Docket: 2013-1849(IT)G

BETWEEN:

JACINTA DAVIDSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on July 17, 2014, at Toronto, Ontario

Before: The Honourable Justice K. Lyons

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Kathleen Beahen

JUDGMENT

The appeals from the determinations made under the *Income Tax Act* for part of the 2008 base taxation year (May and June 2010 benefit payment period) and the 2009 and 2010 base taxation years, with respect to the Canada Child Tax Benefit, are dismissed.

The appeals from the determinations made under the *Income Tax Act* for part of the 2008 base taxation year (September 2009 to April 2010 benefit payment period) and the 2011 and 2012 base taxation years, with respect to the Canada Child Tax Benefit, are quashed.

Each party shall bear their own costs.

Signed at Toronto, Ontario, this 4th day of March 2015.

"K. Lyons"

Lyons J.

Citation: 2015 TCC 54
Date: 20150304
Docket: 2013-1849(IT)G

BETWEEN:

JACINTA DAVIDSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] The issue in this appeal is whether Ms. Davidson, the appellant, is entitled to the Canada Child Tax Benefit ("benefit"). During the hearing, Ms. Davidson confirmed that she is disputing benefits from only September 2009 through to April 2013.[1]

[2] For the purposes of the benefit, the benefit payment period (the "BPP") starts in the July subsequent to the end of the base taxation year (the "BTY") to which it relates and runs for one year as follows:

BTY	**BPP**
2006	July 2007 to June 2008
2007	July 2008 to June 2009
2008	July 2009 to June 2010
2009	July 2010 to June 2011
2010	July 2011 to June 2012
2011	July 2012 to June 2013
2012	July 2013 to June 2014

I. Preliminary matters

[3] It is useful to outline some of the procedural background. On April 4, 2011, the Minister of National Revenue (the "Minister") received Ms. Davidson's application for the 2006 to 2010 BTYs. On September 20, 2011, the Minister determined and notified Ms. Davidson that she was not eligible for the benefit for the 2010 BTY as she did not meet the requirements. On July 30, 2012, Ms. Davidson objected.[2] The Minister requested immigration information and the work permit.[3] Ms. Davidson forwarded the work permit and the March 9, 2010 letter from CIC to the CRA.[4] The Minister subsequently confirmed the determination was correct.[5]

[4] The Minister did not allow any benefit because she:

a) did not provide documentation confirming her immigration status for the 2006, 2007 and part of the 2008 BTYs (July 2009 to April 2010 BPP); and

b) did not meet the immigration status requirements for the benefits for the remaining part of the 2008 BTY (May and June 2010 BPP) nor the 2009 and 2010 BTYs (the "benefits for the relevant period").

[5] The respondent brought a motion, which was granted, to quash the appeal with respect to the:

1. 2011 BTY because the Minister had not made a determination, as conceded by Ms. Davidson, for that BTY;[6] and

2. 2012 BTY because Ms. Davidson had received the benefit for that BTY.

[6] The timeframe Ms. Davidson confirmed is under appeal comprise the following BTYs:

a) Part of 2008 (September 2009 to June 2010 BPP);

b) 2009 (July 2010 to June 2011 BPP);

c) 2010 (July 2011 to June 2012 BPP); and

d) Part of 2011 (July 2012 to April 2013 BPP).

[7] The respondent's position is that the:

a) BPP period from September 2009 to April 2010 ("retroactive benefits") is subject to a discretionary decision by the Minister because Ms. Davidson applied in April 2011 and she can only claim benefits back by 11 months (May 2010) from when her application was submitted and the Court has no jurisdiction;

b) BPP period in May and June 2010, plus the 2009 and 2010 BTYs (collectively "benefits for the relevant period") should be dismissed as she did not have any of the statuses required under paragraph 122.6(e); and

c) BPP from July 2012 to April 2013 falls within the 2011 BTY and has been quashed.

II. Facts

[8] At the time of the hearing, Ms. Davidson was 28 years old. She was born in the United States and moved to Canada in 1994 with her parents when she was nine years old.

[9] Since then, Ms. Davidson lived in various cities in Ontario attending elementary school, high school and post-secondary education in Canada. She had not obtained a student permit from Citizenship and Immigration Canada ("CIC") when she was in high school nor between 2005 to 2012. In June 2012, she obtained a degree of Bachelor of Science in Nursing with Honours from York University.[7]

[10] Ms. Davidson testified that in September 2009, she removed herself and her two children, J.H. age 9 and J.E. age 6, from an abusive relationship. This created financial hardship. She was unable to afford rent, nutritious food and basic necessities. In August 2010, J.N. was born. Prior to September 2009, her husband had claimed the benefit.

[11] In September 2007, Ms. Davidson applied to CIC for permanent resident status (the "Application"). While waiting for her Application to be considered, she was unable to work until she received a work permit issued on October 20, 2011.

[12] The issue is whether Ms. Davidson is entitled to the retroactive benefits and benefits for the relevant period for her children pursuant to the provisions of section 122.6 of the *Income Tax Act* (the "*Act*").

[13] Ms. Davidson states that the benefit was to prevent and reduce child poverty and assist with the basic necessities of life providing income assistance to lower income families. Her position is that although she understands the legislation, it is unfair that her lack of immigration status - especially since she had been in Canada since 1994 - results in her children suffering.

III. Analysis

[14] Ms. Davidson quoted from various sources in asserting that individuals, families and groups in the population can be said to be in poverty when they lack the resources to obtain the types of diet, participate in activities and have living conditions and amenities which are customary, encouraged or approved in society.[8] Because of her immigrant status, her children's health, well-being, quality of life, development and education are in jeopardy making it difficult to provide the basic needs (example, daily nutritious meals) because of her financial status which limits their ability to participate in society perpetuating a cycle of poverty. She broke the cycle of poverty, seeks an exemption from the legislation based on compassion in the best interests of her children and because of her unique circumstances.

Eligible Individual

[15] To be eligible for the benefit, a person must qualify as an "eligible individual" as defined in section 122.6 of the *Act*. The relevant portion is in paragraph 122.6(e) which requires that to be an "eligible individual" in respect of a qualified dependant at any time means a person who at that time:

> (e) is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who
>
> > (i) is a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
> >
> > (ii) is a temporary resident within the meaning of the *Immigration and Refugee Protection Act*, who was resident in Canada throughout the 18 month period preceding that time, or
> >
> > (iii) is a protected person within the meaning of the *Immigration and Refugee Protection Act*,

> (iv) was determined before that time to be a member of a class defined in the *Humanitarian Designated Classes Regulations* made under the *Immigration Act*, …

Retroactive Benefits

[16] The relevant provisions of the *Act* are:

> Eligible individuals
>
> 122.62(1) For the purposes of this subdivision, a person may be considered to be an eligible individual in respect of a particular qualified dependant at the beginning of a month only if the person has, no later than 11 months after the end of the month, filed with the Minister a notice in prescribed form containing prescribed information.
>
> Extension for notices
>
> (2) The Minister may at any time extend the time for filing a notice under subsection 122.62(1).

[17] In response to her application of April 4, 2011 to the Canada Revenue Agency ("CRA"), the CRA requested proof that her children lived with her and proof of her immigration status.[9] Subsequently, the retroactive benefits were disallowed because of the lack of documentation as to her immigration status.[10]

[18] Respondent counsel argues that since Ms. Davidson did not apply for the benefit for the BPPs from September 2009 to April 2010 until April 4, 2011, the Minister exercised her discretion in denying the retroactive benefits because she failed to apply for those benefits within 11 months, as provided in subsection 122.62(1), after the BPP and thus was not an eligible individual.

[19] In *Nicholls v Canada*, 2011 TCC 287, 2011 DTC 1213, the Court noted that it is Parliament's intention to limit a retroactive application for the benefit to eleven months prior to the application, subject to the Minister's discretion to extend it. The Court also found that a decision not to extend the time to make a retroactive application is also a discretionary decision; therefore, a taxpayer cannot appeal to the Tax Court as it is not a notice of determination entitling a taxpayer to appeal.

[20] Pursuant to subsection 122.62(1) of the *Act*, the earliest juncture for which Ms. Davidson is entitled to the benefit is May 2010.[11] As the Minister made a

discretionary decision relating to the BPPs prior to May 2010 and also declined to exercise the discretion under subsection 122.62(2) to extend the time for filing under subsection 122.62(1), the Court has no jurisdiction relating to such discretionary decisions pertaining to the retroactive benefits.

Benefits during the relevant period

[21] Respondent counsel argues that Ms. Davidson was not an "eligible individual" under paragraph 122.6(e) of the *Act* for the benefits for the relevant period because she had not obtained any of the requisite immigration statuses.

Permanent resident status

[22] The *Act* requires that "permanent resident" is to be given the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 as amended ("*IRPA*"), which reads:

> "permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

[23] Generally, foreign nationals need authorization to remain in Canada. Without written authorization confirming their status, they are subject to removal. Sections 31 and 32 of *IRPA* set out the types of documents that a person would have if they had permanent resident status or temporary resident status. Subsection 31(1) of the *IRPA* provides:

> 31.(1) A permanent resident and a protected person shall be provided with a document indicating their status.

[24] Regulation 53 of the *Immigration and Refugee Protection Regulations* ("*IRPR*") states:

> 53.(1) For the purposes of subsection 31(1) of the Act, the document indicating the status of a permanent resident is a permanent resident card that is
>
> > (a) provided by the Department to a person who has become a permanent resident under the Act; or
> >
> > (b) issued by the Department, on application, to a permanent resident who has become a permanent resident under the Act or a permanent resident who obtained that status under the *Immigration Act*, chapter I-2 of the

> Revised Statutes of Canada, 1985, as it read immediately before the coming into force of section 31 of the Act.
>
> (2) A permanent resident card remains the property of Her Majesty in right of Canada at all times and must be returned to the Department on the Department's request.

[25] Section 32 provides:

> 32. The regulations may provide for any matter relating to the application of sections 27 to 31, may define, for the purposes of this Act, the terms used in those sections, and may include provisions respecting
>
> …
>
> (d) the conditions that must or may be imposed, varied or cancelled, individually or by class, on permanent residents and foreign nationals, …
>
> …
>
> (f) the circumstances in which a document indicating status or a travel document may or must be issued, renewed or revoked.

[26] On March 23, 2009, CIC notified Ms. Davidson that the first step in the process is to assess humanitarian and compassionate factors to decide if an exemption from the legislative requirements is to be granted to allow her Application to be processed from within Canada, as opposed to outside of Canada as required under the legislation.[12] If the exemption is granted, the second step is to determine if she meets all other statutory conditions in the *IRPA*.[13] However, CIC needed further information to determine if an exemption could be granted.[14]

[27] Contrary to Ms. Davidson's assertion that CIC's letter of March 9, 2010 was the first statement of approval of her permanent resident status, the letter grants only the exemption, reiterates the two-step decision-making process and cautions her that her Application for permanent resident status could still be refused if certain conditions are not met. It states:

> First, humanitarian and compassionate factors are assessed to decide whether to grant an exemption from certain legislative requirements to allow your application for permanent residence to be processed from within Canada. On 09MAR2010, a representative of the Minister of Citizenship & Immigration approved your request for an exemption from these requirements for the purposes of processing this application.

> Second, you must meet all other statutory requirements of the Immigration and Refugee Protection Act, … As your application is processed, separate decisions will be made about whether you meet these other requirements. …

[28] The basis on which the exemption was subsequently granted was because of humanitarian considerations in the best interests of the children.

[29] The March 9, 2010 letter is almost identical to the letter received by the appellant in *Ahansaz v Canada*, 2007 TCC 568, 2008 DTC 3709, in which the Court concluded that the expression "humanitarian considerations" referred to the permission given to the appellant to apply for permanent residence from within Canada.[15] The Court found that those words did not indicate approval of the permanent residence status.

[30] I find that the March 9, 2010 letter does not grant permanent residence status. Since Ms. Davidson did not present any documentary evidence showing that she had obtained a permanent resident card during the relevant period, I infer that she did not obtain permanent resident status prior to the issuance of confirmation of permanent residence by CIC effective June 18, 2013.[16]

Temporary resident status

[31] Temporary resident status is not automatically acquired by mere residency. Under the *IRPA*, an application must be made to CIC. Subsection 22(1) reads:

> 22.(1) A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b) and is not inadmissible.

[32] Under section 179 of the *IRPR*, an officer shall issue a temporary resident visa which provides temporary resident status if the conditions in paragraph 179 (a) through (f) are satisfied.

[33] Ms. Davidson's characterization of the work permit as a temporary permanent resident card is not borne out by the evidence. The work permit issued by CIC on October 20, 2011 indicates that it "Does not confer temporary resident status" and the work permit was valid only until October 19, 2013.[17] The permit enabled Ms. Davidson to work whilst her Application for permanent residence was under consideration consistent with the letter of March 9, 2010.

[34] This is similar to *Bituala-Mayala v Canada*, 2008 TCC 125, [2008] TCJ No. 90 (QL), in which the Court noted at paragraphs 2 and 6 that the appellant had a work permit, but it explicitly stated that it did not confer temporary resident status on her, therefore, despite that she had a work permit, the limitation meant that she did not meet the conditions in paragraph 122.6(e). For those reasons and because the appellant had no other evidence, the Court found that the appellant did not meet any of the conditions in paragraph 122.6(e) of the *Act*.[18]

[35] In the present case, the express restriction in the work permit, the fact that the work permit was only valid until October 19, 2013, the fact that Ms. Davidson did not produce evidence that she had a temporary resident visa and the factors as previously highlighted in the March 9, 2010 letter, leads me to infer and conclude that temporary resident status was not bestowed on her.

Protected person

[36] To qualify as an eligible individual under paragraph 122.6(e) of the *Act*, refugee protection could have been conferred as a protected person defined in subsection 95(2) of the *IRPA* which reads:

> 95(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

[37] Subsection 95(1) states:

> 95.(1) Refugee protection is conferred on a person when
>
> > (a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;
> >
> > (b) the Board determines the person to be a Convention refugee or a person in need of protection; or
> >
> > (c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.

[38] Ms. Davidson acknowledged that her parents had applied for, but were refused, refugee status when they moved to Canada; she was part of that application. Ms. Davidson admitted that other statuses such as the protected person

status was never granted. Had refugee protection been conferred on Ms. Davidson, she would have obtained a permanent resident visa or a temporary resident permit consistent with section 95. I infer that Ms. Davidson was not a protected person during the relevant period.

Member of a class

[39] Had Ms. Davidson been designated as a member of a class arising from the *Humanitarian Designated Classes Regulations* before the repeal on June 28, 2002, any rights attached to the designation would have been preserved. However, no such evidence was presented by her to show she had obtained that designation prior to the repeal of the regulations and during the relevant period the *Regulations* were not in force.[19] I infer that Ms. Davidson did not receive a designation as a member of a class arising from those Regulations.

[40] Respondent counsel noted the similarities in the present case with the case of *Kwawukumey v Canada*, [2001] 4 CTC 2566. Albeit the wording of the legislation differs in that case, the individual had not obtained the required status and had also spent a lengthy period of time in Canada. C. Miller J. noted that the individual did not have any qualifying statuses as required by paragraph 122.6(e) that was in force at that time and states at paragraph 14:

> 14. … The words "permanent resident", "visitor" and "holder of a permit" are so readily definable by the *Immigration Act* I cannot interpret any of them to include a person holding a Working Authorization under the Deferred Order Removal Class, even though the purpose would have been met by including such a person. The words simply do not leave any scope for relying on other methods of interpretation to yield a more favourable result for Mr. Kwawukumey. I must dismiss the appeal.

[41] In the present appeal, the terms in the *Act* and in the *IRPA* are specifically defined. Ms. Davidson resided in Canada pursuant to a work permit. Parliament has drafted the legislation requiring that certain statuses must be obtained in order to access the benefit. Ms. Davidson did not obtain any of those during the relevant period. Unfortunately, the fact that her children were born in Canada has no bearing on her status as an "eligible individual" within the meaning of the *Act*.

[42] Ms. Davidson's plea for an exemption and submissions on equity are not remedies that this Court can grant. This Court is a statutory Court and considerations of equity do not apply. The Federal Court of Appeal in *Chaya v Canada*, 2004 FCA 327, 2004 DTC 6676 (FCA), noted, in paragraph 4, that:

> 4 … It is not open to the Court to make exceptions to statutory provisions on the grounds of fairness or equity. If the applicant considers the law unfair, his remedy is with Parliament, not with the Court.

IV. Conclusion

[43] Consequently, I conclude that the Court has no jurisdiction to review the discretionary decision of the Minister relating to the denial of the retroactive benefits (nor the time extension relating thereto). The appeals relating to that discretionary decision and the 2011 and 2012 BTYs are quashed. I further conclude that Ms. Davidson was not an "eligible individual" within the meaning of paragraph (e) of the definition in section 122.6 of the *Act*, relating to the benefits for the relevant period and those appeals must be dismissed.

[44] As stated by Ms. Davidson, her efforts in pursuing higher education and obtaining a degree, against all odds, to break the cycle of poverty has contributed to the goals of reducing child poverty. Her contribution is commendable and no doubt will be an inspiration to many.

[45] The names of the children will be expunged from the transcript.

[46] Each party will bear their own costs.

Signed at Toronto, Canada, this 4th day of March 2015.

"K. Lyons"

Lyons J.

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[1] In her notice of appeal, Ms. Davidson claims benefits for what she describes as the taxation years from September 2009 to December 2012.

[2] Exhibit R-4.

[3] Exhibit R-5.

[4] Exhibit R-6.

[5] Notification of Confirmation of the determination was issued by the Minister on January 14, 2013: Exhibit R-1.

[6] The appeal relating to July 2012 to April 2013 is part of the 2011 BTY.

[7] Exhibit A-1.

[8] During her argument, references were made to the Department of Finance and the role of government in promoting fairness and equity among individuals with different incomes and family circumstances and the Federal Poverty Reduction Plan: Working in partnership towards reducing poverty in Canada developed by House of Commons Canada; Dave Quist, Institute of Marriage and Family Canada; Reno Malette, Ontario Teachers' Federation; Andrew Lynk, Canadian. Paediatric Society; Nelson Mandela; Deb Matthews, Government of Ontario; Prime Minister Harper; Melinda Gates; Brian Dickson, former Chief Justice of Canada; and Federal Poverty Reduction Plan; Monica Thompson.

[9] CRA letter dated May 31, 2011 to Ms. Davidson.

[10] CRA letter dated August 26, 2011 to Ms. Davidson.

[11] She had to file the prescribed form for the benefit within 11 months after the BPP that she is applying for in order to be considered an eligible individual.

[12] Regulation 11 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides that an application for a permanent resident status resulting in an visa must generally be made outside of Canada from their country of legal residence or nationality. The Minister of CIC can exercise discretion to waive the requirement that the application be made from outside Canada in order to allow an individual to apply from within Canada based on humanitarian and compassionate considerations and taking into account the best interests of a child directly affected. This was the basis, based on the evidence presented, that humanitarian considerations were used. The exemption is in section 25 of the *IRPA*. See also sections 34, 35 and 37.

[13] That is, medical, security and passport considerations and arrangements for care and support.

[14] Exhibit R-2, CIC letter dated March 23, 2009 to Ms. Davidson.

[15] Paragraphs 17 and 27.

[16] Exhibit A-4.

[17] Exhibit A-2. Usually, under the *IRPA*, work permits are combined with temporary resident status.

[18] Paragraph 7.

[19] In *Ahansaz*, the Court noted that these regulations applied to only persons outside Canada.

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APPEARANCES:

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