Federal Court Cour fédérale

Date: 20230530

Dockets: T-631-22
T-610-22

Citation: 2023 FC 751

Ottawa, Ottawa, May 30, 2023

PRESENT: The Honourable Madam Justice Rochester

Docket: T-631-22

BETWEEN:

FRANÇOIS MORIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-610-22

AND BETWEEN:

EMMANUELLA RUEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, François Morin and Emmanuella Ruel, are spouses. Together they own several rental properties, including a house located not far from Québec City, on the north shore of the St. Lawrence River, which is available for rental on AirBnB [Property].

[2] In March 2020, due to the COVID-19 pandemic, the rentals of the Property ceased for a period of time before slowly beginning to recover. The Applicants applied for and received the Canada Emergency Response Benefit for 7 two-week periods and after the Canada Recovery Benefit [CRB] for 12 two-week periods. Although the Applicants had applied for the CRB for an additional period of time, payments were placed on hold by the Canada Revenue Agency [CRA] pending a verification as to the Applicants' eligibility.

[3] Upon a second review of their applications for the CRB, an officer of the CRA [Officer] found that the Applicants were not eligible to receive the benefit. In decisions dated February 17 and 24, 2022, the Officer concluded that the Applicants had not satisfied the eligibility criteria, namely that they had not earned at least $5,000 net of employment or self-employment income in 2019, 2020 or the 12 months preceding their applications [Decisions]. The Officer found that the Applicants did not have a history of self-employment income, and noted a post-COVID-19 amendment to their respective tax declarations to include $5,400 each of self-employment income for 2019. Prior to the amendments of their respective 2019 tax declarations, those funds were declared as part of a much larger amount identified as rental income.

[4] The Applicants submit that the self-employment income reflects the reality of the work they put into the Property, namely the housekeeping services they perform between each rental along with the administration of the rental of the Property. The Applicants informed the Officer that the value of the services provided was $150 for each cleaning service, which when calculated on the basis of 72 rentals in 2019, totals $10,800, or rather $5,400 each. Rather than agree with the Applicants, the Officer preferred to use the amount of $60 in her calculations, which was the housekeeping charge indicated on a number of the AirBnB invoices submitted by the Applicants. The housekeeping charges on the AirBnB receipts ranged from $0 to $60.

[5] There is no doubt from the record that the Applicants did in fact rent out their Property on AirBnB and that the resulting revenue was declared to the CRA. Moreover, there is no indication whatsoever in the record that the Applicants did not themselves perform the housekeeping of the Property between each AirBnB rental. Rather, the issue is whether it was reasonable for the Officer to conclude, based on the record before him that the Applicants had not each earned $5,000 of self-employment income in 2019 – which in fact differs from rental income.

[6] Despite the able submissions of Mr. Morin and Ms. Ruel on their own behalf, for the reasons that follow, the present applications for judicial review are dismissed.

[7] The Applicants filed separate judicial review applications that were heard jointly pursuant to an Order of Associate Judge Alexandra Steele. While separate records were filed in each matter, there was significant overlap with much of the material being identical. Both

Mr. Morin and Ms. Ruel made submissions at the hearing. I have determined that a single set of reasons is appropriate for both matters and shall be placed on each Court file.

II. Issues and Standard of Review

[8] The parties agree that the sole issue whether the Officer's decision is reasonable.

[9] A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]).

[10] It is the Applicants who bear the onus of demonstrating that the Officer's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court 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", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[11] The focus must be on the decision actually made, including the justification offered for it, and not the conclusion the Court itself would have reached in the administrative decision maker's place. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125; *Clark v Air Line Pilots Association*, 2022 FCA 217 at para 9 [*Clark*]).

[12] I note that in their written and oral submissions the Applicants allege there was bias on the part of the Officer who presumed the Applicants were in bad faith for having noted that they amended their 2019 tax declarations to include self-employment income. Bias is an issue of procedural fairness, as such, for this point, the Court must determine whether the process followed by the Officer satisfied the level of fairness required under the circumstances (*Clark* at para 10; Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35).

III. Analysis

[13] The CRB was a benefit that provided financial support to eligible people residing in Canada and affected by the COVID-19 pandemic for any two-week period between September 27, 2020 and October 23, 2021. In order to be eligible for the CRB payments, applicants must meet the criteria set out under subsection 3(1) of the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [Act]. The eligibility requirements at issue in the present case are the income eligibility requirements. Paragraphs 3(1)(d) to (f) of the Act require an applicant to demonstrate that they earned 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 their first application and that for reasons related to COVID-19 they were not employed or self-employed or they had a reduction of at least 50% in their average weekly income.

[14] Turning first to the Applicants' allegation of bias, noted above. The test for determining whether there is actual bias or a reasonable apprehension of bias by a decision maker is well

established. The Supreme Court in *Committee for Justice and Liberty et al v National Energy Board et al*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at pages 394 and 395 explains:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude"
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> . . . The grounds for this apprehension must, however, be substantial . . . [and not] related to the "very sensitive or scrupulous conscience".

[15] More recently, the Federal Court of Appeal in *Firsov v Canada (Attorney General)*, 2022 FCA 191 has confirmed that the test is:

> [56] …whether "an informed person, viewing the matter realistically and practically – and having thought the matter through – … [would] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly": *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at paras. 20-21, 26.

[16] It is the Applicants, the ones alleging bias, who bear the onus of demonstrating that a reasonable person apprised of all the relevant circumstances would conclude that the Officer would not decide the matter fairly.

[17] The Applicants allege that the Officer was biased by reason of his presumption that they were in bad faith. The Applicants highlight language used by the Officer in her notes to the effect that they amended their 2019 income tax declaration to add revenue from self-employment. In response, the Applicants submit that they did not add revenue when they later amended their tax

declarations, rather they classified their revenue differently. In their view, this mischaracterization is evidence of bias and a presumption by the Officer that they were in bad faith.

[18] The Respondent submits that there is no evidence of bad faith or bias. Moreover, the Applicants had the opportunity to cross-examine the Officer, whose affidavit was filed in the present proceedings, but they declined to do so.

[19] Having considered the Applicants' arguments on this issue, I am not persuaded that they have demonstrated bias on the part of the Officer. In my view, the Officer was not wrong to mention that the self-employment income was added when the declarations were amended. Previously, no self-employment income was declared. The fact that the amounts declared as self-employment income, namely $5,400 each, were deducted from income previously declared as rental income does not render the Officer's comment a mischaracterization or evidence a presumption of bad faith. It is not disputed that the Applicants re-characterized how they classified their revenue in light of COVID-19 and the available programs. The Applicants therefore fall short of providing the substantial grounds required for a reasonable apprehension of bias.

[20] Turning now to the reasonableness of the decision. While I commend the Applicants for the time, effort and energy they have put into both their written and oral submissions, they have failed to meet their burden of demonstrating that the Decisions are unreasonable. As noted above, there is no doubt from the record that the pandemic had an impact on the revenue

generated through the rental of their Property on AirBnB. Equally, there is no doubt from the record before me that the Applicants were the ones who cleaned and prepared the Property between AirBnB rentals. During the hearing the Applicants emphasized all the tasks they performed and the care and attention they put into their Property.

[21] The issue before me is not, however, how I would assess the time and effort they put into cleaning and preparing the Property between rentals. Rather, it is whether it was reasonable for the Officer, based on the record before him, to conclude that the evidence did not support at least $5,000 in self-employment income for each Applicant. Rather than attribute $150 per rental for a total of $10,800 for the 72 rentals in 2019, divided by two resulting in $5,400 for each Applicant, as stated by the Applicants, the Officer preferred to rely on the $60 cleaning charge as indicated on a number of the AirBnB invoices submitted by the Applicants. The invoices contained cleaning fees that ranged from $0 to $60.

[22] The Respondent highlights that it was reasonable for the Officer to conclude that the Applicants' position that they earned $5,400 each in self-employment income in 2019 was not coherent in light of the evidence in the record. The Respondent submits that while one is permitted to engage in prospective tax planning, one cannot simply go back and re-classify rental income after the fact in order to qualify for the CRB (*Canada (Attorney General) v Collins Family Trust*, 2022 SCC 26). Business or self-employment income is subject to different tax treatment than income from property. The Respondent submits that even if there were a portion of the revenue that could be characterized as business or self-employment income, it was reasonable for the Officer to refer to the documentary evidence and use $60, which was the

highest amount in the invoices, which still falls short of the required $5,000 for 2019. Other than the Applicants' assertion that the value of the cleaning services was $150, there was no other evidence to support that position before the Officer.

[23] I agree with the Respondent. Based on the record before the Officer, I find the Officer's reasoning meets the criteria set out in *Vavilov*. As noted above, it is not the function of this Court to reassess the evidence considered by the Officer, absent exceptional circumstances. I do not find that such circumstances exist in the present case.

[24] The Applicants submit that the CRA's Interpretation Bulletin IT-434R provides criteria that permits them to identify revenue as self-employment or business income rather than rental income. The Applicants highlight that Bulletin IT-434R permits income to be identified as business income where services are provided. The Bulletin IT-434R provides examples of various services that may accompany the rental of accommodation and notes that the more the services that are provided, the more likely it is that there is a business as well as a property rental. The Applicants submit that the Officer's analysis was neither coherent nor rational because, among other things, the Officer did not use Bulletin IT-434R to evaluate the business or self-employment income of the Applicants.

[25] The Respondent submits that Bulletin IT-434R is over four decades old and was not raised before the Officer. The Respondent further submits that a number of the documents provided in the context of the present judicial review that seek to provide greater detail about the cleaning services for AirBnB rentals are not admissible on the basis that they were not before the

Officer. The Applicants submit that the documents are admissible because they provide general context to better understand the issues before the Court.

[26] The general rule is that the evidentiary record before this Court on judicial review of an administrative decision is restricted to the evidentiary record that was before the administrative decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19). If one views the documents through the lens of general context, one is left to understand that where a certain level of services are provided alongside simply renting a property, a portion of the income may be business income. One is also left to understand that AirBnB provides information and documentation concerning the cleaning of the rental properties. Taking the documents as general context, I do not consider that they ultimately serve to assist the Applicants in meeting their burden of demonstrating that the Officer's Decisions are unreasonable. Furthermore, as to the Applicants' assertion that the Officer did not use Bulletin IT-434R to evaluate the business or self-employment income of the Applicants, I do not consider that the Officer's Decisions are unreasonable for not having taken into account a document that was not before him at the time the Decisions were made. In any event, the Officer did take into account the Applicants' position as to the cleaning services, however, he chose instead to be guided by the amount indicated in a number of the AirBnB invoices provided by the Applicants.

[27] The Applicants submit that the Officer erred by taking into account the amounts indicated in the AirBnB invoices as they do not evidence the true cost of the cleaning services. The Applicants highlight that the amount in the invoices varies. They submit it is a commercial

strategy as to how much to charge the clients for the cleaning services. They further submit that the charge in the invoices is artificially low. The Respondent replies that the Officer properly assessed that the amount of $150 per rental was not coherent in light of the amounts contained in the invoices, particularly when there was no evidence before the Officer, other than the Applicants' assertion, to validate why a $150 cleaning charge per rental was an appropriate sum.

[28] I am not persuaded that the Officer erred in taking into account the amounts charged for cleaning services in the AirBnB invoices, when considering the Applicants' position that they earned income from self-employment by reason of having cleaned and restocked the Property after each rental. As noted above, absent exceptional circumstances, it is not the function of this Court to reassess the evidence considered by the Officer.

IV. Conclusion

[29] For the foregoing reasons, this application for judicial review is dismissed. The Applicants have been unable to point to a sufficiently serious shortcoming or flaw that would render the Decisions unreasonable.

[30] The Respondent seeks costs but have not made submissions as to quantum. There is no reason in the present matter to depart from the usual practice of awarding costs to the successful party, in this case the Respondent. Pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, the Court has full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid. In exercising that discretion, the Court may consider the factors set out in Rule 400(3), which include: the result of the proceeding; the

importance and complexity of the issues; whether the public interest in having the proceeding litigated justifies a particular award of costs; any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding; and, any other matter that the Court considers relevant. The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs (Rule 400(4)).

[31] I find, under the circumstances, that an award of costs to the Respondent in the amount of $500 per Applicant, totaling $1,000, is appropriate.

JUDGMENT in T-631-22 and T-610-22

THIS COURT'S JUDGMENT is that:

1. The present applications for judicial review are dismissed; and

2. Costs in the amount of $500 per Applicant, totalling $1,000 are awarded to the Respondent.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-631-22
STYLE OF CAUSE:	FRANÇOIS MORIN v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-610-22
STYLE OF CAUSE:	EMMANUELLA RUEL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	DECEMBER 8, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	MAY 30, 2023

APPEARANCES:

François Morin Emmanuella Ruel	FOR THE APPLICANTS (SELF-REPRESENTED)
Mathieu Lamontagne	FOR THE RESPONDENT

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