Canada Agricultural Review Tribunal

Commission de révision agricole du Canada

Citation: Sergiy Vorobyov v. Canada (Minister of Agriculture and Agri-Food) 2012 CART 25

Date: 20121211
Docket: CART/CRAC-1659

Between:

Sergiy Vorobyov, Applicant

- and -

Minister of Agriculture and Agri-Food, Respondent

Before: **Tribunal Member Dr. Bruce La Rochelle**

In the matter of an application made by the applicant, pursuant to paragraph 13(2)(*b*) of *the Agriculture and Agri-Food Administrative Monetary Penalties Act*, for a review by the Tribunal of a Minister's decision dated August 15, 2012, upholding a Notice of Violation issued June 15, 2011.

DECISION

[1] Following a review of the decision, and the reasons for that decision, purportedly made by the Minister of Agriculture and Agri-Food (Minister) on August 15, 2012, and following a review of all written submissions of the parties in this matter, the Canada Agricultural Review Tribunal (Tribunal), by order, sets aside the Minister's decision, finds the Notice of Violation issued to the applicant is null and void, and, as a result, holds that no monetary penalty is payable by the applicant to the respondent.

By written submissions only.

Canada

REASONS

Alleged incident and issues

[2] On August 15, 2012, a decision was allegedly issued by the Minister after the conclusion of a review pursuant to subsection 13(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (Act) S.C. 1995, c. 40, of the facts pertaining to the issuance of Notice of Violation YEG-11-0023 dated June 15, 2011, to the applicant, Sergiy Vorobyov (Dr. Vorobyov).

[3] The Notice of Violation states that the events which gave rise to its issuance to Dr. Vorobyov by the Canada Border Services Agency (Agency) occurred on June 15, 2011, at Edmonton International Airport in Edmonton, Alberta when Dr. Vorobyov is alleged to have imported meat without meeting the prescribed requirements contrary to section 40 of the *Health of Animals Regulations.*

[4] Section 40 of the *Health of Animals Regulations* makes importing meat into Canada unlawful unless an importer meets the requirements of Part IV "Importation of Animal By-Products, Animal Pathogens and Other Things" of the *Health of Animals Regulations*.

[5] On June 20, 2011, Dr. Vorobyov submitted by fax a "Request for review by the Minister", with the request commencing "Dear Minister of Public Safety". This was stamped as received by the Recourse Directorate of the Canada Border Services Agency that same day.

[6] By registered letter dated August 15, 2012, more than one year after Dr. Vorobyov's initial "Request for review by the Minister", a decision was communicated by which the Notice of Violation was maintained. The letter was signed by Ms. Julie Vinette, identified as "A/Senior Program Advisor" of the Appeals Division of the Recourse Directorate of the Canada Border Services Agency. Ms. Vinette signed "For the Minister of Public Safety and Emergency Preparedness".

[7] By letter dated August 28, 2012, sent by express mail on the same date and forwarded by e-mail to the Tribunal on August 29, 2012, Dr. Vorobyov requested a review of the Minister's decision by the Tribunal.

[8] On September 27, 2012, the Agency submitted a report in response to Dr. Vorobyov's request for review. The style of cause in the report was specified to be between Sergiy Vorobyov as the Applicant, and the Canada Border Services Agency as the Respondent.

[9] By letter dated October 16, 2012 and received by the Tribunal on October 22, 2012, Dr. Vorobyov made further representations.

[10] The essence of the case concerns whether Dr. Vorobyov wrongfully imported pork fat to Canada, without a permit. Dr. Vorobyov has advanced several arguments, including the fact that the product in question is chemically-based, primarily used as barbecue fluid and was used by him as a foot lotion during the course of a transatlantic flight. The Agency has countered these arguments, and others advanced by Dr. Vorobyov. However, the Tribunal holds that the Agency's case is not sustainable at first instance, due to a fundamental procedural error. In this regard, the Tribunal relies on its recent decisions in *Iliut Razvan Puia* v. *Canada (Minister of Agriculture and Agri-Food)* 2012 CART 20 and *Nisreen Abdul-Aziz v. Canada (Minister of Agriculture and Agri-Food)* 2012 CART 24.

[11] In the *Puia* and *Abdul-Aziz* decisions, the Tribunal held that the role of the Agency is procedurally improper, as such relates to its actions, purportedly on behalf of the Minister of Agriculture and Agri-Food, concerning a Request for Review by the Minister of the issuance of a Notice of Violation. In the *Puia* and *Abdul-Aziz* decisions, the Tribunal held that the effect of such procedural improprieties was also to nullify any underlying Notice of Violation. The Tribunal has received no indication that either decision is under judicial review and, by a strict calculation of the limitation periods, the period for requesting a judicial review of the decision in *Puia* has expired. In paragraph 20 of the Tribunal's decision in *Abdul-Aziz*, issued November 30, 2012, the Tribunal stated:

> [20] At the hearing, Ms. Abdul-Aziz appeared with her husband and son, with the latter representing her for the purposes of presenting arguments on her behalf. Ms. Melanie Charbonneau appeared for the respondent but there was some confusion as to whether she was before the Tribunal—given that she is currently an employee of the Agency—as the representative for the Agency, for the Minister of Public Safety and Emergency Preparedness, or for the Minister of Agriculture and Agri-Food. The Chairperson commenced the hearing asking the parties if they wished to bring forward any preliminary motions. Ms. Charbonneau indicated to the Tribunal that she wished to bring such a motion. She informed the Tribunal that the Agency was not in a position to make representations at this time and so asked to be excused from the case. When asked by the Chairperson the basis of this position, she replied that the Agency had not yet been able to address the matter of the Puia decision. When further asked by the Chairperson whether she had received instructions to represent the Minister of Agriculture and Agri-Food in this matter, Ms. Charbonneau indicated that she had. On that basis, Ms. Charbonneau, then informed the Tribunal that "we" are not contesting this request for review and that she would not be providing any representations at the oral hearing.

[12] The extract from the *Abdul-Aziz* decision reflects a degree of confusion on the part of the representative of the Agency as to her particular role. It is to be noted that, in the *Abdul-Aziz* case, and as evident from the public record, the Agency, even if it had been a proper client in this case, was represented by one of its own employees, who was not a duly qualified lawyer, and was certainly not represented by duly qualified external counsel from the Department of Justice.

[13] Nowhere in the materials submitted by Dr. Vorobyov or the Agency does a reference to the Minister of Agriculture and Agri-Food appear. The website of the Canada Border Services Agency provides, under "Disagreements, reviews and appeals" (via the following link, accessed December 7, 2012: http://www.cbsa-asfc.gc.ca/recourse-recours/penalties-sanctions-eng.html#s2) contains extensive details of a review regime that is solely referenced to the Agency and, implicitly, the Minister of Public Safety and Emergency Preparedness.

[14] It has been noted that the style of cause in the current case has been particularized by the Agency as being between Dr. Vorobyov and the Canada Border Services Agency, rather than the Minister of Agriculture and Agri-Food. In the *Puia* case, the Agency also particularized the style of cause as being between the Applicant and The Agency, rather than the Minister of Agriculture and Agri-Food. In *Abdul-Aziz*, the Applicant's surname name was spelled by the Agency as Abdul-Azeez, based on the Applicant's own correspondence, where she used the name "Abdul-Azeez" as opposed to her legal name, as found in her passport documentation that was part of the case record. In *Abdul-Aziz*, the Agency described the Respondent in the style of cause as "Canada Border Services Agency, Respondent (on behalf of the Minister of Agriculture and Agri-Food)". In all three cases, the Tribunal has corrected the style of cause, to specify that it is the Minister of Agriculture and Agri-Food who is the Respondent designated in the *Agriculture and Agri-Food Administrative Monetary Penalties Act*. The variations in the style of cause adopted by the Agency are viewed by the Tribunal as further evidence of the Agency's confusion as to its role.

