Docket: 2007-1957(IT)I

BETWEEN:

SIMA AHANSAZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on September 18, 2007, at Montréal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Agent for the Appellant:	Mohammad Hassan Sattari
Counsel for the Respondent:	Jean Lavigne

JUDGMENT

The appeals from the determinations of the Canada Child Tax Benefit made under the *Income Tax Act* for the 2003 to 2005 base years are dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of November, 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 24th day of January 2008
Monica F. Chamberlain, Translator

Citation: 2007TCC568
Date: 20071129
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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] These are appeals from redeterminations of the Canada Child Tax Benefit for the 2003 to 2005 base years. For those base years, the Minister of National Revenue (the Minister) has determined that the Appellant received overpayments of $5,222, $5,680 and $2,572, respectively. The period in question is from July 2004 to November 2006.

[2] In making the redeterminations, the Minister relied on the facts set out in paragraph 5 of the Reply to the Notice of Appeal (the Reply), as follows:

> [TRANSLATION]
> (a) the Appellant and her spouse, Mohammad Hassan Sattari, have four children: Azita, born on April 28, 1991, Nazila, born on October 6, 1993, Amin, born on September 29, 1999, and Mehran, born on April 22, 2003;
>
> (b) for the periods in question, the Appellant and her spouse were residing in Canada under work permits or student permits;
>
> (c) at no time during the periods in question did either the Appellant or her spouse have permanent resident status in Canada, nor was either of them a

> protected person or refugee within the meaning of the *Immigration and Refugee Protection Act*.

[3] The grounds of appeal stated in the Notice of Appeal cite the fact that three of the children of the Appellant and her spouse are Canadian citizens and that the Appellant and her spouse are members of a class defined in the Humanitarian Designated Classes Regulations made under the *Immigration Act*, within the meaning of subparagraph (*e*)(iv) of the definition of "eligible individual" in section 122.6 of the *Income Tax Act* (the "Act").

[4] It will be useful to refer immediately to the definition of "eligible individual" in section 122.6 of the Act, for the purposes of the Canada Child Tax Benefit. The relevant portion reads as follows:

> **"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 the parent of the qualified dependant who primarily fulfils the responsibility for the care and upbringing 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, ...

[5] It is admitted that neither the Appellant nor her husband is a Canadian citizen. It is also admitted that at the time in issue they were not permanent residents within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

[6] We saw in the definition of "eligible individual" that if the mother or father of the eligible dependant is a temporary resident under the *Immigration and Refugee Protection Act*, that person becomes an "eligible individual" after residing in Canada for 18 months.

[7] The Reply states as a fact that for the periods in issue the Appellant and her spouse were residing in Canada under work permits or student permits.

[8] Ordinarily, under the *Immigration and Refugee Protection Act*, student permits and work permits go together with temporary resident status. This was in fact stated by Carole Lahaie, an immigration officer with Citizenship and Immigration Canada, the Respondent's witness. As long as Mr. Sattari's student permit was extended, he was a temporary resident.

[9] However, according to the chronology of events presented by the Appellant's witness, Mr. Sattari, the Appellant's spouse no longer had a student permit during the period in issue. On April 27, 2004, he was given a final refusal for the permit. He had already been without a work permit since June 17, 2003.

[10] Further efforts were made, and Mr. Sattari was given a work permit on October 10, 2006, but the circumstances in which the permit were issued did not give him temporary resident status, under section 202 of the *Immigration Regulations*.

[11] The facts considered by the Minister, as set out in paragraph 5(b) of the Reply, are therefore incorrect. The facts considered in making an assessment are important. When counsel for the Respondent realized that they were incorrect, he should have proposed that they be corrected, in the interests of both the Appellant and the judge.

[12] However, the inaccurate statement of the facts relating to the issuance of the student permit and work permit do not seem to have inconvenienced the Appellant. The grounds of appeal do not refer to the admission of facts. Having regard to this and to the decision of the Federal Court of Appeal in *Hammill v. Canada*, [2005] F.C.J. No. 1197 (QL), I will say no more on this point other than to reiterate the

importance of correcting inaccurate facts set out in a reply to a notice of appeal when the Respondent's representative sees or could see them, given that these are his or her own client's testimony and documents. In a case like the Appellant's, it would also have been useful to have a chronology of the spouses' status as temporary residents in the Reply.

[13] The Federal Court of Appeal stated, at paragraphs 29 and 31 of the decision in *Hammill*:

> 29 Specifically, the Appellant argues that the Tax Court Judge was bound by the facts as admitted, even if contrary evidence was adduced at trial. Sopinka, *The Law of Evidence in Canada*, 2nd ed, Butterworths, 2004 at page 1051; *Urquhart v. Butterfield* (1887), 37 Ch.D. 357, at 369 and 374; *Copp v. Clancy* (1957), 16 D.L.R. (2d) 415, at 425, are relied upon in this regard.
>
> ...
>
> 31 In an appeal against an assessment under the Act, the outcome does not belong to the parties. Public funds are involved and the Tax Court is given, in the first instance, the statutory mandate to confirm or vary the assessment based on the facts, proven or admitted. In this respect, while the Court will not generally look behind a formal admission, the parties cannot by agreement dictate the outcome of a tax appeal. The Tax Court is not bound by an admission which is shown, through properly tendered evidence, to be contrary to the facts.

[14] I will now come back to the arguments. Mohammad Hassan Sattari, the Appellant's spouse, represented her at the hearing. He testified. He produced a document as Exhibit A-1 entitled "Confirmation of Permanent Residence". Item 19 is marked "CH1". According to Mr. Sattari, that notation meant humanitarian considerations, and this is admitted.

[15] According to Mr. Sattari, this means that he is a member of a class of immigrants class in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*, within the meaning of subparagraph (*e*)(iv) of the definition of "eligible individual".

[16] On this point, he also produced a letter from an immigration officer, dated November 24, 2005.

[17] He referred to the first two paragraphs:

> [TRANSLATION]

> ...
> First, the humanitarian factors are assessed in order to decide whether you should be exempted from the requirement that you obtain a permanent resident visa before coming to Canada [A11(1)]. On November 24, 2004, the circumstances of your application were reviewed. We are pleased to inform you that there are sufficient humanitarian grounds and the exemption is granted.
>
> Second, **you and your family members, if applicable, must meet all of the other statutory requirements of the *Immigration and Refugee Protection Act*** (IRPA)[A21], such as the requirements relating to medical examination, security and passport, obtaining a "Quebec Selection Certificate" (QSC) and/or the provisions regarding your support. Under the Canada/Quebec Accord, our decision to approve your application for exemption will be forwarded to the Ministère des Relations avec les Citoyens et de l'Immigration (MRCI). Representatives of MRCI will contact you to assess your situation.

[18] As mentioned earlier, Carole Lahaie produced a chronology of the visitor permits, temporary resident visas, student permits and work permits relating to the Appellant and her spouse, Mr. Sattari, from 1992 to April 27, 2004, the date when extensions of the permits were refused. From that date forward the Appellant and her spouse were no longer temporary residents.

[19] On May 11, 2004, an inadmissibility report was written. On May 20, 2004, an exclusion order was made. On the same date, the Appellant and her husband were offered an opportunity to request a stay of removal, because they were eligible for a pre-removal risk assessment. The removal order became enforceable on December 16, 2004. On January 5, 2005, they asked to make an application for permanent residence for humanitarian considerations (HC). On November 24, 2005, the application was approved in principle. On July 4, 2007, they were granted permanent resident status.

[20] Ms. Lahaie explained that the expression "humanitarian considerations", in this context, refers to the fact that the person may make a permanent resident application within Canada rather than being required to go to a foreign country to make the application. Under the regulations, the application should be made outside Canada.

[21] This is how the first two paragraphs of the letter dated November 24, 2005, must be understood. The third from last paragraph confirms this interpretation:

> [TRANSLATION]
> ...

> You have been exempted, in part, because of the undue hardship you would face if you had to leave Canada and make an application outside the country, as is normally required. If you leave Canada, there is no guarantee that you will be readmitted to continue this application.

[22] Ms. Lahaie explained that subparagraph (*e*)(iv) of the definition of "eligible individual" refers to classes of immigrants applying for visas outside Canada. She said that these are cases that are processed before arrival in Canada.

Analysis and Conclusion

[23] It should be noted, first, that the *Humanitarian Designated Classes Regulations* were repealed on June 28, 2002. See sections 354 and 365 of the *Immigration Regulations*. The *Immigration Act* was also repealed on June 28, 2004, and replaced by the *Immigration and Refugee Protection Act*.

[24] I will now deal with Mr. Sattari's first argument, that three of his children are Canadian citizens. Unfortunately, that has no effect on the status of the father or mother as an "eligible individual" within the meaning of the Act.

[25] On the main argument, that he and his wife are members of a class of immigrants defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*, within the meaning of subparagraph (*e*)(iv) of the definition of "eligible individual", we have learned that these regulations applied only to persons outside Canada.

[26] As well, because those regulations were repealed on June 28, 2002, as noted earlier, they were not in force at the time of the events in issue, that is, from July 2004 to November 2006. While the reference in the definition of "eligible individual" has been retained, it must be assumed that this was in order to preserve rights to the Canada Child Tax Benefit for people who were admitted to Canada on that basis.

[27] The expression "humanitarian considerations" used in the certificate of permanent residence and in the letter dated November 24, 2005, necessarily refers to the permission given to the Appellant and her spouse to apply for permanent residence within Canada and not outside Canada, which permission was granted in the exercise of the discretion of the responsible Minister, under subsection 25(1) of the *Immigration and Refugee Protection Act*.

[28] Section 11 of the *Immigration Regulations* provides that an application for a permanent resident visa must be made outside Canada. However, subsection 25(1), referred to above, allows the Minister or the Minister's agent to grant an exemption from any applicable obligation if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. That subsection reads as follows:

> 25(1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

[29] Section 68 of the *Immigration Regulations* allows permanent resident status to be granted in these circumstances even if the applicant is in Canada.

[30] This is the sense in which, based on the evidence presented both by Mr. Sattari and by the Respondent, the expression "humanitarian considerations" was used in relation to the confirmation of Mr. Sattari's permanent resident status.

[31] Neither the Appellant nor her spouse was an eligible individual within the meaning of the various subparagraphs of paragraph (*e*) of the definition in section 122.6 of the Act. Accordingly, the appeals must be dismissed.

Signed at Ottawa, Canada, this 29th day of November, 2007.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 24th day of January 2008
Monica F. Chamberlain, Translator

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APPEARANCES:

Agent for the Appellant:	Mohammad Hassan Sattari
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COUNSEL OF RECORD:

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