

Docket: 2012-3849(IT)I

BETWEEN:

MILCA KWANGWARI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 9, 2013, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Sara Jahanbakhsh

JUDGMENT

The appeals from the Canada child tax benefit determinations dated March 20, 2012, made under the *Income Tax Act* for the 2008 and 2009 base taxation years, are dismissed.

Signed at Montreal, Quebec, this 26th day of September 2013.

“Lucie Lamarre”

Lamarre J.

Citation: 2013 TCC 302

Date: 20130926

Docket: 2012-3849(IT)I

BETWEEN:

MILCA KWANGWARI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] These are appeals from determinations issued by the Minister of National Revenue (**Minister**) requiring the appellant to pay back overpaid Canada child tax benefit (**CCTB**) amounts on the basis that she was not an eligible individual pursuant to section 122.6, paragraph (a) of the *Income Tax Act* (**ITA**) for the period from July 2009 to June 2011 with respect to her oldest child YK, born in Zimbabwe in 1999, and who entered Canada on July 14, 2011; and pursuant to section 122.6, paragraph (e) for the period from July 2009 to November 2010 with respect to her youngest child JK, who was born in Canada in 2007. Amounts of \$2,234 for the period from July 2009 to June 2010 and \$913.56 for the period from July 2010 to June 2011 are now claimed from the appellant (see Reply to the Notice of appeal, par. 2 and 3).

[2] Section 122.6 of the ITA defines “eligible individual” as follows:

Subdivision a.1 — Canada Child Tax Benefit

122.6. Definitions — In this subdivision,

...

“eligible individual” in respect of a qualified dependant at any time means a person who at that time

- (a) resides with the qualified dependant,
- (b) is a parent of the qualified dependant who
 - (i) is the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant and who is not a shared-custody parent in respect of the qualified dependant, or
 - (ii) is a shared-custody parent in respect of the qualified dependant,
- (c) is resident in Canada or, where the person is the cohabiting spouse or common-law partner of a person who is deemed under subsection 250(1) to be resident in Canada throughout the taxation year that includes that time, was resident in Canada in any preceding taxation year,
- (d) is not described in paragraph 149(1)(a) or 149(1)(b), and
- (e) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who
 - (i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
 - (ii) is a temporary resident within the meaning of the *Immigration and Refugee Protection Act*, who was resident in Canada throughout the 18 month period preceding that time, or
 - (iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act*,
 - (iv) was determined before that time to be a member of a class defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*,

and for the purposes of this definition,

- (f) where the qualified dependant resides with the dependant’s female parent, the parent who primarily fulfils the responsibility for the care and upbringing of the qualified dependant is presumed to be the female parent,
- (g) the presumption referred to in paragraph (f) does not apply in prescribed circumstances, and
- (h) prescribed factors shall be considered in determining what constitutes care and upbringing.

[3] Up until November 2010, the appellant and her spouse, Keith Musiyazviriyo, were neither Canadian citizens, nor permanent residents, nor temporary residents, nor protected persons within the meaning of the *Immigration and Refugee Protection Act*. They had not been determined before that time to be members of a class defined

in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*.

[4] As a matter of fact, the appellant and her spouse received their landed immigrant status on November 26, 2010 (Exhibit R-1). From March 2, 2007 to May 26, 2010, the appellant had work permits issued by the Minister of Citizenship and Immigration of Canada, but those permits specified that they did not confer temporary resident status (Exhibit R-2).

[5] The appellant does not dispute the foregoing facts. She and her spouse feel, however, that they never hide anything from the Canada Revenue Agency (**CRA**) and question why they should now have to pay for a mistake made, according to them, by the CRA.

[6] When their second child was born, in Canada, on February 28, 2007, they were told by the hospital to file an application in order to receive the CCTB. For that purpose, they had to fill out a questionnaire, which they sent to the CRA. Apparently, it was indicated in that questionnaire that the appellant's spouse was a Canadian citizen. The respondent filed through a CRA litigation agent, Mr. Hubert de Groot, a document that the agent identified as being a digitalization of that questionnaire (Exhibit R-3), which questionnaire has since been destroyed.

[7] Mr. de Groot testified that the information that the appellant's spouse was a Canadian citizen had to have been taken from the questionnaire filled out by the appellant. However, both the appellant and her spouse testified that they never indicated on the questionnaire that the appellant's spouse was a Canadian citizen. Even had they done so, which again, they say they did not, they do not understand why the CRA did not ask for proof of citizenship at the time, just as it asked for proof of their address as well as proof of their work permits, which show that they did not confer upon them temporary resident status.

[8] Mr. de Groot was not familiar with immigration procedure and could not testify on this point. All he could say was that it must have been indicated on the questionnaire that the appellant's spouse was a Canadian citizen; he could not say whether it was a mistake by the appellant or by a government agent. The questionnaire has been destroyed, and it is impossible to verify the information provided at the time.

[9] What seems obvious now is that it was because of that error that the appellant received the CCTB for her youngest child to which she was not entitled under the

ITA. This was discovered several years later, hence the determinations under appeal by which the CRA now claims repayment.

[10] It is clear from the evidence that the appellant was not an eligible individual within the meaning of section 122.6 of the ITA. Therefore, I have no other choice than to conclude that the Minister's determinations are correct and that the appellant was not eligible to receive the CCTB for the periods at issue.

[11] However, taking into account the fact that the overpayment of the CCTB to the appellant for the youngest child was due to a mistake which may have been made by a CRA agent, this may be a case in which the Minister may consider possible remission under section 23 of the *Financial Administration Act*. I do not, however, have the authority to order such remission (see *Samayoa v. Canada*, [2006] T.C.J. No. 367 (QL), 2006 TCC 469, par. 18; *Bituala-Mayala v. Canada*, [2008] T.C.J. No. 90 (QL), 2008 TCC 125, par. 8).

[12] I should also note that recommendations have been made by the Taxpayer's Ombudsman that the CRA take certain steps to make it easier for taxpayers to understand the CCTB eligibility requirements. These recommendations were made following complaints received from taxpayers that some of the rules regarding eligibility for the CCTB are not clear and that adequate explanations of those rules are sometimes difficult to obtain, which can result in the cancellation of benefits and the recovery of benefits already paid, as is the case here (see *Proving Your Status, Establishing Eligibility for the Canada Child Tax Benefit*, Ombudsman special report, October 2010 / J. Paul Dubé, Taxpayers' Ombudsman).

[13] The appeals are dismissed.

Signed at Montreal, Quebec, this 26th day of September 2013.

“Lucie Lamarre”

Lamarre J.

CITATION: 2013 TCC 302

COURT FILE NO.: 2012-3849(IT)I

STYLE OF CAUSE: MILCA KWANGWARI v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: September 9, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Lucie Lamarre

DATE OF JUDGMENT: September 26, 2013

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Sara Jahanbakhsh

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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