Date: 20080226

Docket: T-299-07

Citation: 2008 FC 251

Ottawa, Ontario, February 26, 2008

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

HARHUMESH BOPARAI, PARDAMAN BOPARAI & SURJIT K. BOPARAI

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This application for judicial review is brought by a married couple, Pardaman Boparai and Surjit K. Boparai (the Elder Applicants), and their adult son, Harhumesh Boparai (Harhumesh). In January 1999 the Applicants were audited by the Canada Customs and Revenue Agency (now the Canada Revenue Agency and referred to in these reasons as the CRA) and found to owe approximately $44,450 GST plus $14,768.69 interest and $12,001.99 in penalties.

[2] Although the GST portion of their debt was later almost entirely satisfied, the Applicants still owed interest and penalties to the CRA. In December 2004 the Applicants requested relief from the interest and penalties pursuant to the fairness provisions of the *Excise Tax Act*, R.S.C. 1985, c. E-15. Their request was dismissed by the CRA in a letter dated July 18, 2006 (the First Fairness Decision). A second review was conducted later that year, and the request for fairness relief was again denied, this time in a decision by the Assistant Director, Revenue Collections (the Assistant Director) of the CRA's Vancouver Tax Services Office, dated December 4, 2006 (the Second Fairness Decision).

[3] The Applicants ask that this Court overturn the Second Fairness Decision.

II. Preliminary Matter – Motion to Recuse

[4] At the commencement of the hearing, counsel for the Applicants, Mr. Osborne Barnwell, asked that I recuse myself from hearing this application for judicial review. Following submissions on this motion, I advised Mr. Barnwell orally that I would dismiss this motion. My reasons are the following.

[5] My first concern is that this motion could and should have been brought sooner. Parties and their counsel may obtain the name of a presiding judge scheduled to hear a matter from the Court's Registry two weeks in advance of a hearing. For the Federal Court, this has been the case since May 4, 2004, when a Notice to the Parties and the Profession was issued by the Chief Justice. That Notice, which is readily available (for example, on the Federal Court's website: "Notice to the

Parties and the Legal Profession", online: Federal Court, <http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Notices>), states that:

> The name of the presiding judge or prothonotary will be available upon request through the Registry as of two weeks prior to the commencement of scheduled hearings. This policy does not extend to the hearing of motions at general sittings and urgent motions.

[6] Mr. Barnwell submits that he was not aware of the Notice to the Profession and, thus, did not know that I was to hear the Application until he arrived in Court. It is no excuse to claim ignorance of such a Notice, especially one which has been in effect for almost four years. In addition, given Mr. Barnwell's strong views on this issue, I would have expected that he would have taken all available steps to discover the identity of the presiding judge. In these circumstances, it is thus reasonably open to this Court to refuse to hear the motion on the basis that it was not raised earlier.

[7] In spite of my concerns about the failure of counsel to raise this matter earlier, I have considered his submissions and find that they are without merit. Mr. Barnwell asserts that I should recuse myself on the grounds of a reasonable apprehension of bias. The foundation of this argument is a complaint that he made in August 2007 to the Canadian Judicial Council (CJC) alleging that I was "clearly biased" in the handling of immigration matters. Two immigration decisions were specifically cited. That complaint was dismissed, both as to the specific matters raised and as to the broad allegations of bias. Nevertheless, Mr. Barnwell argues that the submissions made by him in support of that complaint still exist and would lead a reasonable person to conclude that I cannot fairly decide any case where he is counsel.

[8] The test for recusal is that set out in the recent decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 60:

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, supra, at p. 394, is the reasonable apprehension of bias: [page289]
>
> > ... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[9] It cannot be ignored that the allegation of apprehension of bias is being made against a judge who is bound by an oath of office and who bears a strong responsibility to be impartial. As stated by the Supreme Court of Canada in *Arsenault-Cameron v. PEI*, [1999] 3 S.C.R. 851 at para. 2, “The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood of bias must be demonstrated." Finally, I observe the reminder given by my colleague, Justice Teitelbaum, in *Samson Indian Nation and Band v. Canada*, [1998] 3 F.C. 3 (T.D.), at paragraphs 73 to 75, as to the solemnity of the judicial oath and the impartiality that it brings with it.

