Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: *Tam* v. *Canada (Canada Border Services Agency),* 2013 CART 41

Date: 20131224
Docket: CART/CRAC-1686

BETWEEN:

Ting Ting Tam, Applicant

- and -

Canada Border Services Agency, Respondent

BEFORE: **Member Bruce La Rochelle**

WITH: **Tony Fan, representative for the applicant; and**
Sylvie Renaud, representative for the Agency

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 of a violation of section 40 of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following a review of written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that Notice of Violation YOW-12-071 dated November 7, 2012, is a nullity and that, therefore, the Applicant is not liable for payment of the monetary penalty.

By written submissions only.

REASONS

Alleged Incident

[2] The respondent, the Canada Border Services Agency (Agency), by Notice of Violation YOW-12-071 dated November 7, 2012, the Agency alleges that, on that date, at the MacDonald-Cartier International Airport, Ottawa, Ontario, Ting Ting Tam (Ms. Tam) "committed a violation, namely: importation of an animal by-product, to wit, meat, without meeting the prescribed requirements, contrary to section 40 of the *Health of Animals Regulations*" (reproduced *verbatim*).

[3] By letter dated December 3, 2012, and received by the Tribunal via fax dated December 4, 2012, Ms. Tam submitted a request for review (Request for Review), raising several arguments. The Request for Review was accompanied by a note from a Mr. Tony Fan (Mr. Fan), who represented himself as a friend of Ms. Tam and raised further points. A further Request for Review, dated December 4, 2012, and without reasons, was also included in the material. The material was forwarded via fax from the Constituency Office of Paul Dewar, Member of Parliament, Ottawa Centre. It was unclear whether the material had been prepared by the Member of Parliament's Constituency Office or prepared by Ms. Tam and forwarded by the Member of Parliament's Office. Hard copies of the material were forwarded via mail from the Constituency Office of Paul Dewar, Member of Parliament, Ottawa Centre, and received by the Tribunal on December 7, 2012.

[4] Between December 2012, and March 2013, there were a number of communications between the parties and the Tribunal, resulting in the Agency submitting its report (Agency Report) on February 2, 2013, and further representations being made by, or on behalf of, Ms. Tam.

Evidence

[5] The evidence before the Tribunal is therefore the following:

i. The Request for Review of Ms. Tam of December 3, 2012, plus the supplementary arguments of Mr. Fan made at that time;

ii. Supplementary arguments made by or on behalf of Ms. Tam, on January 22, March 15, and March 25, 2013; and

iii. The Agency Report dated February 2, 2013.

In the Tribunal's view, the determinative evidence that need be considered in addressing this matter is found in the Agency Report and in Ms. Tam's Request for Review. Supplementary arguments made by, or on behalf of, Ms. Tam are not relevant to the determination of the primary issue in this case.

Selected Facts not in Dispute

[6] The Tribunal is of the opinion that only a selected number of facts of this case, which are not in dispute, and which are as follow, are of relevance for the determination of this matter:

i. On November 7, 2012, Ms. Tam entered Canada at the MacDonald-Cartier International Airport in Ottawa, Ontario. She presented an E311 Declaration Card (Declaration Card) in which she stated that she was not bringing into Canada, among other items, meat or meat products (Agency Report, Tab 1 - Copy of Declaration Card);

ii. Ms. Tam advised the primary inspector that she had arrived from China, after visiting family (Agency Report, Tab 2, primary inspector "will say" statement [Primary Inspector's Statement]);

iii. Ms. Tam was (quoted *verbatim*) "a bit confused and feeling sick" when she arrived in Canada. She had been without her high blood pressure medication for two days, since her sister had packed her bags, and her medication was in Ms. Tam's checked baggage. Ms. Tam is 72 years old, a widow and (quoted *verbatim*) "without any substantial income. I am trying to survive on my meager pension. I am a law abiding senior citizen who never had any problems with the law" (reasons in Request for Review);

iv. The primary inspection was conducted in English. Ms. Tam specifically responded that she did not have any food or agricultural products in her bags, in response to questions from the primary inspector, who had asked her whether she had (quoted *verbatim*) "any food items, plants or vegetation, candies or anything edible" (Primary Inspector's Statement);

v. The primary inspector made specific inquiries of Ms. Tam as follows (quoted *verbatim:* Primary Inspector's Statement):

…

> *That I specifically asked her if she had any food items, plants/vegetation, candies or anything edible.*
>
> *That she told me that she did not have any food or agricultural products in her bags.*
>
> *That I asked her this because it has been my experience working in the air mode stream that it is more than common that individuals of Chinese origin returning from China to bring agricultural products with them.*

> *That I noticed that the manner in which she responded to the question regarding the importation of food products was more sharp, and quick then the other questions I had previously asked her. She appeared nervous. I even asked her again about food, at which point I was convinced that she was importing food or agricultural items.*
>
> …

vi. The primary inspector determined to refer Ms. Tam to secondary inspection (Primary Inspector's Statement).

