Federal Court Cour fédérale

Date: 20230425

Docket: T-688-21

Citation: 2023 FC 595

Toronto, Ontario, April 25, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

XIN YAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant asks the Court to set aside two decisions made by the Canada Revenue Agency ("CRA") on April 21, 2021. Those decisions denied his application for benefits under the *Canada Emergency Response Benefit Act*, SC 2020, c. 5 (the *"CERB Act"*) and the *Canada Recovery Benefits Act*, SC 2020, c. 12 (the *"CRB Act"*).

[2] The applicant's position is that CRA did not provide him with procedural fairness and that the two decisions were unreasonable under the principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the following reasons, I conclude that the application must be dismissed.

I. Summary of this Decision

[4] In these reasons, I conclude that there is no basis for this Court to intervene with the decisions made by CRA to deny the applicant's requests for CERB and CRB payments.

[5] On this application for judicial review of CRA's decisions, I am not permitted to re-examine the evidence to decide what I would have done in the CRA's place, or to correct the Second Reviewer's decision if I were to disagree with the conclusion reached by the Second Reviewer. I have to determine whether CRA's decisions were reasonable. In past cases, the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court have described what it means for a decision to be "unreasonable." I have applied those general legal principles to this case. I also have read and applied prior court decisions involving CERB and CRB payments.

[6] In this decision, I conclude, first, that the applicant did not prove that he sent any additional documents to CRA for consideration, except for the ones CRA acknowledged were considered by the Second Reviewer.

[7] Second, the applicant did not convince me that CRA deprived him of procedural fairness as he claimed.

[8] Third, I conclude that CRA's Second Reviewer reasonably applied the eligibility criteria in the two statutes enacted by Parliament, the *CERB Act* and the *CRB Act*. In addition, the Second Reviewer did not make any fundamental errors when looking at the evidence that was in CRA's possession when he made the decisions.

[9] Taking everything into account, and for the reasons detailed below, I conclude that CRA's decision was reasonable and complied with the law. The respondent Attorney General of Canada therefore succeeds on this application.

II. The Evidence on this Application

[10] The evidence on this application was comprised of materials filed by the applicant, including his affidavits dated March 16, 2022 and April 7, 2022, and a number of documents that were, it appears, included in the Application Record without formal proof by way of supporting affidavit. During this proceeding, the applicant attempted several times to file an application record that complied with the *Federal Courts Rules*. Eventually, by Order dated September 26, 2022, the Court permitted the applicant to file his record in order to move this matter forward to a hearing, without prejudice to later arguments from the respondent. The respondent raised no arguments at the hearing on this issue.

[11] The respondent filed three affidavits from Mr McHugh, who performed CRA's second review of the applicant's applications for benefits under the two statutes (the "Second Reviewer"). The Second Reviewer's affidavit attached two internal CRA documents (one each for the CERB and CRB decisions) whose contents were prepared by the CRA officials who reviewed the applicant's requests for benefits (the "Second Review Reports").

[12] The applicant cross-examined Mr McHugh in writing. His answers are before the Court on the application.

III. Events Leading to this Application

A. *Benefits under the Statutes*

[13] In 2020, to alleviate the economic impacts of the COVID-19 pandemic, Parliament enacted the *CERB Act* and the *CRB Act* to provide financial support to persons who met certain eligibility criteria and were affected by the COVID-19 pandemic. CRA was assigned to decide whether persons met the eligibility criteria for benefits.

[14] The *CERB Act*, effective on March 25, 2020, provided financial support to employed and self-employed workers directly affected by the COVID-19 pandemic. Under subsection 5(1) of the *CERB Act*, benefits were available for the period of March 15, 2020, to October 3, 2020. To be eligible for benefits under the applicable provisions, a person must have had a total income of at least $5,000 from certain sources stated in the legislation for 2019 or in a 12-month period preceding the day on which the person made an application for the benefits. Under section 6 of the *CERB Act* and the *Income Support Payment (Excluded Nominal Income) Regulations*,

SOR/2020-90, section 1, a person is eligible for benefits if the person stopped 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 and the worker did not receive, in respect of the consecutive days on which they had stopped working, more than $1,000 in employment or self-employment income, or other prescribed benefits or allowances.

[15] The *CRB Act*, effective on October 2, 2020, provided financial assistance to persons who were not employed or experienced a specified reduction in their income "for reasons related to COVID-19" but who were not entitled to Employment Insurance benefits: see *CRB Act*, esp. paragraph 3(1)(*f*). The CRB was offered for the period from September 27, 2020, until October 23, 2021. To be eligible for benefits under the applicable provisions, a person must have had a total income of at least $5,000 from certain sources stated in the legislation for 2019 or 2020 or in a 12-month period preceding the day on which the person made an application for the benefits.

B. ***The applicant's application for benefits***

[16] The applicant is a resident of Ontario. Starting in 2016, he had a disability leading him to receive benefits from the government of Ontario under the *Ontario Disability Support Program Act*, 1997, S.O. 1997, c. 25, Sch. B.

[17] In August and September 2018, the applicant worked as an Uber driver. The applicant advised that his work was supported financially by the same Ontario program (the "ODSP"). In those two months, he made approximately $1,500 as an Uber driver.

[18] In October 2018, the applicant was injured and hospitalized for a lower back problem. He advised that he had physical therapy starting in late 2018 and was unable to work and drive for Uber. He made only a small amount of money during 2019. He advised that he had flu-like symptoms in October 2019. In 2020, he expected to continue working and earning employment income.

[19] In March 2020, the COVID-19 pandemic occurred and the applicant advised that he could not work as an Uber driver.

[20] Sometime soon after the pandemic occurred, the applicant applied for and initially received CERB payments. Payments to him occurred in respect of seven two-week periods starting in March and ending in late September 2020.

[21] In October 2020, the applicant applied for additional CERB payments and also applied for the CRB. He sent CRA a letter dated October 14, 2020, by fax with five pages attached. The attachments were an invoice from Canadian Tire dated August 12, 2020, for an Uber vehicle inspection and an Ontario Ministry of Transportation Safety Standards Certificate for a motor vehicle.

[22] The applicant's letter dated October 14, 2020, took the position he was qualified for the CRB. He stated that he received full CERB and the CRA refused to transfer him to the CRB "because there was no $5,000 income in 2019 and 2020. It is not clear and fair."

[23] The same letter advised CRA:

> I was disability from 2016 because injured in work-place. ODSP supported me to find the Uber from May 2018, and based on ODSP Policy, after my Uber's income – $200, the ODSP reduced half of others from its support. So I was self-employment and got income over $900 at September 2018. But I was sent to the hospital at October 8, 2018 because fall off the staircase, resulted in left waist seriously injured and cannot do Uber for one year.
>
> In October 2019, I got body hotter and coughed like today's COVID - 19, my family doctor treated like as flu for three months and at last let me use the Airsense 10 for breath because the doctor was worried about that I maybe die at sleep. Now the doctor applied this machine for me without costs.
>
> So with SICKNESS AND COVID-19, I did not get income $5000 in 2019 and 2020, but I still was a self-employee of the Toronto Uber and the ODSP deducted $900 per month from the CRV $2000. I should be qualified for the CRB.

[24] The applicant advised that he faxed additional documents to CRA in October 2020. They will be addressed below.

C. *CRA's First Review Decisions*

[25] By separate letters dated January 7, 2021, CRA advised that it denied the applicant's applications for CERB and CRB payments.

[26] In the first letter dated January 7, 2021, CRA advised the applicant of its decision concerning his application for the CERB. CRA advised that based on its review, the applicant was not eligible for CERB payments. It confirmed that the applicant had received the CERB for seven two-week periods from March 15, 2020 until September 26, 2020. The applicant was not eligible because he did not meet the following criteria:

> You did not turn at least $5,000 (before taxes) of employment or self-employment income in 2019 or in the 12 months prior to the date of your first application.
>
> You did not stop working, or had your hours reduced, for reasons related to COVID-19.

[27] The letter advised that if he received a CERB payment that he was not eligible for, he would be required to repay the amount.

[28] In a second letter dated January 7, 2021, CRA advised of its decision concerning the applicant's request for the CRB. CRA found that he was not eligible, for failing to meet the same criteria relating to his employment or self-employment income in 2019, 2020 or in the 12 months prior to the date of his first application.

[29] This second letter advised the applicant that if he did not agree with the decision, he could request a second review, which would be completed by an officer who was not involved in the first review and decision.

[30] The letter also advised the applicant that his request for a second review must include the following:

- the reason why you disagree with the CRA's decision, for example not all information was considered, certain facts or details were missing or misinterpreted or not considered in their proper context; and
- any relevant new documents, new facts or correspondence; and
- general contact information, your current home address and current phone number.

D. ***The Applicant seeks a Second Review by CRA***

[31] By letters dated January 12, 2021, sent by fax to CRA, the applicant advised CRA that he did not agree with its decisions.

