Federal Court  Cour fédérale

Date: 20230302

Docket: T-1240-22

Citation: 2023 FC 290

Ottawa, Ontario, March 2, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

APAPA TINO MATEMBE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Apapa Tino Matembe brings before this Court a judicial review application the purpose of which is to challenge the decision concerning his eligibility for the Canada Recovery Benefit [CRB]. The judicial review application is made pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] The decision bears the date of April 27, 2022. It concludes that Mr. Matembe is not eligible for the CRB for one reason:

> You did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019, 2020 or in the 12 months before the date of your first application.

That is the only reason given, and these are the only details provided.

I. Facts

[3] The applicant began working as an independent driver with Uber in January 2019. He applied for the CRB for a total of 26 two-week periods between October 25, 2020 and October 23, 2021.

[4] For our purposes, it will not be necessary to describe in detail the CRB. Sufficient to say that it is part of a package introduced by the federal government and passed by Parliament, the purpose of which was to provide financial support to eligible employees and self-employed individuals directly affected by the Covid-19 crisis. Eligible individuals could apply for benefits in respect of any two-week period falling between September 27, 2020 and October 23, 2021. As we can see, Mr. Matembe applied for the benefit for most of that period. Other than being a resident of Canada, there are other eligibility requirements. The one in play in this case is the requirement that there be minimum employment or net self-employment income of $5,000 in 2019 or 2020, or in the twelve-month period prior to their application for the CRB (*Canada Recovery Benefits Act*, SC 2020, c 12, s 2, at s. 3).

[5] The sole issue before the Court concerns the employment, or self-employment of the applicant in connection with the work he claims he has performed for Uber. The issue is whether Mr. Matembe has been able to substantiate $5,000 of employment or net self-employment.

[6] Mr. Matembe claims that he provided transportation services, since January 2019, in the Toronto region using Uber's software application. That has not been recognized by the decision maker, a functionary employed by the Canada Revenue Agency. The Agency is actually administering the CRB program on behalf of the Minister responsible for the legislation, the Minister of Employment and Social Development.

[7] When the government validates whether payments disbursed through the CRB program have been made in accordance with the legislation in place, a first review is conducted. Once that review is done, there is available a second review which is conducted by a different agent. It is from that review that a judicial review application can be launched in this Court. This is one such application.

[8] In the case at bar, the two reviews reached the same conclusion, actually using the very same formulaic words (see para 2 of these reasons for judgment: the threshold of $5,000 of net self-employment income had not been reached).

[9] Some new information was supplied by Mr. Matembe as part of his request for a second review. For the first review, the applicant offered:

- copies of Uber Tax Summaries for taxation years 2019 and 2020;

- two letters from Ontario's Life, one dated June 14, 2021 and the other dated November 23, 2020. On their face, these letters are concerned about the tax returns of Mr. Matembe for 2019 and 2020, which ostensibly were prepared by Ontario's Life;
- Lyft Earnings Breakdown; and
- the applicant's tax return summaries for the 2019 and 2020 taxation years.

For the second review, the additional information was:

- additional Uber Tax Summaries for the years 2019 and 2020. While the Uber Tax Summaries presented for the first review were a summary of the whole years 2019 and 2020, the additional summaries were compiled on a monthly basis. The letter of September 24, 2021 seeking a second review and sending the additional information specifies that there are no monthly summaries for the months of April to June 2020 because "I [Mr Matembe] didn't earn any money from uber [*sic*]";
- bank statements for the years 2019 and 2020. Mr. Matembe states in his letter of September 24, 2021 that "Interac e-transfer received on bank statement is my daily pay from Uber".

[10] The annual Uber Tax Summaries show:

1) for taxation year 2019, total Uber rider fares of more than $51,000 appear. Together with other income (which includes referrals and incentives), the amount of income reaches $55,039. The Summary also indicates the trip mileage of 23,200 km.

2) for taxation year 2020, total Uber rider fares of more than $37,500 appear. Together with other income (which includes referrals and incentives), the amount of income reaches $39,467. The summary shows trip mileage of 14,668 km.

[11] The monthly tax summaries show basically the same information, but broken down on a monthly basis (except of course for the months of April, May and June 2020).

[12] The tax returns for the years 2019 and 2020 show income of $55,401 for 2019 (the difference coming seemingly from income earned by Mr. Matembe as a driver with Lyft) and $39,467 for 2020. To put it plainly, the Uber Tax Summaries correspond with the income tax returns for taxation years 2019 and 2020.

[13] As for the bank statements made available by the applicant as part of his request for a second review, they show significant activities with Interac e-transfers received on a frequent basis. For instance, for the month of February 2019, one counts 12 such e-transfers received on different days. However, and as readily conceded by Mr. Matembe, the origin of those e-transfers does not appear on the “Everyday Banking Statement”.

II. The Decision Under Review

[14] To say the least, the two decisions made in this case are laconic. They simply state that the applicant has “not earned $5,000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months before the date of your first application”. It would be

impossible to know, on the basis of the formal decision, why the decision maker reached the conclusion that the $5,000 mark was not attained.

[15] Counsel for the respondent relied on the so-called “Second Review Report”, an internal report generated by information systems at the Canada Revenue Agency. The decision maker states in his affidavit of August 5, 2022 that, having consulted data banks (“relevant public notepad entries”, “relevant SA notepad entries”, and “relevant T1 case notes”), the findings are recorded in the Second Review Report (affidavit, para 16).

[16] That Second Review Report consists of a one-page document. It lists the various documents which were before the decision maker as well as the dates of telephone calls made by the decision maker to the applicant. Here three calls were made on successive days (April 4 to 6, 2022) without answers. The Report remains empty in the field provided for “additional comments or concerns”, for instance why this applicant did not return the phone calls after having shown diligence in pursuing his reviews. Furthermore, the record does not show whether Mr. Matembe sought to communicate with the Agency or the decision maker after the decision was made on April 27, 2022, as the Second Review Report ends with the mention of a refusal letter.

[17] I have reviewed the relevant passages from these databanks. They do not provide any further insight into the reasons for the decision of April 27, 2022. The only added comments that may shed some light on the decision come from one paragraph at the end of the Second Review Report. The paragraph reads:

> Explain your decision regarding each criteria the taxpayer did not meet:
> - You did not earn at least $5,000 (before taxes) of employment or net self-employment income in 2019, 2020, or in the 12 months before the date of your first application.
> It is standard practice for Uber to show in memo field of e-transfers, the e-transfers listed in the bank statements were not identified as such. As we would need to see proof of payments from Uber, would need to request statements from account that Uber paid into; however, was not able to contact TP to request documentation, and no attempt from TP to contact us since.

III. The Law

[18] This judicial review application is subject to a standard of review of reasonableness. That constitutes the presumptive standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; [2019] 4 SCR 653, paras 10 and 17 [*Vavilov*]). The recent case law in this Court confirms that the presumption is not displaced where the issue is the eligibility to receive the CRB (*Santaguida v Canada (Attorney General)*, 2022 FC 523 at para 11; *Flock v Canada (Attorney General)*, 2022 FC 305 at para 15; *Aryan v Canada (Attorney General)*, 2022 FC 139 at para 16 [*Aryan*]; *Hayat v Canada (Attorney General)*, 2022 FC 131 at para 14). Hence, this case will be governed by the reasonableness standard of review.

[19] The hallmarks of reasonableness are said to be “justification, transparency and intelligibility – and whether it (the decision) is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, para 99).

[20] The reasonableness standard is not limited to the outcome of the decision. It also applies to the decision-making process. As the majority in *Vavilov* said at paragraph 83, “(i)t follows that

the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome".

[21] The starting point of the review is an examination of the reasons given because they are "the means by which the decision maker communicates the rationale for its decision" (*Vavilov*, para 84). The reviewing court must seek to understand the reasoning process of the decision maker. Those reasons will be read in light of the record, taking into account the administrative setting and without seeking perfection. Indeed a decision maker may demonstrate through the decision the institutional expertise and their experience. The *Vavilov* Court spoke of "judges should be attentive to the application of decision makers of specialized knowledge, as demonstrated by their reasons" (para 93).

[22] Nevertheless, it remains that the decision must be justified, transparent and intelligible. That requires that the decision be of a certain quality. We read at paragraphs 95 and 96 of *Vavilov*:

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.
>
> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to

> a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.
>
> (my emphasis)

[23] In my view, the deficiency in this decision is such that the matter must be sent back to a different decision maker for a new determination to be conducted.

IV. Analysis

[24] The reasons given for a decision must be such that they are transparent and intelligible to the person subject to it, not merely in the abstract. With respect, the decision under review fails that test. In the words of the majority of *Vavilov*, "(w)here a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (para 98).

[25] The starting point for a reasonableness review being the decision itself, it is obvious that it does not meet the standard: it basically says nothing to the applicant as it repeats, word for word, the requirement under the *Canada Recovery Benefits Act* that a person must have earned at least $5,000 either of employment income (before taxes) or of net self-employment income in

2019, 2020, or in the 12 months before the date of an applicant's first application. Mr. Matembe, and for that matter any other applicant, cannot know why his income, as reported to Revenue Canada, would not qualify under the program. This, on its face, is neither transparent nor intelligible. In fact, there is no justification.

[26] That is why the respondent seeks to find in the Second Review Report the reasons that will satisfy the test. The decision maker refers to the "standard practice" for Uber to show in the memo field of a bank statement entry for e-transfers an indication that the payment originated with Uber. The decision maker makes this a *sine qua non* condition.

