Federal Court  Cour fédérale

Date: 20220111

Docket: IMM-6271-20

Citation: 2022 FC 28

Ottawa, Ontario, January 11, 2022

PRESENT: Madam Justice Walker

BETWEEN:

SHUXIAN YE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Ms. Shuxian Ye, is a former permanent resident of Canada who lost her status for failing to comply with her residency obligation. She returned to China and applied for an Authorization to Return (ARC) and for a temporary resident visa (TRV) to return to Canada to wind up her business affairs. Her applications were refused in April 2019. The Applicant requested judicial review of the TRV refusal but the parties agreed to return the matter for redetermination. The TRV application was again refused by a visa officer in a decision dated

November 6, 2020 (Decision) because the Applicant's request for an ARC had been refused in 2019 and the refusal was still valid.

[2] The Applicant now seeks the Court's review of the Decision. She submits that the officer breached her right to procedural fairness and that the Decision is unreasonable.

[3] I have carefully reviewed the timeline of events that resulted in this application for judicial review and the parties' respective interpretations of the legislative provisions governing the issuance of TRVs. Despite the Applicant's able submissions, the application will be dismissed.

I. Factual timeline

[4] The Applicant became a permanent resident of Canada on April 26, 2010 but did not comply with the residency obligations set out in section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[5] A departure order was issued against the Applicant on June 7, 2017 (Departure Order). She appealed the Departure Order to the Immigration Appeal Division (IAD) but her appeal was dismissed on August 9, 2018. The Departure Order was suspended during the appeal process, only coming into force on dismissal of the appeal (paragraph 49(1)(c) of the IRPA).

[6] The Applicant left Canada on June 18, 2018 while her IAD appeal was pending. She did not appear before an officer at a point of entry to verify her departure, nor did she obtain a Certificate of Departure from the Canada Border Services Agency (CBSA).

[7] On September 7, 2018, the Applicant applied to the Canadian embassy in Beijing for a TRV believing that the application would result in an officer enforcing the Departure Order outside of Canada.

[8] In October 2018, the CBSA informed the Beijing embassy that the Applicant was not in Canada on the date the IAD dismissed her appeal. According to the CBSA, her Departure Order came into force on August 20, 2018 and became a deemed deportation order on September 19, 2018. The CBSA continued, "[t]o that end, Ms. Ye is in need of both a Certificate of Departure and an ARC". I note that the dates used by the CBSA, which the parties do not dispute, reflect the fact that the IAD decision was communicated to the Applicant a number of days after August 9, 2018.

[9] On November 5, 2018, a visa officer interviewed the Applicant and completed her Certificate of Departure. The officer informed the Applicant that she required an ARC in order for the TRV to issue.

[10] The Applicant's counsel disagreed that the Applicant was deemed deported and that an ARC was required. In January 2019, counsel sent a letter to the officer arguing that the TRV should be processed without an ARC.

[11] On February 21, 2019, the Beijing embassy advised counsel that the Applicant was subject to a deemed deportation order and that an ARC would be required pursuant to subsection 52(1) of the IRPA and subsection 226(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPRs).

[12] Although the Applicant disagreed, she submitted the ARC application fee to facilitate her application to return to Canada as a visitor. On April 3, 2019, she attended an ARC interview.

[13] In late April 2019, the Applicant's application for an ARC and for a TRV were denied.

[14] The Applicant sought leave and judicial review of the TRV refusal, challenging specifically the visa officer's conclusion that she required an ARC. The Applicant did not apply for judicial review of the ARC refusal.

[15] On December 4, 2019, the parties agreed to settle the application for judicial review and the Applicant's request for a TRV was returned for redetermination.

[16] On January 10, 2020, the Respondent's counsel forwarded an email to the Applicant's counsel stating that their client was working with CBSA "to figure out how to retroactively turn back the deportation order, so they are definitely working on it" (January 10, 2020 email).

[17] On November 6, 2020, the visa officer assigned to redetermine the TRV application issued the Decision refusing the application and the Applicant brought this application for judicial review.

II. Decision under review

[18] The Decision is comprised of a decision letter and Global Case Management System (GCMS) notes. The officer refused to issue a TRV to the Applicant in reliance on subsection 52(1) of the IRPA and the fact that the earlier refusal of the Applicant's ARC application remained valid. Therefore, the Applicant was inadmissible to Canada.

[19] The officer emphasized in the GCMS notes that they did not question the Applicant's *bona fides*. There was nothing on file to indicate that she intended to reside in Canada and would not comply with the terms and conditions of a TRV. However, the officer noted that the Applicant's removal order was enforced outside of Canada and that her ARC application had been refused. The Applicant had not applied for judicial review of the ARC decision, nor had she submitted an application for a new ARC. As a result, the Applicant's TRV application was refused because she was a previously deported person who had not obtained an ARC.

III. Analysis

1. *Procedural fairness – the Applicant's legitimate expectation*

[20] The Applicant submits that she had a legitimate expectation that her TRV application would be redetermined without the need for an ARC and that the officer's insistence to the contrary in refusing the application breached her right to procedural fairness. The Applicant

relies on the Department of Justice's offer to settle her application for judicial review of the first TRV refusal (Offer to Settle) and the January 10, 2020 email from the Department of Justice.

[21] The Respondent submits that the doctrine of legitimate expectations extends only to the process that will be followed in making a decision. It does not give rise to substantive rights, nor can it hinder the discretion of a decision maker (*Chen v Canada (Public Safety and Emergency Preparedness*), 2020 FC 425 at para 42). The Respondent argues that no guarantees were provided to the Applicant that the requirement for an ARC would be waived or that the deemed deportation order would be retroactively reversed.

[22] As part of its submissions, the Respondent argues that the Applicant has improperly produced the Offer to Settle which is marked "without prejudice" and the January 2020 email. In its view, both documents are protected by settlement privilege (*Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669 at para 34). The Applicant disagrees on the basis that the disclosure of the two documents was necessary to prove the scope of the settlement (*Union Carbide Canada Inc. v Bombardier Inc.*, 2014 SCC 35 at para 35 (*Union Carbide*)).

[23] The Offer to Settle sets out the basis of the parties' December 2019 agreement to settle the application for judicial review of the first TRV refusal and the January 2020 email indicates that the Department of Justice was working with the CBSA to determine how to retroactively turn back the deportation order.

[24] I agree with the Respondent that the two documents were sent to the Applicant in furtherance of and to effect settlement. However, I find that the Applicant disclosed the documents to prove the scope of the agreed settlement and are not protected by settlement privilege (*Union Carbide* at para 35). Even though the January 2020 email post-dates the settlement, it was tendered to demonstrate that the settlement terms included acceptance of the Applicant's argument that she did not require an ARC.

[25] The parties agree that the Applicant's reliance on the doctrine of legitimate expectations gives rise to an question of procedural fairness and must effectively be reviewed for correctness (*Alkhoury v Canada (Citizenship and Immigration)*, 2020 FC 153 at para 10) . My review asks whether the process by which the Decision was made was fair having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[26] The doctrine of legitimate expectations was summarized in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 26:

> This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[27] The Applicant states that her legitimate expectation was not that her TRV application would be approved but that the application would be processed without the need for an ARC. She characterizes her expectation as one of procedure and not substance.

[28] I find no breach of the Applicant's right to procedural fairness in the course of the redetermination of her TRV application. I am not persuaded that the Applicant's argument is procedural in nature because the question of whether or not an ARC was required in order for the officer to issue a TRV is a substantive question. As the Respondent argues, the conversion of the Departure Order to deemed deportation order occurred by operation of law and any reinstatement as a departure order requires an analysis of the relevant IRPA and IRPR provisions. More importantly, the evidence discloses no promise or guarantee by the Respondent that the requirement for an ARC would be waived or that the deportation order would be converted to a departure order.

[29] The Offer to Settle does not refer to the deportation order or state that the Applicant's TRV application would be redetermined on the basis that no ARC was required. The January 2020 email indicates only that the Respondent was working with the CBSA to ascertain how to retroactively turn back the deportation order. The email contains no promise that the order would be reinstated to its initial status of departure order.

2. *Is the Decision reasonable?*

[30] The Applicant submits that the Decision is unreasonable and lacks justification. She submits that the officer erred in refusing her request for a TRV based solely on the absence of an

ARC. The Applicant states that she left Canada as a permanent resident while her appeal was pending. She has since done everything possible to remedy her failure to comply with the requirements of subsection 224(2) and paragraphs 240(1)(a)-(c) of the IRPRs. She endeavored to have the Departure Order enforced outside of Canada by applying for a TRV within 30 days of the Order becoming enforceable in reliance on subsection 240(2) of the IRPRs. The Applicant states that she should not be labelled a deportee in these circumstances and that the officer failed to consider her submissions and the impact of his decision on her.

[31] The parties agree that the merits of the Decision are subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*)). While a visa officer's decision is owed a high level of deference by the Court and may be brief, it must respond to the requirements for a reasonable decision: one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

[32] The officer's refusal of the Applicant's request for a TRV requires an analysis of the chronology of her 2018 departure from Canada and the application of the relevant provisions of the IRPA and the IRPRs, which are set out in full in Schedule A to this Judgment and Reasons.

[33] The analysis begins with section 223 of the IRPRs which contemplates three types of removal orders: departure orders, exclusion orders (which are not relevant in this matter), and deportation orders. While the three types of removal order are each subject to specific legislative

provisions, other provisions refer to a removal order rather than to a type of removal order and apply regardless of the type of order.

[34] The Departure Order of June 7, 2017 was issued to the Applicant due to her failure to comply with the residency requirements of section 28 of the IRPA. On that date, the Departure Order was neither enforceable due to her pending IAD appeal (section 49 of the IRPA), nor enforced. The same situation existed when the Applicant left Canada on June 18, 2018.

[35] The Applicant was informed in the Departure Order that it would be deemed to be a deportation order if no Certificate of Departure was issued to her within the period specified in the IRPRs. The Applicant signed the Departure Order on June 7, 2017. The Applicant then elected to leave Canada while her IAD appeal was pending without following the voluntary compliance procedures set out in subsection 238(1) of the IRPRs. She did not obtain a Certificate of Departure from an officer which would have been completed once her IAD appeal was decided and the Departure Order became enforceable.

[36] Following her departure, the Applicant was prohibited from returning to Canada pursuant to subsection 52(1) of the IRPA unless she (a) obtained an ARC; or (b) satisfied other prescribed circumstances. One prescribed circumstance allows a foreign national who is the subject of an enforced departure order to return to Canada without an ARC (subsection 224(1) of the IRPRs). In contrast, subsection 226(1) of the IRPRs requires a foreign national who is the subject of an enforced deportation order to obtain an ARC prior to returning to Canada.

[37] Two further IRPR provisions are of note. First, subsection 224(2) requires a foreign national who is issued a departure order to meet the requirements of paragraphs 240(1)(a)-(c) within 30 days after the order becomes enforceable, failing which the foreign national's departure order becomes a deemed deportation order. Paragraphs 240(1)(a)-(c) state that a removal order is enforced when a foreign national:

> (a) appears before an officer at a port of entry to verify their departure from Canada;
>
> (b) obtains a certificate of departure from the CBSA; and
>
> (c) departs Canada.

[38] Subsection 224(2) and the conjunctive requirements of paragraphs 240(1)(a)-(c) lead to the following result. If a foreign national departs Canada without appearing before an officer at a point of entry to verify their departure, they cannot comply with paragraphs 240(1)(a)-(c) within or outside of the 30-day period contemplated by subsection 224(2). The foreign national is unable return to Canada to appear before an officer at a port of entry and obtain a Certificate of Departure. Whether their departure order becomes a deemed deportation order immediately upon leaving Canada or at the expiry of the 30-day period, it must be enforced as a deportation order by an officer outside of Canada.

[39] At the risk of repetition, the Applicant left Canada on June 18, 2018 as the holder of an unenforceable and unenforced departure order. When the Departure Order became enforceable on August 20, 2018 following the dismissal of her IAD appeal, she was unable to comply with the requirements of paragraphs 240(1)(a)-(c) of the IRPRs as she was already outside of Canada.

[40] The Applicant submits that her application to the Canadian embassy in Beijing for a TRV on September 7, 2018, within 30 days of August 20, 2018, resulted in her Departure Order being enforced outside of Canada as a departure order (subsection 240(2)). On this basis, the Applicant argues that she was not required to obtain an ARC by virtue of subsection 224(1) and the officer's analysis of her TRV application was inconsistent with the provisions of the IRPA and IRPRs. This, however, is not the case.

[41] Subsection 240(2) of the IRPRs requires an officer to enforce a removal order where the foreign national holding the order has departed Canada and applies outside of Canada for a visa or an ARC to return. The foreign national need only establish that they are the person described in the removal order.

[42] On the date she applied for a TRV, the Applicant's Departure Order remained unenforced and section 25 of the IRPRs prevented the officer in the Canadian embassy from issuing a TRV. I agree with the Applicant that subsection 240(2) placed an obligation on the officer to enforce her removal order once she applied for a TRV but the combined effect of subsection 224(2) and paragraphs 240(1)(a)-(c) required the officer to enforce the Departure Order as a deportation order.

[43] Subsection 240(2) applies to all removal orders but does not authorize an officer to override other sections of the IRPRs. In other words, the Applicant's TRV application in reliance on the subsection does not preclude the application of paragraphs 240(1)(a)-(c) of the IRPRs, permit her to enforce the Departure Order and avoid becoming subject to a deemed deportation

order. The language of section 224(2) is mandatory and unambiguous. When the Applicant left Canada without meeting the requirements of paragraphs 240(1)(a)-(c), the Order could only be enforced as a deportation order by operation of law. She cannot rely on subsection 224(1) and avoid the requirement of an ARC. As a result, the Applicant has established no reviewable error in the officer's conclusion that her request for a TRV could not be approved without a valid ARC. The Decision is justified against the facts and law that constrained the officer.

[44] The Applicant also submits that the officer fettered their discretion by relying on the CBSA's determination that she is a deemed deportee and requires an ARC to return to Canada. I do not find the submission persuasive as a reading of the Decision in its entirety demonstrates the officer's consideration of the Applicant's circumstances and is consistent with the admittedly complicated and sometimes harsh interplay of the IRPA and IRPRs. The officer's conclusion reflects the department's Operational Manuals but does not suggest a blinkered reliance on those Manuals to the exclusion of the relevant legislative requirements and the Applicant's submissions.

[45] I emphasize that the outcome of my analysis in no way questions the *bona fides* of the Applicant in seeking to return to Canada. The officer stated in the GCMS notes that he had reviewed the new documentation submitted by the Applicant and her past immigration history. The officer concluded that there was nothing in her file to indicate she would not comply with the terms and conditions of any temporary admission to Canada. The officer accepted the limited purpose of her proposed return and the Respondent has not raised any issue in this regard. The problem confronting the Applicant lies in the requirement that she apply for and obtain an ARC,

and a TRV, in order to return to Canada (subsection 52(1) of the IRPA, subsection 226(1) of the IRPRs). She has chosen not to do so and has focussed on her TRV application. I encourage the Applicant to re-apply to the Canadian embassy in Beijing for an ARC and TRV in order to bring this matter to a suitable conclusion.

IV. Conclusion

[46] The application is dismissed.

[47] No question for certification was proposed by the parties and none arises in this case.

[48] The Respondent has not requested costs and none are awarded.

JUDGMENT IN IMM-6271-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

3. No costs are awarded.

"Elizabeth Walker"
Judge

SCHEDULE "A"

Immigration and Refugee Protection Act, S.C. 2001, c 27

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27

No return without prescribed authorization

52 (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

Interdiction de retour

52 (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.

Immigration and Refugee Protection Regulations, SOR/2002-227

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Visa Issuance

When unenforced removal order

25 A visa shall not be issued to a foreign national who is subject to an unenforced removal order.

Délivrance du visa

Mesure de renvoi exécutoire

25 L'étranger ne peut se voir délivrer de visa s'il est sous le coup d'une mesure de renvoi qui n'a pas été exécutée.

Removal Orders

Types of removal order

223 There are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.

Mesures de renvoi

Types

223 Les mesures de renvoi sont de trois types : interdiction de séjour, exclusion, expulsion.

Departure order

224 (1) For the purposes of subsection 52(1) of the Act, an enforced departure order is a circumstance in which the foreign national is exempt from the requirement to obtain an authorization in order to return to Canada.

Mesure d'interdiction de séjour

224 (1) Pour l'application du paragraphe 52(1) de la Loi, l'exécution d'une mesure d'interdiction de séjour à l'égard d'un étranger constitue un cas dans lequel l'étranger est dispensé de l'obligation d'obtenir l'autorisation pour revenir au Canada.

Requirement

(2) A foreign national who is issued a departure order must meet the requirements

Exigence

(2) L'étranger visé par une mesure d'interdiction de séjour doit satisfaire aux

set out in paragraphs 240(1)(a) to (c) within 30 days after the order becomes enforceable, failing which the departure order becomes a deportation order.

[…]

Voluntary compliance

238 (1) A foreign national who wants to voluntarily comply with a removal order must appear before an officer who shall determine if

(a) the foreign national has sufficient means to effect their departure to a country that they will be authorized to enter; and

(b) the foreign national intends to voluntarily comply with the requirements set out in paragraphs 240(1)(a) to (c) and will be able to act on that intention.

[…]

When removal order is enforced

240 (1) A removal order against a foreign national, whether it is enforced by voluntary compliance or by the Minister, is enforced when the foreign national

(a) appears before an officer at a port of entry to verify their departure from Canada;

(b) obtains a certificate of departure from the Canada Border Services Agency;

(c) departs from Canada; and

exigences prévues aux alinéas 240(1)a) à c) au plus tard trente jours après que la mesure devient exécutoire, à défaut de quoi la mesure devient une mesure d'expulsion.

[…]

Exécution volontaire

238 (1) L'étranger qui souhaite se conformer volontairement à la mesure de renvoi doit comparaître devant l'agent afin que celui-ci vérifie :

a) s'il a les ressources suffisantes pour quitter le Canada à destination d'un pays où il sera autorisé à entrer;

b) s'il a l'intention de se conformer aux exigences prévues aux alinéas 240(1)a) à c) et s'il sera en mesure de le faire.

[…]

Mesure de renvoi exécutée

240 (1) Que l'étranger se conforme volontairement à la mesure de renvoi ou que le ministre exécute celle-ci, la mesure de renvoi n'est exécutée que si l'étranger, à la fois :

a) comparaît devant un agent au point d'entrée pour confirmer son départ du Canada;

b) a obtenu de l'Agence des services frontaliers du Canada l'attestation de départ;

c) quitte le Canada;

(d) is authorized to enter, other than for purposes of transit, their country of destination.

d) est autorisé à entrer, à d'autres fins qu'un simple transit, dans son pays de destination.

When removal order is enforced by officer outside Canada

(2) If a foreign national against whom a removal order has not been enforced has departed from Canada and applies outside Canada for a visa, an electronic travel authorization or an authorization to return to Canada, an officer shall enforce the order if, following an examination, the foreign national establishes that they are the person described in the order.

Exécution d'une mesure de renvoi par l'agent à l'extérieur du Canada

(2) Si l'étranger à l'égard duquel une mesure de renvoi n'a pas été exécutée a quitté le Canada et demande, à l'extérieur du Canada, un visa, une autorisation de voyage électronique ou l'autorisation de revenir au Canada, l'agent exécute la mesure de renvoi si, à l'issue d'un contrôle, l'étranger fait la preuve qu'il est bien la personne visée par la mesure de renvoi.

FEDERAL COURT

SOLICITORS OF RECORD

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