



Citation: *Hemeng v. Canada (Canada Border Services Agency)*, 2017 CART 5

Date: 20170209
Docket: CART/CRAC-1908

BETWEEN:

Comfort Hemeng,

APPLICANT

- and -

Canada Border Services Agency,

RESPONDENT

BEFORE: Chairperson Donald Buckingham

**WITH: Charles Hemeng, representing the applicant; and
Melanie A. Charbonneau, representing the respondent**

In the matter of an application made by the applicant, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts relating to a violation of subsection 16(1) of the *Health of Animals Act*, alleged by the respondent.

DECISION

Following a hearing and review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal, by order, determines, on a balance of probabilities, that the applicant, Comfort Hemeng, did not commit a violation on June 23, 2016, as described in Notice of Violation 3961-16-1224, and is not liable for any payment of a penalty to the respondent, Canada Border Services Agency.

The hearing was held in Montreal, Quebec,
Monday, January 9, 2017.

OVERVIEW

[1] At the heart of this dispute is a half kilogram of beef imported into Canada on June 23, 2016.

[2] Comfort Hemeng (Mrs. Hemeng), who has limited English language abilities, acquired the meat while visiting Ghana.

[3] A Canada Border Services Agency (Agency) officer found the meat in Mrs. Hemeng's luggage and issued a Notice of Violation with Penalty in the amount of \$1,300 for contravening subsection 16(1) of the *Health of Animals Act* (HA Act).

[4] Mrs. Hemeng has requested that the Canada Agricultural Review Tribunal (Tribunal) review the facts surrounding the issuance of the Notice of Violation.

[5] In reviewing the facts of this case, it is my role to weigh the evidence before me and to determine whether the Agency has proven each of the elements forming the basis of the Notice of Violation. In the case of a violation of subsection 16(1) of the HA Act, the Agency must prove Mrs. Hemeng is both the person who committed the violation, and that, while importing beef into Canada, she failed to present it or declare it to Agency officers.

[6] Where the Agency meets its burden of proof, the applicant will be held liable for a violation under the AMP system, unless she can establish a defence, justification 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 Act.

[7] For the reasons below, I find that the Agency has failed to prove all of the elements that form the basis of the Notice of Violation and, as a result, I find Mrs. Hemeng did not commit the violation.

REASONS

Background

[8] Mrs. Hemeng returned to Canada on June 23, 2016, after a visit to Ghana. She completed an E311 Customs Declaration Card (E311 Card) where she marked "Yes" to the question pertaining to the importation of food and agricultural products.

[9] After an inspection of her luggage at secondary inspection at Trudeau International Airport, in Montreal, the Agency issued Notice of Violation 3961-16-1224 to Mrs. Hemeng for "fail[ing] to present an animal or thing, to wit: MEAT BEEF 500 G APX", an action the Agency alleges is contrary to subsection 16(1) of the HA Act. The alleged violation is classified as a "very serious violation" under section 4 of the AMP Regulations, for which the mandated sanction is a warning or a monetary penalty of \$1,300.

[10] Mrs. Hemeng requested the Tribunal review the facts of the Notice of Violation (Request for Review) and outlined the reasons for her Request for Review. In order to maintain her rights to launch a Request for Review under the AMP Act, Mrs. Hemeng did not pay the assessed penalty.

[11] The Tribunal received, *via* the Agency, a letter from Mrs. Hemeng dated August 9, 2016, appointing her husband, Charles Hemeng (Mr. Hemeng), as her representative. She also submitted a copy of the hand-written card (indicating her name and address), which was given to Agency officers during the secondary inspection of her luggage on June 23, 2016.

[12] On September 23, 2016, the Tribunal received the Agency's report (Agency Report) concerning its version of the events that led to the issuance of the Notice of Violation.

Issues

[13] Three issues are raised by this case:

- i. has the Agency proven each of the elements of the violation of subsection 16(1) of the HA Act;
- ii. has Mrs. Hemeng established a permissible defence under the HA Act or under section 18 of the AMP Act that could justify or excuse her actions of June 23, 2016; and
- iii. is the assessed penalty of \$1,300 justified in law?

Analysis

The Customs Process Facing Passengers Arriving in Canada

[14] The evidence demonstrated that the importation and verification process unfolds as follows: (1) each passenger usually receives an Agency E311 Card while still on board the airplane before landing in Canada; (2) the passenger completes the E311 Card, and, in particular, either responds "Yes" or "No" to the question "I am/we are bringing into Canada: Meat, fish, seafood, eggs, dairy products, fruits, vegetables, seeds, nuts, plants, flowers, wood, animals, birds, insects, and any parts, products or by-products of any of the foregoing"; (3) the passenger enters Canada by presenting the E311 Card along with their passport to an Agency primary inspection officer (passengers may choose instead to use an automated border clearance self-serve kiosk but will still have to present a printout of their E311 Card and travel documents to an Agency officer before proceeding further); (4) the Agency primary inspection officer will, after questioning the passenger, place a code on the passenger's E311 Card and may also inscribe it with additional marks

or information for the use of subsequent Agency officers; (5) the passenger will then proceed to collect their luggage and move to exit the Arrivals Customs Hall by presenting their E311 Card to another Agency officer, known as the point officer, who either allows that passenger to exit the Arrivals Customs Hall, or directs them to the Customs secondary inspection area, where the passenger's luggage may be searched; (6) where a passenger is directed to Customs secondary area, they will proceed to a queue and wait for Agency officer to call them over to their inspection counter; (7) the passenger will then hand the E311 Card over to the Agency officer, who may then decide to verify the accuracy of the declaration made by the passenger on the E311 Card.

[15] The key evidentiary document that initiates the Canadian Customs process is the passenger's E311 Card and that person's declaration made on it.

[16] With respect to the administration of monetary penalties under the AMP Act and AMP Regulations, the Federal Court of Appeal has stated individuals must declare and present imported animal by-products as a legal requirement under section 16 of the HA Act and section 12 of the *Customs Act* (*Canada (Attorney-General) v. Savoie-Forgeot*, 2014 FCA 26, at paragraph 17). If individuals declare they are carrying animal by-products and thus voluntarily make them available for inspection, they ought not be found to have violated food and agricultural product importation requirements. On the other hand, individuals who fail to declare the animal by-products they are carrying and do not make them available for inspection are in violation of such requirements (*Savoie-Forgeot*, at paragraphs 18 to 19).

Issue #1 - Has the Agency proved all elements necessary for the violation of subsection 16(1) of the HA Act by Mrs. Hemeng?

[17] Violations arising from various statutes and regulations covered by the AMP Act and AMP Regulations are absolute liability violations (*Doyon v. Canada (Attorney General)*, 2009 FCA 152 (*Doyon*), at paragraphs 11 and 27).

[18] The Federal Court of Appeal has established that enforcement agencies have the burden to prove each of the essential elements of an alleged violation under the AMP Act and AMP Regulations in order to conclude the alleged violator has committed a violation (*Doyon*, at paragraph 42).

[19] Determining the essential elements of a particular violation requires the Tribunal to apply the *Doyon* approach of parsing out the required elements from the statutory language of the provision that establishes the violation (*Doyon*, at paragraph 41).

[20] Subsection 16(1) of the HA Act reads as follows:

16 (1) Where a person imports into Canada any animal, animal product, animal byproduct, animal food or veterinary biologic, or any other thing used in respect of animals or contaminated by a disease or toxic substance, the

person shall, either before or at the time of importation, present the animal, animal product, animal by-product, animal food, veterinary biologic or other thing to an inspector, officer or customs officer who may inspect it or detain it until it has been inspected or otherwise dealt with by an inspector or officer.

(emphasis added)

[21] For the Agency in this case to sustain the AMP violation under subsection 16(1) of the HA Act, it must prove the following three essential elements, each on a balance of probabilities:

- Element 1 – Mrs. Hemeng is the person who committed the violation;
- Element 2 – Mrs. Hemeng brought an animal product or animal by-product into Canada; and
- Element 3 – Mrs. Hemeng failed to present the animal product or animal by-product to Agency officers.

Findings with respect to Elements 1 and 2

[22] With respect to Element 1, Mrs. Hemeng's identity as the alleged violator is not in dispute. Mrs. Hemeng completed her E311 Card using the name that appears on her Ghanaian passport and on her Government of Canada Permanent Resident Card. Mrs. Hemeng was identified by Agency Officer 17955 at the Customs secondary inspection area as the alleged violator and he collected copies of her travel documents to confirm her identity. At the Customs secondary inspection area, Agency Officer 17955 confirmed with Mrs. Hemeng that the luggage he was inspecting belonged to her.

[23] With respect to Element 2, the evidence from Agency Officer 17955 is that he conducted a search at the Customs secondary inspection area of Mrs. Hemeng's luggage and found beef in it. In her Request for Review, Mrs. Hemeng admits that when the Agency officer went through her luggage he found beef. As well, in her oral testimony given under solemn affirmation (entirely in the Twi language of Western Africa and interpreted by Mr. Hemeng who was also under solemn affirmation), Mrs. Hemeng admits importing the beef.

Finding with respect to Element 3

[24] Travellers are given an opportunity to declare and present imported goods in writing on the E311 Card they complete prior to or upon entry into Canada. In some instances, the Agency may adduce evidence that the primary officer asked additional questions in order to clarify some aspect of the declaration with respect to agricultural products and food. For example, where a passenger answers "No" the officer might confirm

that the passenger is not bringing any agricultural or food items or, conversely, where a passenger answers “Yes” an officer might ask for specifics as to what kind of food or agricultural products the passenger is bringing.

[25] It is critical therefore to determine if a passenger has supplemented the written declaration on the E311 Card with an oral declaration to the primary officer. Where an individual checks “No” on the E311 Card that he or she presents to the Agency officer at primary inspection, and there is no evidence of any oral interaction between the two setting out any change in that declaration, then the law is clear importation is complete and it will be too late at some subsequent point during the Customs clearance process to declare and voluntarily make available any imports for inspection (*Savoie-Forgeot*, at paragraph 25).

[26] But what is the legal effect of a traveller completing his or her E311 Card where it is clearly marked “Yes” with respect to the agricultural and food question? In a recent Tribunal decision, the Tribunal determined that: “...checking “Yes” to the E311 Card question pertaining to agricultural and food products creates a rebuttable presumption that the agriculture and food items have been properly declared by the traveller in question” (*Johnson v. Canada (Minister of PSEP)*, 2017 CART 4 (*Johnson*), at paragraph 31).

[27] Given the undisputed fact that Mrs. Hemeng answered “Yes” to the E311 Card question pertaining to agriculture and food, has the Agency adduced sufficient evidence to rebut this presumption, and prove, on a balance of probabilities, that Mrs. Hemeng failed to declare or present the beef to Agency officers?

[28] Absent further evidence, an answer of “Yes” to the question pertaining to food and agriculture on the E311 Card provides notice to the Agency that the traveller is importing agricultural and food items, including any or all of the items listed in the agricultural and food question. So, it should not be a surprise to Agency officers if they later search that passenger’s luggage that they will find some of the listed items.

[29] However, a simple and broad declaration of the importation of agricultural and food items as indicated by a “Yes” response on the E311 Card does not, in every circumstance, suffice to exonerate a traveller who is subsequently found to have agricultural and food items in his or her possession. This is particularly true when there is evidence a traveller has been asked by the primary officer to further specify the exact nature of the agricultural and food items being imported. In this case, the traveller has an obligation to comply and provide the Agency officer at primary with further information as to the nature of the products being imported. It is not enough, in that case, to simply answer “Yes” to the agricultural and food question on the E311 Card (*Johnson*, at paragraphs 38 and 39).

[30] Where there is evidence that the primary officer has asked the traveller to specify which agricultural and food products he or she is importing and the traveller fails to do so, then the traveller will not have met the burden of disclosing the goods and making them available for inspection (*Savoie-Forgeot*, at paragraph 25). While it is not necessary to respond with perfect culinary or anatomical exactitude, the traveller cannot in these

circumstances meet the burden of declaring and presenting by simply answering “Yes” to the general agricultural and food question on the E311 Card.

[31] However, where there is no, or insufficient, evidence that a traveller has failed when asked to specify the content of their imported items by the Agency officer at primary inspection, the traveller’s declaration on the E311 Card that he or she is importing agricultural and food products should be sufficient to meet the obligation of presenting and thus voluntarily making available for inspection all the products covered by that declaration. The traveller, in these circumstances, ought not to be found to have violated pertinent sections of the HA Act or the HA Regulations (*Savoie-Forgeot*, at paragraph 18).

[32] A detailed look at Mrs. Hemeng’s E311 Card shows the following: (1) the “Yes” declaration to the agricultural and food question has been checked and circled; (2) a notation “32” has been handwritten on the E311 Card; (3) two handwritten strokes have been added to the top left corner of the E311 Card (with one likely indicating the number of passengers covered by the E311 Card declaration and the another likely indicating she is a resident of Canada); and (4) a date stamp of “June 23, 2016” placed by the agricultural and food question on the E311 Card. (It was not possible to determine if there were any additional notations on the E311 Card as the bottom portion of it was cut off in the copy submitted to the Tribunal by the Agency.)

[33] What is clear then from an examination of Mrs. Hemeng’s E311 Card is that she declared that she was bringing agricultural and food products into Canada by marking “Yes” to the general question on her E311 Card. The first product listed on that question is “Meat”. The “Yes” declaration is also circled, and while it is unclear why it was circled or what conversation, if any, led to it being circled, this notation is an acknowledgement by the Agency officer at primary inspection that Mrs. Hemeng declared in writing, at least, that she was importing food and agricultural products. Moreover, what is not marked on the E311 Card, as was the case in *Johnson*, was any notation indicating that specific products in the agricultural and food group were being imported. In the *Johnson* case, “fish” and “fruit” were clearly marked while “meat” was not, but upon secondary inspection “meat” was found in the passenger’s luggage.

[34] Mrs. Hemeng gave no evidence in writing or at the hearing as to the nature or content of the conversation, if any, she had with the Agency officer at primary inspection who took, examined, and marked her E311 Card. Her evidence was that she handed the E311 Card to the primary inspection officer, that he marked it and gave it back to her.

[35] Agency Officer 18120 testified he conducted the primary inspection of Mrs. Hemeng on June 23, 2016. Agency Officer 18120 testified that he recalled Mrs. Hemeng arriving at his booth and that he “coded” her for a secondary inspection. He testified that he noted Mrs. Hemeng had answered “Yes” to the agricultural and food question on her E311 Card but coded her card for a selective verification of her luggage, rather than a mandatory verification which he would have done if she had told him she was importing meat.

[36] In cross-examination, Agency Officer 18120 stated that the first question he asked Mrs. Hemeng was “Where are you coming from?” but does not remember her answer. He also testified he had no recollection of the exact questions he asked Mrs. Hemeng and of any of the answers she gave him during primary inspection. This testimony provided by the primary officer provided little convincing evidence as to whether or not Mrs. Hemeng was asked for specifics on the type of food she was bringing into Canada. I, therefore, accord little weight to the officer’s testimony.

[37] There is therefore scant, if any, reliable evidence to conclude that Mrs. Hemeng failed to declare to the Agency officer at primary inspection and thus voluntarily make available for inspection the agricultural and food products, including meat, she was bringing into Canada on June 23, 2016. I find that she made this declaration, it was in writing, and it was, without further specificity, truthful despite any English language difficulties that may have arisen between her and Agency officers on the day in question.

[38] I am mindful that there is evidence provided by other Agency witnesses that Mrs. Hemeng was asked to provide greater specificity about what she was bringing into Canada and that she failed to provide that specificity. That evidence tendered in writing and at the hearing largely focused on the interactions between Mrs. Hemeng and Agency officers conducting the search of her luggage in the secondary inspection area.

[39] The evidence tendered by the two Agency officers, Officer 37355 and Officer 17955 was that they asked Mrs. Hemeng several times if she had “meat” and she replied “Only fish”. These officers testified that they observed no communication problems between themselves and Mrs. Hemeng in English. These conversations occurred during the luggage examination process by the officers at Customs secondary, well after Mrs. Hemeng’s E311 Card containing her written declaration had been finalised. Given that Mrs. Hemeng answered “Yes” to the agriculture and food question on her E311 Card, I find this portion of the Agency’s evidence insufficient to rebut the presumption that she declared to the Agency officer at primary inspection and thus voluntarily made available for inspection all of her agricultural and food items.

[40] Moreover, Mrs. Hemeng’s testimony differed from that of the two Agency officers. As she stated in her written Request for Review, *“I have never been to school and therefore cannot read or write English. I cannot understand or speak English well and so my communication skills is completely zero”*. While her written Request for Review was in passable English, it was never made clear at the hearing whether Mrs. Hemeng herself had drafted her Request for Review or if she had had someone else draft it for her. What was clear at the hearing was that she did not speak English at all, or if she did, only in a very limited capacity. Through her husband interpreter, she testified that during the search of her luggage, she did not understand the Agency officers and so handed them a paper that had her name and address on it (produced as Exhibit 1 in this case). She testified that once out of the Customs Arrival Area, she met her husband and had to have him explain what the documents she had received meant.

[41] I find Mrs. Hemeng made an honest declaration on the E311 Card. She marked “Yes” to the agricultural and food question. The first product listed there is “Meat”. She presented her E311 Card to the Agency officer completing her primary inspection. She did not deceive or mislead the primary officer. I find convincing her evidence that she did not try to conceal the meat and that she truthfully answered the questions, as she best could understand them, of the Agency officers who conducted the search of her bags at secondary inspection. Misunderstandings and miscommunications between Mrs. Hemeng and the Agency officers at secondary inspection were likely, in large part, caused by Mrs. Hemeng’s very limited English language abilities.

[42] The evidence establishes to my satisfaction that Mrs. Hemeng declared and thus voluntarily made them available for inspection the agricultural and food products she was importing. The evidence does not establish Mrs. Hemeng was asked for more particularity at the primary inspection area on that issue. I find, as fact, that by answering “Yes” on her E311 Card, Mrs. Hemeng declared and thus voluntarily made available for inspection the agricultural and food products, including meat, that she was importing into Canada on June 23, 2016. While the Agency may offer evidence to refute this finding by what transpired at the secondary inspection area, I do not find in this case that that evidence is sufficient or convincing to displace my above finding.

[43] Therefore, with respect to Element 3, I find the Agency has failed to prove, on a balance of probabilities, that Mrs. Hemeng did not declare or present and thus make available for inspection to Agency officers, before or at the time of importation, the animal by-product that is the subject matter of this alleged violation.

Disposition

[44] I find that as the Agency has not proven all of the necessary elements to establish that Mrs. Hemeng committed the violation set out in Notice of Violation 3961-16-1224, issued June 23, 2016, she is not liable for any payment of the penalty to the Agency.

[45] In light of this finding, it is not necessary for me to determine issues #2 and #3.

Dated at Ottawa, Ontario, on this 9th day of February, 2017.

Dr. Donald Buckingham, Chairperson