Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Fatehibanafshevaragh v. Canada (Canada Border Services Agency)*, 2018 CART 6

Date: 20180712
Docket: CART/CRAC-1940

BETWEEN:

Amirhassan Fatehibanafshevaragh,

APPLICANT

- and -

Canada Border Services Agency,

RESPONDENT

BEFORE: **Luc Bélanger**
Chairperson

WITH: **Ms. Ellahe Fatehi, representing the Applicant; and**
Ms. Michèle Hobbs, representing the Respondent

In the matter of an application made by the Applicant to the Canada Agricultural Review Tribunal, pursuant to paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review of the facts of a violation of section 40 of the *Health of Animals Regulations.*

DECISION

The Canada Agricultural Review Tribunal, by ORDER, determines that, on a balance of probabilities, the Applicant did commit the alleged violation described in Notice of Violation 4971-16-1973, dated December 19, 2016, and is liable for payment of the penalty in the amount of $800 to the Respondent within thirty (30) days after the day on which this decision is served.

By written submissions only.

REASONS FOR DECISION

I. Background

[1] This case is about a traveller's undeclared importation of Iranian chicken salami at the Pearson International Airport in Toronto on December 19, 2016. The chicken salami was discovered by an officer of the Canada Border Services Agency (the Agency), in the belongings of Mr. Amirhassan Fatehibanafshevaragh (the Applicant), during a luggage examination in the customs secondary area. The Applicant was issued Notice of Violation number 4971-16-1973, with penalty of $800, by the Agency Officer, for an alleged violation of section 40 of the *Health of Animals Regulations* (HA Regulations).

[2] The Applicant, who is represented by his daughter in these proceedings, sought a review of the Notice of Violation to the Canada Agricultural Review Tribunal and chose to proceed by means of written submissions only.

[3] The Applicant alleges that his complete lack of ability in the English language and the absence of an available Farsi translator resulted in an inaccurate declaration of the food items he was importing.

[4] The Agency Officer who issued the Notice of Violation to the Applicant perceived no language barrier and noted this fact in his contemporaneous notes, in his narrative report, as well as in a sworn affidavit filed with the Tribunal.

[5] The Agency asserts that it has met its evidentiary burden of proving all the essential elements of the violation and that the issued Notice of Violation should be upheld.

II. Issues

[6] Two issues are raised by this case:

I. has the Agency proven each of the essential elements related to a violation of section 40 of the HA Regulations; and
II. has the Applicant established a permissible defence?

[7] I have reviewed all the evidence and arguments submitted by each of the parties and have concluded, for the reasons that follow, that the Applicant has committed a violation under section 40 of HA Regulations and is liable for payment of the penalty in the amount of $800.

III. Jurisdiction and Powers

[8] The Tribunal is an expert and independent body constituted by Parliament pursuant to subsection 4.1(1) of the *Canada Agricultural Products Act*, (CAP Act) and its jurisdiction consists of responding to requests for review of matters arising from the issuance of agriculture and agri-food administrative monetary penalties.

[9] The purpose of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (AAAMP Act) is the creation of an alternative to the penal system in order to supplement existing enforcement measures and to provide *"a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts"* (section 3 of the AAAMP Act).

[10] Section 19 of the AAAMP Act establishes that enforcement agencies issuing Notices of Violation have the burden of proof on a balance of probabilities standard. Furthermore, the Federal Court of Appeal (FCA) has confirmed that enforcement agencies have the burden of proving each of the essential elements of an alleged violation (*Doyon v. Canada (Attorney General)*, 2009 FCA 152, at paragraph 42 [*Doyon*]).

[11] In determining the essential elements of a particular violation the Tribunal is guided by the FCA's approach of parsing out the required elements from the statutory language of the provision that establishes the violation (*Doyon*, at paragraph 41).

