Docket: 2013-2332(IT)I

BETWEEN:

VIBHU RAJ JHANJI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 28, 2014, at Winnipeg, Manitoba.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Beth Tait

JUDGMENT

The appeal from a determination made under the *Income Tax Act* in respect of the Canada Child Tax Benefit for the 2010 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

Signed at Edmonton, Alberta, this 29th day of April 2014.

"Robert J. Hogan"

Hogan J.

Citation: 2014 TCC 126
Date: 20140429
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BETWEEN:

VIBHU RAJ JHANJI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] This is an appeal from a decision by the Minister of National Revenue (the "Minister") that the Appellant was not entitled to the Canada Child Tax Benefit (the "CCTB") for the 2010 base taxation year because his son did not reside with him during that period. The 2010 base taxation year is from July 1, 2011 to June 30, 2012.

II. Factual Background

[2] The Appellant is a lawyer from India. In 2004, he and his wife applied to immigrate to Canada with their son, D. They were accepted as skilled workers in 2010 and visited Canada for ten days in January 2011 to claim status as permanent residents.

[3] Tragically, upon their return to India, the Appellant's wife fell ill with fast-spreading cancer. She died in May of that year. The Appellant described his late wife as a brilliant teacher who had two master's degrees, one in Economics (with Honours) and one in Education (with Distinction). She was a gold medalist at Punjab

University in Chandigarh. Two months after the death of his wife, the Appellant's mother also passed away.

[4] The Appellant kept D, who was thirteen at the time, enrolled in the Indian boarding school he had attended since 2006. Hard hit by the loss of his wife and mother and having seen his family's move to Canada disrupted, the Appellant decided to first establish himself in Canada so as to not disrupt his son's education in India. The Appellant believed that this would provide D with a modicum of stability following the loss of his mother. The Appellant then moved to Canada in August 2011, eventually settling in Winnipeg.

[5] The Appellant took up residence in shared accommodations and was hired as a dispatcher for a trucking company. At the same time he began the process of getting admitted to the Manitoba Bar.

[6] The Appellant has resided in Winnipeg ever since. He supports his son financially and maintains close contact with him. The Appellant pays some $6,000 per year for D's boarding school tuition, plus the costs of travel, clothing and tutoring. According to the Appellant, D rarely gets breaks from boarding school. When he does, he stays with the Appellant's sister, his brother's family and his father in the extended family's shared home in India. The Appellant has returned to India twice to spend time with his son at the family home: once in August 2012, for two weeks, and again for two months during D's winter break from November 2012 to January 2013. The Appellant was unable to return home between July 1, 2011 and June 30, 2012 because he had just arrived in Canada and could not afford to return.

[7] D has not been back to Canada since the family's ten-day trip at the beginning of 2011. The Appellant has preferred to travel to India to spend time with his son because of his limited living space in Winnipeg and also because it is less expensive for the Appellant to spend time in India than to have his son visit him in Winnipeg. These trips also gave the Appellant the opportunity to visit his ailing father and his siblings. In addition, the Appellant's son, D, has been assisted by a tutor during his winter break.

[8] The Appellant intends to bring his son to Canada this spring. At that point, D will have completed Grade 10, and the Appellant expects to be more settled by then and to be ready to work in the legal field. The Appellant wants D to be able to undertake post-secondary education in Canada. Indeed, when the Appellant arrived in Canada he quickly opened an RESP account for D, making an initial deposit of

$2,500 and depositing $300 each month ever since. The account balance is now approaching $9,000.

[9] The Appellant applied for the CCTB to offset the expenses of supporting his child. The Respondent asserts that the Appellant does not meet the requirements of the definition of an "eligible individual" under section 122.6 of the *Income Tax Act* (the "ITA") because his son did not reside with him. The Appellant contends that he satisfies the requirements. The Appellant has also raised a number of constitutional arguments regarding how the Minister has applied the law in this case.

III. Issues

[10] The following questions are raised in this appeal:

(A) Was the Appellant an "eligible individual" from July 1, 2011 to June 30, 2012?
(B) If not, did the Minister breach the constitutional rights of the Appellant or his son as guaranteed by the *Canadian Charter of Rights and Freedoms*?

IV. Analysis

[11] The CCTB is a monthly payment made to eligible families to help them offset the costs of raising children. In order to receive the benefit a taxpayer must be an "eligible individual" under section 122.6 of the ITA. To meet the requirements of this definition the taxpayer must:

(A) reside with the child;
(B) be the one primarily responsible for the care and upbringing of the child;
(C) be a resident of Canada; and
(D) be a Canadian citizen, a permanent resident, a protected person, or a temporary resident who has lived in Canada for the previous 18 months and who has a valid visa permit in the nineteenth month.

[12] The evidence shows that the Appellant was still residing in India in July 2011 and cannot be an eligible individual for that month. The issue is whether he is an eligible individual for the remaining months of the 2010 base period.

[13] The Respondent admits that the Appellant is a permanent resident who has resided in Canada since August 2011 and who is D's primary caregiver, but contends that D did not reside with the Appellant during the 2010 base taxation year.

