Federal Court

Cour fédérale

Date: 20211013

Docket: IMM-1203-20

Citation: 2021 FC 1065

Ottawa, Ontario, October 13, 2021

PRESENT: Madam Justice Walker

BETWEEN:

IBHADE NYEROVWO AGBHONKESE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Ms. Agbhonkese, is a citizen of Nigeria. She applied for a permanent resident visa as a member of the Federal Skilled Worker (FSW) class as an Express Entry candidate in 2019. In her application, the Applicant claimed 15 points for having a qualifying relative who lives in Canada and is a Canadian citizen.

[2] A visa officer refused the Applicant's visa application in a decision dated February 6, 2020 (the Decision). The officer found that the Applicant had not provided the necessary documentary evidence to substantiate her claim that her husband's step-brother, Mr. Anthony Agbhonkese, is a qualifying relative. Her husband is Godwin Agbhonkese.

[3] Immediately upon receipt of the Decision, the Applicant requested a reconsideration of the negative Decision. Her request was rejected by letter dated February 11, 2020 (the Reconsideration Refusal).

[4] The Applicant seeks the Court's review of the Decision. She has not filed an application for judicial review of the Reconsideration Refusal.

II. Analysis

[5] My analysis of the issues raised by the parties turns on the Applicant's documentary evidence. Accordingly, it is helpful to first set out that evidence.

[6] The Applicant initially submitted the following documents in support of her reliance on her husband's step-brother as a qualifying relative:

1. A letter signed by Anthony Agbhonkese dated May 4, 2019, stating that Godwin Agbhonkese is his half-brother, on his father's side;
2. A 407 ETR toll invoice issued to Anthony Agbhonkese, billing date March 18, 2019, to an address in Brampton, Ontario;
3. A handwritten rent receipt issued to Anthony Agbhonkese in respect of May 2019 for the same Brampton address;

4. The marriage certificate of the Applicant and Godwin Agbhonkese, from the Benin City, Nigeria registry; and

5. A copy of the identification page of Anthony Agbhonkese's Canadian passport, containing his picture, full name, date of birth, place of birth, nationality (Canadian), date of issuance (April 15, 2018), date of expiry (April 15, 2028), and place of issuance (Brampton, Ontario).

[7] With her reconsideration request, the Applicant provided:

1. An attestation of birth from Lagos State, Nigeria for Anthony Agbhonkese, indicating his father as Agbhonkese Oribhabor and mother as Agboifoh Christiana;

2. A sworn declaration of age in respect of Anthony Agbhonkese from his aunt in Nigeria attesting to the same mother and father;

3. An attestation of birth from Benin City, Nigeria for Godwin Agbhonkese, indicating his father as Agbhonkese Oribhabor and his mother as Agbhonkese Clara; and

4. An affidavit of family status made in the Benin judicial system division, Benin City, Nigeria, sworn before a Commissioner of Oaths, from Agbhonkese Clara, stating that the late Agbhonkese Oribhabor was her husband and that Anthony Agbhonkese is his first son, born of his first wife, and that her children with Agbhonkese Oribhabor include Godwin Agbhonkese.

Preliminary matter: the Reconsideration Refusal

[8] The Respondent first submits that the Decision and Reconsideration Refusal are distinct decisions that must be challenged in separate applications. Therefore, the Applicant's submissions regarding the Reconsideration Refusal should not be considered by the Court (*Kosolapova v Canada (Citizenship and Immigration)*, 2014 FC 458 at para 8 (*Kosolapova*)). The Respondent also submits that the evidence submitted with the Applicant's reconsideration request should have been provided with her initial application and that the officer did not err in concluding that they could not consider evidence submitted after the date of the first application.

[9] The Applicant submits that her initial application and reconsideration request are materially similar, have the same applicant and the same application number. No meaningful purpose would be served by effectively duplicating the proceedings (*Naderika v Canada (Citizenship and Immigration)*, 2015 FC 788 at para 29 (*Naderika*)).

[10] The Reconsideration Refusal states that the Applicant's initial application was considered on its merits and refused due to insufficient evidence supporting her claim that her husband has a sibling living in Canada. The officer referred to the February 6, 2020 Decision and concluded that "[w]e cannot consider any information submitted after the date on which you submitted your application, nor after the date on which we rendered a decision on your application".

[11] In *Kosolapova*, the decision under review was an application for permanent residence on humanitarian and compassionate (H&C) grounds. Justice MacTavish, then a member of this Court, emphasized that the original H&C decision, dated January 11, 2013, and a reconsideration decision dated March 26, 2013 were separate decisions, each of which should have been challenged through an application for judicial review (*Kosolapova* at para 8).

