Federal Court  Cour fédérale

Date: 20231018

Docket: IMM-6242-21

Citation: 2023 FC 1384

Ottawa, Ontario, October 18, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ADEJOKE OMOBOLANLE KOLAWOLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Adejoke Omobolanle Kolawole, applied for permanent residence under a time-limited public policy program for those who made a refugee claim and worked in the health care sector during the COVID-19 pandemic ("Pathway Program"). An officer at Immigration, Refugees and Citizenship Canada [IRCC] refused her application. The Officer found her ineligible for the Pathway Program due to her inadmissibility under section 42(1) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [*IRPA*], a provision that says one is inadmissible if a family member is inadmissible.

[2] Ms. Kolawole was surprised by this decision. She did not know she was inadmissible to Canada; nor that in December 2019 her husband was found inadmissible under section 40(1) of the *IRPA* for misrepresenting on a Temporary Resident Visa application [TRV].

[3] Ms. Kolawole argues that the decision to reject her application is unfair and the reasons are insufficient because she had no notice of her spouse's inadmissibility, and therefore her own inadmissibility, until she received the Officer's decision on her permanent residence application. She says that this left her with no opportunity to respond.

[4] There are indeed significant concerns regarding the soundness of the Officer's ineligibility decision. During the course of this judicial review process, it became apparent that the very basis of Ms. Kolawole's husband's inadmissibility may not be valid. This calls into question if it can serve as a basis to find Ms. Kolawole an inadmissible family member and as a consequence ineligible for the Pathway Program.

[5] In these exceptional circumstances, where the decision at issue relies on a determination that the Court has serious concerns is not in accordance with the law, the decision cannot stand and must be sent back for redetermination.

[6] For the reasons that follow, I allow the judicial review.

II. Background on the Temporary Public Policy

[7] 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* ("Temporary Public Policy") was created by the Minister of Citizenship and Immigration through their public policy power under section 25.2 of the *IRPA*. It was a time-limited program specifically for those who had made refugee claims and worked in the health care sector during the early phase of the pandemic. The program became operational on December 14, 2020 and ended on August 31, 2021. The government created the Temporary Public Policy to recognize 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."

[8] 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.

[9] Another requirement was that applicants not be inadmissible to Canada. This is the only eligibility requirement that is at issue in this judicial review. The Temporary Public Policy provided exceptions to its general bar on inadmissibility. These exceptions recognized that a number of circumstances that result in inadmissibility because of non-compliance with the *Act* under section 41(a) of the *IRPA*, such as overstaying a visa, entering Canada without the required

visa, or without a valid passport or travel document, would make a large number of those who make refugee claims ineligible for a program that is specifically targeted at recognizing their contributions.

[10] Section 22 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] further exempts refugee claimants whose refugee claims are pending and those recognized as refugees from being found inadmissible because of misrepresentation under section 40(1) of the *IRPA*.

III. Background on Ms. Kolawole's Application

[11] On August 3, 2021, Ms. Kolawole applied for permanent residence through the Pathway Program, including her husband and three minor children as dependants on her application. An Officer at IRCC refused her application on September 3, 2021, finding her ineligible for the program because she was inadmissible under section 42 of the *IRPA* for having an inadmissible family member. Ms. Kolawole's inadmissibility was a direct consequence of a December 2019 IRCC decision to find her husband inadmissible for misrepresentation on a TRV that had been filed from Nigeria in November 2018. Ms. Kolawole alleges on this application that she never knew about her or her husband's inadmissibility until receiving the Officer's decision. Ms. Kolawole claims that her family did not receive the IRCC's December 2019 decision that was addressed to a hotel in North York, Ontario.

[12] The Pathway Program requires that the applicant has made a refugee claim in Canada; accordingly, the information as to when and where Ms. Kolawole and her family made their

refugee claims was before the Officer. In August 2019, Ms. Kolawole, her husband, and her children entered Canada from the United States through the Roxham Road crossing, and immediately made refugee claims. At the time Ms. Kolawole applied for the Pathway Program, all their refugee claims remained pending before the Immigration and Refugee Board.

IV. Issue and standard of Review

[13] Ms. Kolawole primarily framed her arguments around procedural fairness and notice. I have found it unnecessary to address the issue of whether the Officer had a duty to notify Ms. Kolawole of her potential inadmissibility in these circumstances.

[14] I have serious concerns about the validity of the inadmissibility decision that led to Ms. Kolawole being found to be inadmissible, and as a consequence, ineligible for the Pathway Program. I find this to be the determinative issue.

[15] As this issue is about the substantive merits of the decision, I have considered it on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 25), namely: whether it is reasonable to allow the rejection of Ms. Kolawole's application to stand when, apparent on the face of the record before the Officer, there are serious concerns that the very basis on which she was found ineligible may not be valid.

V. Analysis

[16] The concern about the validity of the misrepresentation inadmissibility determination, the foundational inadmissibility finding in this case, is apparent on the face of the record before the Officer. There are two critical dates: the date of the inadmissibility decision on Mr. Kolawole's TRV application (December 2, 2019), and the date that Ms. Kolawole and her family made refugee claims (August 26, 2019). From these two undisputed dates, it is clear that at the time that the misrepresentation finding was made under section 40(1)(a) of the *IRPA*, the family, including Ms. Kolawole's husband, were already in Canada as refugee claimants.

[17] Consequently, the misrepresentation inadmissibility finding appears to be contrary to section 22 of the *IRPR*, which states that refugee claimants are exempt from the application of the misrepresentation inadmissibility provisions pending the disposition of their refugee claim. Section 22 of the *IRPR* reads as follows:

> Persons who have claimed refugee protection, if disposition of the claim is pending, and protected persons within the meaning of subsection 95(2) of the Act are exempted from the application of paragraph 40(1)(a) of the Act.

[18] This is a serious concern, calling into whether this foundational inadmissibility determination — the misrepresentation inadmissibility finding that appears to have been made contrary to the law — can be relied upon to find Ms. Kolawole inadmissible and ineligible for the Pathway Program (*Almrei v Canada (Citizenship and Immigration)*, 2011 FC 554 at para 46).

[19] Ms. Kolawole's application was refused without any consideration of this potential invalidity. I do not find the ineligibility decision can be upheld as reasonable when, apparent on the face of the record before the Officer, there are serious concerns that the very basis for Ms. Kolawole's inadmissibility and consequential ineligibility for the Pathway Program may not be in accordance with the law. In these circumstances, the decision is untenable in light of the relevant factual and legal constraints that bear on it (*Vavilov* at para 101).

[20] This concern that the foundation for Ms. Kolawole's inadmissibility, and therefore her ineligibility for the Pathway Program, may be invalid was raised at the judicial review hearing. The Respondent's arguments focused on two issues: i) the Applicant and her family's failure to challenge the misrepresentation inadmissibility decision when they learned of it; and ii) the futility of sending the matter back for redetermination.

[21] The Respondent characterized the real issue as being one that was not before me — the husband's misrepresentation inadmissibility decision — and argued that the decision to find Ms. Kolawole ineligible simply flowed from that decision. The Respondent argued that the real problem lay in the Applicant's husband failing to challenge the misrepresentation inadmissibility determination.

[22] I agree that her husband's inadmissibility is the foundation upon which Ms. Kolawole's ineligibility is based. I do not agree, however, that this means that the real concern is with a decision that is not before me. From the perspective of Ms. Kolawole and her family, the question of central and immediate importance is the rejection of her permanent residence

application. The TRV application resulting in Mr. Kolawole's inadmissibility finding has long ago become irrelevant to this family, as they entered Canada as refugee claimants approximately six months prior to its determination. Yet, the misrepresentation inadmissibility determination made on that TRV application was relied upon to find Ms. Kolawole inadmissible and ineligible for the Pathway Program. The reliance on that inadmissibility finding is core to her challenge on judicial review and is appropriately before me.

[23] Ms. Kolawole's counsel explained that a judicial review of the December 2019 misrepresentation inadmissibility determination had not been pursued because the family only learned of the decision in September 2021 when Ms. Kolawole received the rejection of her permanent residence application. The Respondent argued that Mr. Kolawole could have challenged the decision in September 2021 when he became aware of the decision, and/or have requested an extension of time to file such a challenge.

[24] I agree with the Respondent that there may have been potential avenues that the Applicant and her family could have pursued in order to address the validity of the foundational inadmissibility finding. I do not, however, view their failure to do so to be a sufficient basis for the Court to ignore its concern that the sole basis on which Ms. Kolawole's application was rejected is an inadmissibility determination that appears to not be in accordance with the law. The consequences of a rejection are severe for Ms. Kolawole and her family. Ms. Kolawole cannot reapply for permanent residence under this Temporary Public Policy because the program is no longer operational.

[25] The Respondent also argued that even if the Court were to send the matter back for redetermination, there could be no remedy as an officer's hands would be tied since they would have to find that Ms. Kolawole remained a family member of someone with an unchallenged inadmissibility finding. I agree that sending the matter back with no further directions to the officer may likely result in the key concern raised in this judicial review not being addressed on redetermination. In my view, as I explain below, this unusual circumstance calls for a creative remedy in order to prevent a potential injustice.

VI. Remedy

[26] In these exceptional circumstances, I am ordering the matter be sent back to be redetermined with specific directions that address the legal validity concern that was raised in this judicial review. The Officer is directed to not finally determine this matter until the Applicant and her family have had an opportunity to address the potential invalidity of the decision to find Ms. Kolawole's husband inadmissible in December 2019.

JUDGMENT in IMM-6242-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;

2. No serious question of general importance is certified;

3. The September 3, 2021 decision is quashed and the matter is sent back to be redetermined by a different officer at IRCC;

4. The officer redetermining the application must notify the Applicant that they are redetermining the application and ask for confirmation of Mr. Kolawole's consent to seek to have IRCC re-open the December 2, 2019 inadmissibility finding on Mr. Kolawole's TRV application;

5. If Mr. Kolawole provides his consent, the officer must seek to have the December 2, 2019 inadmissibility finding re-opened and provide the Court's Judgement and Reasons in this matter to the officer considering the re-opening at IRCC. The Applicant's permanent residence application must be held in abeyance pending IRCC's determination on the re-opening of the December 2, 2019 misrepresentation inadmissibility determination;

6. If Mr. Kolawole does not provide his consent, the officer must provide the Applicant with 60 days to provide any further submissions on the application; and

7. The parties remain at liberty to apply to me, with notice to the other party, for clarification if difficulties arise with implementation of this Order during the redetermination proceeding.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6242-21
STYLE OF CAUSE:	ADEJOKE OMOBOLANLE KOLAWOLE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	APRIL 12, 2023
JUDGMENT AND REASONS:	SADREHASHEMI J.
DATED:	OCTOBER 18, 2023

APPEARANCES:

Henry Igbinoba	FOR THE APPLICANT
Nimanthika Kaneira	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Henry Igbnioba Barrister and Solicitor North York, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT