Federal Court  Cour fédérale

Date: 20240228

Docket: T-1473-22

Citation: 2024 FC 327

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 28, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

MOHAMMAD REZA RASHIDIAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mohammad Reza Rashidian [applicant], is seeking judicial review of a second-level decision made by an officer of the Canada Revenue Agency [CRA], dated June 16, 2022, determining that the applicant was not eligible for the Canada Recovery Benefit [CRB], on the grounds that the applicant was not working on grounds other than COVID-19.

[2] The applicant argues that the officer breached the principles of procedural fairness, as he did not know what criteria (or deficiencies) he was supposed to address in order to demonstrate his eligibility during the second review. He posits that the CRA's decision was procedurally unfair and must therefore be set aside.

[3] For the reasons that follow, the judicial review application is dismissed.

II. Facts

[4] From November 16, 2020, to August 20, 2021, the applicant applied for and received the CRB for 21 two-week periods, from October 11, 2020 to July 31, 2021.

[5] The applicant's case was selected for an initial review of his eligibility for the CRB.

[6] On September 3, 2021, a CRA officer contacted the applicant, who explained that he had a service contract in Iran between January 2020 and February 2020. He clarified that he had been paid approximately Can$6,050 in foreign currency.

[7] Following this first review, on September 16, 2021, the officer entered in the CRA system that the applicant was eligible for the CRB.

[8] Nevertheless, on September 17, 2021, after a [TRANSLATION] "return review", the decision made on September 16, 2021 was reversed and it was determined that the applicant had not been eligible for all CRB periods in question.

[9] In a letter dated September 21, 2021, the applicant was notified that he had not been eligible for the CRB for the following reasons:

> [TRANSLATION]
>
> A. You did not earn $5,000 (before taxes) in employment income or net self-employment income in 2019, 2020, or in the 12 months preceding the day of your first application.
> B. You left your job voluntarily.
> C. You were able to work, but did not seek employment.

[10] On October 13, 2021, the applicant requested a review of the first review decision and a second officer was assigned to carry out that review. The second review included a telephone communication between the officer and the applicant on June 14, 2022.

[11] The second review decision was communicated by letter dated June 16, 2022, addressed to the applicant. This letter confirmed that he had not been eligible for the CRB for all of the periods stated, because the reasons for which he had not worked had not been related to COVID-19. That June 16, 2022, decision is the subject of this judicial review application.

III. Preliminary issue: Admissibility of new evidence in the applicant's record

[12] As a preliminary matter, the respondent objects to the inclusion in the applicant's record of four exhibits that were included in the applicant's affidavit of August 18, 2022. These comprised a training record (DOC-01), an email from the OACIQ dated October 7, 2020 (DOC-02), three emails from the Organisme d'autoréglementation du courtage immobilier du Quebec [OACIQ] dated March 24, 2020, March 27, 2020, and October 7, 2020 (DOC-05), and a REMAX transaction report for January 1, 2022, to December 31, 2022 (DOC-08).

[13] The procedural context of this matter is relevant to the issue of admissibility of these documents.

[14] On July 15, 2022, the applicant filed the notice of application for judicial review against the decision that he was not eligible for the CRB.

[15] On August 26, 2022, he served his affidavit dated August 19, 2022, under the *Federal Courts Rules* [Rules].

[16] On March 31, 2023, Associate Judge Tabib ordered that the case be conducted as a specially managed proceeding and established timelines with respect to the process and next steps for the proceeding.

[17] On May 29, 2023, the applicant filed a written motion under Rule 369 for leave to serve a second affidavit and thirteen additional exhibits, and for an extension of time and the issuance of a new schedule. The thirteen exhibits are described as (a) excerpts from the Registre des entreprises du Quebec [REQ] concerning various beauty care companies; (b) copies of diplomas and certificates for various training courses, notably in beauty care; (c) bulk excerpts from brokerage contracts and communications (training courses, invoices, correspondence with the OACIQ between 2015 and 2023; and (d) a foreign-language document related to another document in the record.

[18] Associate Judge Steele rendered an order on June 28, 2023 [Order], dismissing the applicant's motion on the grounds that the criteria for the filing of additional evidence had not been met (citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 20).