[14] The ITA does not define "resides" or "resides with". This Court has most often relied on the definition formulated by Judge Bonner in *S.R. v. The Queen*:[1]

> 12 . . . The threshold test is whether the child resides with the parent. Physical presence of the child as a visitor in the residence of a parent does not satisfy the statutory requirement. The word "resident" as used in s. 122.6 connotes a settled and usual abode.[2]

[15] This Court has, on occasion, interpreted the term "resides" more broadly so as not to frustrate the legislative intent of the CCTB regime. For example, in *Bouchard v. The Queen*,[3] this Court awarded the CCTB to a single father while he was incarcerated. In coming to this decision, Woods stated the following:

> 18 In my view, the child tax benefit provisions should be interpreted in a compassionate way in these types of circumstances so as not to frustrate the obvious intention of Parliament to assist low income families.
>
> 19 Where there is one parent who has custody of the child and takes care of the child, generally that parent should be entitled to the child tax benefit even though the parent may not be physically under the same roof as the child for a period of time.
>
> 20 The circumstances in which the daughter found herself in here are tough for a 17 year old. To deny the benefit to her custodial parent who took care of her would be the antithesis of what Parliament had in mind in enacting the family benefit regime.

[16] This line of reasoning is consistent with other decisions of this Court. In *Fiogbe*,[4] Judge O'Connor commented in *obiter dictum* that parents would not necessarily become ineligible for the CCTB if their child had to stay in hospital for an extended period of time.[5]

[17] In *Penner v. The Queen*,[6] the Court found that a parent will not be precluded from receiving the CCTB while a child is in boarding school. In that case, the

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1 2003 TCC 649. In *Fiogbe v. The Queen*, 2007 TCC 454, O'Connor referred to this passage as the most often cited definition of "reside".
2 *S.R. v. The Queen*, *supra*.
3 2009 TCC 38.
4 *Supra*, note 1.
5 *Ibid*. at para 6.
6 2006 TCC 413.

appellant was the primary caregiver of her granddaughter. The appellant worked in a remote village in Northern Saskatchewan. She decided to have her granddaughter attend school in a larger town and to that end sent her to live with a social worker with whom the appellant's minister had put her in touch. The appellant paid the social worker room and board on her granddaughter's behalf and maintained legal custody of her granddaughter. Beaubier held that the circumstances were analogous to sending the child to boarding school and concluded that in such instances the child's parent, or grandparent in that particular case, would remain an "eligible individual".

[18] In *Charafeddine v. The Queen*,[7] Sheridan held that the appellant had met the requirement of residing with her children despite the fact that her children had been abducted by their father and were in Lebanon. Sheridan acknowledged that, in cases related to the CCTB, "reside" normally means "to live in the same house as". Nonetheless, she determined that "[b]ut for their father's wrongful detention of them in Lebanon, the little girls would have been physically present in Canada".[8] Sheridan went on to conclude as follows:

> 16 . . . there are some cases where, in the unusual circumstances of the case, the Court has found residency to exist even when the parent and child were not physically present in the same abode. . . . Residency is a question of fact that can only be decided in the particular circumstances. The legislative objective of putting financial resources in the hands of the parent upon whom the children are dependent for their care and well being must also be respected.[9]
>
> [Emphasis added.]

[19] In summary, I find helpful in the instant case the comments of Sheridan that residency can only be determined in the particular circumstances of that case, and those of Woods suggesting that the Court should not determine residency in a manner that frustrates Parliament's obvious intention to assist families.[10]

[20] The facts before me suggest that, but for the tragic and unexpected death of the Appellant's wife, the family would be living together in Winnipeg. The family came to Canada in 2010 to obtain their permanent residency status and plan their move to Canada. The death of D's mother meant that there would be one less parent to take care of D and one less income earner to support the family in their new country. The

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[7] 2010 TCC 417.
[8] *Ibid*. at para. 15.
[9] *Ibid*.
[10] The Appellant also cited *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, in support of his argument that legislation conferring benefits should be interpreted in a broad and generous manner.

Appellant believed that under these new circumstances it would be best for D to remain at the boarding school he had been attending the six previous years. This offered the Appellant's son greater stability as the Appellant took steps to establish the family permanently in Canada.

[21] The Appellant kept the role of D's primary caregiver and paid his boarding school tuition and his expenses. It was arranged by the Appellant that D, during his infrequent breaks from school, would live in the Appellant's quarters at the extended family's shared home. The Appellant could not afford to return to India to visit D during the 2010 base taxation year, but he returned twice the following year. This was more suitable than bringing D to Winnipeg as the Appellant's accommodations were less than ideal for hosting his son and D was receiving tutoring in India during his vacations. Throughout his time in Canada the Appellant has been making monthly contributions to an RESP account so that D will be able to receive post-secondary education when he moves to Canada in the near future.

[22] Given my finding that the Appellant and D would have been living together during the period at issue were it not for the unforeseen death of the Appellant's wife, I conclude that the Appellant and D can be considered as having constructively resided together from August 2011 through June 2012. The CCTB regime was designed to support families in their efforts to meet their basic needs and improve their economic circumstances. I do not believe that the legislative intent behind the residency requirement was to exclude otherwise eligible families who have had to adapt to unfortunate circumstances.

[23] For all of these reasons I find that the Appellant was an "eligible individual" from the month of August 2011 onwards during the 2010 base period.

[24] In view of my answer to the first question, it is unnecessary for me to consider the second issue.

V. Conclusion

[25] On the basis of the reasons set out above, I find that the Appellant is entitled to the CCTB from August 2011 through June 2012.

Signed at Edmonton, Alberta, this 29th day of April 2014.

"Robert J. Hogan"

Hogan J.

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COURT FILE NO.:	2013-2332(IT)I
STYLE OF CAUSE:	VIBHU RAJ JHANJI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	February 28, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice Robert J. Hogan
DATE OF JUDGMENT:	April 29, 2014

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Beth Tait

COUNSEL OF RECORD:

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Name:	
Firm:	

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