Federal Court  Cour fédérale

Date: 20231228

Docket: T-731-23
T-732-23

Citation: 2023 FC 1761

Montreal, Quebec, December 28, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

LEI ZHANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Lei Zhang, is seeking judicial review of two decisions dated March 10, 2023 [Decisions] whereby the Canada Revenue Agency [CRA] found her inadmissible for the Canada Emergency Response Benefit [CERB] and the Canada Recovery Benefit [CRB]. The CRA found Ms. Zhang ineligible because she had not earned at least $5,000 of employment or

self-employment income in the prescribed periods, and she had not stopped working or had her hours reduced for reasons related to COVID-19.

[2] Ms. Zhang submits that the CRA did not properly exercise its discretion in arriving at these Decisions. More specifically, Ms. Zhang alleges that she met all of the eligibility criteria to receive CERB and CRB benefits, and that the CRA based its decisions on erroneous findings of fact without regard for the materials before it. Furthermore, Ms. Zhang submits that the CRA violated her procedural fairness in allowing the same decision-maker to determine both her first and second requests for review leading up to the two Decisions.

[3] For the reasons that follow, Ms. Zhang's application for judicial review will be dismissed. I am satisfied that the CRA's Decisions were responsive to the evidence, and its findings regarding Ms. Zhang's ineligibility for the CERB and CRB benefits have the qualities that make the CRA's reasoning logical and consistent in relation to the relevant legal and factual constraints. Furthermore, Ms. Zhang's right to procedural fairness was not violated.

II. Background

A. *The CERB and CRB eligibility requirements*

[4] The CERB and CRB were part of an arsenal of measures introduced by the federal government starting in 2020 to alleviate the economic repercussions caused by the COVID-19 pandemic. They consisted of targeted monetary payments designed to provide financial support to workers who suffered a loss of income due to the pandemic, and who could not benefit from the protection offered by the usual employment insurance plan. The CRA is the federal agency

responsible for administering the program on behalf of the Minister of Employment and Social Development.

[5] The CERB was available for seven four-week periods between March 15, 2020 and September 26, 2020 for eligible employees and self-employed workers who had suffered a loss of income due to the COVID-19 pandemic. The CRB was available for any two-week period between September 27, 2020 and October 23, 2021 for eligible employees and self-employed workers who had suffered a loss of income due to the COVID-19 pandemic (*Aryan v Canada (Attorney General)*, 2022 FC 139 at para 2 [*Aryan*]).

[6] The eligibility criteria for the CERB are set out and detailed in the *Canada Emergency Response Benefit Act*, SC 2020, c 5, s 8 [CERB Act]. Among other things, the CERB Act requires employees or self-employed workers to have earned at least $5,000 in employment or self-employment income in 2019 or in the 12-month period preceding their application for the CERB. I pause to observe that, according to the CERB Act, the total income must be at least $5,000 but the legislation does not specify whether it is net or gross income. The CERB Act simply refers to “total income”. It also requires that the worker ceased working for reasons related to COVID-19 for at least 14 consecutive days within the four-week period in respect of which the worker had applied for the CERB.

[7] The eligibility criteria for the CRB are set out in the *Canada Recovery Benefits Act*, SC 2020, c 12, s 2 [CRB Act]. The CRB Act also requires employees or self-employed workers to have earned at least $5,000 in employment income or net self-employment income in 2019, 2020, or in the 12 months preceding the date of their last application — expressly specifying that

income from self-employment is revenue from the self-employment less expenses incurred to earn that revenue. In addition, in order to receive CRB payments, employees or self-employed workers had to have suffered a 50% drop in their average weekly income compared with the previous year, for reasons related to COVID-19.

B. ***Ms. Zhang's work history and benefits applications***

[8] Ms. Zhang has work experience conducting patent agent- and engineering-related work. In 2018, Ms. Zhang worked as a patent agent trainee at MBM Intellectual Property Law LLP. Prior to this, she had accrued work experience as a patent agent in the United States, and as a semiconductor engineer in Ottawa and Waterloo.

[9] In December 2019, Ms. Zhang alleges to have received a job offer to work remotely as an independent contractor for her client, Jinan Jingkong Electrical Equipment Co. Ltd. [Jinan]. In this role, Ms. Zhang provided patent-related advice and research to her client and was to be paid $6,200 USD (approximately $8,000 CAD at the time).

[10] In Ms. Zhang's 2020 tax return, she claimed $4,200 for expenses relating to the business use of her home, resulting in her 2020 net self-employed business income totalling $3,800 — an amount below the eligibility threshold for CERB or CRB payments. Recently, Ms. Zhang amended her 2020 tax return after consulting an accountant and adjusted her business expenses for the use of her home to $2,100 since, according to her, she also used her work area for study and leisure time. After the amendment to her tax return, her self-employment net business income was $5,900.

[11] Ms. Zhang applied for and received the CERB for the seven four-week periods from March 15, 2020 to September 26, 2020. She also applied for and received the CRB for the 27 two-week periods from September 27, 2020 to October 9, 2021.

[12] In relation to her applications for both the CERB and CRB, a CRA agent called Ms. Zhang and advised her that she would need to provide documentation to verify her self-employment income. Ms. Zhang subsequently provided a single invoice, and several letters from Jinan with limited detail. The CRA conducted a first review of Ms. Zhang's benefits applications. On December 2, 2022, the CRA determined that Ms. Zhang was not eligible to receive CERB or CRB payments based on the available information. Ms. Zhang requested a second review of these CRA determinations on December 22, 2022.

[13] On March 10, 2023, after conducting a second review on both Ms. Zhang's CERB and CRB applications, the CRA once again determined that Ms. Zhang was ineligible for both benefits.

C. *Decisions*

[14] The second-review Decisions regarding Ms. Zhang's CERB and CRB eligibility were both delivered on March 10, 2023. Ms. Christine McCormick, the CRA agent who conducted the two secondary reviews, determined that Ms. Zhang was ineligible for CERB benefits because she did not earn $5,000 of self-employment income in 2019 or in the 12 months before the date of her first application, and because she did not stop working or have her hours reduced for reasons related to COVID-19. Ms. McCormick similarly determined that Ms. Zhang was

ineligible for CRB benefits because she did not earn at least $5,000 of net self-employment income in 2019, 2020, or in the 12 months before the date of her first application.

D. *The standard of review*

[15] It is now well established that the standard of review applicable to the merits of the CRA's decisions regarding CERB and CRB benefits is reasonableness (*He v Canada (Attorney General)*, 2022 FC 1503 at para 20 [*He*]; *Lajoie v Canada (Attorney General)*, 2022 FC 1088 at para 12; *Aryan* at paras 15–16). This is in line with the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the Court established a presumption that the standard of reasonableness is the applicable standard in judicial reviews of the merits of administrative decisions (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]).

[16] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision-maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision-maker" (*Vavilov* at para 85; *Mason* at para 64). The reviewing court must therefore ask whether the "decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136).

[17] Such a review must include a rigorous and robust evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must take a "reasons first" approach and begin its inquiry by examining the reasons provided with "respectful attention", seeking to understand the reasoning process followed by the decision-maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[18] The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

[19] However, the standard of review applies differently on procedural fairness issues. It is true that many courts have stated that the standard of correctness applies to procedural fairness issues. But the Federal Court of Appeal has repeatedly held that procedural fairness does not require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 at para 54 [*CPR*]). It is for the reviewing court to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR* at para 54). Consequently, when

an application for judicial review concerns procedural fairness and a breach of the principles of fundamental justice, the question that must be answered is not necessarily whether the decision was "correct". Rather, the reviewing court must determine whether, given the particular context and circumstances of the case, the process followed by the administrative decision-maker was fair and gave the parties concerned the right to be heard, as well as a full and fair opportunity to be informed of the evidence to be rebutted and to have their case heard (*CPR* at para 56). Reviewing courts are not required to show deference to administrative decision-makers on matters of procedural fairness.

III. Analysis

A. *Reasonableness of the Decisions*

[20] Ms. Zhang claims that the CRA did not properly exercise its discretion in arriving at its Decisions. In support of her claims, Ms. Zhang alleges that she met all of the eligibility criteria to receive the CERB and CRB benefits, and that the CRA based its Decisions on erroneous findings of fact without regard for the evidence she submitted in relation to her claims. More specifically, Ms. Zhang argues that the CRA's findings on her ineligibility for the CERB and CRB benefits erroneously disregarded the evidence she provided in relation to her net business income from her work for Jinan and her 2020 tax return. According to Ms. Zhang, the CRA erred in refusing to consider the invoice evidence she sent, or her amended 2020 tax return demonstrating a change in her net business income for the relevant tax year.

[21] I am not persuaded by Ms. Zhang's arguments and instead find that the Decisions were reasonable in the circumstances.

[22] First, with respect to the income requirements for both the CERB and CRB benefits, it was open for Ms. McCormick to conclude that Ms. Zhang did not properly establish that she earned the requisite amount of income in the prescribed period to render her eligible for the benefits.

[23] Indeed, Ms. McCormick drafted detailed and comprehensive decision reports to record her findings. It is well established that these reports form part of the reasons of the Decisions (*Lavigne v Canada (Attorney General)*, 2023 FC 1182 at para 26 [*Lavigne*]; *He* at para 30; *Aryan* at para 22). In her decision reports, Ms. McCormick noted the following: Ms. Zhang had no previous history of earning self-employment income; she provided no documentation to support that she had actually received $6,200 USD or that this amount was sent through certified mail; the invoice submitted to Jinan by Ms. Zhang did not indicate whether it had been paid, the type of payment, or the date of payment, and it was not signed by either party; the letter agreement was not a formal contract and only briefly indicated the nature of the engagement and agreement; and, importantly, all of the documents Ms. Zhang provided from Jinan were created years after she claimed to have been paid $6,200 USD, and did not indicate the exact date of payment.

[24] Upon reading Ms. McCormick's notes and decision reports, it is clear that the CRA thoroughly considered Ms. Zhang's arguments as well as the evidence she submitted. In her reasons, Ms. McCormick expressly identified no less than 9 reasons supporting her conclusions that the evidence adduced by Ms. Zhang was insufficient to establish that she effectively received the $6,200 USD cash amount for self-employment income.

[25] Furthermore, the CRA guidelines entitled “Confirming CERB, CRB, CRSB, CRCB and CWLB Eligibility” [Guidelines] indicate that acceptable proof for self-employment income requires an invoice for services rendered and documentation for receipt of payment for the service provided (for example, a statement of account or bill of sale showing the payment and the balance owed or paid). While these Guidelines are not binding, they can certainly help inform the reasoning of the decision-maker. Furthermore, as noted by the Attorney General of Canada [AGC], this Court has recognized that a decision-maker may depart from non-binding guidelines provided that the departure is reasonable and explained through a reasoned explanation (*Crook v Canada (Attorney General)*, 2022 FC 1670 at para 17). Here, Ms. McCormick meticulously assessed the evidence provided by Ms. Zhang and found that it was insufficient to establish her eligibility. In her reasons, Ms. McCormick pointed to the fact that the documents did not indicate whether Ms. Zhang had been paid at all, let alone whether they could be considered sufficient to establish a formal contract or bill of sale.

[26] A party challenging an administrative decision must satisfy the reviewing court that “any shortcomings or flaws relied on [...] are sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100). Here, Ms. Zhang have not persuaded me that there is such a shortcoming. In this case, I am instead satisfied that the CRA’s reasoning can be followed without a decisive flaw in rationality or logic and that the reasons were developed in such a way that the analysis could reasonably lead the reviewer, having regard to the evidence and the relevant legal and factual constraints, to conclude as it did (*Vavilov* at para 102). Here, there is no serious deficiency in the Decisions that would taint the analysis and that would be likely to undermine the requirements of justification, intelligibility, and transparency.

[27] Following *Mason* and *Vavilov*, the reasons given by administrative decision-makers have taken on a greater importance and are now the starting point for the analysis on an application for judicial review. They are the primary mechanism by which administrative decision-makers show that their decisions are reasonable, both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They serve to state "how and why a decision was made", demonstrate that "the decision was made in a fair and lawful manner", and shield against "the perception of arbitrariness in the exercise of public power" (*Vavilov* at para 79). In short, it is the reasons that establish the justification for the decision, and reviewing courts must read them "holistically and contextually" in "light of the record and with due sensitivity to the administrative regime in which they were given" (*Vavilov* at paras 97, 103; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 15).

[28] In the case of Ms. Zhang, the CRA's reasons provide a transparent and intelligible justification for the Decisions (*Vavilov* at paras 81, 136). At paragraph 102 of *Vavilov*, the Supreme Court held that the reviewing court "must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived'". Here, it is easy to trace and to follow Ms. McCormick's line of analysis and the Decisions do bear the hallmarks of reasonableness, which are justification, transparency, and intelligibility (*Vavilov* at para 99).

[29] Based on all of the cumulative factors canvassed by Ms. McCormick, it was reasonable for the CRA to conclude that Ms. Zhang did not meet the eligibility requirements relating to her income. Furthermore, given that the CRA reasonably determined that Ms. Zhang did not earn the $6,200 USD as income, it was subsequently reasonable to conclude that Ms. Zhang did not see

her hours reduced due to COVID-19, as she had no other self-employment income that could have been reduced in the first place.

[30] I observe that, according to the Guidelines to which Ms. Zhang referred extensively in her submissions, acceptable proof that an applicant met the CERB or CRB income requirements include documentation for "receipt of payment for the service provided, e.g. statement of account, or bill of sale showing a payment and the remaining balance owed". This is precisely what Ms. Zhang failed to provide to the CRA, despite several requests to that effect made y Ms. McCormick. In CRA's assessment, the letter agreement, the Jinan invoice, and the December 2022 and February 2023 letters from Jinan did not constitute sufficient convincing evidence of an actual payment having been made to Ms. Zhang in the absence of an actual transfer or receipt of money. As any taxpayer, Ms. Zhang is certainly entitled to be remunerated in cash but it was her burden to maintain sufficient records in order to rely on cash payments to support her eligibility to the CERB or CRB benefits (*Sjogren v Canada (Attorney General)*, 2023 FC 24 at para 38 [*Sjogren*]).

[31] I pause to underline that the issue before the Court is not whether the interpretations proposed by Ms. Zhang might be defendable, acceptable, or reasonable. Rather, the Court has to look at this issue in respect of the interpretation made by the CRA. The fact that there may be other reasonable interpretations of the facts does not, in and of itself, mean that the decision-maker's interpretation was unreasonable. Doing so would amount to indirectly applying the correctness standard, which Vavilov expressly instructed reviewing courts not to do (Khelili v Canada (Citizenship and Immigration), 2023 FC 64 at para 26).

[32] In the present case, Ms. Zhang essentially disagrees with Ms. McCormick's findings of fact that she did not satisfy the CERB and CRB income requirements or the CERB work reduction requirement. However, in the context of a judicial review, it is not the task of a reviewing court to reweigh the evidence on the record, or to reassess the decision-maker's findings of fact and substitute its own (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55). Rather, the Court must consider the reasons as a whole, together with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53), and limit itself to determining whether the conclusions are irrational or arbitrary.

[33] Here, the CRA's conclusions are squarely based on the evidence in the case and contend with the arguments and information provided by Ms. Zhang.

[34] Turning to Ms. Zhang's amended tax return, this Court has noted on numerous occasions that tax returns do not conclusively prove that a taxpayer earned the income they have reported (*Sjogren* at para 39; *Aryan* at para 35; *Hu v Canada (Attorney General)*, 2022 FC 1678 at para 25). Consequently, this evidence cannot be relied on to establish Ms. Zhang's alleged income. In *Lavigne*, the Court was similarly seized of the issue of an amendment to a tax return and noted that it is not unreasonable for a CRA agent to conclude that an amendment to a tax return made for the sole purpose of qualifying for the CERB or CRB does not alter a factual finding that a person's net business income did not exceed the $5,000 threshold (*Lavigne* at para 37).

[35] The onus was on Ms. Zhang to establish that she met, on a balance of probabilities, the eligibility criteria (*Cantin v Canada (Attorney General)*, 2022 CF 939 at para 15; *Walker v Canada (Attorney General)*, 2022 CF 381 at paras 37, 55). She has not done so.

[36] In her written and oral submissions, Ms. Zhang relied extensively on this Court's recent decision in *Moncada v Canada (Attorney General)*, 2023 FC 114 [*Moncada*]. She submits that, based on this precedent, it was unreasonable for the CRA to find her ineligible for the CERB and CRB in light of the invoice she had submitted. In *Moncada*, Justice Sadrehashemi determined that the CRA officer's reasons lacked transparency and justification with respect to how the invoices Mr. Moncada submitted were insufficient to meet the CRB income eligibility requirement (*Moncada* at para 11). Ms. Zhang contends that the CRA officer reviewing her file similarly erred in not properly considering the invoice she submitted in the determination of her eligibility.

[37] With respect, the factual circumstances of Ms. Zhang's case are starkly different from those of Mr. Moncada. In the case of Mr. Moncada, the CRA officer had made no mention whatsoever of the invoices he filed, nor raised any concern with the invoices provided (*Moncada* at para 12). Indeed, Justice Sadrehashemi explicitly stated that "where the Officer does not reference the invoices and provides no explanation as to how they are insufficient to meet the eligibility requirements, I find that the decision is unreasonable" [emphasis added] (*Moncada* at para 13). Here, however, Ms. McCormick explicitly referenced the invoice provided by Ms. Zhang multiple times in her decision reports and in her phone calls with Ms. Zhang. Moreover, she asked Ms. Zhang for further information with respect to this invoice, and she went into great detail in her notes to explain why she found that the invoice was insufficient to demonstrate Ms.

Zhang's eligibility for the CERB and CRB. In the present case, it is abundantly clear that the CRA referenced, considered, and provided an explanation as to how Ms. Zhang's invoice was insufficient. Consequently, the *Moncada* case finds no application to the facts of this case.

[38] I underline that the CERB and CRB programs were governmental measures of social and economic assistance, adopted to overcome the inherent limits of the unemployment insurance program in the unprecedented and difficult context created by the COVID-19 pandemic. In order to access the exceptional economic relief offered by the CERB and CRB programs, applicants had to demonstrate that they had actually received employment or self-employment income. In the case of Ms. Zhang, she was unable to provide the necessary evidence to convince the CRA officer that she indeed received the self-employment income she claimed to have made, or that it was effectively sent by certified mail as claimed.

[39] It was up to the CRA officer to assess the sufficiency of the evidence, and, in this case, she was not satisfied with the evidence provided by Ms. Zhang. I find nothing unreasonable in this conclusion (*Hayat v Canada (Attorney General)*, 2022 FC 131 at para 20).

B. ***Procedural fairness***

[40] Ms. Zhang also submits that the CRA violated her right to procedural fairness in allowing the same decision-maker to review both the first and second Decisions made in her file.

[41] Again, I disagree.

[42] With respect, Ms. Zhang's procedural fairness argument is meritless and cannot stand. While it is true that the letters forming the basis of the Decisions are signed by the same individual, it is untrue that the same individual conducted both the first and second reviews of Ms. Zhang's file. As pointed out by the AGC, the name on the letters notifying Ms. Zhang of the Decisions is the same because it happens to be the name of the manager of the agent who actually reviewed the file, not the name of the agents themselves. Indeed, it is not disputed that Ms. McCormick conducted the second review of Ms. Zhang's files and that she was not involved with the first review. Furthermore, Ms. McCormick considered all of the evidence placed before her and provided Ms. Zhang with numerous opportunities to provide additional evidence and information and to meet the case against her. As a matter of fact, Ms. Zhang submitted several new documents that were all taken into account by the CRA in its assessment of her case.

[43] Therefore, it is clear that Ms. McCormick provided Ms. Zhang multiple opportunities to know the case against her and to provide the necessary documentation to support her claims. In light of the record, I have no hesitation to conclude that Ms. Zhang benefited from the right to be heard, as well as from an impartial and procedurally fair process before the CRA (*CPR* at para 56).

[44] This is not a situation where a violation of procedural fairness hampered the decision-making process.

IV. Conclusion

[45] For the above-mentioned reasons, Ms. Zhang's applications for judicial review are dismissed. The Decisions are based on an internally coherent and rational analysis, and have the requisite attributes of transparency, justification, and intelligibility. According to the reasonableness standard, it is sufficient for the Decisions to be justified having regard to the legal and factual constraints to which the decision-maker is subject. This is the case here and there are no grounds justifying the Court's intervention.

[46] At the hearing before the Court, counsel for the AGC informed the Court that he would not be seeking costs in this matter. Accordingly, no costs are awarded.

JUDGMENT in T-731-23 and T-732-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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