Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Appiah-Kubi v Canada Border Services Agency,* 2020 CART 17

Dockets: CART-2064

BETWEEN:

APPIAH-KUBI

APPLICANT

- AND -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT

BEFORE:	**Luc Bélanger, Chairperson**
WITH:	**Ms. Mercy Appiah-Kubi, the Applicant; and Ms. Bria Hearty, representing the Respondent**
DECISION DATE:	**June 23, 2020**
DECISION DATE:	**December 5, 2019**
PLACE OF HEARING:	**Toronto, ON**

1. OVERVIEW

[1] On November 16, 2018, the Minister of Public Safety and Emergency Preparedness (Minister) issued decision #18-01406. The Minister's decision upheld the Notice of Violation (NOV) with a penalty of 800$ issued against Ms. Appiah-Kubi for importing into Canada raw beef, contrary to section 40 of the *Health of Animals Regulations* (*HA Regulations*). Ms. Appiah-Kubi requested a review of the Minister's decision before the Canada Agricultural Review Tribunal (Tribunal) pursuant to paragraph 13(2)(b) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (*AAAMP Act*).

[2] A day prior to the hearing, the Canada Border Service Agency (Agency) informed the Tribunal it would not be attending because of a change in its policy regarding the implementation of section 40 of the *HA Regulations*. As a result, it was consenting to Ms. Appiah-Kubi's appeal and advised it would proceed to cancel the NOV. In an ORDER, I informed the parties I would take the Agency's consent to the appeal under reserve and confirmed that the hearing would proceed as scheduled.

[3] Hence, there are two issues before the Tribunal. As a preliminary matter the Tribunal must determine whether it should endorse the Agency's consent to the appeal. If answered in the negative then, the Tribunal must make a finding as to whether or not the Minister erred when it held the Agency proved all the essential elements to establish Ms. Appiah-Kubi committed the violation set under section 40 of the *HA Regulations*.

[4] In this instance, I find that the Tribunal should not endorse the Agency's consent to the appeal because it offers no argument or evidence to conclude the Minister erred or that Ms. Appiah-Kubi did not violate section 40 of the *HA Regulations*. Pursuant to section 14 and 38 of the *AAAMP Act*, the authority to set aside a Minister's decision or to cancel a NOV rests solely with the Tribunal. Tribunal has the exclusive jurisdiction to hear and determine all questions of facts or law in relation to a request for review and accordingly it must fulfill its legislative mandate by undertaking a review of the facts surrounding the issuance of the NOV.

[5] I find that that the Minister did not err in its findings. The decision is based on sufficient and uncontested evidence which shows that the NOV issued against Ms. Appiah-Kubi should be upheld. A review of the Minister's decision confirms the Agency established all the essential elements of section 40 of the *HA Regulations*. Accordingly, the Minister's decision is confirmed and Ms. Appiah-Kubi is liable for the penalty amount of 800$.

2. PRELIMINARY MATTER: SHOULD THE TRIBUNAL ENDORSE THE AGENCY'S CONSENT TO THE APPEAL?

[6] On December 4, 2019, the Agency sent an email to the Tribunal stating it would not be attending the hearing scheduled the next day because of a change in its policy regarding the implementation of section 40 of the *HA Regulations*. Later that same day, I issued an ORDER confirming the hearing would proceed as scheduled because the Agency provided insufficient information to assess how this change policy would impact the Tribunal's jurisdiction to review the Minister decision and determine whether Ms. Appiah-Kubi should be held liable for that violation occurred in April 2018.

[7] The Agency sent a follow-up letter claiming that subsection 16(1) of the *Health of Animals Act* (*HA Act*) was the appropriate provision to apply when a traveller fails to present an animal product rather than section 40 of the *HA Regulations*. The Agency further stated it was consenting to Ms. Appiah-Kubi appeal without making any admission or taking a position on the merits of the appeal. The Agency advised it would proceed to cancel the NOV with penalty issued against Ms. Appiah-Kubi.

[8] On December 5, 2019, at the hearing, I provided a copy of the Agency's submissions to Ms. Appiah-Kubi and her representative. I informed Ms. Appiah-Kubi that I would take the Agency's consent to the appeal under reserve as I could not render a decision without conducting a proper analysis. I also stated I would be seeking further submissions from both parties to determine whether or not I should endorse the Agency's consent to the appeal.

[9] On December 20, 2019, I issued an ORDER requesting that the Agency provide by no later than January 21, 2020, answers to following questions:

1. Did the Applicant, based on the applicable law and the evidence on file, violate section 40 of the *HA Regulations* when she failed to declare she was importing beef skin on April 26, 2018? On what authority can the Tribunal endorse the Respondent's consent to the appeal?
2. On what authority can the Tribunal endorse the Respondent's consent to the appeal?
3. Did the Minister err in its decision to uphold the notice of violation such that the Tribunal should exercise its authority to order that the Ministerial Decision # 18-01406 should be set aside?

[10] The ORDER also granted Ms. Appiah-Kubi 30 days from the day the Agency filed its submissions to provide a reply.

[11] On January 21, 2020, the Agency filed its response to the order. For the first question, the Agency asserted that Ms. Appiah-Kubi violated section 40 of the *HA Regulations*, when she failed to declare that she was importing raw beef in April 2018. The Agency argued the facts and evidence outlined in its report and documents from the ministerial review would satisfy the Tribunal in the completion of its review.

[12] For the second question related to the Tribunal's authority to endorse the Agency's consent to the appeal, the Agency submitted it wished to rely on its previous position that Ms. Appiah-Kubi violated section 40 of the *HA Regulations*. Consequently, I should no longer consider whether the Tribunal holds authority to endorse such consent.

[13] For the third and final question on whether the Minister erred in its decision by upholding the NOV, the Agency maintained its position that there are no grounds to vary or set aside the Minister's decision in this case. Additionally, the Agency argued that the Minister made a reasonable decision based on sufficient and uncontested evidence. According the Agency, the Minister's decision falls well within the range of reasonable and acceptable outcomes. The Agency asked the Tribunal to proceed with its analysis, of the case, based on the submissions and evidence previously filed by the Agency.

[14] On February 17, 2020, Ms. Appiah-Kubi sent her reply to the Tribunal. She mainly requested that I disregard the Agency's latest submissions and endorse the Agency's consent to the appeal.

[15] Once the Minister renders a decision, he is *functus officio* as establish in *Chandler*,[1] meaning it has fulfilled its mandate since it accomplished the purpose for which it was created. In other words, once the decision is rendered the Agency cannot re-examine the case because the matter is out of its hands.

[16] The Tribunal's authority when reviewing a decision of the Minister is clear. Pursuant to paragraph 14(1)(a) of the *AAAMP Act* it must confirm, vary or set aside the Minister's decision. In order to set aside a decision, the Tribunal needs to be convinced that the Minister erred in law or in fact when it found that all the essential elements of the alleged violation were established.

[17] After undertaking a thorough analysis of the applicable legal framework, this is my view. I find that the Tribunal cannot endorse the Agency's consent to the appeal because it offers no argument-in-law or even evidence that would support a finding by the Tribunal that Ms. Appiah-Kubi did not commit the violation. Hence, I will now proceed to the analysis of the facts, applicable law and the procedural history of the case, to determine whether the decision of the Minister should be confirmed, varied or set aside.

3. BACKGROUND

[18] On April 26, 2018, Ms. Appiah-Kubi entered Canada through Pearson International Airport in Toronto, returning from Ghana. Ms. Appiah-Kubi completed her Declaration Card at a self-directed kiosk and she failed to declare she was importing any of the listed food, plant or animal products into Canada.

[19] Upon making her way towards the verification checkpoint, Ms. Appiah-Kubi was approached by roving Border Services Officer (BSO) Szymanski who questioned and referred her to secondary inspection.

[20] The inspection, completed by BSO Wongkee, revealed she was bringing dried fish, salted fish, terrestrial meat and 332g of dried animal skin, potentially antelope, which Ms. Appiah-Kubi designated as "bush meat".

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[1] *Chandler v. Alberta Association of Architects* [1989] 2 SCR 848.

[21] Since Ms. Appiah-Kubi did not have documentation permitting importation, for instance a Zoosanitary Export Certificate, BSO Wongkee determined she violated section 40 of the *HA Regulations*. Ms. Appiah-Kubi was served in person, with a NOV, and a penalty of $800.

a. Procedural History and Orders

[22] On May 16, 2018, Ms. Appiah-Kubi requested that the Minister undertake a review of the facts of the violation. In her request she apologized for the incident and explained that the violation occurred because of her inability to seek interpretation and assistance at the self-service kiosk. Additionally, she explained that she believed she had sufficiently declared everything, since in her native dialect the words "fish" and "meat" are used interchangeably.

[23] On November 16, 2018, the Minister upheld the violation. On January 2, 2019, the Ms. Appiah-Kubi requested that the Tribunal review the Minister's decision. On February 26, 2019, I found her request for review admissible.

