



Citation: Josue Luboya Kaleka v. Canada (CBSA), 2012 CART 5

Date: 20120223
Docket: CART/CRAC-1576

Between:

Josue Luboya Kaleka, Applicant

- and -

Canada Border Services Agency, Respondent

[Translation of the official French version]

Before: Chairperson Donald Buckingham

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 a violation of paragraph 34(1)(b) of the *Health of Animals Regulations*, alleged by the respondent.

DECISION

[1] Following a review of all written submissions filed by the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation 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

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on May 5, 2011, at Pierre-Elliott-Trudeau International Airport in Dorval, Quebec, the applicant, Josue Luboya Kaleka (Kaleka), entered Canada having in his possession milk products from the Netherlands, a country from which it is unlawful to import milk products unless proper documentation is secured for importation, thus contravening paragraph 34(1)(b) of the *Health of Animals Regulations*.

[3] The Tribunal must determine whether the Agency has established all of the elements required to support the Notice of Violation in issue.

Procedural history

[4] Notice of Violation #3961-11-M-0149, dated May 5, 2011, states that, on May 5, 2011, at Pierre-Elliott-Trudeau International Airport in Dorval, Quebec, Kaleka [TRANSLATION] “committed a violation, namely: Importation of animal products, specifically milk or milk products, without the required certificate, contrary to paragraph 34(1)(b) of the *Health of Animals Regulations*”, which is a violation of section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and of section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[5] Paragraph 34(1)(b) of the *Health of Animals Regulations* states as follows:

34. (1) *No person shall import milk or milk products into Canada from a country other than the United States or from a part of such a country, unless*

(a) the country or part of the country is designated as free of foot and mouth disease pursuant to section 7; and

(b) the person produces a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin or part of such a country is the designated country or part thereof referred to in paragraph (a).

[6] On May 5, 2011, the Agency served Kaleka the Notice of Violation in person. The purpose of the Notice of Violation was to inform Kaleka that the alleged violation, for which the penalty is \$800, is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[7] In a letter dated May 9, 2011, which the Tribunal received on May 10, 2011, Kaleka requested a review by the Tribunal of the facts of the violation, in accordance with paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. In a telephone call with Tribunal staff, Kaleka stated that he wished the review to be conducted by written submissions only. The Tribunal, therefore, conducted this review on the basis of all of the written submissions it received from the parties.

[8] On May 20, 2011, the Agency sent its report (the Report) regarding the Notice of Violation to Kaleka and to the Tribunal, which received it on May 23, 2011.

[9] In a letter dated May 24, 2011, the Tribunal invited Kaleka to file with it, any additional statements in this matter, no later than June 23, 2011. No additional written submissions were received from Kaleka by that date. However, Kaleka sent Additional Submissions to the Tribunal on September 6, 2011. Since the Agency accepted that these additional submissions be admitted into the evidence before the Tribunal, the documents were added to the file. Neither Kaleka nor the Agency filed any other material in this case.

Evidence

[10] In the present matter, the evidence submitted to the Tribunal consists of the written submissions filed by the Agency (the Notice of Violation and the Agency's Report) and by Kaleka (his request for review and his Additional Submissions).

[11] In its Report, the Agency presented the following evidence:

- On May 5, 2011, Kaleka arrived in Canada from the Conga via Addis Ababa and Paris on flight AC871. His flight landed at the International Airport in Dorval (Tab 2 of the Agency's Report - Declaration Card E311(09) signed by Kaleka, and Tab 5 - Boarding Pass).
- Kaleka filled out and signed the Canada Border Services Agency's Declaration Card (E311), dated May 5, 2011. He checked "No" beside the following statement: "I am/we are bringing into Canada: Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects." (Tab 2 of the Agency's Report – Declaration Card E311(09) signed by Kaleka).
- Moreover, on the Canada Border Services Agency's Declaration Card (E311), dated May 5, 2011, Kaleka checked "Yes" beside the following statement: "I am/we are bringing into Canada: Commercial goods, whether or not for resale (e.g. samples, tools, equipment)." (Tab 2 of the Agency's Report – Declaration Card E311(09) signed by Kaleka).

- Kaleka reported to the Canada Border Services Agency in Montréal (Dorval) upon deplaning. He completed the primary inspection, but was required to undergo a secondary inspection. Officer 13254, who performed the secondary inspection, signed a statement according to which she asked the passenger whether he had any meat, milk products or cheese, to which Kaleka replied “No”. The Officer found a can containing 2.5 kilograms of milk powder in Kaleka’s luggage. Officer 13254 also stated that she had asked the applicant for the required permits and certificates, but that none were provided for the product in question. The product was therefore seized and destroyed. (Tab 7 of the Agency’s Report - Form CBSA 142(05) - Inspector’s Non Compliance Report for Travellers at Points of Entry).
- Officer 13254 further stated that she had contacted her supervisor to resolve the situation, noting that “Supt. BEATTIE came to address the subject’s concerns at approximately 16 :15. Supt. BEATTIE explained that the item was refused entry because he did not have the proper importation certificate. The subject then stated he was importing this product as a commercial sample. The subject told Supt. BEATTIE that he has an import/export business (stlaurent.net) that he was bringing this product in for.”
- The milk product found in Kaleka’s luggage was photographed (Tab 4 of the Agency’s Report - Photographs). Officer 13254 noted that she had found “NIDO FULL-CREAM POWDERED MILK...MINIMAL CONCEALMENT” (Tab 7 of the Agency’s Report – Form CBSA 142(05) – Inspector’s Non Compliance Report for Travellers at Points of Entry).
- The importation of milk products from the Netherlands is prohibited unless proper documentation is secured for importation. Kaleka did not give any documents of the sort to the Agency’s representatives, on May 5, 2011, or after that date (Tab 7 of the Agency’s Report – Form CBSA 142(05) – Inspector’s Non Compliance Report for Travellers at Points of Entry, and Tab 10 of the Agency’s Report – Automated Import Reference System (AIRS) report for the importation of chicken meat).

[12] In the submissions appended to his request for review, Kaleka states that [TRANSLATION] “In fact, on May 5, 2011, the day on which I returned from my trip to Kinshasa in the Congo, a can of milk powder was seized from my luggage by a customs officer at Trudeau airport for the stated reason that it was prohibited to bring this can into Canada and because it was allegedly an offence to import a can of milk without the required certificate”. He further observed that the can of milk powder was seized and destroyed. Kaleka noted [TRANSLATION]: “The amount requested for this alleged violation is either unwarranted or an abuse of authority, especially as the amount bears no relation to the value of the can of milk powder in question, which costs only 20 dollars”.

[13] Both in the Additional Submissions and the submissions appended to his request for review, Kaleka states that, during the secondary inspection, the immigration officer addressed some unfortunate, malicious, indeed disrespectful remarks to him. Moreover, even though he checked “Yes” beside the statement “I am/we are bringing into Canada: Commercial goods, whether or not for resale (e.g. samples, tools, equipment)” on the Canada Border Services Agency’s Declaration Card (E311), Kaleka noted that he is not a frequent traveller and that his trips, especially his recent ones were family related.

Analysis and applicable law

[14] This Tribunal’s mandate is to determine the validity of agriculture and agri-food administrative monetary penalties issued under the authority of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). The purpose of the Act is set out in section 3:

3. The purpose of this Act is to establish, as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient administrative monetary penalty system for the enforcement of the agri-food Acts.

[15] Section 2 of the Act defines “agri-food Act”:

2. “agri-food Act” means the Canada Agricultural Products Act, the Farm Debt Mediation Act, the Feeds Act, the Fertilizers Act, the Health of Animals Act, the Meat Inspection Act, the Pest Control Products Act, the Plant Protection Act or the Seeds Act[.]

[16] Pursuant to section 4 of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health, depending on the circumstances, may make regulations:

4. (1) The Minister may make regulations

(a) designating as a violation that may be proceeded with in accordance with this Act

(i) the contravention of any specified provision of an agri-food Act or of a regulation made under an agri-food Act, . . .

[17] The Minister of Agriculture and Agri-Food has made one such set of regulations, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, which designate as violations certain offences against provisions of the *Health of Animals Act* and the *Health of Animals Regulations*, and the *Plant Protection Act* and the *Plant Protection*

Regulations. These violations are listed in Schedule 1 to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, which includes a reference to paragraph 34(1)(b) of the *Health of Animals Regulations*.

[18] The Act's scheme of administrative monetary penalties (AMP), as set out by Parliament is, however, very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal described the AMP system as follows, at paragraphs 27 and 28:

[27] In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.

[28] Therefore, the decision-maker must be circumspect in managing and analysing the evidence and in analysing the essential elements of the violation and the causal link. This circumspection must be reflected in the decision-maker's reasons for decision, which must rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay.

[19] The Act creates a liability scheme that is not very permissive since it allows neither a due diligence nor a mistake of fact defence. Section 18 of the Act states 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.

