Federal Court  Cour fédérale

Date: 20170710

Docket: IMM-3298-16

Citation: 2017 FC 666

Ottawa, Ontario, July 10, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

CHIKA KELECHI OSAHOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Chika Kelechi Osahor [the Applicant] is a citizen of Nigeria. She arrived in Canada in January 2008 as an International Student and studied at the University of Alberta. She graduated in April 2012, with a Bachelor of Science in Biological Sciences.

[2] Prior to her graduation Ms. Osahor applied for a Post Graduate Work Permit [PGWP] and also applied for admission to the Nursing Program offered at Trent University in Ontario. She did not anticipate admission to Trent, but in June 2012 she received an offer of admission. At the end of June 2012 she was also granted her PWGP, valid until June 2015.

[3] On receipt of the PGWP, Ms. Osahor noted that the terms of the work permit included a prohibition against returning to school unless authorized. She reports that she contacted the Respondent by phone, explained her circumstances and was advised that the PGWP could not be cancelled but that she should apply for a new study permit and an off campus work permit. She further reports she was advised that upon completion of the Nursing Program at Trent she would be in a position to apply for a second PGWP so long as she did not use the PWGP issued in June 2012.

[4] Ms. Osahor received the renewed study permit and an off campus work permit. She graduated from the Trent Nursing Program in January 2016 and was subsequently authorized to practice as a Registered Nurse in Ontario. Not having made use of the initial PGWP, she applied for a second PGWP. In applying for the second PGWP Ms. Osahor's counsel at the time acknowledged to the Officer that she was seeking a second PGWP, noted she had not worked under the first PGWP and submitted that the Officer considering the application could, in the circumstances, grant a second PGWP. It does not appear that Ms. Osahor's 2012 telephone conversation with the Respondent or the advice she reports she was given in the course of that conversation was disclosed to the Officer.

[5] The Respondent's PGWP Program Delivery Instructions [PDI] provide that students are not eligible to be issued a PGWP if a PWGP has been previously issued. In denying Ms. Osahor's application the Officer applied this criteria.

[6] Ms. Osahor submits that in refusing her application the Officer applied the PGWP-PDI as if they were law, that the Officer failed to consider her unique circumstances, and that this in turn amounted to a fettering of discretion. She further submits that there was a breach of the doctrine of legitimate expectation based on the information provided over the phone by the Respondent in 2012. The Respondent submits that the PGWP-PDI are mandatory in this respect and that the doctrine of legitimate expectation cannot be relied upon to extend substantive rights to Ms. Osahor.

[7] Having considered the Parties' submissions, I am of the opinion that the Application turns on a single issue, whether the Officer unreasonably interpreted and applied the restrictions within PGWP-PDI in declaring students ineligible to receive a second PGWP. For the reasons that follow I am of the opinion that it was reasonable for the Officer to conclude the criteria were to be applied and the refusal of the Application on the facts disclosed was also reasonable. The Application is dismissed.

II. Standard of Review

[8] Ms. Osahor submits that the issues pertaining to fettering of discretion and procedural fairness are to be reviewed against the standard of correctness. The Respondent submits that findings of fact and of mixed fact and law are to be reviewed against a standard of

reasonableness whereas questions of procedural fairness and natural justice are reviewable on a correctness standard.

[9] The core issue raised by Ms. Osahor relates to the interpretation and application of the PGWP-PDI within the legislative and regulatory framework established by the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Deference will normally be extended to a decision-maker's interpretation and application of their home statute (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]). A reviewing court will not normally intervene where the decision-making process is justified, transparent and intelligible, and the decision is within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir*, at para 47).

[10] Furthermore, where prior jurisprudence has determined the standard of review to be applied in considering a particular issue a reviewing court may adopt that standard (*Dunsmuir*, at para 62). In *Nookala v Canada (Citizenship and Immigration)*, 2016 FC 1019, 46 Imm LR (4th) 287, Justice Anne Mactavish addressed a question similar to that raised here, whether an applicant must satisfy the PGWP-PDI criteria. In addressing the issue Justice Mactavish adopted a reasonableness standard of review (*Nookala*, at para 10, see also *Abubacker v Canada (Citizenship and Immigration)*, 2016 FC 1112 at paras 14 and 17, [2016] FCJ No 1111 (QL) [*Abubacker*] and *Rehman v Canada (Citizenship and Immigration)*, 2015 FC 1021 at para 7, [2015] FCJ No 1015 (QL) [*Rehman*]).

[11] As noted above the core issue relates to the interpretation of the *IRPA* scheme, a matter that the jurisprudence establishes is to be reviewed against a reasonableness standard.

III. Analysis

[12] Ms. Osahor submits that the law does not prevent the issuance of a second or replacement PGWP. She argues that the PGWP program is a product of policy and the PGWP-PDI are a policy document that is to be interpreted and applied by decision-makers as a guideline. In effect, she submits that an officer considering applications pursuant to the PGWP-PDI is not prevented by law from issuing a second PGWP where special circumstances exist. She submits that in failing to recognize this discretion, and by abiding strictly to the PGWP-PDI requirements without consideration of her particular circumstances the Officer in this case erred. She further argues that the special circumstances evidenced in this case warranted the exercise of discretion and the granting of a second PGWP. I disagree.

[13] The Parties agree that the PGWP is not expressly provided for in the *IRPA* or the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*], but rather is made available to applicants pursuant to the authority provided the Minister under section 205 of the *IRPR*. Section 205 states in part:

205 A work permit may be issued under section 200 to a foreign national who intends to perform work that	**205** Un permis de travail peut être délivré à l'étranger en vertu de l'article 200 si le travail pour lequel le permis est demandé satisfait à l'une ou l'autre des conditions suivantes :
[…]	[…]

(c) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,	**c)** il est désigné par le ministre comme travail pouvant être exercé par des étrangers, sur la base des critères suivants :
[…]	[…]
(ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy; or	**(ii)** un accès limité au marché du travail au Canada est justifiable pour des raisons d'intérêt public en rapport avec la compétitivité des établissements universitaires ou de l'économie du Canada;

[14] In effect, section 205 of the *IRPR* extends to the Minister the authority to provide foreign nationals with limited access to the Canadian labour market where that access satisfies public policy objectives relating to the competiveness of Canada's economy or academic institutions. The *IRPR* do not prescribe criteria but rather authorize the Minister to both designate the work to be performed and define how, or on what basis, limited access is to be provided. In doing so the Minister must be in a position to establish program criteria. As noted by Justice Mactavish at paragraphs 11 and 12 of *Nookala*:

> [11] Fettering of discretion occurs when a decision-maker treats guidelines as mandatory: see, for example, *Canadian Reformed Church of Cloverdale B.C. v. Canada (Minister of Employment and Social Development)*, 2015 FC 1075, 2015 F.C.J. No. 1089. The operative portion of the document establishing the Post-Graduation Work Permit Program is not, however, a "guideline", as that term is used in the jurisprudence: see, for example, *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 32, 3 S.C.R. 909.
>
> [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.
>
> [Emphasis added]

[15] As Justice Mactavish notes in *Nookala*, the PGWP- PDI is a document that provides information, guidance, and sets out program criteria. Ms. Osahor argues that *Nookala*, as well as the decisions of this Court in *Abubaker* and *Rehman* where Justices Sandra Simpson and Denis Gascon reached conclusions that accord with those of Justice Mactavish, can be distinguished from the case at hand. She submits that in each of these cases the PGWP-PDI requirements in issue found their basis in section 199 of the *IRPR*, a section that identifies criteria a foreign national must satisfy in applying for a work permit from within Canada. In effect Ms. Osahor argues that the finding in these cases is to the effect that the mandatory program criteria as established in the PGWP-PDI is *obiter*. I am unconvinced.

[16] In each of the above noted cases the decisions before the Court were reviewed on a standard of reasonableness and the issue was whether it was reasonable for the decision-maker to apply the criteria set out in the PGWP-PDI. In *Nookala*, Justice Mactavish makes no reference to *IRPR* section 199 but does conclude "[t]he program document at issue in this case establishes criteria that must be satisfied for a candidate to qualify for a Post-graduate Work Permit [Emphasis Added]" (*Nookala*, at para 12). This conclusion was also adopted in *Abubaker* at paragraph 16. In *Rehman*, Justice Gascon does address section 199 but then proceeded to note that the PGWP-PDI establish "distinct requirements" that an applicant must meet (*Rehman*, at para 19). This is exactly the circumstance before the Court in this case.

[17] The Minister is granted the authority pursuant to section 205 of the *IRPR* to set out criteria for the issuance of a PGWP. Having established those criteria in the PGWP-PDI it was reasonable for the Officer considering Ms. Osahor's application to conclude that those specific requirements could not be ignored. I am also unable to find any breach of procedural fairness arising out of the doctrine of legitimate expectations. The Officer was not advised of the content of the 2012 telephone conversation on which Ms. Osahor now relies. Not having provided notice of this conversation to the Officer, it is not now open to Ms. Osahor to argue on judicial review that the Officer erred in failing to consider and address those circumstances.

IV. Applicant's request for a Certified Question

[18] Ms. Osahor's counsel has proposed the following question for certification:

> In applying the criteria found in the Program Delivery Instructions for the Post-Graduation work permit program as mandatory and akin to statutory rules or delegated legislation, is a Visa Officer fettering his or her discretion?

[19] To be certified, a question must be dispositive of the appeal and raise a question of general importance that transcends the interests of the parties (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9, [2014] 4 FCR 290).

[20] In my opinion the *Zhang* criteria have not been satisfied here.

[21] The PGWP-PDI do set out qualifying criteria and those criteria have been characterized as criteria that must be satisfied in the jurisprudence of this court, a position that I have adopted within the context of this particular case. However, the dispositive issue in this case was the

reasonableness of the Officer's determination to follow the criteria, and not that the criteria were adopted or treated as mandatory in nature.

[22] However, if I am wrong in drawing a distinction between whether the PWGP-PDI criteria are mandatory in nature and the overall reasonableness of the Officer's decision to follow them, the second of the *Zhang* criteria also prevents certification as it has not been satisfied. The issue raised in this Application has been previously considered by this Court on three separate occasions. The Court's jurisprudence is not split or inconsistent on the issue. Where the jurisprudence has sufficiently answered a question an issue of general importance does not arise (*Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, at paras 4-10, 29 Imm LR (4th) 211; *NK v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1377 at paras 62, 80, 102, [2015] F.C.J. No. 1449 (QL)).

[23] The request to certify the above question is denied and the Application is dismissed.

JUDGMENT IN IMM-3298-16

THIS COURT'S JUDGMENT is that the Application is dismissed. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3298-16
STYLE OF CAUSE:	CHIKA KELECHI OSAHOR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 2, 2017
JUDGMENT AND REASONS:	GLEESON J.
DATED:	JULY 10, 2017

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