Federal Court  Cour fédérale

Date: 20240205

Docket: IMM-8752-21

Citation: 2024 FC 178

Toronto, Ontario, February 5, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CHINWE BRIDGET KEKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of the October 6, 2021 decision of a representative of the Minister of Immigration, Refugees and Citizenship Canada [Officer] denying her application for permanent residence [PR] made under the *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 [Pathway Program].

[2] The application was denied on the basis that the Applicant had not demonstrated 120 hours of work providing direct patient care between March 13, 2020 and August 14, 2020.

[3] For the reasons that follow, I find that the Applicant has not established that the Officer's decision was unreasonable or that there was a breach of procedural fairness. Accordingly, the Application for Judicial Review must be dismissed. Although dismissal is necessary given the Pathway Program's prescribed eligibility requirements, the Applicant's failure to succeed on this Application does not detract from or diminish the Applicant's significant contribution as a Personnel Support Worker [PSW] during the pandemic.

II. Background

[4] The Applicant is a Nigerian citizen who advanced a claim for protection upon arriving to Canada. She also undertook studies to become a PSW and has worked in that field since 2018.

[5] On November 23, 2020, the Pathway Program was created by the Minister of Citizenship and Immigration pursuant to the public policy power under section 25.2 of the IRPA. The Pathway Program was an exceptional measure to recognize the "extraordinary contribution of refugee claimants working in Canada's healthcare sector during the COVID-19 pandemic […]" by providing those individuals with PR status. It was implemented on December 14, 2020 and ended on August 31, 2021.

[6] Eligibility requirements for the Pathway Program included that an applicant demonstrate they had worked, providing direct patient care, for a minimum of 120 hours (4 weeks full-time) between March 13 to August 14, 2020 [First Work Period], and for a minimum of 6 months full-time (or 750 hours if employed part-time) before August 31, 2021 [Second Work Period]:

> 4. Worked in Canada in one or more designated occupations (see Annex A) 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 (the date when Canadian travel advisories were issued) and August 14, 2020 (the date the public policy was announced [*sic*]; 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. [Emphasis added.]

[7] The Pathway Program further provided that periods of paid or unpaid sick leave may be counted towards the minimum prescribed work requirements in specifically defined circumstances:

> 4. Periods of paid or unpaid sick leave may be counted when assessing the 120 hours or the 6-month experience requirement if the applicant contracted COVID-19. Periods of paid or unpaid leave due to illness/disability, maternity/parental leave, quarantine or isolation requirements due to COVID-19, caring for family who

> contracted COVID-19 or lack of child care due to COVID-19 may be counted when assessing the 6-month experience requirement. [Emphasis added.]

[8] From June 2018 to December 2019, the Applicant worked as a PSW in Montreal. In January 2020, the Applicant began to work in the Toronto area, working approximately 189 hours from January to September 2020. However, during the First Work Period, the Applicant only completed 42 hours of work due to an injury that led to her being placed on medical leave from April 4 to August 15, 2020.

[9] The Applicant applied for permanent residence under the Pathway Program in June 2021.

[10] The Officer refused the Application, finding that, although the Applicant had worked as a PSW providing direct patient care, she had only completed 42 hours of work during the First Work Period. The Officer's rationale is short and I have reproduced it in full for ease of reference:

> Chinwe Bridget KEKE, is the primary applicant for permanent residence under the Health Care Worker public policy pathway.
>
> The applicant has been employed by GEM Health Care Services as a Personal Support Worker since January 29, 2020. Between March 13, 2020 and August 14, 2020 the applicant worked 42 hours.
>
> The applicant has also been employed by AGTA Health Care and Right at Home Health Care as a Personal Support Worker.
>
> It is the onus of the applicant to satisfy the decision-maker that they meet all the requirements of the public policy. As per the public policy, applicants are required to have worked 120 hours between March 13, 2020 and August 14, 2020 and have worked 6 months full-time or 750 hours part-time before August 31, 2021. As seen in the documentary evidence, the applicant worked 42

> hours during the 120 hour work experience requirement. It was put forth that the applicant had been on disability leave between April 2020 and August 2020. To note, only periods of sick leave due to COVID-19 may be counted towards the 120 hour work experience. As one of two essential work experience requirements are not met, no further consideration is given to the 6 months work experience.
>
> As the eligibility requirements are not met, the application is refused.