[32] With respect to the CERB, the applicant's first letter dated January 12, 2021, advised that he did meet the criteria for CERB:

> 1. By the ODSP Policy, the Toronto Uber is my self-employed job started from July 2018, which is disability-related job and paid by both ODSP office and customers.
> 2. In 2019, my total income is over $20,000. Affected by COVID - 19, I cannot work in 2020. I applied CERB total $14,000 and ODSP office charged total $6,300. (By ODSP Policy, the income of the disability related job must be charged 50% from monthly income over $200).
>
> **So I do earn over $5000 of the Toronto Uber income in 2019 and affected by COVID – 19. I did stop working as an Uber in Toronto area.**
>
> [Original emphasis.]

[33] With respect to the CRB, the applicant's second letter dated January 12, 2021, advised that he did meet the criteria for CRB:

> 1. By the ODSP Policy, the Toronto Uber is my self-employed job started from July 2018, which is disability-related job and paid by both ODSP office and customers.
> 2. In 2019, my total income is over $20,000. Affected by COVID - 19, I cannot work in 2020. I applied CRB as zero but the ODSP Office charged $900 monthly from October 2020. (By ODSP Policy, the income of the disability - related job must be charged 50% from monthly income over $200)
> 3. Disability – related job is a job. If you do not admit, it should be discrimination against my disability!
>
> **So you should pay me CRB from October 2020 because I do earn over $5000 of the Toronto Uber income in 2019 and affected by COVID – 19. I did stop working as an Uber in Toronto area.**
>
> [Original emphasis.]

E. *CRA's Second Review Decisions*

[34] CRA made two decisions in response to the applicant's letters applying for benefits, one for each of the *CERB Act* and the *CRB Act* applications. Both are under review in this proceeding. Together, I will call them the Second Review Decisions.

[35] The Second Review Decisions were made by the same decision-maker (the CRA Second Reviewer) and memorialized by separate letters dated April 21, 2021.

[36] Both decisions found that the applicant was not eligible for the statutory benefits because he did not meet the following criteria:

a) The applicant did not earn at least $5,000 (before taxes) of employment or self-employment income (for the CERB, in 2019 or in the 12 months prior to the date of your first application; and for the CRB, in 2019, 2020 or in the 12 months prior to the date of his first application); and
b) The applicant did not stop working, or have his hours reduced, for reasons related to COVID-19.

IV. Materials before the CRA Second Reviewer

[37] On an application for judicial review, the reviewing court analyzes the reasonableness of the decision maker's decision based on a formal "record". As will be explained below, the general rule is that the record contains only the materials that were before the decision maker when the decision was made. There are narrow and specific exceptions to this general rule, none of which applies in the present case as explained below.

[38] On this application, there is a dispute between the parties as to what was in the possession of CRA and its Second Reviewer when he made the Second Review Decisions.

A. *Undisputed Materials before the Second Reviewer*

[39] There is no dispute that the materials in the possession of the Second Reviewer prior to the Second Review Decisions included:

- the applicant's faxed letter dated October 14, 2020 and its attachments (Canadian Tire invoice and Ontario Vehicle Safety Certificate);
- the first reviewer's letters dated January 7, 2021;
- the applicant's two letters dated January 12, 2021;
- some of the contents of the internal CRA Second Review Reports (namely, the notes and entries made by the first reviewer);
- the applicant's personal information, including his mailing address, as recorded on the CRA's computer system as of April 30, 2021;
- the Applicant's income and the deductions from income for the 2018, 2019 and 2020 taxation years as recorded on the CRA's computer system; and
- the Applicant's tax information slips for the 2018, 2019 and 2020 taxation years as recorded on the CRA's computer system.

B. *Were Any Other Documents before the Second Reviewer?*

[40] The parties did not agree on whether certain additional documents were before the Second Reviewer and therefore whether the formed part of the decision maker's record for the purposes of this judicial review.

[41] The applicant advised that he attached four additional documents to this fax message to CRA in October 2020. The additional documents included:

a) a certificate of health status for the applicant dated December 17, 2018;

b) a document dated October 9, 2018, describing diagnostic imaging on the applicant;

c) a letter dated July 6, 2020, to the applicant from the Ontario Ministry of Children, Community and Social Services entitled “Important Notice about Canada Emergency Response Benefit (CERB)”; and

d) Statement of Assistance (ODSP/POSPH) for June 2020 from the Ontario Ministry of Children, Community and Social Services.

[42] The Second Review Reports did not mention the four additional documents, nor were they otherwise attached to any of the Second Reviewer’s affidavits. The Second Reviewer’s supplementary affidavit sworn on September 28, 2021, advised that he did not have the four documents during the second review. The Second Review Reports confirmed that CRA received two documents from the applicant prior to CRA’s first review decisions, specifically with a letter from the applicant, “vehicle invoicing from Canadian Tire” and “Ontario Ministry of Transportation Safety standard certificate”.

[43] On cross-examination in writing, the Second Reviewer confirmed that CRA reviewed the applicant’s letters dated October 14, 2020 (with attachments) and January 12, 2021.

[44] There is no documentary evidence in the record to show that the applicant faxed the four additional documents to CRA in October 2020, or at any time before he commenced his application for judicial review. In response to a question at the hearing, the applicant confirmed that nothing in the record confirmed that the four additional documents were faxed to CRA at that time.

[45] The preponderance of the evidence on this application leads to the conclusion that the applicant has not established that he sent the four additional documents to CRA in October 2020 or at any time prior to the Second Reviewer's decisions that are at issue in this proceeding. I conclude that these additional documents were not part of the record before the decision-maker for the purposes of this judicial review location.

[46] The applicant also argued that two additional documents should be considered on this application: a copy of the applicant's ODSP payments during certain months (August and September 2018, and April to October 2020), contained in a letter dated June 9, 2021, from the Ontario Ministry of Children, Community and Social Services; and copies of the applicant's Notices of Assessment for his employment income for the 2018 and 2019 taxation years.

[47] The letter dated June 9, 2021, cannot be part of the record before the Second Reviewer when he made the decisions because it post-dates the Second Review Decisions. The contents of the applicant's tax returns for 2018 and 2019 were available to the CRA reviewers and, according to the evidence, considered by the Second Reviewer.

[48] The applicant submitted that the respondent's letter dated May 14, 2022, acknowledged that these documents were sent to the CRA and were therefore part of the record for the Second Review Decisions. The applicant also submitted that the respondent's letter wrongly and improperly objected to his request under Rule 317 of the *Federal Courts Rules*. However, the respondent's letter did not contain the alleged acknowledgement. The letter objected to producing the two sets of documents for three reasons: the Ontario Ministry was not a party to this proceeding, the documents were not before the Second Reviewer, and the Notices of Assessment were in the applicant's possession. Although the applicant submitted otherwise, I also see nothing inherently improper about the contents of the letter. In any event, such arguments could and should have been made and resolved by motion before the hearing of this application.

[49] The applicant filed an "Affidavit of Exhibits" dated June 18, 2021. It attached the same letter dated June 9, 2021, from the Ontario Ministry of Children, Community and Social Services summarizing the applicant's ODSP payments in August and September 2018 and April to October 2020. It also attached Scotiabank records from August to September 2018 that appeared to show deposits related to the applicant's work with Uber.

[50] The Second Reviewer confirmed that the ODSP payments letter dated June 9, 2021, and the Scotiabank records from August to September 2018 were not made available to him during the second review.

[51] The applicant alleged that CRA "held back" documents that were in its possession, namely the additional documents the applicant claimed to have sent to CRA by fax message with his letter dated October 14, 2020. Apart from his own statement that he sent the documents to CRA, the applicant did not refer to any evidence that supported, or was consistent with, his position that CRA was in possession of the documents but failed to disclose them in the Second Reviewer's affidavit or in answer to the applicant's questions on written cross-examination. I see no basis in the evidence that shows, or implies, that CRA held back documents as the applicant alleged. Without such support, the applicant's allegation cannot be taken into account: *Flock v Canada (Attorney General)*, 2022 FCA 187, at para 8.

[52] The applicant raised concerns about of CRA's internal copy of his fax cover sheet sent on October 14, 2020, because at the top, it contained a date in 2011 (more than a decade ago). The applicant was concerned that this document was fraudulently created. I suspect there is a much simpler explanation: the fax machine at CRA itself automatically inserted the erroneous date at the top of the document. In any event, nothing substantive turns on it because it is clear from the applicant's letter itself that it was sent on October 14, 2020, and the respondent did not allege otherwise.

V. Admissibility of New Evidence on this Application

[53] The applicant requested that the Court admit, as additional or fresh evidence on this application, the documents the applicant claimed were before the Second Reviewer. The respondent submitted that these documents do not meet the legal criteria for new evidence on

judicial review applications (citing *Greeley v Canada (Attorney General)*, 2019 FC 1493, at para 28).

[54] On a judicial review, the general rule is that the evidentiary record before the reviewing court is restricted to the evidentiary record that was before the administrative decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is not admissible on an application for judicial review in this Court: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19; *Santaguida v Canada (Attorney General)*, 2022 FC 523, at paras 32-34; *Aryan v Canada (Attorney General)*, 2022 FC 139, at para 42. In *Andrews v Public Service Alliance of Canada*, 2022 FCA 159, at para 18, de Montigny JA explained:

> It is beyond dispute that, in principle, the only evidence that can be considered in a judicial review application is the evidence that was before the decision maker: [citations omitted]… This principle derives from the role of a reviewing court, which is not to make findings of fact or to determine matters on the merits, but rather to examine the reasonableness of the administrative decision maker's decision. For a reviewing court to accept fresh evidence on judicial review would be tantamount to performing a *de novo* analysis of the evidence itself.

[55] There are three exceptions to the general rule: (i) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (ii) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision maker, to enable the court to fulfil its role of reviewing the decision for procedural unfairness; and (iii) an affidavit that highlights the complete absence of evidence before the decision-maker when it made a particular finding. There may be additional

exceptions, as the list is not closed. See *Association of Universities*, at para 20; *Santaguida*, at para 33; *Greeley*, at para 28.

[56] In my view, these new documents are not admissible to fortify the applicant's arguments about the substantive reasonableness of the Second Review Decisions. In addition, I am not persuaded that they are relevant to any procedural fairness argument raised by the applicant. I conclude therefore that the documents should not be admitted on this application.

VI. Hearing in this Court

[57] At the hearing in this Court, the applicant made submissions using prepared notes. In accordance with discussions at a pre-hearing case conference on February 16, 2023, a professional interpreter assisted the applicant to make his submissions and to understand the respondent's submissions and questions from the Court. The applicant made his submissions both through the interpreter and in English himself. He answered questions from the Court in the same manner. The Court appreciates the applicant's efforts and acknowledges his submissions, the essence of which showed an underlying understanding of reasonableness review principles.

[58] During the respondent's submissions, the interpreter assisted the applicant. In addition, the respondent's counsel's submissions were made at a pace amenable to translation, and she paused regularly to ensure that the interpreter was able to translate comfortably for the applicant. The Court appreciates the sensitive and professional contribution of the respondent's counsel to the conduct of the hearing.

[59] The Court also recognizes and is grateful for the work of the interpreter.

[60] The applicant did not raise any concerns during or after the hearing about the interpretation or his ability to communicate his own submissions and to understand the Court and the respondent.

VII. Analysis

A. *Did CRA deprive the applicant of procedural fairness?*

[61] If a procedural fairness question arises on an application for judicial review, the Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected. While technically no standard of review applies, the Court's review exercise is akin to correctness: *Hussey v Bell Mobility Inc,* 2022 FCA 95, at para 24; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196, [2021] 1 FCR 271, at para 35; *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55; *Larocque v Canada (Attorney General),* 2022 FC 613, at para 25.

[62] The applicant made a number of submissions related to procedural fairness. His principal concern was that CRA made insufficient efforts to contact him by failing to call his mobile telephone number. He pointed out that this number was available on the Canadian Tire invoices. Instead, he submitted that CRA only attempted to contact him by telephoning his fax number.

[63] The respondent submitted that the legal requirement for procedural fairness is to provide the applicant with a meaningful opportunity to be heard. The respondent argued that the applicant had ample opportunity to be heard, and was heard, because he submitted his letters dated October 14, 2020, and January 12, 2021. The respondent noted that the first CRB decision dated January 7, 2021 advised the applicant to include any new information he wished to be considered and to include contact information including his telephone number. The respondent observed that CRA attempted many times to reach the applicant by telephoning him, using the telephone number on the cover sheet of his fax in October 2020 that he characterized as both his home telephone number and his fax number. The respondent noted that the Second Reviewer's answers to cross-examination questions also stated that the home/fax number was the one in CRA's file.

[64] While I have some sympathy for the applicant, I find no procedural unfairness in the circumstances. The question is whether the applicant had a full and fair, or meaningful, opportunity to be heard. In my view, he did because he was sufficiently apprised of what he had to show to CRA to prove his claim for benefits and why his first request was denied, and he had the opportunity to make, and actually made, submissions to support his position.

[65] The applicant wrote letters dated October 14, 2020, explaining his situation and providing some documents, which were reviewed by the first reviewer before making the first decisions. He received CRA's letters dated January 7, 2021, notifying him about those decisions, which told him the two reasons why he did not succeed on his application – he did not meet the minimum income threshold and he did not show that his work stopped or his hours were reduced

because of COVID-19. The letter relating to his claim for CRB payments also counselled him about the contents of his request for a second review. That letter told him to advise CRA the reason why he disagrees with the CRA's first decision (and gave examples – "not all information was considered, certain facts or details were missing or misinterpreted or not considered in their proper context"). The same letter also advised him to send "any relevant new documents, new facts or correspondence".

