Federal Court Cour fédérale

Date: 20240621

Dockets: T-1826-22
T-1827-22

Citation: 2024 FC 964

Ottawa, Ontario, June 21, 2024

PRESENT: Madam Justice Whyte Nowak

CONSOLIDATED MATTERS

BETWEEN:

IRINA ELYKOVA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Irina Elykova [the Applicant], seeks judicial review of two decisions of the Canadian Revenue Agency [the CRA]. The first decision, which is the subject of Federal Court File No. T-1826-22, found the Applicant ineligible for the Canada Recovery Benefit

[CRB] [the CRB Decision]. The second decision, which is the subject of Federal Court File No. T-1827-22, found the Applicant ineligible for the Canada Worker Lockdown Benefit [CWLB] [the CWLB Decision]. Both the CRB Decision and the CWLB Decision were based on the CRA's determination that the Applicant had not met the requisite income criteria under the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [the *CRB Act*] and *Canada Worker Lockdown Benefit Act*, SC 2021, c 26, s 5 [the *CWLB Act*].

[2] At the request of the Respondent, and with the consent of the Applicant, the applications for judicial review of the CRB and CWLB Decisions were heard together and their related court files shall be consolidated pursuant to Rule 105(a) of the *Federal Courts Rules*, SOR/98-106. The CRB and CWLB Decisions are closely connected in that they arise out of the same factual matrix, involve the same decision-making body, and the Applicant has sought the same relief in respect of both the CRB and CWLB Decisions. I am satisfied separate reviews would not be an efficient use of judicial resources (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 173).

[3] While I am sympathetic to the Applicant's position, her application essentially asks the Court to order the CRA to reconsider her eligibility for the CRB and CWLB payments based on new evidence that was not before the decision-maker. That is not the role of the Court, which is to examine the evidence and the arguments that were before the CRA agent who assessed her eligibility and determine whether the decision made was reasonable and arrived at in a manner that was procedurally fair. After reviewing the record below and considering the submissions of the parties, I find that the Applicant has not discharged her onus of showing that either the CRB

Decision or the CWLB Decision is unreasonable, nor have I found that she was denied procedural fairness in the process by which these decisions were arrived at. Accordingly, this consolidated application for judicial review is dismissed.

II. Facts

[4] The Applicant applied for and received CRB payments and had started to receive CWLB payments when the CRA validation process found her to be ineligible for both.

A. *The First Review*

[5] On March 21, 2022, a CRA agent [the First Reviewer] began a review of the Applicant's eligibility. The First Reviewer spoke with the Applicant by phone and informed her that she was not eligible for the CERB and CWLB payments as she had not demonstrated that she had earned the minimum $5,000 of employment income or net self-employment income in 2019, 2020 or in the 12 months before the date of the Applicant's first application [the Income Criteria] as required by subsection 3(1) of the *CRB Act* and subsection 4(1) of the *CWLB Act* respectively. The Applicant explained that she ran her laser hair removal business out of her home and mostly received e-transfers and rarely cash, and she only provided receipts to customers upon request. The First Reviewer asked the Applicant to provide bank statements from September 2019 to December 2021.

[6] The First Reviewer considered the Applicant's documents, her answers to questions from their phone call, and information on file with the CRA and concluded that the Applicant was

ineligible for the CRB and CWLB. The CRA sent the Applicant letters dated May 13, 2022 [the First Decisions] notifying her that she had been found ineligible on the basis that she had not met the Income Criteria under the *CRB Act* and the *CWLB Act*. The First Decisions made it clear that the Income Criteria was calculated "before taxes" or "net self-employment income". The First Decisions advised the Applicant that if she disagreed with the CRA's decisions, she could request a second review of her eligibility and she could submit new relevant documents and facts. The Applicant did just that.

[7] By letter dated June 13, 2022, the Applicant requested a second review of her eligibility for the CRB and CWLB and she provided submissions in which she insisted that she was eligible because her gross self-employment income for 2019 and 2020 exceeded the Income Criteria. She provided additional documents in the form of invoices for laser hair removal services and babysitting and receipts for rent received.

B. *The Second Review*

[8] The CRA agent who conducted the second review [the Second Reviewer] considered the CRA case notes and the Applicant's income and deductions for the tax years 2018 through 2020 as recorded on the CRA's computer system, as well as the Applicant's letter dated June 13, 2022 including the Applicant's submissions and the documents attached to her letter. The Second Reviewer spoke by phone with the Applicant on July 25, 2022. On that call, the Applicant stated that she did not have any additional documents to submit and no other income to declare.

[9] The Second Reviewer determined, based on a review of the materials and the phone call, that the Applicant was ineligible for the CRB and CWLB because she did not meet the Income Criteria. The CRA advised the Applicant of these decisions in the CRB Decision and CWLB Decision [collectively, the Second Decisions], each of which were dated July 25, 2022 and received by the Applicant on July 27, 2022.

III. Preliminary Issues

[10] The Applicant has sought to introduce new evidence both in her Application Record and at the hearing of this matter. The Respondent objected to both.

A. *The New Evidence Referred to at the Hearing*

[11] In her submissions at the hearing of this application, the Applicant referred to new evidence that she said she had received just days earlier. She asked the Court to accept this new evidence consisting of: (i) a letter from a client confirming that she had attended appointments and paid the Applicant cash; (ii) the 2021 T1 form of her babysitting employer, which includes how much the Applicant earned working for her; and (iii) a bank statement for the years 2019-2021 showing e-transfers. The Respondent did not receive advance notice of these documents and objected to them being tendered at the hearing. At the conclusion of the hearing, I advised the Applicant that I would not be accepting these documents as they were not properly before the Court and the Respondent had not been given notice.

B. *The New Evidence Included in the Application Record*

[12] The Applicant's Application Record contains an affidavit sworn by her on July 24, 2023 [the Applicant's Affidavit], which outlines the history of her applications for the CRB and CWLB and the validation process. It also speaks to the language barriers that the Applicant believes may have led her to provide incomplete or incorrect information and the steps she took to correct that information by hiring an accountant and filing documents to have her taxes reassessed for the years 2019, 2020 and 2021. The Applicant also disclosed that she had earned income as a student recruiter and organizer of online virtual recruitment events for eight months in 2020.

[13] The Applicant's Affidavit also attaches the following documents that do not appear in the Certified Record [collectively, the New Evidence]: (i) the Applicant's Business License and Certification; (ii) medical records; (iii) a 2020 T4A slip from 10564567 Canada Inc.; (iv) a letter from a Tax Specialist dated December 11, 2022 advising that she had been hired by the Applicant and had reviewed and corrected the Applicant's 2019, 2020 and 20121 tax returns; (v) the Applicant's Certificate of English as a second language dated July 2015 [the Language Certificate]; (vi) new invoices for hair removal services [the New Invoices]; and (vii) Notices of Reassessment for the tax years 2019, 2020 and 2021 dated September 9, 2022, September 6, 2022 and August 22, 2022, respectively [collectively, the Corrected Tax Information]. The New Evidence was not before the Second Reviewer and some of the New Evidence post-dates the Second Decision.

[14] The Respondent objects to the Applicant's inclusion of the New Evidence in the Application Record and relies on well-established law that holds that judicial review of an administrative tribunal should be based on the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* [*Access Copyright*], 2012 FCA 22 at paras 19-20).

[15] The Respondent acknowledges that there are recognized exceptions to this rule, but argues none of these exceptions apply. The exceptions include evidence that: (i) is general evidence of a background nature that is of assistance to the Court; (ii) is relevant to an alleged denial of procedural fairness by the decision-maker that is not evident in the record before the decision-maker; or (iii) demonstrates the complete lack of evidence before a decision-maker for an impugned finding [*Access Copyright* at para 20].

[16] While the Applicant did not make submissions as to why the New Evidence should be accepted by the Court, I have considered the exceptions recognized in *Access Copyright* and find as follows:

(1) *Business License and Certification for Laser Hair Removal*

[17] None of the *Access Copyright* exceptions apply. The Applicant's business license may well be "general evidence of a background nature", however, it is of no assistance to the Court. The Second Reviewer did not question whether the Applicant earned income from her laser hair removal business; rather, the Second Reviewer was not satisfied that the Applicant had met the Income Criteria based on this and other sources of claimed income. This evidence does not

assist the Court in assessing the issues to be decided on this judicial review and shall be excluded.

(2) *Medical records*

[18] While I am sympathetic to the Applicant, these records which are intended to show the impact the CRA and legal proceedings have had on her health, are simply not relevant to this Court's analysis nor do they fall under any of the *Access Copyright* exceptions; accordingly, they shall be excluded.

(3) *The Language Certificate*

[19] The Applicant has argued that language barriers may have led her to misunderstand the Income Criteria and she has raised this as an issue of procedural unfairness. The CRA Notes included in the certified record contain a notation by the First Reviewer on January 11 2022 that states, "due to language barrier she will call from accountant's office". Another notation on January 12, 2021 states, "Manual attestation completed with the assistance of third language volunteer." I consider these notations to be evidence going to the Applicant's procedural fairness argument. Given that these are included in the record before the decision-maker, the second exception in *Access Copyright* is not applicable and the Language Certificate shall therefore be excluded.

(4) *The Tax Specialist Letter*

[20] This letter falls under the "general evidence of a background nature" exception; however, it is of no assistance in determining the issues before the Court and does not add anything more than is already stated in the Applicant's Affidavit. It shall therefore be excluded.

(5) *The 2020 T4A slip, the New Invoices, and the Corrected Tax Information*

[21] None of the *Access Copyright* exceptions apply to the Applicant's T4A slip, New Invoices or the Corrected Tax Information as they cannot be said to be "general evidence of a background nature that is of assistance to the Court". Instead, they go directly to the merits of the decisions under review which is not permissible (*Henri v Canada (Attorney General),* 2016 FCA 38 at paras 40-41). This evidence shall be excluded.

IV. Issues and Standard of Review

[22] The Applicant has raised issues going to both the reasonableness of the Second Decision and matters relating to procedural fairness.

[23] The role of a court performing judicial review of the merits of a decision was explained by the Supreme Court of Canada in its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 82-83 and 99-100 [*Vavilov*]. Based on that authority, the Applicant bears the burden of showing that the decision under review was unreasonable in that there is some fundamental flaw in its rationale or outcome, or that it lacks

the hallmarks of justification, intelligibility and transparency to those who are subject to it (*Vavilov* at paras 95, 99 and 100). In conducting this analysis, the Court is not entitled to either reweigh or reassess the evidence (*Vavilov* at para 125).

[24] Issues of procedural fairness on the other hand, are reviewed on a standard akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 [*Canadian Pacific*] at paras 34-35 and 54-55, citing *Mission Institution v Khela,* 2014 SCC 24 at para 79). The Court looks to ensure that administrative decisions are made using a fair, open and appropriate procedure that provides an opportunity for those affected by the decision to understand the case they have to meet and put forward their views and evidence fully for consideration by an impartial decision-maker (*Canadian Pacific* at para 41).

V. Analysis

A. *Does the Corrected Tax Information render the Second Decision unreasonable?*

[25] The Applicant has conceded in her Notice of Application that the Second Decisions are reasonable but that they are unreasonable once the Corrected Tax Information is taken into account. She argues that because the Corrected Tax Information was "accepted by the CRA" it follows that the CRA must consider it.

[26] This argument fails for two reasons. First, I have found that the Corrected Tax Information must be excluded from the record as it does not meet any of the exceptions identified in *Access Copyright*. Second, the reassessment and correction of the Applicant's taxes

does not change the fact that this information was not before the Second Reviewer when the Second Decisions were made and therefore cannot form the basis for a finding that it was unreasonable for the Second Reviewer not to have considered it (*Showers v Canada (Attorney General)*, 2022 FC 1183 at para 24).

B. *Was it procedurally unfair for the CRA to deny the Applicant a third review?*

[27] The Applicant argues that the CRA's refusal to consider the Corrected Tax Information also constitutes a failure in procedural fairness as she argues that the CRA should have granted her a third review in order to consider it.

[28] I see no merit in this argument. The CRA's validation procedures [the CRA Validation Procedures] are described in the affidavit of the Second Reviewer whose affidavits were included in the Respondent's Motion Records. The CRA followed the CRA Validation Procedure in their dealings with the Applicant, and at each step of the process, the Applicant was advised of her recourse should she disagree with the CRA's decision. None of these steps mention the possibility of a third review. The CRA notes and the Applicant's Affidavit note that she was advised by the Second Reviewer in their call on July 25, 2022, that a third review was not possible. The Second Decision too stated that if the Applicant disagreed with the decision, she could seek judicial review of the decision by the Federal Court.

[29] It is not open for this Court to order the CRA to grant the Applicant a third review in the absence of a finding that the Second Decisions were unreasonable or were arrived at in a manner that was procedurally unfair. Notably, the Court must give "important weight" to the CRA's

choice of procedures (*Greater Toronto Airports Authority v Canada (Transportation Agency)*, 2017 FCA 64 at para 15 citing *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 231). Those choices undoubtedly reflect the CRA's institutional constraints, constituency and expertise.

C. *Did the Applicant's Language Skills render the Second Decision Procedurally Unfair?*

[30] In her written and oral submissions, the Applicant claims that language barriers during the CRA process "potentially led to miscommunication regarding the Applicant's eligibility." The Applicant's Affidavit provides evidence that the Applicant's proficiency in English is limited and that she would have preferred to have had a translator assist her on calls with the CRA. The question for the Court is whether, accepting that the Applicant faced a language barrier, which I find the record supports, the Applicant nevertheless knew the case she had to meet and had an opportunity to respond to it (*Canadian Pacific* at para 41).

[31] The Respondent argues that the Applicant knew the case she had to meet and points to at least two occasions when the Applicant was told in phone calls with the First and Second Reviewers that she had not provided sufficient documents to prove her eligibility. The Respondent submits that there did not seem to be any confusion related to these requests as the Applicant provided additional self-employment invoices and receipts following both her calls with the First and Second Reviewer. I would add to this that the CRA notes also indicate that on at least two occasions before the CRB and CWLB Decisions were rendered, the Applicant sought the assistance of her accountant and third parties to assist her with her language barrier.

[32] I agree with the Respondent that there is no procedural unfairness associated with the CRB Decision and CWLB Decision: the Applicant knew the case she had to meet and had an opportunity to, and did respond.

VI. Conclusion

[33] The Applicant has not met her burden of showing that the Second Decision was unreasonable nor has she shown that she was denied procedural fairness. Accordingly, this consolidated judicial review application is dismissed.

JUDGMENT in T-1826-22 and T-1827-22

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review in Federal Court File Nos. T-1826-22 and T- 1827-22 are hereby consolidated;
2. This consolidated application for judicial review is dismissed; and
3. There is no order as to costs.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1826-22 T-1827-22
STYLE OF CAUSE:	IRINA ELYKOVA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
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