[10] In dealing with this motion that I recuse myself from hearing the present application, I must ask myself whether an informed person, "viewing the matter realistically and practically - and having thought the matter through" would conclude that there is sufficient justification for disqualification in this case.

[11] Mr. Barnwell makes no attempt, in this motion, to explain how a complaint in respect of immigration matters could lead to a reasonable apprehension of bias in respect of a matter that arises under the *Excise Tax Act* (or, for that matter, in respect of other immigration matters). Further, Mr. Barnwell acknowledges that the complaint was dismissed by the CJC.

[12] Mr. Barnwell's arguments appear to rest on an allegation that, because he made a complaint to the CJC, I am generally predisposed to decide against his clients. If Mr. Barnwell is correct, I would be forced to recuse myself from every case where Mr. Barnwell is counsel. Indeed, it follows from Mr. Barnwell's submissions that, once a complaint to the CJC is made – regardless of its merits or subject matter – a judge will be presumed to be biased in every case where the party before him or her has brought a complaint to the CJC. That is an absurd result and one that has been specifically discredited in the jurisprudence.

[13] In *P.S.-M v. A.J.-L.C.* (1993), 101 D.L.R. (4th) 345 (Que. C.A.) a husband brought a motion for recusal of the presiding judge on the grounds of reasonable apprehension of bias. The motion was based partly on the fact that both the husband and a psychologist he had retained as his expert witness had filed complaints against the judge with the CJC. The majority of the Quebec Court of Appeal was of the view that the mere presence of complaints filed with the CJC did not warrant disqualification and held at page 360:

> This court is not prepared to accredit the principle that any professional ethics complaint concerning a judge necessarily entails his withdrawal from the case; otherwise, it is not hard to imagine the dishonest manoeuvres of a party wishing to paralyze the proceedings or trying to avoid a decision that he anticipates will be unfavourable to him.

See also: *Allain Sales & Services Ltd. v. Guardian Insurance Co. of Canada*, [1996] N.B.J. No. 346 (Q.B.) (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1764 (T.D.) (QL), aff'd [2000] F.C.J. No. 1026 (C.A.) (QL).

[14] In conclusion, the apprehension of bias alleged by Mr. Barnwell is not well-founded. An informed person, viewing the matter realistically and practically – and having thought the matter through – would not think that it is more likely than not that I, whether consciously or unconsciously, would not decide fairly. The motion for recusal is dismissed.

III. Reasonableness of the Second Fairness Decision

[15] I now turn to the merits of the application for judicial review.

A. *Legislative Scheme*

[16] Under the *Excise Tax Act*, the Minister of National Revenue (the Minister) may, in his discretion, waive or cancel interest (s. 281.1(1)) or penalties (s. 281.1(2)). These provisions are commonly referred to as the "fairness provisions".

[17] Although the fairness provisions in the *Excise Tax Act* are silent as to the criteria to be used by the Minister in exercising his discretion, *GST Memorandum No. 500-3-2-1 Cancellation of Waiver of Penalties and Interest* (GST Memorandum 500-3-2-1) outlines the kinds of

circumstances where the Minister may decide to exercise his discretion. The situations described in the Memorandum are:

- extraordinary circumstances that may have prevented a person from making a payment when due, such as floods or fire or a serious illness in the family (GST Memorandum 500-3-2-1, para. 6);

- where the penalties or interest were incurred primarily because of the actions of the CRA, most notably processing delays (GST Memorandum 500-3-2-1, para. 7); and

- where there is an inability to pay amounts owing (GST Memorandum 500-3-2-1, para. 8).

[18] Where an "extraordinary circumstance beyond the person's control has prevented the person from complying with the Act", paragraph 9 of the memorandum sets out a number of factors that "will" be considered to determine whether the penalties and interest should be waived. It is important to note that the listed factors are only mandated when the Mister concludes that circumstances beyond the control of the person exist, as contemplated by paragraph 6 of GST Memorandum 500-3-2-1. In contrast, for claims of departmental delay or inability to pay amounts owing, under by paragraphs 7 and 8 of the memorandum, there are no listed factors. On this point, GST Memorandum 500-3-2-1 differs from a similar fairness memorandum that applies when a person seeks waiver of penalties and interest assessed under the fairness provisions of the *Income*

Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (see, *Information Circular 92-2 – Guidelines for the Cancellation and Waiver of Interest and Penalties* [Information Circular 92-2]).

[19] In sum, the Minister has a wide discretion to consider when to grant fairness relief of the payment of interest and penalties assessed under the *Excise Tax Act*. He is guided by GST Memorandum 500-3-2-1 but, of course, not bound by it.

B. *Standard of Review*

[20] The parties agree that the appropriate standard of review of a fairness decision is that of reasonableness *simpliciter* (*Vitellaro et al. v. Canada (Customs and Revenue Agency)*, 2005 FCA 166 at para. 5; *Lanno v. Canada Customs and Revenue Agency*, 2005 FCA 153, at paras. 3-7). On this standard, I can only overturn the Second Fairness Decision if I determine that the decision is not supported by reasons that stand up to a "somewhat probing examination" (*Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748 at para. 56).

C. *Non-reviewable findings*

[21] In this case, I am not persuaded that a number of the errors alleged by the Applicants to exist in the Second Fairness Decision are in fact reviewable errors. Specifically, having reviewed the record and the submissions of the parties, I conclude that:

1. The Assistant Director did not err by failing to consider the total debt outstanding in determining whether there is financial hardship. Unlike the case of *Nail Centre,* above, relied on by the Applicants, there is, in effect, no outstanding GST debt in the case at bar. All of the amounts owing at this stage consist of interest and penalties.

2. It was reasonable for the Assistant Director to take into account the Applicants' home in India. In spite of requests, the Applicants failed to provide any documentary evidence of its value or the alleged problems associated with selling real property in India.

3. The Assistant Director did not err by failing to explicitly reference the factors set out in paragraph 9 of GST Memorandum 500-3-2-1. Given that the reasons claimed by the Applicants did not involve a circumstance beyond their control, paragraph 9 was not engaged. The case of *Gandy v. Canada (Customs and Revenue Agency)*, 2006 FC 862, relied on by the Applicants, is distinguishable as *Gandy* involved a decision made under the *Income Tax Act*. As previously noted, the requirements of Information Circular 92-2 differ from those of GST Memorandum 500-3-2-1.

4. On the facts of this case, it was not unreasonable for the Assistant Director to fail to give weight to any delay by the CRA.

5. The test for financial hardship relied on by the Assistant Director was not unduly onerous. Specifically, there was nothing unreasonable in the findings of the Assistant Director with regard to the equity in the Harhumesh's family home or the costs of private schooling for his children.

6. The Assistant Director acted reasonably in giving little weight to the submissions of the Applicants on how the GST debt arose in the first place.

[22] Overall, I find that the approach taken by the Assistant Director and the CRA in considering the request for relief was appropriate. The Assistant Director did not ignore evidence and did not take into account irrelevant factors in exercising his discretion. However, as discussed below, I still have a serious concern with the Second Fairness Decision.

D. *Assessment of Monthly Income and Expenses*

[23] The main thrust of the Applicants' submissions to the CRA was that they were not financially able to pay off the interest and penalties in light of their day-to-day expenses. To respond to the Applicants' assertion that they would suffer financial hardship, CRA officials (correctly, in my view) focused on the monthly income and expenses for the Applicants' household. My problem

arises from the failure of CRA officials to provide adequate explanations of how this analysis was carried out.

[24] As part of the process, officials in the CRA reviewed all of the documentation and prepared a "Fairness Request Summary". It is evident that this Fairness Request Summary was before the Acting Director and, in my view, forms part of the reasons. Reviewing the Fairness Request Summary, I observe that a significant portion is devoted to an analysis of the financial data provided by the Applicants. Part of that data was summarized in a "Monthly Income and Expense Statement" (referred to by the CRA as an IEAL). The importance of this IEAL is demonstrated by the following extracts from the Fairness Request Summary:

> The IEAL indicates total mnthly hh income as $4197 with total mnthly expenses as $9308.54 leaving a deficit of $5161.54 per mnth. However, upon further review of the IEAL it appears the spouse's income was not included and some of the expenses are total debts owing, not monthly expenses. In addition, there are RESP's, RRSP's and the kid's tuition for their private school listed as monthly expenses.
>
> Assigned c/o also charged out T1 returns for both Hargurmesh and spouse, Harinderpreet. When she reviewed the self-employed returns of the spouse, she noticed similar expenses being claimed on both the IEAL and the T1 return. Therefore, we disallowed some of those expenses on the IEAL.
>
> The IEAL that we accept is revised to show a surplus of approx. $4k per month. . . .

