

Federal Court of Appeal



Cour d'appel fédérale

Date: 20241219

Docket: A-368-23

Citation: 2024 FCA 215

**CORAM: LOCKE J.A.
LEBLANC J.A.
PAMEL J.A.**

BETWEEN:

HUI PING HU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Montréal, Quebec, on December 11, 2024.

Judgment delivered at Ottawa, Ontario, on December 19, 2024.

**REASONS FOR JUDGMENT BY:
CONCURRED IN BY:**

**PAMEL J.A.
LOCKE J.A.
LEBLANC J.A.**

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REASONS FOR JUDGMENT

PAMEL J.A.

[1] The appellant, Ms. Hui Ping Hu, appeals from a decision of the Federal Court (2023 FC 1590, *per* Ahmed J.) dismissing her application for judicial review of a second-level decision of the Canada Revenue Agency (CRA) which determined that she was ineligible for the Canada Recovery Benefit (CRB) — a program introduced under the *Canadian Recovery Benefits Act*, S.C. 2020, c. 12, s. 2 — on the grounds that she had failed to meet one of the program's conditions, being that she had not earned at least \$5,000 (before taxes) of employment or net

self-employment income in 2019, 2020, or in the 12 months prior to the date of her first application (the minimum applicable income during the relevant period).

[2] Ms. Hu claims to operate a daigou business in Canada, buying local commodities such as medication, sweets, clothing and other items, and selling them to customers in China. Ms. Hu undertakes her activities via a WeChat group named “Happily shopping in Canada”, using WeChat Pay, a payment feature integrated within the WeChat app which allows Ms. Hu to make purchases for her customers and receive payment from them. Through Ms. Hu’s WeChat wallet, the app is able to generate transaction history reports and statements from Chinese Banks to which the WeChat account is linked. According to Ms. Hu, no formal invoices are generated through WeChat Pay and, in any event, none is required for her to receive payment from her customers.

[3] In July 2020, Ms. Hu applied for the CRB and began receiving CRB payments in October 2020, which continued for 26 two-week periods ending in October 2021. In December 2020, Ms. Hu’s file was selected for eligibility review and she proceeded to prepare and submit documents in support of her claim. One of the documents — referred to as Exhibit E and submitted in June 2022 — was an Excel spreadsheet prepared by Ms. Hu using the customer payment information from her WeChat wallet. The financial information on Exhibit E is mostly in English, however the information relating to the names of her customers and the items she purchased for them is mostly in Chinese. Another set of documents submitted by Ms. Hu — referred to as Exhibit F — were screenshots of her WeChat wallet showing purchases she purports to have made for her customers. In addition, the CRA had access to Ms. Hu’s 2018

Notice of Assessment showing income of \$5,171 and her 2019 Notice of Assessment showing income of \$8,238.

[4] In July 2022, the CRA informed Ms. Hu that she was ineligible for the CRB, as she had not established that she had earned the minimum applicable income during the relevant period. It would seem that Ms. Hu, who claims she prepared her own tax returns, was reporting her income not as self-employment income but rather as Other Income.

[5] In August 2022, Ms. Hu requested a second review, and proceeded to file a series of additional documents, mostly in Chinese, in support of her claim that her daigou business was not simply casual, but a true business undertaking, and that she met the minimum net-revenue threshold requirements. Following a telephone conversation later that month with the CRA Benefits Compliance Officer tasked with the second review (the second reviewer), Ms. Hu provided English translations of documents identified by the second reviewer. According to Ms. Hu, no request was made to translate Exhibits E and F. On September 3, 2022, Ms. Hu submitted further documents, including, amongst other things, a letter from her freight forwarder confirming she was a client (however without attaching the freight transaction history that had been requested by the CRA), a translated spreadsheet of WeChat screenshot income statements for 2019 and a payment transaction report in support of Exhibit E. More documents followed about two weeks later, including credit card statements, bank statements from the Bank of China, and what seems to be screenshots from the WeChat revenue figures and customer lists.