[19] Associate Judge Steele's Order at paragraphs 10 and 11 describes the principle that applies generally to all judicial review applications. This principle is that the record before the Court must be the same as the one that was before the decision maker (*Paradis v Canada (Attorney General)*, 2016 FC 1282 at para 21; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at para 13; *Perez v Hull*, 2019 FCA 238 [*Perez*] at para 16). Exceptions to this general principle are limited to (1) providing context enabling the Court to understand the issues relevant to the judicial review; (2) highlighting the complete absence of evidence before the administrative tribunal on a particular finding; or (3) bringing to the Court's attention procedural defects that cannot be found in the evidentiary record of the administrative tribunal (*Bernard* at paras 20, 24–25; *Perez* at para 16).

[20] According to Associate Judge Steele, even if the first preliminary requirement were met (*Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88), which is not the case here, the documents are irrelevant, or unnecessary, in the context of this dispute. The documents in question do not fall within the exceptions discussed in *Bernard* and *Perez* and are inadmissible from the outset. She therefore ordered that the applicant serve and file his record (Rule 309) no later than August 19, 2023.

[21] On August 11, 2023, the applicant submitted his record for this judicial review application. The record still includes the affidavit of August 19, 2022, with eight exhibits. The following four exhibits are the subject of the respondent's dispute:

A. DOC-01: Document entitled "PFCO 2019-2021 - Courtier immobilier résidentiel et commercial au sein d'une agence/Residential and commercial real estate broker acting agency – 1 mai 2019 au 30 avril 2021". The applicant submits that these documents demonstrate that he has completed the mandatory training to hold a real estate brokerage licence.

B. DOC-02: Email from OACIQ Certification dated October 7, 2020, confirming his real estate brokerage licence as of October 7, 2020. The applicant affirms that this document is evidence of his broker's licence.

C. DOC-05: Three emails from OACIQ dated March 24, 2020, March 27, 2020, and October 7, 2020, from OACIQ Certification with the subject line "Avis de maintien des droits acquis." The applicant submits that this document confirms and demonstrates that he kept his real estate brokerage license in effect in 2020.

D. DOC-08: Document dated April 22, 2022, and entitled [TRANSLATION] "Transaction Report (2022-01-01 to 2022-12-31)" from Re/Max Imagine Inc. The applicant submits that this document lists the real estate transactions he entered into after the pandemic. The document proves that he could have entered into real estate transactions had his industry not been affected by the pandemic.

[22] The respondent alleges that the new evidence was not before the decision maker, did not fall within the exceptions set out in the case law and was not admissible.

[23] The applicant claims that during his call with the second review officer, she asked him only three questions, namely, his address, his social insurance number and [TRANSLATION] "did you earn money in real estate?" He had been unaware that there were any doubts with respect to

his real estate activities, and had he known, he would have provided the documents listed above and would have been able to prove those activities. The documents show that he had continued to work as a real estate broker.

[24] The applicant confirms that exhibits DOC-01, DOC-02, DOC-5 and DOC-08 attached to his affidavit were not before the decision maker. However, as in his previous written motion, the applicant explained at the hearing that his work in aesthetics and real estate had been affected by the pandemic, and that the CRA's decision was unjustified as the CRA officer had not asked him to provide supporting documentation before rejecting his CRB application.

[25] The same case law principles set out in Associate Judge Steele's Order as summarized above apply here.

[26] The Court's role is to review the administrative decision maker's decision in the legal and factual context that was before that decision maker. In keeping with this role, the evidentiary record before the Court on an application for judicial review is generally limited to the evidentiary record that was before the decision maker. The exceptions to this rule listed in the Order also apply in this context.

[27] It should be noted that the applicant's arguments focus on the fact that the officer had never indicated to him during their communication that he should provide additional documentation, and that had he known this, he would have provided the disputed documents to prove that he was eligible to receive the CRB.

[28] The record in this matter includes the log entries/notes recorded by the CRA officers (or the automated systems) [Notes].

[29] The Notes from August 3, 2021, describe a call with the officer in which the applicant notifies her that he had [TRANSLATION] "activated his real estate brokerage contract in October 2020. He had a drop of more than 50% in his weekly income since November 2020 due to COVID-19. He sent out resumés, consulted Indeed and Emploi-Qc (to no avail) and did not turn down any reasonable work."

