

Canada Agricultural
Review Tribunal



Commission de révision
agricole du Canada

Citation: Kalongi Mado Mulanga v. Canada (CBSA), 2012 CART 2

Date: 20120209
Docket: CART/CRAC-1557

Between:

Kalongi Mado Mulanga, Applicant

- and -

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

DECISION

[1] Following a review of all of the written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable to pay the respondent a monetary penalty of \$800 within 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 November 22, 2010, at Pierre-Elliott-Trudeau Airport in Dorval, Quebec, the applicant, Kalongi Mado Mulanga (Mulanga), entered Canada having in her possession pork sausages from France, a country from which it is unlawful to import meat products unless proper documentation is secured for importation, thus contravening section 40 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 #3961-10-M-0564, dated November 22, 2010, states that, on November 22, 2010, at Pierre Elliot-Trudeau Airport in Dorval, Quebec, Mulanga [TRANSLATION] “committed a violation, namely the following: Import of an animal by-product, specifically meat, without having fulfilled the prescribed requirements, contrary to section 40 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] Section 40 of the *Health of Animals Regulations* reads as follows:

40. *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.*

[6] On November 22, 2010, the Agency served the Notice of Violation on Mulanga personally. The purpose of this notice was to inform Mulanga that the alleged violation, for which the imposed penalty is \$800, is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[7] In an undated letter, which the Tribunal received on December 16, 2010, Mulanga 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*. During a telephone call with Tribunal staff, Mulanga stated that she 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] Following a decision by the Tribunal to grant the Agency an extension of time to file its report (Report), the Agency provided the applicant and the Tribunal with its Report concerning the Notice of Violation. The Tribunal received its copy of the Report on January 18, 2011.

[9] On January 18, 2011, the Tribunal asked Mulanga to respond to the Report and send the Tribunal any further submissions related to this case by no later than February 17, 2011.

[10] In response to the Tribunal's request, Mulanga filed a letter (additional submissions), which sets out her position in respect of the Report. This material, received by the Tribunal on February 16, 2011, is included in the evidence for this case. No other material was filed by Mulanga or the Agency in this case.

Evidence

[11] In this case, 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 Mulanga (her request for review and her additional submissions).

[12] The Agency presented the following evidence in its Report:

- Mulanga arrived in Canada from France on board flight TS711 on November 22, 2010. Her flight landed at Dorval International Airport (Tab 2 of the Agency's Report - Declaration Card E311(09) signed by Mulanga).
- Mulanga filled out and signed the Canada Border Services Agency's Declaration Card (E311). She answered "no" to 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 Mulanga).
- Mulanga reported to the Canada Border Services Agency in Dorval upon deplaning. She completed the primary inspection, but was required to undergo a secondary inspection. Officer 18286, who conducted the secondary inspection, signed a declaration in which she stated having asked the passenger whether the suitcase belonged to her, to which the passenger answered in the affirmative. The officer also stated that she had asked for the required permits and certificates, but that none was provided for the meat product. This 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, final page).

- The meat product found in Mulanga's luggage was photographed (Tab 6 of the Agency's Report – Photos) by Officer 18286. She indicated that she had found [TRANSLATION] "sausage, 0.8 kg" (Tab 5, Agency's Report – Tag for intercepted item(s) – Form BSF 156) in "a plastic bag in the suitcase" (Tab 7 of the Agency's Report – Form CBSA 142(05) – Inspector's Non-Compliance Report for Travellers at Points of Entry).
- Importing pork meat from France is unlawful unless the importer has the documents required for that purpose, and Mulanga did not give any documents of the sort to the Agency's representatives either on November 22, 2010, or afterwards (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 chicken meat).

[13] In her submissions for her request for review, Mulanga stated that [TRANSLATION] "*In fact, on my last trip between Paris and Montréal, I brought with me two sausages, having a total value of 12 euros, for my personal consumption and I did declare them, but during the check the customs officer confiscated them and gave me an \$800 fine, for no real reason as far as I can see. As well, since I am currently unemployed, I am completely unable to pay this exorbitant amount.*" In her additional submissions, Mulanga repeated that [TRANSLATION] "*the sausages, which I brought with me for my personal consumption, had a total value of 12 euros. I question why the customs officer is fining me \$800 for that—really, it's inhumane!*"

Analysis and applicable law

[14] The Tribunal's role is to determine the validity of agricultural and agri-food administrative monetary penalties imposed under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act). The purpose of the Act is set out at 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" as follows:

- 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] In accordance with section 4, the Minister of Agriculture and Agri-Food or the Minister of Health, depending on the circumstances, may make regulations as follows:

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 made those regulations, namely, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, which define, as violations, certain contraventions to the *Health of Animals Act*, the *Health of Animals Regulations*, the *Plant Protection Act* and the *Plant Protection Regulations*. Those violations are listed in Schedule 1 to the *Agri-Food Administrative Monetary Penalties Regulations*, which refers to section 40 of the *Health of Animals Regulations*.

[18] The Administrative Monetary Penalty (AMP) system set out in the Act and established by Parliament is very strictly enforced. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes this 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 near-absolute liability scheme since it does not allow the defence of having exercised due diligence to prevent the violation or of having made a mistake of fact. Section 18 of the Act 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.

[20] In the event that a provision setting out AMPs has been adopted for a specific violation, as one has been for section 40 of the *Health of Animals Regulations*, Mulanga has very few defences. In the present case, section 18 of the Act excludes almost every excuse that may be raised, such as the fact that she possibly misunderstood the Declaration Card E311 or simply forgot to declare or present a food product to the inspector, as she was required to do.

[21] Considering Parliament's clearly expressed intention on this question, the Tribunal acknowledges that none of the statements made or not made by Mulanga in her request for review can be used as a defence, in accordance with section 18.

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

[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 provides 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 AMP system must reasonably apply with equal strictness to both Mulanga and the Agency. Consequently, the Agency has the burden of proving, on a balance of probabilities, all of the elements of the violation, which serve as a basis for the Notice of Violation.

[25] The Tribunal's view is that the Agency has established all of the elements of the violation set out in the Notice of Violation. The identity of the person who allegedly committed the violation is not in question. The Tribunal is of the opinion that Mulanga did not declare the sausages before she went through the secondary inspection. In this regard, the Tribunal accepts the evidence that the Agency provided by means of the Declaration Card signed by Mulanga, stating that she had no meat products to declare (Tab 2 of the Report) and that Officer 18286 found undeclared meat in Mulanga's luggage (Tab 7 of the Agency's Report – Form CBSA 142(05) – Inspector's Non-Compliance Report for Travellers at Points of Entry), evidence that Mulanga does not really deny, although in her letter received by the Tribunal on December 16, 2010, she states, without specifying when this occurred, that [TRANSLATION] *“... I did declare them; but during the check the customs officer confiscated them and gave me an \$800 fine.”*

[26] The Tribunal also accepts that Officer 18286 found, in the applicant's luggage, two sausages imported from France, for which the applicant had no documents permitting her to import any meat by-product of the sort (Tab 7 of the Agency's Report – Form CBSA 142(05) – Inspector's Non Compliance Report for Travellers at Points of Entry).

[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, may nonetheless have severe financial repercussions for someone newly arrived in Canada who has imported two sausages for her personal consumption. It seems that Mulanga 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 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 said Notice.

[28] The Agency's inspectors are tasked with protecting Canadians, the food chain and agricultural production in Canada from the risks posed by biological threats to plants, animals and humans. These duties, no doubt, must be exercised responsibly. The Tribunal is aware that the Agency has its own procedure for handling traveller complaints against inspectors, where the actions of inspectors become excessive towards the travelling public. It is not incumbent on 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 function 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] Consequently, having considered all of the written submissions of the parties, the Tribunal is of the opinion that Mulanga committed the violation and that she is liable to pay the respondent a monetary penalty of \$800 within 30 days after this decision is served.

[30] However, the Tribunal wishes to emphasize to Ms. Mulanga that this offence is neither a criminal offence nor an offence under an Act of Parliament, but an offence punishable by monetary penalty and that, in five years' time, she may apply to the Minister to have the violation removed from her record, in accordance with subsection 23(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. This provision reads 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 9th day of February, 2012.

Dr. Donald Buckingham, Chairperson