Analysis

[7] In the Tribunal's view, this matter cannot proceed further, given the racial profiling of Ms. Tam admitted to by the primary inspector. That profiling is particularly found in the following statement:

> *That I asked her this because it has been my experience working in the air mode stream that it is more than common that individuals of Chinese origin returning from China to bring agricultural products with them.*

The primary inspector, whose discretion was the basis upon which Ms. Tam was referred to secondary inspection, initially proceeded from an irrelevant consideration: Ms. Tam's race.

[8] "Racial Profiling" is a concept developed in criminal law. The concept was defined by the African Canadian Legal Clinic and advocated by its then counsel, Ms. Caroline Engmann, as intervener before the Ontario Court of Appeal in R v. Richards (1999) 120 O.A.C. 344 at paragraph 24:

> ***24*** *In its written submissions the intervener, the African Canadian Legal Clinic, defined racial profiling in these terms:*
>
> > Racial profiling is criminal profiling based on race. Racial or colour profiling refers to that phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or colour resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality or general criminal propensity of an entire racial group.

[9] Writing for the court in *Richards*, Mr. Justice Rosenberg referred at paragraph 25 to the fact that the Crown in that case conceded that proceedings motivated by race in their initiation would be unlawful:

> ***25*** *…The Crown conceded that it had the burden of proving that the arrest was lawful. If there was a reasonable doubt that the demand…was racially motivated, the arrest was unlawful and the appellant was entitled to be acquitted….*

[10] The definition of racial profiling advocated by the African Canadian Legal Clinic was implicitly endorsed by the Ontario Court of Appeal in *R. v. Brown* (2003) 170 O.A.C. 131 at paragraph 7:

> ***7*** *There is no dispute about what racial profiling means. In its factum, the appellant defined it compendiously: "Racial profiling involves the targeting of individual members of a particular racial group, on the basis of the supposed criminal propensity of the entire group" and then quoted a longer definition offered by the African Canadian Legal Clinic in an earlier case,* R. v. Richards (1999), 26 C.R. (5th) 286 (Ont. C.A.)*, as set forth in the reasons of Rosenberg J.A.…*

[11] Unlike the direct evidence of racial profiling in the present case, racial profiling normally cannot be established by such direct evidence, but must be inferred from conduct. Writing for the court in the *Brown* case, Mr. Justice Morden discusses this dimension, at paragraph 44:

> ***44*** *A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.*

[12] In addition, the person in authority who is racially profiling another may not even be aware of it. As discussed by Mr. Justice Gibson in *Powell III v. TD Canada Trust*, 2007 FC 1227, at paragraph 29:

> ***29*** *Evidence of racial profiling is illusive, particularly since intention to racially profile is not required. In the result, a person engaging in racial profiling may not even be aware that he or she is doing so.*

A similar view was expressed by Mr. Justice Morden in *Brown*, at paragraph 8:

> ***8*** *The attitude underlying racial profiling is one that may be consciously or unconsciously held. That is, the police officer need not be an overt racist. His or her conduct may be based on subconscious racial stereotyping.*

[13] In the Tribunal's view, the concept of racial profiling and the prohibitions against same, as developed in criminal law, are equally applicable to proceedings involving a determination to issue a Notice of Violation in relation to an administrative monetary penalty. To maintain such proceedings when racial profiling has, as here, been admitted to by the Agency, would bring the system of justice into disrepute.

[14] The Tribunal has recently addressed systematic racial profiling by the Agency in the case of *Bougachouch v. Canada* (CBSA), 2013 CART 20. In that case, following arrival in Montreal on a flight from Morocco, the passengers were segregated by Arab race or appearance. On the uncontroverted evidence, persons of Arab race or appearance were referred to secondary inspection, while persons of Caucasian race or appearance were permitted to pass through primary inspection only, thus avoiding the possibility of their baggage being searched and any Notice of Violation issued, if products subject to the imposition of an administrative monetary penalty were to be found. In Bougachouch, on the uncontroverted evidence, only those of Arab race or appearance were subject to search and the possibility of a Notice of Violation being issued. The Tribunal held that, under these circumstances, the proceedings against Mr. Bougachouch, who had been in the "Arab waiting line", were a nullity. The Tribunal reasoned as follows, at paragraphs 31 to 34:

> ***31*** *The Tribunal is of the view that it has the right to reject a Notice of Violation, due to the conduct of Agency officers towards an applicant. In effect, the Tribunal has the right to judge that the conduct of Agency officials has been so highly egregious that the Tribunal refuses to admit evidence obtained as a result of such conduct, based on the fact that, to do otherwise could potentially cause the system of justice to fall into disrepute. The current state of the law is able to accord to the Tribunal a discretionary power to bar evidence obtained as a result of flagrant disregard for the applicant's rights. See, for example, the decision of Madame Justice Spies in* R. v. Johnson, 2007 CanLII 2007 57813 (ONSC)*, and the decision of Mr. Justice Kruzick in* R. v. Nguyen, 2006 CanLII 1769 (ONSC)*. The Tribunal, in a decision by Chairperson Buckingham, expressed related sentiments in Amalia Eustergerling v. Canada (CBSA), 2012 CART 19, in paragraphs [41] to [45] and, in particular, paragraphs [43] and [45], which read as follows:*
>
> > [43] The Supreme Court of Canada has considered the abuse of discretion in the case of *Roncarelli v. Duplessis [1959*] S.C.R. 121, and has stated the law as follows at page 140:
> >
> > > *In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute….*

…

> [45] Therefore, the Tribunal is convinced that the decision of Inspector 10481 was not based on capricious or discriminatory criteria such as race, or gender or other irrelevant considerations. It would appear to the Tribunal that Inspector 10481 made her decision strictly on the basis of the particular case at hand, without letting her judgment be clouded by irrelevant or extraneous considerations. Moreover, even if proper and improper purposes underlying Inspector 10481's action would have existed, intervention by this Tribunal would only be merited where the improper purpose contributed to a material extent in the issuance of the Notice of Violation with Penalty….
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> …
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> ***32*** *Despite having been given three opportunities (in the Agency's Report, at the hearing and in the Agency's additional submission) to submit evidence to counter the appearance of bias, the Agency chose not to submit anything. Consequently, the Tribunal finds that there was bias in the selection of Mr. Bougachouch and his luggage.*
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> ***33*** *The Tribunal acknowledges that the decisions of Agency inspectors are made under great pressure and that the discretion of inspectors must be respected under most circumstances. However, there are rare circumstances under which discretion and decision-making are seriously compromised. There is no imputation of bad faith. For some reason, without any convincing explanation, only Arabs were referred to secondary inspection in this case. Discretion is not being exercised when only Arabs, arriving on a flight with many other individuals, are required to undergo secondary inspection. The Tribunal remains without a convincing explanation from the Agency for this "Arab waiting line".*
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> ***34*** *In the view of the Tribunal, the case at hand is one of those rare cases where the discretionary power to bar evidence should be exercised. As a result, the Tribunal considers the Notice of Violation to be a nullity. To do otherwise could cause the system of justice to fall into disrepute*.

[15] The Tribunal reasons similarly to *Bougachouch* in the present case. In addition, the Tribunal applies the reasoning of *Eustergerling,* at paragraph 45, referenced in the extract from *Bougachouch*, quoted *ante*. In particular, based on the reasoning in *Eustergerling*, the Tribunal finds that the decision of the primary inspector to refer Ms. Tam to secondary inspection was: (a) initially based on "discriminatory criteria"; and (b) "the improper purpose contributed to a material extent in the issuance of the Notice of Violation with Penalty".

[16] The Tribunal emphasizes that there is no imputation of bad faith in relation to the conduct of the primary inspector. There is no evidence that he conducted himself otherwise than in what he genuinely believed to be an appropriate manner. However, as superior courts have noted in the *Powell III* and *Brown* cases, quoted *ante*, racial profiling is not necessarily conscious behaviour.

[17] The Notice of Violation issued to Ms. Tam is therefore considered by the Tribunal to be a nullity, based on considerations that, to do otherwise, would tend to bring the system of justice into disrepute.

Conclusion

[18] Following a review of written submissions of the parties, the Tribunal, by order, determines that the Notice of Violation YOW-12-071, dated November 7, 2012, is a nullity and that therefore the applicant is not liable for payment of the monetary penalty.

Dated at Ottawa, Ontario, this 24th day of December, 2013.

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Dr. Bruce La Rochelle, Member