[12] In contrast, in *Naderika*, the Court considered a June 17, 2014 decision refusing an application for permanent residence in Canada under the FSW class. Justice Gascon noted that on June 17, 2014, upon receipt of the refusal, the applicant contacted the visa office and indicated that he had submitted documents in March 2014 in response to a January request from the officer. The applicant requested reconsideration and enclosed the March 2014 documents with the request. The applicant subsequently filed an application for judicial review in respect of

the June 2014 refusal decision but not the reconsideration refusal. Justice Gascon was satisfied that the interests of justice required the Court to consider the reconsideration request as part of its judicial review of the initial decision (*Naderika* at para 29):

> [29] In any event, I am satisfied that the interests of justice demand that the Court reviews the determination on the reconsideration request as part of the judicial review of the initial decision refusing Mr. Naderika's application for permanent residence (*Marr v Canada (Citizenship and Immigration)*, 2011 FC 367, at para 56 [*Marr*]; *Thangappan v Canada (Citizenship and Immigration)*, 2012 FC 1266, at para 3). The refusal to reconsider refers to the same decision, is part of the same immigration file and was issued before Mr. Naderika filed his application for judicial review. Further, the evidence placed before the Officer conclusively answered the concern that had led to the initial decision. As such, no useful purpose would be served by requiring Mr. Naderika to file a separate application for judicial review and to bifurcate the proceedings, and it would be contrary to the interests of justice to do so.

[13] In the present case, the Applicant's reconsideration request and additional evidence was submitted the day she received the Decision. It responded to the concern that she had not established the relationship between Godwin and Anthony Agbhonkese. I find that no useful purpose would be served by requiring the Applicant to challenge the Reconsideration Refusal separately.

[14] In addition, I do not accept the Respondent's argument that the officer was not permitted to consider the evidence submitted with the reconsideration request. The assessment of an application for reconsideration is a discretionary process that consists of two steps: (1) whether to reconsider the previous decision; and, if so (2) the actual reconsideration of the initial decision (*Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at para 55). In determining whether to reconsider an initial decision, a visa officer is not precluded from assessing whether

any new evidence necessitates reconsideration. At the second stage, the officer would then evaluate the new evidence and determine whether it cured the evidentiary omission(s) that impacted the refusal of the initial application (*Gill v Canada (Citizenship and Immigration)*, 2018 FC 1202 at paras 12-16). In my opinion, the new evidence submitted with the Applicant's reconsideration request warranted the officer's assessment of whether to reconsider the Decision and an evaluation of the new evidence of the Applicant's family connection to Anthony Agbhonkese.

Overview of Express Entry program

[15] Express Entry is Immigration, Refugees and Citizenship Canada's (IRCC) system for managing economic immigration applications in three classes, one of which is the FSW class. In practical terms, an applicant establishes an Express Entry profile with IRCC. If they meet the criteria for one of the three classes, they will be placed in a pool of candidates. From there, the applicant may be selected to apply for permanent residence in Canada as an FSW based on their ranking within the pool. The applicant must then submit a complete application demonstrating they meet the eligibility criteria.

[16] The statutory framework for the application process begins with Division 0.1 of Part 1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA), "Invitation to Make an Application". Subsection 10.1(1) provides that a foreign national who seeks to enter Canada as a member of a class referred to in an instruction given under paragraph 10.3(1)(a) may only make an application for permanent residence if the Respondent invites them to do so.

[17] Subsection 10.3(1) of the IRPA provides that the Respondent may give instructions governing any matter relating to the application of Division 0.1, including the classes in respect of which a foreign national may be invited to apply for permanent residence under subsection 10.1(1), the criteria that a foreign national must meet to be eligible to be invited to make an application and the basis on which an eligible foreign national may be ranked relative to other eligible foreign nationals.

[18] As noted above, one of the classes for which an invitation may be issued under subsection 10.1(1) is the FSW class referred to in subsection 75(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Subsection 75(1) specifies that the FSW class is “a class of persons who are skilled workers and who may become permanent residents on the basis of their ability to become economically established in Canada”. In turn, subsection 76(1) of the Regulations establishes the criteria by which a FSW will be assessed to determine if they “will be able to become economically established in Canada”. One of the criteria for which points are awarded to an applicant is the existence of a qualifying family relationship in Canada.

[19] The Government of Canada has published on its website a set of operational instructions and guidelines (the Guidelines) regarding the documentation an applicant is required to submit to establish compliance with the criteria on which they base their application. To validate a claim of a qualifying relative in Canada:

– A copy of **both** sides of the family member’s Canadian citizenship document, Canadian birth certificate and/or permanent resident card must be provided.

- Evidence that the family member currently resides in Canada must be provided (a residential lease, mortgage documents, utility bills, etc).

- The documents must show their address in Canada and should be recent (dated within six months prior to submission).

- Proof of the relationship of the applicant or the accompanying spouse or common-law partner to the family member must also be provided (e.g. a birth certificate, an official document naming the applicant as a relative, a copy of the inside back cover of the relative's passport showing the relative's parent's marriage certificate, legal adoption documents and any other documents that prove or describe the relationship).

- If the applicant claims a stepbrother or stepsister, there should be no evidence in the application that the marriage or common-law relationship between the parents of the stepbrother or stepsister has broken down.

Reasonableness of the Decision

[20] The determinative issue in this application is whether the Applicant's evidence reasonably established her qualifying family relationship with her husband's step-brother. The Applicant submits the officer's review of her evidence was not reasonable.

[21] The merits of the Decision, including the officer's review of the Applicant's evidence, are subject to review for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*). Where the applicable standard is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision "is based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[22] The Respondent submits that the Applicant failed to comply with the requirements set out in the Guidelines because she included with her application only one side of Anthony Agbhonkese's biographical page from his Canadian passport and that the letter from Anthony did not establish the Applicant's family relationship with him.

[23] I do not find the Respondent's submissions persuasive. The officer's reliance on the Guidelines was not justified or explained intelligibly and reflects a form-over-substance approach.

[24] I find that the officer unreasonably disregarded Anthony Agbhonkese' proof of identity in the form of his Canadian passport without logical rationale. The biographical page of Anthony's Canadian passport establishes his name, date of birth, Canadian nationality and eligibility to carry a Canadian passport, and suggests that he is resident in Brampton, Ontario. Neither the officer nor the Respondent made any submission as to what additional information would be provided by the other side of the biographical page. The requirement in the Guidelines for both sides of a document makes reference to a number of documents that are issued in the form of a card where there is information listed on both sides of the card. A passport is not a similar document. It is comprised of a number of pages rather than sides. I note also that the Guidelines themselves rely on "the biographical data page of a passport or travel document" to confirm the identity of the applicant.

[25] The letter submitted as proof of the relationship between Anthony Agbhonkese and Godwin Agbhonkese states that Godwin is Anthony's younger half-brother and that Godwin's

mother was their late father’s last wife. The Respondent argues that the letter is not the type of document contemplated by the Guidelines as it is not an official document. The Respondent describes the letter as weak and insufficient to establish the relationship between the Applicant and Anthony Agbhonkese.

[26] The Applicant submits that the Guidelines do not require an official document to establish the relationship of an applicant to a Canadian family member. The Guidelines refer to a series of official documents and “any other documents that prove or describe the relationship”. The Applicant also argues that the evidence she provided with her reconsideration request fully establishes the family relationship.

[27] I find that this aspect of the officer’s reasons does not satisfy the hallmarks of a reasonable decision for a number of reasons. First, the officer gave no explanation in the Decision for the basis of their conclusion that the applicant “did not provide sufficient documentary evidence with your application to prove [your family connection]”. Second, neither the officer nor the Respondent has persuasively addressed the fact that the Guidelines contemplate “any other document”, a document other than an official document, as acceptable evidence of a qualifying family relationship. It may be as the Respondent argues that the officer considered the substance of Anthony Agbhonkese’s letter and found it insufficient for a number of reasons. However, the officer did not provide an analysis of any such shortcomings in the Decision.

[28] In addition, while there was no obligation on the officer to reconsider the Applicant's application, as a matter of fairness and common sense, an officer should do so where the request was made within days of the original refusal and the new evidence confirms a material fact in issue (*Naderika* at paras 30, 33; see also *Mansouri v Canada (Citizenship and Immigration)*, 2012 FC 1242 at para 8). In this case, the reconsideration request was made the day the Decision was issued and the new evidence establishes the Applicant's compliance with the qualifying family member criteria through her spouse and his Canadian step-brother.

[29] As a result, in the circumstances of this case, I find that the Decision is unreasonable, as is the officer's refusal to reconsider the Applicant's application for permanent residence as an FSW. The officer's Decision will be set aside and the Applicant's application returned for redetermination based on the evidence initially submitted and that included with the reconsideration request.

Procedural Fairness

[30] The Applicant submits that the officer made a veiled credibility finding in concluding that her documentation did not meet the Guidelines and that she was denied procedural fairness because the officer did not provide her an opportunity to address their concerns regarding her documentary evidence.

[31] Procedural fairness issues do not necessarily lend themselves to a standard of review analysis (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 (*Canadian Pacific*)). The role of this Court is to determine whether the procedure is fair

considering all the circumstances (*Canadian Pacific* at paras 54-56; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[32] One of the principles of procedural fairness requires that an applicant be provided with a meaningful opportunity to present the various types of evidence relevant to their case and to have it fully considered. However, in the context of a visa application, the duty of fairness does not require a visa officer to inform an applicant of concerns arising directly from the requirements of the legislation or regulations and to give the applicant an opportunity to disabuse the officer of those concerns (*Naderika* at paras 20-21; *Liu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1025 at para 16). In this case, the officer's evidentiary concerns arose directly from the Regulations and Guidelines. I find that the Applicant's right to procedural fairness was not breached by any failure of the officer to allow her to respond to their evidentiary concerns.

[33] The Applicant also argues that the Decision was not based on an insufficiency of evidence and that the officer must have drawn adverse credibility findings in reaching their decision to refuse her application. I do not agree. There is no suggestion in the record that the officer made veiled credibility findings. The basis of the refusal was the officer's conclusion that the Applicant had failed to submit documents that complied with the Guidelines and established her relationship with Anthony Agbhonkese. While I have found that the Decision is not reasonable within the *Vavilov* framework, the officer's process was fair and the Decision was not based on credibility findings.

III. Conclusion

[34] The application is granted.

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

JUDGMENT IN IMM-1203-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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