[12] The monetary penalty regime within which the Tribunal operates is of an absolute liability nature for which very few permissible defences are available to applicants *(Doyon*, at paragraph 11). At paragraphs 27 and 28 of *Doyon*, the FCA describes the administrative monetary penalty regime in agriculture and its exclusion of due diligence and reasonable mistake of fact defences based on subsection 18(1) of the AAAMP Act ,which reads as follows:

> *18 (1) A person named in a notice of violation does not have a defence by reason that the person*
>
> *(a) exercised due diligence to prevent the violation; or*
>
> *(b) reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.*

[13] As for defences which are permitted pursuant to this legislative enactment, subsection 18(2) of the AAAMP Act states:

> *Every rule and principle of the common law that renders any circumstance a justification or excuse in relation to a charge for an offence under an agri-food Act applies in respect of a violation to the extent that it is not inconsistent with this Act.*

[14] At paragraph 11 of *Doyon,* discussing which types of defences are available to applicants under subsection 18(2) the AAAMP Act , Justice Létourneau writes:

> *These defences include intoxication, automatism, necessity, mental disorder, self-defence, res judicata, abuse of process and entrapment. I must say that, apart from the necessity defence, as used in Maple Lodge Farms Ltd. v. Canada (Canadian Food Inspection Agency), [2008] C.A.R.T.D. No. 9, and a break in the chain of causation, I do not really see the benefit of most of these defences, especially if one compares them with the due diligence defence, which is excluded.*

[15] Common Law defences are rarely available and infrequently raised by applicants. Applicants most often succeed as a result of enforcement agencies failing to meet their evidentiary burden of proving each of the essential elements of a violation, on a balance of probabilities. Common law defences which have been recognized as applicable as defences to Notices of Violation by the Tribunal are:

- necessity (*Maple Lodge Farms Ltd. v. Canada (CFIA),* RTA nº 60291, RTA nº 60295, RTA nº 60296, and RTA nº 60297);
- automatism (*Klevtsov v. Canada (MPSEP),* 2017 CART 10); and
- officially induced error of law (*Shar Kare Feeds Limited v. Canada (CFIA),* 2013 CART 15, at paragraphs 37 to 39).

IV. Analysis

Issue 1: Has the Agency proven each of the elements of the violation of section 40 of the HA Regulations?

[16] Section 40 of the HA Regulations states the following:

> *No person shall import into Canada an animal by-product, manure or a thing containing an animal by-product or manure except in accordance with this Part.*

[17] The Agency outlined two essential elements that needed to be proven for a violation of section 40 of the HA Regulations, namely:

- Element 1 – the Applicant is the person who committed the violation;

- Element 2 – the Applicant imported an animal by-product into Canada.

[18] I am of the view that the essential elements put forth by the Agency, for violations of section 40 of the HA Regulations, are insufficient. A strict interpretation of the two essential elements suggested by the Agency, as their burden of proof, could potentially lead to an absurd result where someone who has properly declared their animal by-product would still be found to have committed a violation of section 40 of the HA Regulations. Such a result would go against the teachings of the FCA, in *Canada (Attorney General) v. Savoie-Forgeot,* 2014 FCA 26 (*Savoie-Forgeot*), at paragraph 18, where it held:

> *It follows that where individuals declare that they are carrying animal by-products and thus voluntarily make them available for inspection, they ought not to be found to have violated section 40 of the Regulations…*

[19] The FCA has provided further guidance as to the composition of the essential elements underlying a violation of section 40 of the HA Regulations in both *Savoie-Forgeot* and *Canada Border Services Agency v. Castillo,* 2013 FCA 271 (*Castillo*).

[20] In *Savoie-Forgeot*, at paragraph 16, the FCA described the burden that the Agency had to meet for violations of section 40 of the HA Regulations in the following terms:

> *[…] In the case at hand, the CBSA thus needed to prove that Ms. Savoie-Forgeot "imported" into Canada an animal by-product that was not subject to one of the exceptions set out in Part IV of the Regulations.*

[21] In *Castillo*, which concerned an importation by a traveler of fried chicken from El Salvador, at paragraph 14 of its decision, the FCA listed the possible exceptions found in section IV of the HA Regulations and which could apply to a violation of section 40:

> *Part IV of the Health of Animals Regulations operates to permit the importation of animal by-products from El Salvador in four circumstances:*
>
> *1) Where the importer produces documentation from the government of the country of origin attesting to certain safety requirements (paragraph 41(1)(c));*
>
> *2) Where an inspector has reasonable grounds to believe that the animal by-product would not introduce disease into Canada (subsection 41.1(1));*
>
> *3) Where the importer produces documentation showing the treatment of the by-product and where an inspector has reasonable grounds to believe (based on the document, its information, and any other relevant information, including potentially an inspection of the by-product) that the importation of the by-product would not, or would likely not, introduce disease (subsection 52(1)); or*
>
> *4) Where the Minister of Agriculture and Agri-Food has issued a permit allowing the importation of the animal by-product (subsection 52(2) and section 160);*

[22] Furthermore, in *Savoie-Forgeot*, the FCA found that the Agency needed to prove the failure to declare an animal by-product, thus not making it available for inspection (at paragraphs 18-19). Specifically, the FCA stated as follows, at paragraph 19:

> *… individuals who fail to declare the animal by-products they are carrying and thus do not make them available for inspection are in violation of section 40 of the Regulations. In their case, the failure to declare signals the end of the importation process as they have, through their failure, removed the possibility for the officer to inspect the items and also the officer's discretion under subsection 41.1(1) of the Regulations to allow the individual to retain them...*

[23] Additionally, in *Savoie-Forgeot,* at paragraph 25, the FCA expressed the following:

> *It should be noted that* ***disclosure of goods and making them available for inspection should occur at the first contact with customs officials and not later, when a search is imminent or under way.*** *A traveller is not allowed to gamble that he or she will not be directed to the secondary search area, and to declare the goods only if it appears they will be discovered as a result of a search…*
>
> *(Emphasis added)*

[24] Basing itself on the guidance provided by the FCA in *Savoie-Forgeot* and *Castillo*, the Tribunal recently concluded that the Agency must establish four essential elements for violations of section 40 of the HA Regulations, in the traveller context, namely:

- Element 1 – the Applicant is the person who committed the violation;
- Element 2 – the Applicant imported an animal by-product into Canada;
- Element 3 – the animal by-product was not subject to any of the exceptions listed at Part IV of the HA Regulations; and
- Element 4 – the Applicant failed to declare the animal by-product at first contact with Agency officers and thus did not make it available for inspection.

(see *Campbell v. Canada (Canada Border Services Agency)*, 2018 CART 4 at paragraph 26)

[25] Element 1 has been established by the Agency with the copy of the Applicant's passport provided in their report and the Applicant does not dispute this element.

[26] Element 2 is established by the photos in the Agency's report showing significant amounts of various meat products and by the Applicant's own admissions.

[27] Element 3 has been established through the *Automated Import Reference System* printout which was provided in the Agency's Report which states that chicken salami from Iran should be refused entry and as such does not fall into any of the exceptions outlined at Part IV of the HA Regulations.

[28] Finally, Element 4 has been established by the Agency's customs declaration card showing that the Applicant declared "no" to the question pertaining to agricultural products. The Applicant does not dispute the fact that the chicken sausages were not declared on the customs declaration card. However, the Applicant does raise his lack of comprehension of the language of the declaration card, thus challenging the commission of this fourth element. I will therefore assess this argument in detail.

[29] The question I must determine, with respect to Element 4, is: did a severe language barrier stop the Applicant's declaration from reaching a point of finality, thus preventing the alleged violation from materializing?

[30] It is my view that where a severe language barrier exists and where a declaration cannot be properly finalized because of language incomprehension, no import violation can occur. The Tribunal has also discussed this possibility in some of its previous decisions (see *Gavryushenko v. Canada (Canada Border Services Agency)*, 2016 CART 33 at paragraph 23 [*Gavryushenko*] and *Cikotic v. Canada (Canada Border Services Agency)*, 2017 CART 11 at paragraph 32).

[31] In his Request for Review, the Applicant writes that he did not understand English and requested a translator. Because this request was not met, he was forced to fill out the declaration card on his own without understanding its meaning. The Applicant does not provide any further details as to where, when or to whom this request was made. For instance, was it made to a flight attendant during the flight or later on, after disembarking the airplane, at his first point of contact with an Agency officer?

[32] In its submissions to the Tribunal, the Agency provided its Report, with documentary evidence, within various tabs, supporting the Agency's assertion that no language barrier existed between the Applicant and Agency officers.

[33] At TAB 3 of the Agency Report, the Secondary Officer's handwritten notes, written on the day of the alleged violation, state that there was no language barrier. Similarly, at TAB 5 of the Agency Report, the Secondary Officer's Narrative Report, drafted on the day of the alleged violation, also notes "*There was no language barrier*".

[34] At TAB 9 of the Agency Report, in the Secondary Officer's sworn affidavit, he affirms that all communication between himself and the Applicant took place in English and the Applicant responded to his questions in English. He further affirms that the Applicant never requested an interpreter during the examination of his luggage at customs secondary. Finally, he affirms that there was no indication that the Applicant did not understand what was being discussed.

[35] The Applicant has asserted a severe language impediment, but provided very little detail or context and no evidentiary support. It may be that the Applicant does indeed struggle in English but there is little on the record to indicate that the Applicant so fundamentally failed to understand English to establish that he could not have committed a

violation of section 40 of the HA Regulations. I give the evidence provided by the Agency on the language barrier issue more weight than the evidence provided by the Applicant.

[36] In my view, the Agency has met its evidentiary burden of demonstrating that no language impediment existed which was severe enough to prevent the Applicant's declaration from reaching a point of finality. Therefore, the Agency has successfully proven Element 4.

[37] Furthermore, as discussed in *Gavryushenko*, at paragraph 27, referencing *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85, the Tribunal stated that: *"legitimate policy concerns militate against entertaining belated assertions about language comprehension"*.

[38] From the evidence presented, it is impossible for me to conclude that the Applicant's language limitations prevented him from committing the act of failing to declare the chicken salami. In other words, I am convinced that his language proficiency in English did not prevent him from understanding the declaration card and, consequently, from properly declaring the chicken salami.

Issue 2: Has the Applicant established a permissible defence?

[39] The FCA's decision in *Doyon*, at paragraph 11, confirmed that: *"Violations of the Act are absolute liability offences for which, as stipulated in section 18 [of the AAAMP Act], a defence of due diligence or honest and reasonable mistake of fact is not available...."*

[40] In his written submissions to the Tribunal, the Applicant raises the fact that he was unaware that the importation of the food products for personal use was not permitted by law. This defence falls into the category of due diligence and reasonable mistake of fact defences explicitly excluded by subsection 18(1) of the AAAMP Act and which cannot be considered by this Tribunal.

[41] The Applicant has not raised any of the specific common law defences enumerated by the FCA or any of those previously recognized by this Tribunal (see paragraph 15 above). Instead, the Applicant raises a lack of proficiency in the English language preventing him from properly declaring the imported food products.

[42] The Tribunal has previously discussed language impediments and has been unwilling to recognize them as a form of common law defence (see for example *Taleb v. Canada (Canada Border Services Agency)*, 2016 CART 26 at paragraphs 25 and 26 and *Gavryushenko* at paragraph 34). I am also of the view that language impediments do not constitute a common law defence.

V. Order

[43] I find, on a balance of probabilities, that the Applicant did commit a violation of section 40 of the HA Regulations, as described in Notice of Violation 4971-16-1973, dated

December 19, 2016, regarding events occurring on that day, and is liable for payment of the penalty in the amount of $800 to the Agency within thirty (30) days after the day on which this decision is served.

[44] I wish to inform the Applicant that this violation is not a criminal offence. After five years, he 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 AAAMP Act.

Dated at Ottawa, Ontario, on this 12th day of July, 2018.

Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal