



Citation: *Shaikh v. Canada (Minister of Public Safety and Emergency Preparedness)*,  
2016 CART 10

Date: 20160318  
Docket: CART/CRAC-1848

**BETWEEN:**

**Sarfuddin Shaikh, Applicant**

**- and -**

**Minister of Public Safety and Emergency Preparedness, Respondent**

**BEFORE: Chairperson Donald Buckingham**

**WITH: Mr. Sarfuddin Shaikh, represented in part by Ashutosh Pathak; and  
Ms. Sherri-Lynn Foran and Melanie Charbonneau, representatives for  
the respondent**

In the matter of an application made by the applicant, pursuant to paragraph 13(2)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review by the Canada Agricultural Review Tribunal of the Minister's decision CS-72450 dated July 16, 2015, upholding Notice of Violation 4974-14-0281 issued by the Canada Border Services Agency for a violation committed by the applicant of paragraph 34(1)(b) of the *Health of Animals Regulations*.

**DECISION**

**Following a review of the decision of the Minister of Public Safety and Emergency Preparedness and the reasons for that decision issued July 16, 2015, and a review of all written submissions of the parties, the Canada Agricultural Review Tribunal, by order, CONFIRMS the decision of the Minister. As a result, the monetary penalty of \$800 is payable by Sarfuddin Shaikh to the Canada Border Services Agency under Notice of Violation 4974-14-0281 within thirty (30) days after the day on which this decision is served.**

By written submissions only.

## **OVERVIEW**

[1] This case is about whether the Canada Agricultural Review Tribunal (Tribunal) should confirm, vary or set aside a decision of the Minister of Public Safety and Emergency Preparedness (Minister's Decision) dated July 16, 2015, finding against Sarfuddin Shaikh (Mr. Shaikh).

[2] The Minister's Decision holds that on the basis of Canada Border Services Agency (Agency) officials finding about 2 kg of ghee from India in the luggage of Mr. Shaikh upon his return to Canada, Mr. Shaikh contravened paragraph 34(1)(b) of the *Health of Animals Regulations* (HA Regulations) and was validly issued a Notice of Violation with a penalty of \$800.

[3] Mr. Shaikh does not contest that he imported the ghee or that ghee is a milk product or that he failed to declare the product to Agency officials prior to secondary inspection of his luggage. Mr. Shaikh also does not contest that he did not have any certificates or permits which would have allowed the importation. He maintains, however, that he did not understand the obligations imposed on him by Canadian law because he could not understand English or French.

[4] There are two issues raised in this case:

- i. whether, given the record before the Tribunal, the Minister erred in his finding that the Agency has proven all the necessary elements of the violation required to sustain the Notice of Violation with Penalty; and
- ii. whether Mr. Shaikh's language proficiency in English was so minimal that he has a defence to the commission of the violation.

## **REASONS**

### **1. Background**

[5] On March 24, 2014, at the Toronto airport, Agency officials inspected Mr. Shaikh's luggage and found about 2 kg of ghee, a butter-like milk product. The Agency alleged that Mr. Shaikh had not declared the ghee on his Declaration Card. Nor did he orally declare it to the Agency inspector immediately upon disembarking his airplane, or to the Agency secondary inspector officer prior to its discovery during the secondary inspection. The Agency also alleges that Mr. Shaikh did not present any certificates or permits that would have permitted the importation of the ghee into Canada.

[6] That same day, on the basis of the discovery of the ghee, the Agency issued Mr. Shaikh with Notice of Violation 4974-14-0281 with a penalty of \$800 for importing a milk product without a prescribed certificate of origin, an act which violates paragraph 34(1)(b) of the HA Regulations.

[7] Eight days later, Mr. Shaikh challenged the Notice of Violation by filing a request for review of the facts of the case to the Minister of Public Safety and Emergency Preparedness (Minister).

[8] The Minister, in his decision of July 16, 2015, upheld the Agency's action to issue a Notice of Violation with a penalty of \$800.

[9] Within 15 days of being served with the Minister's Decision, Mr. Shaikh requested a review of the Minister's decision to this Tribunal.

## **2. Applicable Law and Standard of Review**

[10] The essential elements for the commission of a violation of paragraph 34(1)(b) of the HA Regulations requires that the Minister be convinced, on a balance of probabilities, that the Agency has proved that Mr. Shaikh:

- i. is the person who committed the violation;
- ii. imported milk or a milk product into Canada from a country other than the United States; and
- iii. failed to produce to an Agency inspector a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin of the product is designated as free from foot and mouth disease.

(See *Lorraine Fernandez v. Canada (CBSA)*, 2012 CART 21, at paragraph 25).

[11] Where the Agency meets its burden of proof, the applicant will be held liable for a violation under the AMP system, unless he can establish a defence or excuse permitted under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AMP Act), the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations* (AMP Regulations), or as it pertains to this case, the HA Regulations.

[12] The Tribunal is an expert and independent body constituted by Parliament pursuant to the *Canada Agricultural Products Act*, R.S.C., 1985, c. 20 (4<sup>th</sup> Supp.) (CAP Act) and its jurisdiction consists of responding to requests to review matters arising from the issuance of agriculture and agri-food administrative monetary penalties (*Hachey Livestock Transport Ltd. v. Minister of Agriculture and Agri-Food*, 2015 CART 19, at paragraphs 12 to 16).

[13] The AMP Act provides for a review by the Tribunal of a first-instance decision made by the Minister (subsection 12(2) and paragraph 13(2)(b) of the AMP Act).

[14] Powers given to the Tribunal by Parliament in conducting this exercise are set out in paragraph 14(1)(a) of the AMP Act, "After concluding a review requested under this Act, the

*Tribunal shall, by order, as the case may be, (a) confirm, vary or set aside any decision of the Minister...".* As such, the Tribunal performs a function not as a decision-maker of first instance or as a court conducting a judicial review, but rather as a specialized or appellate administrative tribunal reviewing an administrative decision of first instance.

[15] Although the AMP Act provides for a review, as well as possible remedies, it does not specify the type of review to be conducted by the Tribunal. This Tribunal has held that relevant legislation and jurisprudence favours that the Tribunal apply a “*de novo*” type of administrative appellate review of a Minister’s decision under the AMP Act (see *Hachey*, at paragraphs 28 to 50).

[16] The appropriate type of review for the Tribunal to employ is to complete a *de novo* examination of the facts and draw its own factual and legal conclusions with little or no required deference to the findings, reasoning, and conclusion contained in the Minister’s Decision of July 16, 2015.

[17] A *de novo* examination of the facts does not require the Tribunal to ask the parties to present anew the evidence in this case. It does, however, require the Tribunal to fully examine and consider the evidence presented, to evaluate its relevance and weight, and to review factual findings made by the Minister, including additional factual findings, if any, that may be required for the resolution of the case. The Tribunal must also apply the appropriate law to the factual findings of the case to determine if the decision of the Minister should be confirmed, varied or set aside.

### **3. Analysis**

#### **Issue #1: Did The Minister Err In His Finding That The Agency Has Proven All The Necessary Elements Of The Violation?**

[18] The record shows that the following facts are not in dispute:

- On March 24, 2014, Mr. Shaikh entered Canada at Toronto coming from India via Saudi Arabia. He signed and completed the English side of the Agency Declaration Card and did not mark on that card that he was bringing any dairy products into Canada.
- There is no evidence of any oral exchange between Mr. Shaikh and the Agency primary inspection officer that examined Mr. Shaikh’s Declaration Card.
- Mr. Shaikh was referred to secondary inspection of his luggage. His bags were inspected and the ghee was found.
- The evidence shows that Mr. Shaikh indicated to the Agency secondary inspection officer and in his submissions to the Minister and to the Tribunal that

he did not think he needed to declare the product as it was for someone else and because it was readily available in Canada at local grocery shops.

- The evidence shows that when asked by the Agency inspector if he had permits or certificates for the importation of the ghee, Mr. Shaikh responded “no”. There was no other evidence that Mr. Shaikh produced any certificates or licences to the Agency officials that would have permitted the importation of the ghee.

[19] The Minister makes similar findings of fact (page 1 of the Minister’s Decision), although he does not make any temporal note as to when the alleged violation took place.

[20] Mr. Shaikh’s representative, Ashutosh Pathak, (Mr. Pathak) provided written submissions to the Tribunal in a letter dated November 30, 2015. However, those submissions do not contest any of the facts set out in paragraph 18 above.

[21] I agree with the conclusion of the Minister with respect to his findings of fact necessary to determine that Mr. Shaikh committed the violation. I also agree that the Minister properly applied the law with respect to defining the elements necessary to substantiate a violation of paragraph 34(1)(b) of the HA Regulations. With respect to the Minister’s omission regarding the date on which the alleged violation took place, the record shows that it was indeed on March 24, 2014 as this was the date on which the Notice of Violation was issued. At Tab 17 of the record, a preliminary letter from the Agency to Mr. Shaikh acknowledging the latter’s request for review to the Minister, indicates in its first paragraph that the alleged violation took place on March 24, 2014. Likewise, at Tab 4 of the record, the report of the Agency officer who completed the secondary inspection and issued the Notice of Violation to Mr. Shaikh indicates the date of the violation as March 24, 2014. Consequently, I do not consider this omission as impugning any of the Minister’s findings.

#### Issue #2: Did Mr. Shaikh’s Limited Language Proficiency In English Provide A Defence To His Committing The Violation?

[22] Mr. Shaikh alleges that *“Due to issues communicating in English, I have been disadvantaged in this entire process. ... Due to my lack of understanding in English, I was unable to understand the questions on the declaration form when I was asked if I had any milk related products. In addition, when I was questioned by the CBSA officer, I was not able to comprehend what he was asking me.”* (verbatim from Mr. Shaikh’s Request for Review to the Tribunal dated August 6, 2015). However, in his request for review to the Minister (dated April 1, 2014), Mr. Shaikh makes no mention of any difficulties in understanding English. Moreover, both requests are written in very good English.

[23] In late 2015, Mr. Pathak wrote to the Tribunal indicating that *“Mr. Shaikh has informed us that he has severe difficulty in comprehending the English language. This letter is written with the assistance of a Hindi speaking Paralegal in the office.”* (verbatim from letter dated November 30, 2015). Mr. Pathak’s submission sets out that Mr. Shaikh barely has a

working knowledge of English and that his prior letters were written with assistance. Regarding the alleged violation, Mr. Pathak alleges that Mr. Shaikh told him that he just checked off the boxes on the Declaration Card like he usually does but did not read or understand what he was doing. As well, during questioning by Agency inspectors, Mr. Shaikh told Mr. Pathak that one of the inspectors told him that if he had said yes to the questions on the Declaration Card he would have been released. Mr. Pathak also recounts to the Tribunal that Mr. Shaikh alleges that he did not understand any of this conversation. Mr. Pathak concludes his submissions by stating that Mr. Pathak did not understand the consequences or what was required of him in the situation because of his lack of English comprehension and his health issues.

[24] The Agency argues that the evidence does not show that Mr. Shaikh was unable to appreciate the nature and consequences of his actions because of a difficulty in understanding English. The record shows that Mr. Shaikh filled out, dated and signed his Declaration Card and answered all questions asked by Agency inspectors in a spontaneous and voluntary manner. He demonstrated that he understood everything that was being asked of him. Mr. Shaikh did not, at any time, speak or act as if he did not understand English. The Agency points out that Mr. Shaikh failed to mention any language difficulty during the events of March 24, 2014, in his request for review to the Minister filed only eight days after the event. The Agency also indicates that both the request to the Minister and the request to the Tribunal were both well articulated in the English language. The Agency argues that if Mr. Shaikh's understanding of English had been a genuine issue, it would have been known at the time of primary and secondary inspections, as well as when he made his request for review to the Minister. It was not. Mr. Shaikh should have made his claim of language difficulties at the first opportunity and to do so only now before the Tribunal is unfair to the Agency.

[25] This Tribunal has considered the issue of an applicant's lack of understanding of an official language of Canada and its possible effect in mounting a defence under subsection 18(2) of the AMP Act (see *Abou-Latif v. Canada (Canada Border Services Agency)*, 2013 CART 35, at paragraphs 34 to 37).

[26] It may be that Mr. Shaikh does indeed struggle in English. However, apart from a reference made in his written submission to the Tribunal and in his submissions relayed to the Tribunal by Mr. Pathak, there is little on the record to indicate that Mr. Shaikh so fundamentally failed to understand English that he has established a permissible defence under subsection 18(2) of the AMP Act. The evidence provided by the Agency that Mr. Shaikh had a sufficient knowledge of English is strong; he filled out his Declaration Card; he answered questions in English at secondary inspection; and presumably he also answered questions at primary inspection on March 24, 2014. There is also evidence by way of correspondence from Mr. Shaikh that he had at least a rudimentary proficiency in English; he submitted documentation to the Minister and to the Tribunal in English, and before his letter to the Tribunal on August 6, 2015, there is absolutely no mention made by him or by the Agency with respect to any difficulties by Mr. Shaikh in English. I find this evidence more convincing than the later submissions from Mr. Shaikh that he had "severe difficulty in comprehending the English language".

[27] On the basis of the record, I find that Mr. Shaikh's language proficiency in English on March 24, 2014, was not so inadequate as to convince me, on a balance of probabilities, that he has made out any defence to the violation permitted under subsection 18(2) of the AMP Act.

#### 4. Disposition

[28] The Minister's Decision of July 16, 2015:

- i. made findings of fact necessary to determine that Mr. Shaikh committed the violation;
- ii. properly applied the law with respect to defining the elements necessary to substantiate a violation of paragraph 34(1)(b) of the HA Regulations; and
- iii. assessed the penalty appropriately in this matter.

[29] Therefore, the Tribunal confirms the decision of the Minister. As a result, the monetary penalty of \$800 is payable by Mr. Shaikh to the Canada Border Services Agency under Notice of Violation 4974-14-0281 within thirty (30) days after the day on which this decision is served.

[30] The very strict AMP system established by Parliament, and the penalties set out in the AMP Act, as in this case, can nonetheless have important repercussions for Canadians, especially someone like Mr. Shaikh. Mr. Shaikh lives on a fixed income on which he maintains is barely enough to get by. Paying the penalty, he says would leave him without enough money to survive. He requests therefore that the penalty be waived considering the dire circumstances he is under.

[31] With respect to Mr. Shaikh's request to have the penalty in his case reduced or eliminated, the AMP Act and AMP Regulations preclude any reduction or elimination. First, the AMP Regulations strictly classify the nature of violation under paragraph 34(1)(b) of the *Health of Animals Regulations* as "serious". The Tribunal has no discretion to alter that classification. Second, section 5 of the AMPs Regulations stipulates that the penalty "*in respect of a violation that is committed by an individual otherwise than in the course of business and that is not committed to obtain a financial benefit is ... \$800, for a serious violation*". The Tribunal has no discretion to alter that amount. Finally, according to its enabling legislation, the Tribunal has neither the mandate, nor the jurisdiction, to set aside or dismiss a Notice of Violation, nor to reduce or increase penalties arising from such Notices, for reasons relating to humanitarian or financial situations facing particular applicants.

[32] Mr. Shaikh might consider contacting the Agency to determine whether they can agree to set up a payment schedule or another kind of payment agreement to pay the penalty.

[33] Agency inspectors must protect Canadians, the food chain and agricultural production in Canada from the risks posed by biological threats to plants, animals and humans. There is no doubt that officers must exercise these duties diligently, respectfully and responsibly. Travellers, who feel aggrieved by the Agency, may take up their concerns via the Agency's website service under the title "Compliments, Comments and Complaints".

[34] This violation is not a criminal offence. After five years, Mr. Shaikh is entitled to apply to the Minister of Agriculture and Agri-Food to have the violation removed from the records, in accordance with section 23 of the AMP Act.

Dated at Ottawa, Ontario, on this 18<sup>th</sup> day of March, 2016.

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Dr. Donald Buckingham, Chairperson