[25] Hand-written notations on the submitted IEAL appear to show how CRA officials amended the document. As discussed in the above passage, some of the expenses submitted by the Applicants were total debts and not monthly payments; I have no difficulty with these adjustments. However, I cannot understand how the calculations for the IEAL were completed with respect to the inclusion of the income of Harhumesh's spouse and adjustments to other expenses.

[26] The first problem that I have with analysis of the IEAL relates to the spouse's stated income. In the original IEAL, the spousal income was listed as $1500. This is contrary to the statement by CRA Officials in the Fairness Request Summary that "the spouse's income was not included". While it was open to the officials to disagree with the $1500 figure submitted, it was an error for them to state that no income was included.

[27] I have more serious concerns with the calculations that were carried out by CRA officials when they adjusted the IEAL to reflect the income of Harhumesh's spouse. In doing so, they relied on an income tax return summary on file (referred to in the Fairness Request Summary as a T1 return) for the spouse. Apparently, on the basis of this T1 return, the officials increased the spousal income from $1,500 to $5,138. It is quite unclear to me how CRA officials came up with the $5,138 figure, although it is arithmetically close to the spouse's total gross income set out in her T1 return (T1, line 166), plus her income tax refund (T1, line 486), divided by 12. My best guess is that the CRA officials disallowed all expenses that were claimed against the gross income of $60,000 on the spouse's T1 return. However, in the absence of background information, I am unable to probe the reasonableness of the CRA's figure for Harhumesh's spouse.

[28] Finally, I question whether CRA officials deducted or disallowed certain expenses twice. The first deduction was from the income set out in the IEAL. As noted above, CRA officials disallowed expenses claimed by the spouse as reflected in her T1 return. As a result of this disallowance, the spousal income was <u>increased</u> by an amount equal to the disallowed expenses. However, it also appears that the same amounts were deducted from the claimed expenses on the

IEAL, thereby reducing the expenses of the household. I reach this conclusion on the basis of the words of the CRA official quoted above where she states that:

> When she reviewed the self-employed returns of the spouse, she noticed similar expenses being claimed on both the IEAL and the T1 return. Therefore, we disallowed some of those expenses on the IEAL. [Emphasis added.]

[29] If I am correct in my interpretation of the notations and comments in the Fairness Request Summary, CRA officials disallowed the same expenses twice. The disallowed amounts could have been used to increase the income or to decrease the expenses in the IEAL – but not both. As a result, the CRA's calculation of total monthly family income minus total monthly family expenses would be overstated.

[30] It may be that there are reasonable explanations for the adjustments to the IEAL. However, based on the record before the Court, I am unable to replicate the calculations of CRA officials and, thus, cannot conduct a "somewhat probing" examination. Given the importance of the IEAL in determining the Applicants' ability to pay the interest and penalties, I consider this to be a fatal error in the Second Fairness Decision and am prepared to allow this application for judicial review.

IV. Conclusion

[31] For these reasons, the application for judicial review will be allowed, with costs to the Applicants.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed;

2. The Second Fairness Decision is quashed and the matter referred back to a different decision maker for redetermination; and

3. Costs are awarded in favour of the Applicants, such costs to be assessed in accordance with the middle of column III of Tariff B.

"Judith A. Snider"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-299-07
STYLE OF CAUSE:	HARHUMESH BOPARAI ET AL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 4, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER, J.
DATED:	February 26, 2008

APPEARANCES:

Mr. Osborne Barnwell	FOR THE APPLICANT
Ms. Fozia Chaudary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mr. Osborne Barnwell Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT