Federal Court Cour fédérale

Date: 20230116

Docket: IMM-6966-21

Citation: 2023 FC 60

Ottawa, Ontario, January 16, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

RICHMAN BALOGUN JOHN OKEDAYO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Richman Balogun John Okedayo ("Mr. Okedayo"), applied for permanent residence under a time-limited public policy program for those who had applied for refugee protection and worked in the health care sector during the COVID-19 pandemic. There were specific eligibility requirements to qualify for the temporary public policy. At issue is whether Mr. Okedayo's unpaid internship at a seniors centre between April 2020 and June 2020 should

count toward meeting one of the eligibility requirements. The Applicant raised a number of issues. In my view, the determinative one is procedural fairness. I find that it was unfair to give Mr. Okedayo no notice of the Officer's view that the internship had to be a part of an "accredited program" where there is no indication that this is required in the text or guidelines of the temporary public policy under which Mr. Okedayo applied.

[2] Based on the reasons below, the application for judicial review is granted and the matter returned to be redetermined by a different officer.

II. Background

[3] Mr. Okedayo came to Canada in September 2018. He made a claim for refugee protection soon after. His refugee claim was refused as was his appeal of that decision to the Refugee Appeal Division.

[4] At the start of the pandemic, from April 2020 until June 2020, Mr. Okedayo took an unpaid internship at a seniors centre in North York, Ontario as part of a Home Support Worker certificate program. His work involved assisting seniors with activities of daily living, providing wellness checks, and distributing personal protective equipment ("PPE") to vulnerable seniors. Following his completion of this certificate program, Mr. Okedayo did paid work as a personal support worker at a number of different facilities between April 2021 and July 2021.

[5] In August 2021, Mr. Okedayo applied for permanent residence under a special time-limited program for individuals who had worked in the health care sector during the COVID-19

pandemic and had either a pending refugee claim or had their refugee claim refused: Temporary Public Policy to facilitate the granting of permanent residence for certain refugee claimants working in the health care sector during the COVID-19 pandemic ("the Temporary Public Policy").

[6] The Temporary Public Policy was created by the Minister of Citizenship and Immigration through their public policy power under section 25.2 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*]. It was operational on December 14, 2020 and ended on August 31, 2021. The impetus for the program was the recognition by the government of the "extraordinary contribution of refugee claimants working in Canada's health care sector during the COVID-19 pandemic" and that "as these individuals face an uncertain future in Canada,… current circumstances merit exceptional measures to provide these individuals with Permanent Residence status in recognition of their service during the pandemic."

[7] The text of the Temporary Public Policy set out specific eligibility requirements, including the type of health care work that would qualify, as well as guidance on the number of hours of work required and the time period when the work had to have taken place.

[8] On September 28, 2021, a Humanitarian and Migration Officer at Immigration, Refugees and Citizenship Canada [IRCC] ("the Officer") refused Mr. Okedayo's application for permanent residence. Mr. Okedayo received a refusal letter indicating that he failed to meet the requirement of working for 120 hours between March 13, 2020 and August 14, 2020 in a qualifying occupation.

[9] Mr. Okadeyo believed this was a mistake. He asked the Officer to reconsider their decision on October 4, 2021, explaining that he had met the requirements based on his internship at the seniors' centre, for which he provided a letter of employment, timesheets, and his certificate of completion. The following day, a Senior Immigration Officer found that upon considering Mr. Okedayo's submissions there was no basis to reopen his case.

[10] Mr. Okedayo retained new counsel and filed this application for judicial review. At the time he filed his application for leave and judicial review, Mr. Okedayo did not have the notes of Officer explaining their decision. Mr. Okedayo received these notes after he filed his application with this Court.

III. Issue and Standard of Review

[11] The determinative issue on judicial review was whether the Officer breached procedural fairness in not providing Mr. Okedayo notice with respect to their view about the necessity of accreditation and that based on this view his internship would not qualify. This issue does not relate to the merits of the decision. The general presumption of a reasonableness standard of review does not apply in these circumstances (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 77). The question I need to ask is whether the procedure was fair in 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).

[12] The consequences of a rejection under the Temporary Public Policy are severe for Mr. Okedayo. This is a time-limited program that is designed to recognize the work of health care workers with insecure status in Canada who provided direct care in the early days of the COVID-19 pandemic. Mr. Okedayo cannot reapply because the program is no longer operational. In these circumstances, given the stakes for Mr. Okedayo, the ability to remain in Canada permanently and the nature of the program under which he applied militate in favour of a heightened duty of fairness than may be ordinarily expected (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at para 31; *Likhi v Canada (Minister of Citizenship and Immigration)*, 2020 FC 171 at para 27; *Lakhanpal v Canada (Minister of Citizenship and Immigration)*, 2021 FC 694; *Kaur v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1690 at para 27).

IV. Analysis

[13] The eligibility requirement at issue is found in the text of the Temporary Public Policy:

> The foreign national:
>
> ….
>
> Worked in Canada in one or more designated occupations… providing direct patient care in a hospital, public or private long-term care home or assisted living facility, or for an organization/agency providing home or residential health care services to seniors and persons with disabilities in private homes:
>
> a. for a minimum of 120 hours (equivalent to 4 weeks full-time) between March 13, 2020… and August 14, 2020…; and
>
> b. for a minimum of 6 months full-time (30 hours per week) or 750 hours (if working part-time) total experience (obtained no later than August 31, 2021); and,

c. for greater certainty, periods of work in a designated occupation must be paid unless the applicant was doing an internship that is considered an essential part of a post-secondary study program or vocational training program in one of the designated occupations, or an internship performed as part of a professional order requirement in one of the designated occupations.

[14] The dispute in this judicial review is with respect to the first required time period for work between March 13, 2020 and August 14, 2020. This is the period of time when Mr. Okedayo had done his internship at a seniors' centre as part of the Home Support Worker certificate program. At issue is whether this unpaid work qualifies under the internship criteria, namely that it was either "an essential part of a post-secondary program or vocational training program in one of the designated occupations" or "an internship performed as part of a professional order requirement in one of the designated occupations."

[15] The details of Mr. Okedayo's internship are set out in the letter provided from the seniors centre:

> Richman was an intern without remuneration at… Seniors Centre from April 6, 2020 to June 19, 2020 under the National Occupational Classification Code of (NOC 4412). This clinical internship placement is considered an essential part of the Home Support Worker certificate program. Richman worked a total of 218 hours since the start date.
>
> Richman's duties were mainly but not limited to:
>
> • To provide professional support to residents through constant companionship and provides assistance with activities of daily living (ADLs) such as feeding, dressing, bathing, toileting, skincare, oral hygiene, in accordance with pre-established plan of care. The student also provided meal preparation, housecleaning and home maintenance, and laundry.

> • Report and document unsafe conditions as well as behavioural, and/or cognitive changes to the supervisors.
>
> • Provided mental health support, wellness check, and PPE distribution for vulnerable seniors.

[16] Following the filing of his application for leave and judicial review, Mr. Okedayo received the notes of the Officer's decision. It was then that Mr. Okedayo learned for the first time that the Officer's concern was their view that, "upon verification," the seniors' centre where Mr. Okedayo had done his internship was not an "accredited program by the province of Ontario or of any other provinces or territories in Canada" and therefore his work there could not be counted toward the work experience eligibility requirement.

[17] There is no explanation as to what sort of verification the Officer underwent in making this determination. Nor is there any explanation as to how the Officer defined "accredited." The Respondent on judicial review has attempted to fill in this gap by providing various rationales for requiring "accreditation" as well as how accreditation can be defined by whether the institution is a "designated learning institution," a concept found in section 211.1 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] in the context of student permit applications.

[18] The Respondent filed a lengthy affidavit from Céline Beauparlant, an assistant director in the Social and Discretionary Program and Policy Division in the Immigration Branch of IRCC. Much of the affidavit provides a rationale for the necessity of requiring accreditation of internships and further that the definition for "designated learning institutions" found in section 211.1 of *IRPR* is used to define accreditation under the Temporary Public Policy. The Officer's

reasons did not offer any of these explanations as to the need for accreditation or how accreditation is defined. Nor can any of these explanations or requirements be found in the text of the Temporary Public Policy, the guidelines, or the application form.

[19] As noted by Justice Southcott in *Aje v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 811 [*Aje*] commenting on Ms. Beauparlant's affidavit: "I have difficulty with the Respondent's efforts to rely on this evidence in the absence of any indication in the record that these policy considerations were documented or otherwise communicated in a manner that brought them to the Officer's attention.... the Court's analysis must be based on the information that was available to the Officer when arriving at the relevant interpretation." Justice Fuhrer cited this passage from *Aje* with approval in a stay motion decision where the Minister used Ms. Beauparlant's affidavit to support the policy considerations involved in defining the criteria for unpaid internships (*Benipal v Canada (Minister of Citizenship and Immigration)*, 2022 CanLII 58755 (FC) at para 4).

[20] The Respondent relies heavily on the decision *Aje* to support the reasonableness of the Officer's interpretation of the requirements for an internship under the Temporary Public Policy. I note, however, that in *Aje*, Justice Southcott found the procedural fairness argument regarding notice to be without merit because the applicant had been informed of the specific reasons, namely that their program had not been accredited, prior to filing their application for reconsideration (*Aje* at para 18). This was not the case for Mr. Okedayo, who only learned of the Officer's determination with respect to his internship not being "accredited" when he filed his application for leave and judicial review.

[21] From the perspective of Mr. Okedayo while applying for permanent residence, there is no information in the guidelines, in the questions posed in the application, nor in the text of the Temporary Public Policy indicating that a program needs to be “accredited” nor any explanation for the criteria decision-makers would use to determine if a program was “accredited.” The Officer’s decision also fails to explain this.

[22] Mr. Okedayo still has no information as to the criteria that was used or the type of verification done by the Officer to determine that his internship would not qualify as a “vocational training program” under the Temporary Public Policy. Associate Chief Justice Gagné recently dealt with this issue in a case also concerning the qualification of an unpaid internship under the Temporary Public Policy. Associate Chief Justice Gagné found in *Iriafe v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1428 at paragraphs 9-11 that it was unfair to rely on extrinsic requirements and information without giving the applicant an opportunity to respond:

> An immigration officer is not under a duty to provide an opportunity for the applicant to address any of the officer’s concerns regarding the application that arise directly from the requirements of the legislation or regulations (*Hassani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1283 at paras 23-24). By contrast, if an officer intends to base his or her decision on extrinsic information of which an applicant is unaware, then an opportunity to respond should be made available to enable the applicant to disabuse the officer of any concerns arising from that evidence (*Hakimi v Canada (Citizenship and Immigration)*, 2015 FC 657 at para 22).
>
> If the Officer had any concerns about the quality or legitimacy of the vocational training program completed by the Applicant — that is not a specific requirement of the Pathway Program — the Applicant had the right to be informed of that concern and allowed to address it.

> In my view, by not giving the Applicant such an opportunity, the Officer breached her right to procedural fairness.

[23] The same reasoning applies to Mr. Okedayo's case. I find it unfair that no notice was provided to him of the Officer's concerns with accreditation and the nature of the internship program undertaken by Mr. Okedayo.

[24] The Respondent argued that even if I find there was a breach of procedural fairness, there is no purpose in sending the matter back because the application is bound to fail. I do not agree.

[25] First, Mr. Okedayo has never had the opportunity to address concerns with the nature of his internship. The Respondent's arguments before me relied on accreditation being defined using the concept of a "designated learning institution" under section 211.1 of *IRPR*. Recently, in *Abiodun v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1675, this Court found it unreasonable for an officer to require an internship to meet the definition of "designated learning institution" used for the "student class" under section 211.1 of *IRPR*, finding at paragraph 18:

> The Temporary Public Policy does not explicitly nor implicitly require that an internship be completed through a DLI [Designated Learning Institute]. In fact, it specifically provides that internships may be completed as part of a 'vocational training program in one of the designated occupations' without any reference to attendance at a DLI [Designated Learning Institute]."

[26] Second, given that Mr. Okedayo does not have a pending refugee claim, he may be able to request humanitarian and compassionate relief under subsection 25(1) of *IRPA* in relation to a particular requirement of the Temporary Public Policy (see *Otiteh v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1537 at para 18).

[27] In these circumstances, I cannot confidently conclude that the breach of procedural fairness has no impact on the decision (*Sarker v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1168 at paras 16-17; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC)). Accordingly, the matter has to be sent back and redetermined.

V. Disposition

[28] In their written materials, the Applicant sought costs. I do not find that there are “special reasons” to award costs (Rule 22 of *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22). The application for judicial review is allowed. No party raised a question for certification and I agree that none arises.

JUDGMENT IN IMM-6966-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The decision of IRCC dated September 28, 2021 is set aside;
3. The matter is sent back to a different officer to be redetermined;
4. The Applicant shall be provided with an opportunity to provide further submissions on redetermination;
5. No serious question of general importance is certified; and
6. No costs are awarded.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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