[20] Since an AMP provision has been enacted for a particular violation, in this instance paragraph 34(1)(b) of the *Health of Animals Regulations*, Kaleka has very few defences available to him. In the present matter, section 18 of the Act excludes practically any excuse that Kaleka might raise, such as his not being a frequent traveller and his consequently limited knowledge of the law on food and products that are prohibited while travelling, his indicating on the E311 Declaration Card that he was bringing commercial goods, whether or not for resale, or simply his forgetting to declare or show any food product to the inspector as he should have done.

[21] Given Parliament's clear intent in this regard, the Tribunal accepts that none of the statements made by Kaleka in his request for review could be relied on in his defence under section 18.

[22] However, in *Doyon*, the Federal Court of Appeal also pointed out that the Act places a heavy burden on the Agency. At paragraph 20, the Court states:

[20] Lastly, and this is a key element of any proceeding, the Minister has both the burden of proving a violation and the legal burden of persuasion. The Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice: see section 19 of the Act.

[23] Section 19 of the Act reads as follows:

19. *In every case where the facts of a violation are reviewed by the Minister or by the Tribunal, the Minister must establish, on a balance of probabilities, that the person named in the notice of violation committed the violation identified in the notice.*

[24] The strictness of the AMP scheme must reasonably apply to both Kaleka and the Agency. Therefore, it is the Agency's duty to prove, on a balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation.

[25] Therefore, the Agency must prove every element of the violation on a balance of probabilities. In the case of a violation of paragraph 34(1)(b) of the *Health of Animals Regulations*, the Agency must prove the following:

- (1) Kaleka is the person who committed the violation;
- (2) Kaleka brought (imported) milk or milk products into Canada from a country other than the United States;
- (3) Kaleka did not produce to an Agency inspector a certificate of origin signed by an official of the government of the country of origin that shows that the country of origin is designated as free of foot and mouth disease.

[26] The Tribunal is of the opinion that the Agency has established all of the elements of the violation set out in the Notice of Violation. Elements 1 and 2 have not been challenged. The identity of the person who committed the violation is Kaleka. Furthermore, the Tribunal acknowledges, and Kaleka admits, that Officer 13254 found in Kaleka's luggage, a can of milk powder he had imported from a country other than the United States, specifically, a product made in the Netherlands and bought outside the United States. Lastly, regarding the

third element, Kaleka did not present any document or certificate of origin signed by an official of the government of the country of origin that shows that the country of origin is designated as free of foot and mouth disease, a certificate that would have allowed him to import the milk product in question.

[27] The very strict AMP system established by Parliament and set out in the Act protects Canada's agricultural and food systems against contamination and disease. The penalties set out in the Act, as in this case, can nonetheless have severe repercussions for Canadians, especially someone like Kaleka. It seems that Kaleka is asking the Tribunal to waive, for financial reasons, the penalty imposed in this case and to show clemency by setting aside the \$800 fine. Unfortunately, once the Agency has established all the facts of the alleged violation on a balance of probabilities, the Tribunal's power is limited to confirming the notice of violation and ordering the offender to pay the fine specified in this Notice of Violation.

[28] Agency inspectors are charged with protecting Canadians, the food chain and agricultural production in Canada from the risks posed by biological threats to plants, animals and humans. There is no doubt that these duties must be exercised responsibly. The Tribunal is aware that the Agency has its own procedure for reviewing traveller complaints against inspectors who have conducted themselves improperly towards travellers. It is not for the Tribunal to determine whether that was the case here. Furthermore, the Tribunal's jurisdiction to review Notices of Violation comes from its enabling statutes. According to these laws, the Tribunal has neither the mandate, nor the jurisdiction, to set aside or dismiss a Notice of Violation for reasons relating solely to the conduct of Agency inspectors towards an applicant or for humanitarian or financial reasons.

[29] Following a review of all written submissions of the parties, the Tribunal, therefore, finds that Kaleka committed the violation 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.

[30] The Tribunal wishes to point out to Mr. Kaleka that this violation is neither a criminal nor a federal offence but a violation punishable by a monetary penalty and that, after five years, he has the right to apply to have the notation of this violation removed from the Minister's records, in accordance with subsection 23(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, which states as follows:

23. (1) *Any notation of a violation shall, on application by the person who committed the violation, be removed from any records that may be kept by the Minister respecting that person after the expiration of five years from*

(a) where the notice of violation contained a warning, the date the notice was served, or

(b) in any other case, the payment of any debt referred to in subsection 15(1),

unless the removal from the record would not in the opinion of the Minister be in the public interest or another notation of a violation has been recorded by the Minister in respect of that person after that date and has not been removed in accordance with this subsection.

Dated at Ottawa, this 23rd day of February, 2012.

Dr. Donald Buckingham, Chairperson