[24] On October 30, 2019, I issued an ORDER determining the hearing to review this matter would be held in Toronto on December 5, 2019.

b. Legal Framework

[25] As previously mentioned, the request for review in this matter has been made under paragraph 13(2)(b) of the *AAAMP Act* and the Tribunal is as a result performing a review of the first instance Minister's decision. The Tribunal's powers in conducting a review of the Minister's decisions are set out in paragraph 14(1)(a) and 39 of the *AAAMP Act*.

[26] As previously determined in *Hachey*,[2] when conducting a review of a Minister's decision, the Tribunal must apply a "*de novo*" type of review since it performs the function of a specialized or appellate administrative tribunal reviewing a first instance administrative decision.

[27] As a result, the Tribunal must 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 conclusions contained in the Minister's decision. The Tribunal must apply the applicable law to the factual findings of the case and determine whether the decision of the Minister's decision should be confirmed, varied or set aside.

[28] Furthermore, when reviewing a Minister's decision, I must keep in mind the punitive nature of the administrative monetary penalty system. Accordingly, I must carefully manage and analyze the evidence as well as the essential elements of the violation as established in *Doyon*.[3]

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[2] *Hachey Livestock Transport Ltd. v. Canada (Minister of Agriculture and Agri-Food),* 2015 CART 19.
[3] *Doyon v. Canada (Attorney General),* 2009 FCA 152, at para 28.

[29] The first step of the analysis is to outline the essential elements of a violation of section 40 of the *HA Regulations* which reads as follows: "No person shall import into Canada an animal by-product[4], manure or a thing containing an animal by-product or manure except in accordance with this Part".

[30] As previously determined by the Tribunal in *Campbell*,[5] and recently reaffirmed in *Ganchorka*,[6] in order for an individual to be held liable for a violation of section 40 of the *HA Regulations*, the Agency must prove on a balance of probabilities the following four elements:

1. the Applicant is the person who committed the violation;
2. the Applicant imported animal product or animal by-product into Canada;
3. the animal by-product was not subject to any of the exceptions listed in Part IV of the *HA Regulations*; and
4. the Applicant did not declare the animal by-product of first contact with the Agency officer and therefore did not make it available for inspection.

[31] Elements 1 and 2 of the violation are not in dispute because Ms. Appiah-Kubi's identity was verified with her passport, driver's licence, and the preliminary inspection receipt. According to the Agency, Ms. Appiah-Kubi admitted that one of the bundles discovered in her luggage contained raw beef and she confirmed she was the only person responsible for importing it. Hence, there is sufficient evidence to establish that she imported animal by-product.

[32] Ms. Appiah-Kubi does not deny she imported raw beef. She argues that she sufficiently declared everything in her possession by stating she had fish. In her view, the violation was the result of her inability to seek interpretation and assistance at the self-service. In her native dialect "fish" and "meat" are used interchangeably. Only elements 3 and 4 are in dispute.

4. ISSUES

[33] The issue is whether the Minister erred in finding that the Agency proved all the essential elements of the violation.

5. ANALYSIS

[4] Section 2 of the *HA Regulations* defines an *animal by-product* as follows: "means an animal by-product that originated from a bird or from any mammal except a member of the orders Rodentia, Cetacea, Pinnipedia and Sirenia; (sous-produit animal)".
[5] *Campbell v. Canada (Canada Border Services Agency)*, 2018 CART 4.
[6] *Ganchorka v Canada Border Services Agency*, 2019 CART 15.

[34] The Agency submitted a Report which contained all the evidence it relied on to issue the violation to Ms. Appiah-Kubi. According to the Report, BSO Wongkee conducted a search in the Agency's AIRS which revealed that beef originating from Ghana was to be refused entry into Canada unless accompanied by a Zoosanitary Export Certificate. According to the Agency's evidence, BSO Wongkee asked Ms. Appiah-Kubi, whether she had any importation documentation and she did not. Based on the evidence adduced by BSO Wongkee, the seized raw beef is not subject to any of the exceptions listed in Part IV of the *HA Regulations*.

[35] Furthermore, the evidence adduced before the Minister, most specifically Ms. Appiah-Kubi's Declaration Card and BSO Wongkee's notes, supports a finding that at no time before or during the importation Ms. Appiah-Kubi presented the beef or animal skin for inspection. BSO Wongkee's notes indicate that when asked whether she was importing anything other than fish by roving BSO Szymanski, she said "no". Ms. Appiah-Kubi maintained she only had fish at BSO Wongkee's counter. It was only during secondary examination, after the officer made an incision into the packages, that the beef was discovered. Ms. Appiah-Kubi then acknowledged she imported the beef. Ms. Appiah-Kubi also confirmed she knew her luggage contained raw beef and that meat was prohibited for import.

[36] The Agency further demonstrated that Ms. Appiah-Kubi failed to declare she had agricultural and food products other than fish when she was questioned both by the roving BSO Szymanski and BSO Wongkee during the secondary examination. The Agency relied on the Tribunal's previous decision, *Johnson*[7], to argue that Ms. Appiah-Kubi's declaration during preliminary and secondary inspections were not sufficient to exonerate her from her obligation of presenting and voluntarily making the products covered by that declaration available for inspection. In order to exonerate herself, she had to declare and present the raw beef in her possession.

[37] Finally, the Agency argued there are no grounds to vary or set aside the Minister's decision in this case. The Agency asserted the Minister made a reasonable decision based on sufficient and uncontested evidence, which on a balance of probabilities established the Applicant committed the violation.

[38] According to Ms. Appiah-Kubi's her inability to seek interpretation and assistance at the preliminary inspection kiosk cause her to commit the violation. She stated that it was her first time using these kiosks and in her previous travel she completed her declaration with the assistance of other passengers. Ms. Appiah-Kubi explained that in her native dialect the words "fish" and "meat" are used interchangeably, which may have led to the inaccurate declaration. In sum, she is requesting that I set aside the Minister's decision because of her poor command of English.

[39] The Tribunal considered in *Abou-Latif*[8] and *Aobuli*[9]language proficiency in previous cases and determined that "a complete lack of understanding of either Official Language of Canada could be viewed as an impairment of volition" [10]. However, in both cases, the Tribunal concluded the applicants understanding of English was not inadequate enough to excuse their actions.

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[7] *Johnson v. Canada*, 2017 CART 4 at paras 31-32.
[8] *Abou-Latif v. Canada (Canada Border Services Agency)*, 2013 CART 35; see also *Aobuli v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 CART 9.
[9] *Aobuli*, *supra* note 8 at paras 22-23.
[10] *Ibid* at para 34.

[40] The evidence in this case leads me to conclude that Ms. Appiah-Kubi's command of English was adequate enough for her to appreciate the nature and consequences of her actions. As pointed out in the Agency's submissions, Ms. Appiah-Kubi accurately declared that she had agricultural and food products at the preliminary inspection. According to BSO Wongkee after he questioned her about the type of meat in the package seized, Ms. Appiah-Kubi had no linguistic difficulties in their interaction.

[41] I find that Ms. Appiah-Kubi failed to raise a permissible defence and challenge the decision of the Minister. The evidence before the Minister supports a finding that the Agency proved, on a balance of probabilities, all the essential elements of the violation set out in section 40 of the *HA Regulations*. Thus, the Minister did not err in upholding the NOV.

[42] According to the *AAAMP Regulations*, violations are classified as minor, serious or very serious. Bringing an animal by-product into Canada without declaring it is a "serious violation". The legal rules specify penalties for violations: $500 for a minor violation, $800 for a serious violation and $1,300 for a very serious violation (section 4 of the *AAAMP Regulations*). These penalties are fixed. The penalty of $800 in this case is justified in facts and law.

[43] At the end of the hearing, the representative of Ms. Appiah-Kubi requested that the costs be disbursed by the Agency to compensate for the fees and expenses arising from this review process and cover emotional repercussions experienced by the applicant. As previously determined in *Favel Transportation*,[11] the Tribunal does not have the power to award legal costs.

6. ORDER

[44] I find that Ms. Appiah-Kubi has committed the violation in # 4974-18-0854, dated April 26, 2018, and must pay the penalty of $800 to the Canada Border Service Agency within thirty (30) days after the day on which Ms. Appiah-Kubi receives this decision.

[45] I wish to inform Ms. Appiah-Kubi that this violation is not a criminal offence. Five years after the date on which the penalty is paid, she is entitled to apply to the Minister of Public Safety and Emergency Preparedness to have the violation removed from the records, in accordance with section 23 of the *AAAMP Act*.

Dated at Ottawa, Ontario, on this 23rd day of June 2020.

(Original signed)

Luc Bélanger

[11] *Favel Transportation Inc. v. Canada (Canadian Food Inspection Agency)*, 2013 CART 17.

Chairperson