[6] On September 20, 2022, the second reviewer communicated with Ms. Hu and indicated that although a voluminous set of documents had been filed by Ms. Hu, she, the second reviewer, was unable to match up the documents so as to confirm that Ms. Hu had in fact started a daigou business in 2018 and was therefore self-employed. In response, Ms. Hu submitted a further summary of her customer purchases about a week later. However, on October 6, 2022, the second reviewer confirmed that Ms. Hu was ineligible for the CRB (the second-level decision). From the relevant entries in the Special Assessment Observations notepad reproduced by the second reviewer in the Special Assessment Observations, it seems that the second reviewer was simply unable to match up the documents submitted by Ms. Hu and was thus unable to determine that Ms. Hu indeed earned at least the minimum applicable income—applicable as self-employed income—during the relevant period.

[7] On November 4, 2022, Ms. Hu filed an application for judicial review of the second-level decision (the Notice of Application); although her Notice of Application only identified the second-level decision as forming the subject matter of her proceeding, it does make passing reference to Ms. Hu also seeking a determination regarding her eligibility for the Canada Worker Lockdown Benefit (CWLB). The Federal Court dismissed Ms. Hu's application for judicial review. Although expressing sympathy for Ms. Hu, the Federal Court eventually determined that there was nothing unreasonable with the second-level decision given the evidence before the second reviewer at the time. The Federal Court accepted the second reviewer's conclusion that Ms. Hu failed to provide the necessary evidence to establish that she earned the minimum applicable income during the relevant period. The Federal Court also refused to allow Ms. Hu to introduce new evidence, determining that the evidentiary record was to be restricted to that

which was before the second reviewer, and that none of the exceptions outlined in this Court's decision in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] were applicable. The Federal Court also dismissed Ms. Hu's assertion that she was treated unfairly—a purported breach of procedural fairness—when the second reviewer found that Ms. Hu was unable to provide Canadian bank statements and invoices to match her documentation despite her having provided evidence to demonstrate her business income. Finally, as for the passing reference to the CWLB in the Notice of Application, the Federal Court stated simply that the matter involving CWLB was not before it.

[8] Ms. Hu now appeals to this Court seeking to set aside the Federal Court decision, while also seeking to introduce fresh evidence in the process. The fresh evidence includes English translations of Exhibits E and F — which Ms. Hu claims are the documents which establish her eligibility for the CRB — requests for adjustments to her Income Tax Returns filed on December 9, 2022 (about a month after Ms. Hu filed her Notice of Application), customer invoices which Ms. Hu conceded were prepared for the purposes of supporting her claim before the Federal Court, her 2019 Notice of Reassessment dated January 30, 2023 (issued after the filing of the Notice of Application but nearly 9 months prior to the hearing before the Federal Court), additional screenshots of Ms. Hu's WeChat account, spreadsheets she created supposedly to consolidate her account activity, and additional invoices for purchases made on behalf of her customers.

[9] As a result of Ms. Hu's motion under Rule 343(3) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), on March 28, 2024, and while noting this part of Ms. Hu's motion was not challenged by the respondent, this Court allowed Ms. Hu to include in the Appeal Book the requests for adjustments to her Income Tax Return filed on December 9, 2022, as well as some of the translated screenshots showing expenditures Ms. Hu incurred on behalf of her customers. Two other sets of documents were disallowed. The remaining documents were to be included in a separate Supplemental Appeal Book for determination of their inclusion by the panel hearing the appeal (*Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149 [*Namgis First Nation*], at paras. 19 and 20).

[10] As regards the new documents, it is now well-established that any new evidence before this Court meant to supplement the record for judicial review purposes is fresh evidence that can be admitted only under the relevant test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 (SCC) (see *Namgis First Nation*, at para. 16); that the evidence (1) could not have been adduced at trial with the exercise of due diligence; (2) is relevant in that it bears on a decisive or potentially decisive issue on appeal; (3) is credible in the sense that it is reasonably capable of belief; and (4) is such that, if believed, could reasonably have affected the result in the court below (*Palmer* at 775).

[11] In short, Ms. Hu has not shown special circumstances in which the Court may grant leave to a party to present evidence on appeal pursuant to Rule 351, in line with the bases for admission of fresh evidence set out in *Palmer* (*Namgis First Nation*, at para. 25). I am not convinced that Ms. Hu was not reasonably able, with the exercise of due diligence, to adduce the

fresh evidence before the second reviewer or the Federal Court. Ms. Hu argues that the English translations of Exhibit E and F are necessary because the second reviewer failed to request them, although the second reviewer did ask for translations of other documents. However, it seems likely that the second reviewer did not ask Ms. Hu to translate Exhibits E and F because it was not necessary for her purposes given that significant portions of the documents were already in English. As for the remaining documents, I have not been convinced they are decisive or potentially decisive on any issue in the present appeal, or that the Court should exercise its residual discretion to admit them as fresh evidence in the interest of justice.

[12] Turning now to the ultimate decision of the Federal Court, there is no dispute that in an appeal from a judicial review decision of the Federal Court, this Court must “step into the shoes” of the Federal Court and determine whether the Federal Court correctly selected and applied the standard of review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46). Here, the Federal Court correctly identified the standard of review applicable on judicial review, being one of reasonableness, and proceeded to apply that standard correctly (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 16). Ms. Hu argues that her evidence, in particular Exhibits E and F, establishes that she earned at least the minimum applicable income during the relevant period. In essence, Ms. Hu is asking this Court to reweigh the evidence, and even more, to reconsider the matter based on new evidence that was not before the second reviewer or the Federal Court. As stated by Justice Stratas in *Namgis First Nation*, at paragraph 16: “The first-instance reviewing court was the forum for building the record for the application for judicial review. The appellate court is not such a forum.” I understand that Ms. Hu is displeased with the second-level decision and wishes for this Court to

reassess her claim, with fresh evidence in hand. However, as Justice Ahmed had rightly noted, it was not for the Federal Court to reweigh the evidence on judicial review. It is even less so the role of this Court.

[13] Nor has Ms. Hu convinced me that the Federal Court's determination on the procedural fairness issue requires this Court's intervention. Before the Federal Court, Ms. Hu claimed that the CRA treated her unfairly because she could not provide Canadian banking statements and invoices to match her documentation. Before this Court, Ms. Hu claims that the CRA breached its duty of procedural fairness by not accepting her documents as substantiating her claim and by not assisting her more with identifying how best to present her claim. Although I appreciate the CRA's own guidelines call for Benefits Compliance Officers to work with claimants to identify documents which best support their claim for CRB payments, here, the evidence suggests the second reviewer did just that.

[14] In the end, the Federal Court determined that the second-level decision was not unreasonable, and Ms. Hu has simply been unable to point me to any reviewable error on the part of the Federal Court that would permit this Court to intervene.

[15] As to Ms. Hu's claim that the Federal Court erred in not addressing her eligibility to the CWLB, I note Rule 302 which limits an application for judicial review to a single order. I also note the fact that Ms. Hu never sought a second review of the first-level decision denying her eligibility to CWLB, and thus never exhausted her administrative remedies in respect thereto (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, at paras. 30 to 33).

Moreover, the evidence suggests that Ms. Hu herself acknowledged she was not eligible for CWLB, which may explain why she never proceeded to request a second-level review of that decision. In any event, the issue was addressed by the Federal Court and I see no reviewable error in respect thereof.

[16] Consequently, I would dismiss Ms. Hu's appeal. The Attorney General of Canada advises that he is no longer seeking costs in the matter, and thus I would award none.

“Peter G. Pamel”

J.A.

“I agree.

George R. Locke J.A.”

“I agree.

René LeBlanc J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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GENERAL OF CANADA

PLACE OF HEARING: Montréal, Quebec

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REASONS FOR JUDGMENT BY: PAMEL J.A.

CONCURRED IN BY: LOCKE J.A.
LEBLANC J.A.

DATED: DECEMBER 19, 2024

APPEARANCES:

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