



Ottawa, Canada K1A 0B7

Citation: *Mustafa v Canada Border Services Agency*, 2020 CART 16

Docket: CART-2042

BETWEEN:

METUSH MUSTAFA

APPLICANT

- AND -

CANADA BORDER SERVICES AGENCY

RESPONDENT

BEFORE: Luc Bélanger, Chairperson

**WITH: Mr. Metush Mustafa, Applicant; and
Mr. Christopher Hayes and Ms. Sandy Kozak, representing the
Respondent**

DECISION DATE: June 18, 2020

HEARING DATE: December 5, 2019

PLACE OF HEARING: Toronto, ON

1. OVERVIEW

[1] On October 9, 2018, the Canada Border Service Agency (Agency) issued a Notice of Violation (NOV) with a penalty of \$800 against Mr. Mustafa for importing into Canada an animal by-product, namely sausages, contrary to section 40 of the [Health of Animals Regulations](#) (*HA Regulations*). Mr. Mustafa requested a review of the facts of the NOV before the Canada Agricultural Review Tribunal (Tribunal) pursuant to paragraph 9(2)(c) of the [Agriculture and Agri-Food Administrative Monetary Penalties Act](#) (*AAAMP Act*).

[2] A day prior to the hearing, the Agency informed the Tribunal it would not be attending the hearing because of a change in its policy regarding the implementation of section 40 of the [HA Regulations](#). As a result, it was consenting to Mr. Mustafa 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 Agency proved all the essential elements to establish Mr. Mustafa 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 support a finding the Agency erred in issuing the violation or that Mr. Mustafa did not violate section 40 of the [HA Regulations](#). Pursuant to section 14 and 38 of the [AAAMP Act](#), the authority to cancel the NOV issued against Mr. Mustafa, 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 must fulfill its legislative mandate by undertaking a review of the facts of the NOV.

[5] I find the Agency established that Mr. Mustafa, by importing sausages into Canada without declaring them, committed the violation prescribed under section 40 of the [HA Regulations](#). Accordingly, Mr. Mustafa 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 facts of the NOV and determine whether Mr. Mustafa should be held liable for that violation occurred in October 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 Mr. Mustafa's 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 Mr. Mustafa.

[8] On December 5, 2019, at the hearing, I provided a copy of the Agency's submissions to Mr. Mustafa. I informed Mr. Mustafa 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 he failed to declare he was importing sausages on October 9, 2018?
2. On what authority can the Tribunal endorse the Respondent's consent to the appeal?
3. On what authority can the Agency now cancel the NOV # 4974-18-1868?

[10] The ORDER also granted Mr. Mustafa 30 days from the day the Agency filed its submissions to provide a reply.

[11] On January 22, 2020, the Agency filed its response to the order. For the first question, the Agency asserted that Mr. Mustafa violated section 40 of the [HA Regulations](#), when he failed to declare that he was importing beef sausages on October 9, 2018. The Agency argued the facts and evidence outlined in its report would satisfy the Tribunal in the completion of its review. In its view, the Agency had established, on a balance of probabilities, the four essential elements of the alleged violation.

[12] For the second question, the Agency submitted it wished to resort to its previous position that Mr. Mustafa 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 question, the Agency also indicated that it wished to resort to its previous position that Mr. Mustafa violated section 40 of the [HA Regulations](#). 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] Mr. Mustafa did not file a reply to the Tribunal.

[15] An applicant who receives a NOV issued under the [AAAMP Act](#) has the option to request a review to either the Minister or the Tribunal pursuant to paragraph 9(2)(b) or (c) of the [AAAMP Act](#). When an applicant, just like Mr. Mustafa did, files a request for a review to the Tribunal pursuant to paragraph 9(2)(c) of the [AAAMP Act](#), the matter is out of the Minister's hands. Pursuant section 38 and paragraph 39(1)(b) of the [AAAMP Act](#), the Tribunal has sole and exclusive jurisdiction to hear and determine all questions of facts or law in relation to any matter over which it is given jurisdiction.

[16] When reviewing a NOV the Tribunal's authority is clear. Pursuant to paragraph 14(1)(b) of the [AAAMP Act](#) it must determine whether or not the person requesting the review committed the alleged violation. Where the Tribunal decides that the person committed a violation it must consider whether the amount of the penalty was established in accordance with the regulations.

[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 Mr. Mustafa did not commit the violation. Hence, I will now proceed to the analysis of the facts and procedural history of the case, to determine whether Mr. Mustafa committed the alleged violation.

3. BACKGROUND

[18] On October 9, 2018, the Mr. Mustafa entered Canada through Pearson International Airport in Toronto. He was returning from Kosovo, a journey that took over 30 hours as a result of a missed connection. Mr. Mustafa completed a Declaration Card on which he failed to declare he was importing any of the listed food, plant or animal products into Canada.

[19] After passing through the Primary Inspection line, Mr. Mustafa went to the carousel to claim his luggage. At the carousel, the detector dog handled by Border Service Officer (BSO) Reid made a positive indication on Mr. Mustafa's luggage. As a result, Mr. Mustafa was selected for secondary processing.

[20] Upon inspection, Mr. Mustafa's luggage revealed that it contained approximately 15 cans of beef, 3 kg of beef sausages, 48 packages of chicken, and 4 quinces. A search through the Agency's Automated Import Reference System (AIRS) revealed that beef sausages from Kosovo should be refused entry into Canada unless the documentary requirements as prescribed in the [HA Regulations](#) were provided.

[21] Mr. Mustafa did not have documentation permitting importation. BSO Reid seized the beef sausages and determined he violated section 40 of the [HA Regulations](#). Mr. Mustafa was served in person, with at NOV, with a penalty of \$800.

a. Procedural History and Orders

[22] Following the issuance of the NOV, Mr. Mustafa requested, on October 15, 2018, that the Minister of Public Safety and Emergency Preparedness review the NOV pursuant to paragraph 9(2)(b) of the [AAAMP Act](#).

[23] On November 14, 2018, the Minister acknowledged the receipt of Mr. Mustafa's request and informed him that a ministerial decision, identified as #18-02900, would be rendered on the basis of the evidence submitted if none were received within 30 days.

[24] On November 28, 2018, the Tribunal received Mr. Mustafa's request for the review of the Minister's decision #18-02900.

[25] During the mandatory case management conference held on October 10, 2019, the Agency explained that, although Mr. Mustafa requested a review by the Minister of Public Safety and Emergency Preparedness, his true intention was to solely proceed before the Tribunal. The Agency decided to close Mr. Mustafa's request for a ministerial review.

[26] On November 25, 2019, the Agency then clarified that the decision to close Mr. Mustafa's request for a review was purely administrative—it was not a minister's decision. As result, although the Minister's decision #18-02900 is referenced in the record and was the basis of the Mr. Mustafa's request for a review to the Tribunal, it was never rendered.

[27] On November 28, 2019, I issued an ORDER that the Tribunal would review of the facts of the NOV issued against Mr. Mustafa at a hearing in Toronto on December 5, 2019.

b. Legal Framework

[28] As previously mentioned, paragraph 14(1)(b) of the [AAAMP Act](#) provides that a direct request for a review of an NOV entails that the Tribunal must hear all relevant evidence and arguments presented by the parties and make a determination as to whether the applicant committed the violation based on the applicable law.

[29] Furthermore, when reviewing the facts of the NOV, I must keep in mind the punitive nature of the administrative monetary penalty system. Hence, I must carefully manage and analyze the evidence as well as the essential elements of the violation as established in [Doyon](#).¹

[30] 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,² manure or a thing containing an animal by-product or manure except in accordance with this Part".

[31] As previously determined by the Tribunal in [Campbell](#),³ and recently reaffirmed in [Ganchorka](#),⁴ 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 an 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 failed to present the animal by-product to Agency officers before being referred to the Customs secondary area for luggage inspection.

[32] Elements 1 and 2 of the violation are not in dispute because Mr. Mustafa's identity was confirmed with his passport and he does not dispute the fact he imported sausages. Hence, the Tribunal must determine whether the Agency has established on the balance of probability elements 3 and 4.

4. ISSUE

[33] The issue is whether Mr. Mustafa violated section 40 of the [HA Regulations](#) by failing to declare an animal by-product which was not subject to any of the exceptions listed in Part IV of the [HA Regulations](#).

5. ANALYSIS

¹ [Doyon v. Canada \(Attorney General\)](#), 2009 FCA 152, at para 28.

² 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)".

³ [Campbell v. Canada \(Canada Border Services Agency\)](#), 2018 CART 4.

⁴ [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 Mr. Mustafa. According to the Report, the BSO conducted a search in the Agency's AIRS which revealed that sausages from Kosovo were to be refused entry into Canada. In addition, the BSO asked whether Mr. Mustafa had any importation documentation that would allow the sausages to be imported. Based on the evidence adduced by the Agency the sausage does not appear to be subject to any of the exceptions listed in Part IV of the [HA Act](#).

[35] Furthermore, the evidence adduced by the Agency, most specifically Mr. Mustafa's Declaration Card and the notes from BSO Reid, supports a finding that at no time before or during the importation Mr. Mustafa presented the imported sausage. In fact, the evidence demonstrates it was only after the items were discovered by BSO Reid during secondary examination that Mr. Mustafa acknowledged he was importing sausages into Canada.

[36] Mr. Mustafa did not contest the Agency's evidence. He argued the violation was unintentional and a result of his impaired mental state due to fatigue from a long trip with his daughter. Additionally, he argued the Agency stole and inaccurately identified the items seized, and that the penalty was extreme.

[37] Due diligence and mistakes of fact are not available defences to violations under the absolute liability [AAAMP Act](#) regime. The fact that Mr. Mustafa did not intend to commit the violation is not a permissible defence. The evidence of Mr. Mustafa's impairment due to fatigue does not excuse his actions.

[38] I find that Mr. Mustafa failed to raise a permissible defence and has not challenged the Agency's evidence. The Agency has proven on a balance of probabilities, all the elements of a violation of section 40 of the [HA Regulations](#).

[39] According to the [Agriculture and Agri-Food Administrative Monetary Penalties Regulations](#) (*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.

6. ORDER

[40] I find that Mr. Mustafa has committed the violation in # 4974-18-1868, dated October 9, 2018, and must pay the penalty of \$800 to the Canada Border Service Agency within thirty (30) days after he receives this decision.

[41] I wish to inform Mr. Mustafa that this violation is not a criminal offence. Five years after the date on which the penalty is paid, he 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 18th day of June 2020.

(Original signed)

Luc Bélanger
Chairperson
Canada Agricultural Review Tribunal