III. Preliminary matter

[11] The Respondent has been identified as the Minister of Immigration, Refugees and Citizenship Canada in the style of cause, the name commonly used to refer to the Respondent. However, the Respondent is identified in statute as the Minister of Citizenship and Immigration, and should be so identified in the style of cause (rule 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 and s 4(1) of the IRPA). The style of cause is amended accordingly (rule 76 of the *Federal Courts Rules*, SOR/98-106).

IV. Issues and standard of review

[12] The Application raises two issues:

A. Was the Officer's decision reasonable?

B. Was there a breach of procedural fairness?

[13] In conducting a reasonableness review, the Court must determine whether the outcome and the rationale supporting that outcome reflect the hallmarks of reasonableness – transparency, intelligibility and justification. A reasonable decision is 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 (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85 [*Vavilov*]). A reviewing Court will only intervene where satisfied that any flaws or shortcomings in the decision are more than merely superficial or peripheral missteps; to justify intervention on judicial review, the flaws or missteps must render the decision unreasonable (*Vavilov* at para 100).

[14] Questions of fairness are to be assessed with a focus on the nature of the substantive rights involved and by asking whether the procedure was fair having regard to all of the circumstances. While no standard of review applies *per se*, correctness best reflects the Court's approach (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, citing *Eagle's Nest Youth Ranch Inc v Corman Park (Rural Municipality #344)*, 2016 SKCA 20 at para 20).

V. Analysis

A. *The Officer's decision was reasonable*

[15] The Applicant submits the Officer unreasonably interpreted the Pathway Program as requiring the Applicant to satisfy both the minimum 120 work hours within the First Work Period and the minimum 6 months of full-time work within the Second Work Period. In support of this view, the Applicant points to and relies upon the Officer's refusal letter where "or" is used in describing the two eligibility periods:

> You are not eligible under the new temporary public policy, because:

> [X] you did not work 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 :
>
> - for a minimum of 120 hours (equivalent to 4 weeks full-time) between March 13, 2020 and August 14, 2020;
>
> **or**
>
> - 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); [Emphasis added.]

[16] The Applicant submits that the Officer's refusal letter indicates the hours worked requirement was to be interpreted disjunctively and that the Applicant did satisfy the requirements of the Pathway Program despite not having worked 120 hours during the First Work Period due to her injury. The Applicant submits that the refusal was therefore unreasonable and unfair.

[17] The Applicant further argues that the Officer erred in concluding the Applicant had failed to demonstrate she had met both of the prescribed minimum work periods. This because the exception provided for in the Pathway Program required the counting of time on medical leave for the First Work Period (see para 7 above).

[18] Although I am sympathetic to the Applicant's circumstances, neither of these arguments are persuasive.

[19] A careful reading of the Officer's refusal letter indicates the Applicant has failed to satisfy one "or" the other of the required qualifying work period requirements, without specifying which qualifying work period was not satisfied. This does not, as the Applicant argues, indicate program eligibility requires an Applicant to only satisfy the criteria for one of the two required work periods. Such an interpretation is inconsistent with a careful reading of the refusal letter itself and the Officer's decision when read holistically, and is contrary to the clearly prescribed terms of the program.

[20] The refusal letter unequivocally advises the Applicant that the application has been denied. The use of "or" in the refusal letter and the failure to identify which work period criteria were not satisfied may create some uncertainty as to the reason for refusal but this uncertainty is clarified upon review of the Officer's rationale. In explaining the decision, the Officer states "applicants are required to have worked 120 hours between March 13, 2020 and August 14, 2020 **and** have worked 6 months full-time or 750 hours part-time before August 31, 2021" (emphasis added). This interpretation of condition 4 of the Pathway Program was not only reasonable, but in my opinion, was the only reasonable interpretation available. Condition 4 uses "and" in establishing the conditions that must be met before an officer may grant permanent residence to an applicant under the Pathway Program (see para 6 above).

[21] Similarly, the Officer reasonably concluded that the Applicant's period of medical leave was not to be counted in determining whether the required minimum work hours had been established for the First Work Period.

[22] The Pathway Program defines terms under the heading “Concepts and Definitions applicable for the purpose of the public policy.” Paragraph 4 under this heading addresses the counting of sick leave in two sentences (see para 7 above). The first sentence provides that periods of sick leave may be counted in assessing work hours under either the First Work Period or the Second Work Period where the applicant has contracted COVID-19. The second sentence contemplates a broader set of circumstances in which sick leave “may be counted when assessing the 6-month experience requirement” (emphasis added). It is not disputed that the injury resulting in the Applicant’s medical leave was not related to the Applicant having contracted COVID-19. The Officer reasonably concluded the broader circumstances in which sick leave may be counted as described in the second sentence of paragraph 4 were not available in assessing hours worked during the First Work Period. That is, only sick leave due to COVID-19 could have been considered in the calculation of the Applicant’s hours under the First Work Period.

[23] The Officer’s decision, when read holistically and in light of the requirements of the Pathway Program and the Applicant’s circumstances, is transparent, intelligible and justified.

B. *No breach of fairness*

[24] The Applicant argues that the Officer failed to recognize the importance of the decision to the Applicant and take into account her stellar track record in the PSW field as well as her clear intent, had she not been injured, to work through the First Work Period. It is submitted that the Applicant was entitled to have her application examined on a fair and objective basis in consideration of the objectives of the IRPA. It is also submitted that the Officer failed to consider

several of the factors identified in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) in determining the content of the duty of fairness owed to the Applicant. The Applicant further argues the Officer's reasons were inadequate and failed to explain why the Officer did not exercise discretion in reviewing the Applicant's employment history.

[25] The Applicant has not identified any specific breach of fairness. There is no dispute as to the facts that were before the Officer, and it is not alleged that the Officer rejected relevant evidence or drew negative credibility inferences from the evidence without notice. In the absence of any alleged breach of fairness, there is no need to address the *Baker* factors.

[26] The Applicant argues the Officer failed to exercise discretion; however, the exercise of discretion is a matter to be assessed on a reasonableness standard. In any event, the Applicant has not identified what discretion the Officer had in considering the Applicant's eligibility for the Pathway Program. Justice Anne Mactavish's finding in *Nookala v Canada (Citizenship and Immigration)*, 2016 FC 1019 [*Nookala*], involving an application for a Post-Graduation Work Permit, is of direct application:

> [12] The Program document at issue in this case establishes criteria that *must* be satisfied for a candidate to qualify for a Post-Graduation Work Permit. While the Program document also provides information and guidance as to how the program is to be administered, nothing in the document confers any discretion on immigration officers to modify or waive the Program's eligibility requirements. Consequently, no fettering of discretion occurred when the immigration officer determined that Mr. Nookala was required to hold a valid study permit in order for him to be eligible for a Post-Graduation Work Permit.

[27] The Applicant's argument that the Officer fettered their discretion is not persuasive. The Pathway Program does not confer discretion, and as noted in *Nookola*, there is no free floating power to positively determine applications that fall outside the requirements of the program (*Salazar Godinez v Canada (Citizenship and Immigration)*, 2023 FC 495 at para 21).

[28] Similarly, adequacy of reasons does not provide a basis upon which to find a breach of fairness. Instead, the adequacy of reasons form part of the Court's assessment of whether a decision satisfies the hallmarks of reasonableness (*Vavilov* at paras 99-101; *Marcelin v Canada (Citizenship and Immigration)*, 2021 FC 761 at para 7; *Malanda v Canada (Citizenship and Immigration)*, 2021 FC 709 at para 6; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16. I have already determined the Officer's decision was reasonable.

VI. Conclusion

[29] Accordingly, the Application for Judicial Review is dismissed. Neither party has proposed a question for certification and none arises.

JUDGMENT IN IMM-8752-21

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Respondent as the Minister of Citizenship and Immigration.
2. The Application is dismissed
3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8752-21
STYLE OF CAUSE:	CHINWE BRIDGET KEKE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 6, 2023
JUDGMENT AND REASONS:	GLEESON J.
DATED:	FEBRUARY 5, 2024

APPEARANCES:

Ayoola Odeyemi	FOR THE APPLICANT
Stephen Jarvis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ayoola Odeyemi Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT