APPEAL #

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 21 January 2013 which determined that, subject to review of the assets of the appellant and her spouse, the appellant and her children are eligible for income assistance. However, the ministry held that the employment income of $859/month of her spouse must be included in the family unit's net income determined under Schedule B of the Employment and Assistance Regulation and therefore deducted from the amount determined under Schedule A. The ministry found that the appellant's husband, a citizen of another country and serving in the military of that country and currently resident of that country, is a dependant of the appellant as defined under section 1(1), 1(3) and 1.1 of the Employment and Assistance Act and therefore his employment income must be included in the calculations prescribed in sections 7(3) and 28 of the Regulation.

This decision reversed an earlier ministry decision based on a determination after an internet search that the appellant's husband's military pay, based on his rank, would be approximately $2000 per month.

PART D – Relevant Legislation

Employment and Assistance Act (EAA), sections 1 and 1.1
Employment and Assistance Regulation (EAR) section 7 and 28

APPEAL #

PART E – Summary of Facts

The appellant did not attend the hearing. She was represented by her advocate, who brought with her a Release of Information form that indicated that the appellant authorized her to make decisions on the appellant's behalf.

With the consent of the ministry, an intern from the advocate's organization attended the hearing as an observer.

The evidence before the ministry at reconsideration included the following:

1.From the ministry's files:

- The appellant is a Canadian citizen.
- She has three children.
- She is married and her husband is a serving member of the military of another country, currently residing in that country.
- The appellant relocated to Canada in 2012 because she has dual citizenship and she wants her children to get acclimatized before her husband's retirement from the military next year when he moves to Canada as well.
- A pay stub for her husband for June 2012 showing net income of $859 (after FX conversion by the ministry). (Elsewhere, the sum of $894/month is used.
- Information given to the ministry by the appellant that she had received $500 from her husband in November to pay December rent.

2. The appellant's Request for Reconsideration dated 09 January 2013, to which was attached a submission from the appellant's advocate. In the submission the advocate states that due to the husband's limited income, cultural obligations and the now strained relationship between the appellant and her husband, the level of financial support the appellant receives from him is very limited and inconsistent. The appellant is willing to sign a family maintenance enforcement order in an attempt to ensure ongoing support. The balance of the advocate's submission goes to argument.

The appellant filed her Notice of Appeal on 29 January 2013, giving as reasons for why she disagrees with the ministry's reconsideration decision: "It is patently unreasonable."

After reconsideration and prior to the hearing, the appellant submitted a statutory declaration dated 28 February 2013. The statutory declaration states, in part, that:

- Under his country's Citizenship Act, the appellant's husband cannot have dual citizenship as a member of the military. He has no citizenship status in Canada whatsoever and as an income assistance recipient, the appellant is unable to sponsor him to be in Canada. Moreover he is unable to retire from the military for at least two years.
- When in the other country, the appellant's relationship with her husband was strained. She lived in an abusive relationship and feared for her safety. Despite her disabilities, her husband treated her as a slave and refused to provide the resources needed for her and her children.
- She has been separated from her husband and her marriage since leaving the other country on 21 September 2012.
- Since coming to Canada, she has spoken to her husband approximately once a month but only for the sake of her children. He continues to be unsupportive of her move and has offered limited financial support to assist her in raising the children.

- Her husband cannot legally join the family in Canada and has never shown any interest in doing so. She does not think he will ever join the family in Canada.

At the hearing, the appellant's advocate presented a written submission, drawing on the evidence in the statutory declaration and going to argument (see part F below).

The ministry presented no new evidence.

The ministry did not object to the admission of the new information presented in the statutory declaration. The appellant's advocate explained that language and cultural issues, as well as the appellant's feelings of shame over her marital breakup, were barriers to the appellant fully disclosing her situation to strangers – i.e. ministry staff. The panel finds that the information in the statutory declaration was in support of the information and records before the ministry at reconsideration as it clarifies and elaborates statements made in the Request for Reconsideration that the relationship between the appellant and her husband was "strained." The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the $859/month employment income of the appellant's spouse must be included in the family unit's net income determined under Schedule B of the Employment and Assistance Regulation and therefore deducted from the amount determined under Schedule A. More specifically, the issue is whether the ministry was reasonable in finding that the appellant's husband, a citizen of another country serving in the military of that country and currently resident of that country, is a dependant of the appellant as defined under section 1(a), 1(3) and 1.1 of the Act, and therefore that his employment income must be included in the calculations prescribed in sections 7(3) and 28 of the Regulation.

The relevant legislation is from the EAA:

Interpretation

1 (1) In this Act:

"dependant", in relation to a person, means anyone who resides with the person and who

(a) is the spouse of the person,

(b) is a dependent child of the person, or

(c) indicates a parental responsibility for the person's dependent child;

"family unit" means an applicant or a recipient and his or her dependants;

(3) For the purpose of the definition of "dependant", spouses do not reside apart by reason only that a spouse is employed or self-employed in a position that requires the spouse to be away from the residence of the family unit for periods longer than a day.

Meaning of "spouse"

1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they are married to each other, or

(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.

(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they have resided together for at least

(i) the previous 3 consecutive months, or

(ii) 9 of the previous 12 months, and

(b) the minister is satisfied that the relationship demonstrates

(i) financial dependence or interdependence, and

(ii) social and familial interdependence,

consistent with a marriage-like relationship.

And from the EAR:

Citizenship requirements

7 (3) If a family unit includes a person who is not described in subsection (2) *[applicants eligible due to citizenship],*

(a) the person's income and assets must be included in the income and assets of the family unit for the purposes of determining whether the family unit is eligible for assistance, except as otherwise provided in this regulation, and

(b) the family unit is not eligible for any income assistance under Schedule A, hardship assistance under Schedule D or supplements under Division 1, 2, 3 or 5 of Part 5 of this regulation on account of or for the use or benefit of that person.

Amount of income assistance

28 Income assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

(a) the amount determined under Schedule A, minus

(b) the family unit's net income determined under Schedule B.

The position of the appellant, as set out in her advocate's written submission, begins with the argument that her husband does not have any citizenship status in Canada whatsoever. Section 134(1) (c) (ii) of the Immigrant and Refugee Protection Regulations does not allow for social assistance income to be used in the income calculation for the eligibility of sponsorship. Therefore, as a recipient of income assistance, the appellant would not be eligible to sponsor her husband to come to Canada. As a result he would be unable to come to Canada even if he wanted to. The advocate refers to the appellant's statement in the statutory declaration that her husband has never shown any interest in coming to Canada and she does not think he will ever join the family in Canada. While the appellant is, technically, still legally married, the advocate submits that the evidence provided clearly demonstrates that she and her husband do not live together and will not live together. Further, the appellant argues that the evidence provided also demonstrates that the appellant's estranged husband does not live apart from the family only (advocate's emphasis) for the reason that he is employed in a position that requires him to be away for periods longer than a day. Thus, he should not be considered a dependant spouse pursuant to section 1(3) of the EAA.

At the hearing, the ministry indicated that with the evidence pointing to an irreconcilable marital situation, section 1(3) of the EAA did not apply. The ministry had been guided by an earlier understanding that the appellant's husband would soon be retiring from the military and be joining the family in Canada. As this does not appear to be the case, the ministry would not consider the estranged husband a dependant of the appellant and therefore his income would not be factored into the calculation of the amount of the appellant's income assistance. The panel does not consider this submission by the ministry as determinative of the issue under appeal. The panel must still address the reasonableness of the reconsideration decision.

The evidence is that the appellant and her husband are estranged and live apart, he in another country. The panel finds that they do not "reside apart by reason only that a spouse is employed or self-employed in a position that requires the spouse to be away from the residence of the family unit

for periods longer than a day" as required for section 1(3) of the EAA to apply; they live apart because of marital breakup and/or immigration hurdles. The panel notes that at reconsideration the ministry did not have the benefit of a clear picture of the appellant's marital situation. Based on all the information available, the panel finds that the ministry was not reasonable in determining that the husband is a dependant of the appellant as defined in section 1(1) of the EAA, and therefore not a part of the appellant's family unit. Thus, section 7(3) of the EAR does not apply.

The panel therefore finds that the ministry's decision that the husband's employment income must be included in the family unit's net income determined under Schedule B of the EAR and therefore deducted from the amount determined under Schedule A was not reasonably supported by the evidence. Accordingly, the panel rescinds the ministry's decision in favour of the appellant.