[30] The Notes dated June 14, 2022, confirm that the applicant has been a real estate broker since 2007 and that [TRANSLATION] "the taxpayer claims not to have had any sales between January 1, 2019, and October 2021, which corresponds to the end of his CRB claims. He mentions that he has no documents that can demonstrate income from this work." Moreover, the Notes from June 14, 2022 confirm that the officer [TRANSLATION] "asked the taxpayer if he had any additional documents concerning his employment as a real estate broker to send [them]."

[31] The second review report includes a section entitled [TRANSLATION] "Did the applicant submit any additional documents?" and the entry under it is "no."

[32] DOC-01, DOC-02 and DOC-05 date back to 2020. These documents were available to the applicant and could have been submitted had he exercised due diligence following the telephone call with the CRA officer on June 14, 2022. It is not permitted to introduce new evidence belatedly or to supplement the evidence the applicant could and should have adduced.

[33] DOC-08 includes transactions completed in 2022, which date from after the periods relevant to CRB eligibility. This document is simply not relevant or useful to the Court in determining whether or not the CRA's second review officer's decision was reasonable.

[34] The documents in question do not provide any context that would enable the Court to understand the issues relevant to judicial review. In addition, if one were to apply the other exceptions in *Association des universités*, this is not new evidence that would show procedural defects or a violation of procedural fairness. These documents do not highlight the complete absence of evidence before the decision maker when it made a particular finding. On the contrary, the case file shows that the decision maker had evidence which the applicant submitted for his request for a second review and during their telephone conversation of June 4, 2022.

[35] For the reasons we have noted above, DOC-01, DOC-02, DOC-05 and DOC-08 are not admissible and I will not consider them in the analysis of the decision under judicial review.

IV. Analysis

A. *Standard of review*

[36] The AGC argued that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653 [*Vavilov*] at paras 16 and 17).

[37] I agree that the reasonableness standard applies in the context of a judicial review of a decision by the CRA refusing to grant the CRB (*Baron v Attorney General of Canada*, 2023 FC 1177 [*Baron*] at para 19, citing *He v Canada (Attorney General)*, 2022 FC 1503 [*He*] at para 20; *Lajoie v Canada (Attorney General)*, 2022 FC 1088 at para 12; *Aryan v Canada (Attorney General)*, 2022 FC 139 at paras 15–16).

[38] A court applying the reasonableness test does not ask what decision it would have made in the place of the administrative decision maker. It is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It is rooted in the principle of judicial restraint and demonstrates respect for the distinct role of administrative decision makers (*Vavilov* at para 13).

[39] It does not seek to determine the range of possible outcomes at which the decision maker may have arrived, or to conduct a *de novo* analysis, or to determine the correct solution to the problem (*Vavilov* at para 83). It is not for the reviewing court to weigh and reassess the evidence considered by the decision maker (*Vavilov* at para 125).

[40] A reasonable decision is one that is made on the basis of a coherent and rational chain of analysis, and that is justified in light of the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision (*Vavilov* para 85). Reasonableness review is not a line-by-line treasure hunt for error (*Vavilov* at para 102).

[41] The burden is on the party challenging the decision to show that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

B. *Breach of procedural fairness*

[42] The applicant alleges that during the second review, the officer did not ask him to provide explanations or produce evidence to validate his eligibility for the CRB.

[43] The applicant cites recent decisions of this Court in *Baron* and *El Harim v Attorney General of Canada*, 2023 FC 1689 [*El Harim*]. He relies on the analysis of those two decisions. He contends that the breaches of procedural fairness described, in particular in *Baron*, were of a similar nature to his situation and were made on the same grounds, and that, as a result, I should determine that a breach of procedural fairness has occurred in his case.

[44] In *Baron*, Justice Gascon summarizes the principles that apply in matters of procedural fairness, which do not require the application of the usual standards of judicial review (*Baron* at para 22, citing *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Limited v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at paras 33–56.)

[45] Rather, it is a legal question that should be assessed having regard to the circumstances to determine whether the decision maker respected the standards of fairness and natural justice. Therefore, the true question raised when procedural fairness and breaches of the principles of fundamental justice are the object of an application for judicial review is not so much whether the decision was "correct", but rather whether, taking into account the particular context and circumstances at issue, the process followed by the administrative decision maker was fair and offered the parties a right to be heard and a full and fair chance to know and respond to the case against them (*Baron* at paras 20 and 23, citing *CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 [*Huang*] at paras 51–54).

[46] I will further quote Justice Gascon on the subject of procedural fairness and the duty to act fairly. Notably, the test to be assessed is not concerned with the merits or content of a decision. Rather, the Court is interested in the process followed by the decision maker to reach its conclusion. Procedural fairness includes the right (1) to be heard; (2) to have an opportunity to respond to the case to be met; and (3) to be heard by an independent and impartial court (*Therrien (Re)*, 2001 SCC 35 at para 82). It is established law that the principle of the duty of procedural fairness is "eminently variable", inherently flexible and context-specific (*Baron* at para 24, citing *Vavilov* at para 77; *Baker* at para 21; *CPR* at para 40; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 113; *Foster Farms LLC v Canada (International Trade Diversification)*, 2020 FC 656 at paras 43–52). It "does not reside in a set of enacted rules" (*Green v Law Society of Manitoba*, 2017 SCC 20 at para 53). The nature and extent of the duty will vary with the specific context and the different factual situations dealt with by the administrative decision maker, as well as the nature of the disputes it must resolve (*Baker*, at

paras 25–26). In other words, whether a decision is procedurally fair must be determined on a case-by-case basis.

[47] The respondent alleges that the second review officer analyzed the applicant's case fairly and independently of the first officer. In contrast to the applicant's allegations, the notes of the telephone conversation of June 14, 2022, show that the applicant had an opportunity to explain his situation by making submissions, and that the officer asked him if there were any other documents the applicant wanted to send her concerning his employment as a real estate broker. The applicant did not send any further documents.

[48] The parties confirmed that the crux of this matter is centred on the issue of procedural fairness.

[49] According to the applicant, the CRA's decision was based on unfavourable conclusions he was unable to rebut because of the lack of procedural fairness.

[50] The respondent contends that the applicant had the opportunity to discuss the circumstances that rendered him unable to work. In addition, the mere fact that the CRA had changed its position with respect to the applicant's eligibility for the benefit did not mean that the officer had breached a requirement of procedural fairness. The evidence on the record favours the respondent's argument.

[51] On September 21, 2021, following the first review, the CRA's letter set out the following reasons: (1) the applicant had left his job voluntarily; and (2) the applicant was not looking for work although he was capable of working. The letter also explained that the applicant would be able to request a second review, provided that he explained [TRANSLATION] "why [he] disagree[d] with the CRA's decision" and "any relevant new documents, facts or correspondence." Having reviewed the letter, the applicant would or should have known, when he requested a second review, that the eligibility criteria relating to his termination would be part of that review.

[52] The Court considers that the letter of September 21, 2021, notified the applicant of the process and information required for a second review by the CRA. However, the Court cannot analyze the letter of September 21, 2021, in isolation and also has to consider other factors, such as the opportunity that had been provided to the applicant to submit additional information during the CRA's second review.

[53] On June 14, 2022, the officer contacted the applicant. In contrast to what the applicant claims, the notes of the conversation of June 14, 2022, show that the conversation between him and the CRA officer was not superficial. In the [TRANSLATION] "Discussion" section of the Notes, the officer referred to several specific pieces of information, including (1) the fact that the applicant had been a real estate broker for REMAX since 2007; (2) the fact that the applicant was a technician specializing in aesthetics; (3) the history of the contract the applicant had with a doctor in Iran from January 2, 2020 to February 27, 2020; and (4) the fact that March 2, 2020, was the day the applicant had returned to Canada.

[54] In particular, the Notes include information that only the applicant could have provided, such as [TRANSLATION] “The taxpayer mentions being a full-time student at Cégep du Vieux Montréal since January 2022”; “He mentions not having made any brokerage income from January 1, 2019, until the end of his CRB applications”; and “He says it was difficult, because people wouldn’t let them into their houses anymore. He had tried to seek employment but he had nothing.”

[55] The Notes dated June 14, 2022, confirm that the officer had provided the applicant with an opportunity to submit additional documents: [TRANSLATION] “I asked the taxpayer if he had any additional documents concerning his employment as a real estate broker to send us.” In the second review report, there is a section entitled [TRANSLATION] “Did the applicant submit any additional documents”, and below that section, it is written “no.”

[56] The second review report also includes observations and comments found in the Notes about the telephone call on June 14, 2022, indicating which information had been provided by the applicant, i.e., [TRANSLATION] “the taxpayer mentions” and “the taxpayer asserts”, and other notes such as [TRANSLATION] “He mentions not having any documents that would demonstrate income from this work.”

[57] I conclude that the subject of the applicant’s June 14, 2022, conversation with the officer was his real estate brokerage activities and his eligibility for the CRB as a result of that work; that the applicant was given an opportunity to explain his situation; and that he did so.

[58] During the call, the officer also told him that he could provide further documents This meant that after June 14, 2022, the applicant could have supplemented his record in order to demonstrate his eligibility for the CRB.

[59] The applicant had ample opportunity to address the CRB's requirements during the second review.

[60] I also find that the applicant's situation is distinguishable from the facts in *Baron* and *El Harim*. In the applicant's situation, the criteria regarding his employment as a real estate broker were clearly identified and discussed, and he was given an opportunity to provide additional information following the telephone call. In addition, in her decision, the officer took into account the elements of the discussion that related to the applicant's reason for not working.

[61] I conclude that there was no breach of procedural fairness. The applicant was given a full and fair opportunity to make his submissions and provide any additional documentation in the course of the second review. In rendering her decision, the officer considered the applicant's arguments. With respect, although the applicant disagrees with the CRA's conclusion, the facts do not give rise to a finding of procedural unfairness.

C. *Decision was reasonable*

[62] Although the parties confirmed that the issue of procedural fairness was the crux of this judicial review application, I will nevertheless determine the matter of the CRA's decision on a standard of reasonableness.

[63] The CRB was created by the *Canada Recovery Benefits Act*, SC 2020, c12, s 2 [Act]. Among the criteria assessed in an application for benefits is whether the applicant can demonstrate that, during the two-week period, for reasons related to COVID-19, the applicant was not employed or self-employed (paragraph 3(1)(f) of the Act).

[64] Without repeating all the references to the Notes and the record, I conclude that the officer considered the nature of the applicant's work in aesthetics and real estate brokerage, as well as the particular circumstances of his case to determine whether or not he had stopped working for reasons related to COVID-19.

[65] Regarding the aesthetics work, the applicant worked in Iran between January 2, 2020, and February 27, 2020, a period that had been set out and determined when the contract was executed on January 1, 2020. His return to Canada in March 2020 followed the end of the contract. It was reasonable to conclude that the end of his work as a consultant in aesthetic services in February 2020 was not related to the pandemic.

[66] With respect to his real estate brokerage work, the officer referred to the applicant's tax returns from 2017 to 2021 and the information in the CRA systems confirming no REMAX slips for the applicant dating back to 2015. During the June 14, 2022, call, the applicant confirmed that he had not earned any real estate brokerage income since January 2019.

[67] At the hearing, the applicant argued that the officer had failed to understand that his work as a real estate broker had been affected by the lockdown and that real estate agents could not

enter homes. The Notes confirm that this argument was submitted by the applicant and noted by the officer. The applicant did not indicate what other submissions he was allegedly prevented from making.

[68] The Notes and the review report mention that the officer considered the applicant's statements with the information noted in her review report. It was open to the officer to conclude from all of the evidence that the applicant was not actively engaged in real estate brokerage even before the onset of the pandemic.

[69] On the basis of the CRA's reasons, the evidence in the record and the applicable law, the decision cannot be characterized as being unreasonable. I conclude that the reasoning followed by the CRA officer exhibits the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

[70] I must therefore dismiss the application for judicial review.

V. Costs

[71] The parties confirmed at the hearing that they had agreed that the sum of $800 should be awarded to the successful party.

[72] The respondent also confirmed that the costs awarded following Associate Judge Steele's Order dated June 28, 2023, in the amount of $500, had yet to be paid by the applicant.

[73] Given the circumstances, including the parties' agreement, the sum of $800 in costs is reasonable and justified. The costs set by the Court in this judicial review application do not include the amount of unpaid costs to be remitted to the respondent pursuant to Associate Judge Steele's Order.

JUDGMENT in T-1473-22

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. The applicant must pay costs in the amount of $800 and $500 to the respondent.

"Phuong T.V. Ngo"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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