[27] There is not any indication that the decision maker had any reason to believe that Uber has a "standard practice", where that belief may come from or how the decision maker came about an understanding of Uber's standard practice. In his affidavit, the decision maker speaks of his "experience" to claim that "payments from Uber are identified as such in taxpayers' bank statements" (affidavit, para 18). Neither the "standard practice" in the Second Review Report, nor the "experience" of the affiant are supported by any evidence or argument. They appear to be statements, declarations. The specialized knowledge is not demonstrated by the reasons given, nor can it be inferred from the material available to the decision maker.

[28] It is not as if there was nothing else on this record. Mr. Matembe offered as evidence Uber Tax Summaries, first for the taxation years 2019 and 2020 and then, for the second review, the monthly Uber Tax Summaries. The income appearing on those summaries is then reported in the tax returns for the same taxation years. One can be easily reconciled with the other. Finally,

the record shows numerous e-transfers every month. Instead of considering what may be seen as powerful evidence, the decision maker erects a wall in stating in the Second Review Report that "would need to request statements from amount that Uber paid into". There is no explanation for that requirement. Even more puzzling in my view is the complete lack of explanation for why the documentary evidence presented is inadequate.

[29] Thus, the decision does not offer reasons from claiming a "standard practice" at Uber or some "experience" with Uber that bank statements identify Uber as the payer. It is less than clear that the affidavit can supplement the decision *ex post facto*. If "experience" is not available to explain the decision, we are left with the Second Review Report that speaks of a "standard practice" without any indication where that knowledge comes from. Be that as it may, the reference to "standard practice" or "experience" amounts to the same thing if there is no evidence to support the statement. The *Vavilov* Court instructs reviewing courts to be attentive to the application of specialized knowledge, but it is to be demonstrated by the reasons. As we read in paragraph 93 of *Vavilov*, "(t)his demonstrated experience and expertise may also explain why a given issue is treated in less detail". With respect, there is nothing of the sort in these reasons.

[30] Assuming, without deciding, that the Second Review Report can be seen as being part of the decision through some analogy with the notes in immigration cases (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCR 817, para 44, *Aryan* (*supra*), para 22), it remains that, in my view, the Second Review Report is clearly lacking to satisfy the test for a reasonable decision when the reviewing court is unable to develop an understanding of the reasoning that led to the administrative decision maker to reach the conclusion. Not only was

there significant evidence made available by the applicant, but that evidence was not even alluded to for the purpose of discounting it. This applicant is right to be puzzled: the decision must be justified, transparent and intelligible to the individual subject to it. I repeat: "(i)t would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party" (*Vavilov*, para 95). If there is a standard practice at Uber, the source of the knowledge had to be disclosed. If the Uber Tax Summaries are not acceptable, the decision maker should say why. Similarly, if the combination of the tax returns and the Uber Tax Summaries must be discounted, there should be reasons for why that is. The same should be done about the addition to the combination of tax returns and Uber Tax Summaries, of the evidence of numerous e-transfer transactions every month.

[31] Simply stating in an internal report that the expectation is to have a particular mention in a memo field of e-transfers relating to Uber, without anything in support of a "standard practice", is short of the mark. The Court finds itself in the unenviable position of having to conclude that where the reasons "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision" (*Vavilov*, para 96).

V. Conclusion

[32] It follows that the judicial review application must be granted. The matter of the second review of the applicant's eligibility to the Canada Recovery Benefits must be sent back to a different decision maker for a new determination.

[33] The respondent raised with the Court that the Canada Revenue Agency should not be designated as the respondent, as it is not directly affected by the second decision. Although the Agency helps in administering the program, it does so on behalf of the Minister of Employment and Social Development. Counsel asked that the Attorney General of Canada be the responding party designated as the named respondent. It may be that a proper designation be the minister responsible for the program, that is the Minister of Employment and Social Development. As nothing rides on this choice, I propose to follow the case law in this Court and to replace the style of cause with the Attorney General of Canada as the named respondent.

[34] At the hearing of this case, the applicant, who had not sought costs (or some form of replacement) before this Court, confirmed that he was not seeking costs. As a result, there will not be an adjudication of costs or disbursements in this case.

JUDGMENT in T-1240-22

THIS COURT'S JUDGMENT is:

1. The application for judicial review is granted. The matter of the second review of the applicant's eligibility to the Canada Recovery Benefits is to be sent back to a different decision maker for a new determination;

2. The style of cause is amended to replace the Canada Revenue Agency with the Attorney General of Canada as the named respondent; and

3. No costs are awarded.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1240-22
STYLE OF CAUSE:	APAPA TINO MATEMBE v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 13, 2023
JUDGMENT AND REASONS:	ROY J.
DATED:	MARCH 2, 2023

APPEARANCES:

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