[66] CRA's letters dated January 7, 2021, contributed to the applicant's knowledge of the substantive criteria to establish eligibility for benefits and why he did not succeed on his application during the first review. The CRB decision also told him what kinds of materials and explanations to provide for the second review. The applicant supplemented his submissions with his January 12, 2021 letters. The Second Reviewer considered all of the letters as well as the attachments sent with the letters in October 2021. Unfortunately, the applicant did not submit additional materials for the Second Reviewer's consideration at that time, as CRA suggested in one letter dated January 7, 2021.

[67] Also unfortunately, and contrary to the advice in CRA's letter dated January 7, 2021, the applicant did not provide his contact information and current mobile telephone number in his letter dated January 12, 2021. The applicant's mobile telephone number was only in the Canadian Tire invoice, listed beside his home number (which was the number used by both CRA reviewers to try to contact him, as noted, on several occasions).

[68] The applicant also relied on the content in the Second Reviewer's affidavit, which explained the process for validating an application for the CERB and CRB and states that if necessary, the CRA agent could also request any additional documents or information from the applicant prior to determining eligibility. However, the existence and contents of the guidelines do not assist the applicant's position because they do not impose a mandatory requirement on CRA to call and assist claimants in every case or in his case in particular. Here, CRA attempted to reach the applicant in order to find out more information from him. Regrettably, CRA did not reach him, despite many attempts to do so, because he did not provide his contact information with his request for the second review**.**

[69] In the circumstances, I conclude that the applicant had a fair opportunity to be heard, having been advised of the case to meet before the second review and having made written submissions to support his positions on two occasions. See *Larocque*, at para 26; *Santaguida*, at paras 20, 24.

[70] Accordingly, I conclude that CRA did not deprive the applicant of procedural fairness.

B. ***Were the Second Reviewer's Decisions Reasonable?***

[71] The standard of review relating to the substantive merits of CRA's decisions is reasonableness: *Maltais v Canada (Attorney General)*, 2022 FC 817, at para 18; *Aryan*, at para 16.

[72] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision bear the hallmarks of transparency, intelligibility and justification: *Vavilov*, at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov*, esp. at paras 85, 91-97, 103, 105-106 and 194*; Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

[73] The Supreme Court in *Vavilov*, at paragraph 101, identified two types of fundamental flaws that may warrant intervention from a reviewing court: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. The Court in *Vavilov* contemplated that the reviewing court may consider whether evidence before the decision-maker constitutes a factual constraint on the decision-maker. However, the reviewing court may not reweigh or reassess the evidence and, except in unusual circumstances, may not analyze and decide for itself whether the decision was correct: *Vavilov*, at paras 83, 116, 124, 125-126.

[74] However, not all errors or concerns about the decision under review will warrant intervention. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep". The problem must be sufficiently central or significant to render the decision unreasonable – there must be "sufficiently serious shortcomings" in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov,* at para 100.

[75] The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov*, at paras 75 and 100.

[76] This Court has held that the reasons for the Second Review Decisions include the letters sent to the applicant and the Second Review Reports: *Crook v Canada (Attorney General),* 2022 FC 1670, at para 14 (citing *Kleiman v Canada (Attorney General),* 2022 FC 762, at para 9); *Aryan,* at para 22.

[77] The applicant's principal argument was that he qualified for the CERB and CRB payments and that CRA erred in its analysis of his circumstances by misapplying the *CERB Act* and the *CRB Act*. However, as noted already, the Court cannot revisit the merits of the Second Reviewer's decisions, or reassess or reweigh the evidence. The question is whether the two decisions contain a reviewable error: Were the decisions reasonable, applying the principles in *Vavilov*?

[78] In my view, the applicant has not demonstrated that the Second Review Decisions contained a reviewable error that would permit this Court to intervene.

[79] There is no basis to conclude that the Second Review Decisions contain a "failure of rationality internal to the reasoning process" as contemplated by *Vavilov*, at paragraph 101. The letters setting out the reasons for the Second Review Decisions contained a rational and intelligible line of reasoning.

[80] For the following reasons, I also conclude that the applicant has not shown that the Second Review Decisions were "in some respect untenable in light of the relevant factual and legal constraints" bearing on them: *Vavilov*, at paragraph 101.

(1) Legal Constraints on the CRA Second Review Decisions

[81] Neither of the Second Review Decisions contained an error of law or failed to apply any of the statutory provisions that CRA had to apply.

[82] The statutory provisions required that to be eligible for the benefits, a person "had" to have, during the specified time period in each provision, "a total income of at least $5,000" from the specified sources: see *CERB Act*, section 2 (definition of "worker") and paragraphs 6(1)(*a*) and (*b*); *CRB Act*, paragraphs 3(1)(*d*) and (*f*). In both statutes, Parliament expressly listed the sources of income to be considered for an individual to meet the $5,000 threshold for total income. Those sources were employment, self-employment, certain benefits paid to the person under the *Employment Insurance Act*, and allowances, money or other benefits paid to the person

under a provincial plan because of (to paraphrase) pregnancy or to care for new-born or adopted children: see *CERB Act*, section 2, "worker"**.**

[83] The applicant submitted that the CRA had to obey the applicable statutes enacted by Parliament. I agree. The Federal Court of Appeal has held that CRA has no choice but to apply the eligibility criteria in the legislation and to assess an applicant's entitlement to benefits based on those criteria: *Flock*, at paras 4, 7. The $5,000 income criterion is a firm threshold: *Coscarelli v Canada (Attorney General)*, 2022 FC 1659, at para 29 (applying *Flock*). The Court cannot rewrite or revise the requirements of the statute and a CRA official cannot provide relief on the grounds of fairness only: *Flock*, at para 7. Thus, in order to render reasonable decisions, the Second Reviewer had to apply the requirements of the *CERB Act* and the *CRB Act* when making the Second Review Decisions.

[84] In this case, the Second Review Decisions followed the requirements of the two statutes. Both decisions rested on whether the applicant earned more than $5,000 during the specified time periods, and whether the applicant stopped working, or had his hours reduced, for reasons related to COVID-19. Those elements reflect provisions in the two statutes, as noted above.

[85] The applicant submitted that he presented evidence that he was injured in October 2018. If he had not been injured at that time and had been able to work in late 2018 and 2019, he would have earned more than $5,000 in 2019 based on his self-employment earnings from August and September 2018 while working as an Uber driver. However, for eligibility, the statutes required that a person "had", during the specified time period in each provision, "a total income of at least

$5,000" from the specified sources. The Second Reviewer's decision applied a legal standard that required the applicant to show that he did earn at least $5,000. The applicable provisions in the statutes require the Second Reviewer to apply that threshold to what he did earn as income from the stated sources, not what the applicant would or could have earned if certain events had not occurred in his life: *Flock*, at paras 4, 7. The Second Review Decisions did not violate either statute and did not contain a legal error on this ground.

[86] The applicant submitted that he was employed by Uber and his employment was supported financially by the ODSP, which implied that his ODSP payments were akin to employment income. On that argument, CRA erred in law by failing to consider those payments.

[87] This argument does not succeed on the express terms of the two statutes. In both cases, Parliament expressly listed the sources of income to be considered for an individual to meet the $5,000 threshold for total income: see paragraph 3(1)(*d*) of the *CRB Act* and section 2 of the *CERB Act*. It was not unreasonable for CRA to find that the sources listed in these provisions did not include the OSDP, including the OSDP payments received by the applicant, as a source of money to reach the $5,000 threshold. Although the applicant did not demonstrate how the OSDP's financial support of his Uber driving occurred, even assuming a connection, his Uber income was not in excess of $5,000 in any of 2018, 2019 or the 12 months leading up to his application, and the OSDP payments themselves did not fall within the specified sources of income prescribed by Parliament in the two statutes: *Flock*, at paras 3, 4 and 7; *Davis v. Canada (Attorney General)*, 2022 FC 1247, at para 24.

(2) Factual Constraints Bearing on the CRA Second Review Decisions

[88] The Supreme Court in *Vavilov* held that absent "exceptional circumstances", a reviewing court will not interfere with the decision maker's factual findings and will not reweigh or reassess the evidence: *Vavilov*, at para 125. A reviewing court's ability to intervene arises only if the reviewing court loses confidence in the decision because the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paras 101, 126 and 194. See also *Canada Post*, at para 61.

[89] In this case, the applicant has not shown that the reasons for the Second Review Decisions fundamentally misapprehended, failed to account for or ignored any material evidence in a manner that might permit this Court to intervene. The Second Review Decisions were not untenable in light of the relevant factual constraints that bear on them: *Vavilov*, at para 101.

[90] The applicant noted that he was self-employed as an Uber driver and that his total income was in excess of the required $5,000. He submitted that he obviously could not work with Uber after the onset of the COVID-19 pandemic.

[91] The evidence before the Second Reviewer included the applicant's tax returns for 2018, 2019 and 2020. They were considered by the Second Reviewer, which was lawful: *Aryan*, at paras 25, 32, 35, 38, 41. Nothing in those returns suggests that the applicant made more than $5,000 from any of the sources listed in the statutes. His returns indicate that his taxable income exceeded $5,000 but not from the required sources set out by Parliament in the *CERB Act* and the

CRB Act. The Second Review Decisions did not misapprehend or ignore any material evidence when reaching its conclusions that the applicant did not meet the $5,000 threshold.

[92] The applicant argued that the Second Reviewer erred by failing to conclude that he could not work for Uber because of the onset of the COVD-19 pandemic. However, the applicant did not submit any evidence to show that he was in fact working as an Uber driver in 2020 before March when the pandemic apparently caused Uber to stop its services. As such, it was open to the Second Reviewer to conclude, on the evidence in CRA's possession, that the applicant did not stop working, or have his hours reduced, for reasons related to COVID-19.

[93] I understand that the OSDP reduced the applicant's monthly payments because he received CERB payments. He likely has been asked to repay the CERB payments he received in 2020 ($14,000) and also will have to pursue the OSDP for payment of the money deducted by the OSDP from his monthly payments. It is easy to see how the applicant's situation may feel unfair and unjust, having spent the money he received and being engaged in litigation and other processes to restore his financial position. Unfortunately, I am not able to provide the applicant with a comprehensive solution to this situation.

[94] Accordingly, I conclude that the applicant has not shown that the Second Review Decisions contained a reviewable error.

VIII. Additional Arguments raised by the Applicant

[95] The applicant made a number of additional submissions and allegations, which I will address briefly and for completeness.

[96] The applicant submitted that the respondent should not have been able to file his responding record because it was filed past the 30 days contemplated in the *Federal Courts Rules*. He submitted that pleadings had already closed. However, by Order dated September 26, 2022, the Court permitted the applicant to file an application record (following several previous unsuccessful attempts) in a form that did not entirely comply with the Rules. The same Order gave the respondent 30 days to file a responding record. The respondent did so within the time contemplated by the Order.

[97] The applicant argued that the respondent's legal counsel should not be permitted to file the respondent's submissions, or appear to make oral submissions on this application, because she commissioned the affidavit of the Second Reviewer that was filed in this proceeding. While the applicant made general references to the *Conflict of Interest Act*, S.C. 2006, c. 9, s. 2 (without any specifics), the applicant relied on no specific Federal Court case law and made no legal submissions to support his position. The respondent argued there was nothing improper about that action and noted that it occurred before counsel became involved in this proceeding. In my view, the applicant has not shown that counsel was precluded from appearing on this application. Indeed, I am aware of no reason why counsel's actions were unlawful or improper.

[98] The applicant objected to statements or positions taken by the respondent during the proceeding in relation to his daughter's assistance to him during previous hearings or case conferences. The respondent referred to Rule 119 of the *Federal Courts Rules*. There is no need to make any determination on this issue as it is not related to any substantive issue and any language concerns were resolved at the pre-hearing conference on February 16, 2023 and by the presence of the interpreter at the hearing.

[99] The applicant argued that he was the subject of discrimination by CRA based on his disability. Assuming (without deciding) that this allegation was properly the subject of argument in this proceeding, the applicant did not refer to any specific evidence of discrimination to support his allegation. His position cannot be given any effect.

[100] The applicant similarly claimed during argument that CRA violated his rights under the *Canadian Charter of Rights and Freedoms*. The respondent observed that the applicant made this allegation for the first time at the hearing. Given the absence of any notice by the applicant in his Notice of Application or otherwise, the Court is unable to entertain those submissions.

[101] The applicant made a number of allegations during his submissions concerning actions taken by another member of this Court prior to the hearing while this proceeding was under case management, claiming that the actions were illegal, unconstitutional and improper. I will not address these allegations as they were not relevant to the issues arising on this application. However, the absence of any comment should not be taken as any form of support or agreement with the allegations.

[102] Lastly, after the hearing, the applicant sent a letter dated March 14, 2023, strongly objecting to the absence of a document in the materials I had during the hearing. The document in question was an exchange of emails between the respondent's counsel and the applicant's daughter. It was contained in a previous version of his application record that was not accepted for filing but was not in the application record that was ultimately accepted for filing. I looked at the document during the hearing and the applicant read its contents aloud during his submissions. In the circumstances, the absence of this email exchange in the filed application record (which I used during the hearing) did not cause any prejudice to the applicant or his position, which was fully articulated during the hearing.

IX. Conclusion

[103] The application will be dismissed. The respondent was successful but did not request costs.

[104] In the exercise of the Court's discretion in Rule 400, there will be no costs payable by either party to the other party.

JUDGMENT in T-688-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed, without costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-688-21
STYLE OF CAUSE:	XIN YAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 14, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	APRIL 25, 2023

APPEARANCES:

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