang v Canada (Citizenship and Immigration)*, 2007 FC 593 [*Zhang*], subsection 63(2) of the IRPA is written in the present tense and, having once held a permanent resident visa does not place an applicant within the ambit of this provision (*Zhang* at paras 11,

> 16). The IAD could reasonable conclude that it did not have jurisdiction to hear the appeal given that the Applicant's visa had expired on September 16, 2018, and that the Exclusion Order was made on October 16, 2018.

[37] In this case, as noted by the IAD, the Applicant's permanent resident visa expired on December 28, 2017, prior to the subsection 44(1) reports being issued and well prior to the ID hearing and Exclusion Orders. This deprived the Applicant of any standing to appeal because she no longer held a valid visa at the time the Exclusion Orders she sought to appeal were issued. In my view, the IAD did not err in its finding that it did not have jurisdiction to hear the Applicant's appeal.

[38] For all of these reasons, I consider the Decision to be reasonable and the application will be dismissed.

[39] There was no question for certification proposed by the parties. It is noted that a question was certified in *Pepa*. In *Pepa*, a notice of appeal has been filed in respect of the following certified question:

> For the purposes of determining its jurisdiction to hear an appeal pursuant to subsection 63(2) of the IRPA, shall the validity of the permanent resident visa be assessed by the IAD at the time of arrival in Canada, at the time the report under subsection 44(1) is made, at the time it is referred to the ID, as the case may be, or at the time the exclusion order is issued?

[40] In this case, the Applicant's visa expired before the reports were made under subsection 44(1) of the IRPA. Based on the submissions made by counsel and the arguments made by the Applicant, I do not consider there to be any question that should be certified arising from this proceeding.

JUDGMENT IN IMM-1694-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1694-20
STYLE OF CAUSE:	XIUFENG SHAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 14, 2021
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	NOVEMBER 10, 2021

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