[15] In the opinion of the Tribunal, the entire review process by the Agency, as it relates to processes under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and *Regulations*, and as outlined in the Agency's own website, is premised on a basis of legal action which appears to be completely without legal authority. In this regard, the reasoning of *Puia* is adopted in the present case, as follows (paras. 21-34 of the *Puia* decision):

> [21] *A body conducting a review of a first instance decision, such as is the case here with the Tribunal's review of a Minister's decision, must apply the proper standard of review applicable to that decision. In* New Brunswick (Board of Management) v. Dunsmuir, 2008 SCC 9 (Dunsmuir) *at paragraph 34, the Supreme Court of Canada reduced the historical three standards of reviews to two — correctness and reasonableness:*
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> > *[34] The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness simpliciter lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review - correctness and reasonableness.*

[22] The Supreme Court continues in Dunsmuir, *at paragraphs 46-47, to set out the reasonableness standard and its application, and, in paragraph 50, the correctness standard and its application:*

> *[46] What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?*
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> *[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*
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> *...*
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> *[50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.*

[23] Learned authors have commented, more specifically, as to when one or the other of the two standards of review will apply as follows:

> *"Thus correctness will normally be the standard of substantive judicial review on: constitutional questions, 'true questions of jurisdiction or vires', questions concerning the division of jurisdiction between competing administrative regimes, and 'a question ... of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's special expertise". Conversely, unreasonableness will normally be the standard of review of a tribunal's finding of fact, making or applying policy, and exercising discretion and the application of the law to the facts when a legal question cannot readily be extricated from the facts". (Brown and Evans, Judicial Review of Administrative Action in Canada, Toronto: Canvasback Publishing, 2011 at pages 14-9 to 14-10)*

[24] It is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority. As well, any administrative action that contravenes a grant of legal authority conferred by statute will be invalid. Although not explicitly listed in the above list cited by Brown and Evans, the question of the validity of the exercise of authority by the decision-maker in question will be a question of law and therefore be subject to the correctness standard of review as set out in Dunsmuir*. Such a question is without doubt akin to true questions of jurisdiction or vires, questions concerning the division of jurisdiction between competing administrative regimes, and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's special expertise.*

[25] An important element then in conducting a review of a decision of first instance and the decision-making process is to ensure that the person making the decision is the one who has been so designated by statute (see Secord v. Saint John (City) Board of Police Commissioners (2006)*, 43 Admin. L.R. (4th) 218 (NBQB)). In addition, even where statutorily-authorized persons have formally made decisions, a reviewing body will have to* ensure that they have, in fact, applied their minds to the representations of the parties and to the matters that the statute directs them to decide (*see* Khan v. University of Toronto (1995), *130 D.L.R. (4th) 570 (Ont. Div. Ct.)).*

[26] In the present case, it is not at all clear to the Tribunal that the person who made the decision is the person so designated by statute to make it. As such this question of the validity of the exercise of authority by the decision-maker in question will be a question of law and therefore be subject to the correctness standard of review as set out in Dunsmuir. A review of the Act and of the Interpretation Act R.S.C. 1985 c. I-21, is necessary to explore if the correctness standard has been met in this case.

[27] Section 2 of the Act defines "Minister" as follows:

> *"Minister" means the Minister of Agriculture and Agri-Food, except that, in relation to a violation involving a contravention of the* Pest Control Products Act*, it means the Minister of Health;*

[28] Nowhere in the Act is the "Minister of Public Safety and Emergency Preparedness" mentioned. At first view, it is clear that the author of the Minister's decision of December 1, 2011, associates himself or herself with this latter mentioned Minister. At no point has the Agency or Laurin [the decision-maker in the Puia *case] provided any indication or authentication of their authority, delegated, sub-delegated or otherwise, which would give him or her, the right to hear and decide this case on behalf of the "Minister of Agriculture and Agri-Food" or the "Minister of Health".*

[29] The Interpretation Act's section 24 is also instructive:

> ***24.** (1) Words authorizing the appointment of a public officer to hold office during pleasure include, in the discretion of the authority in whom the power of appointment is vested, the power to*
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> *(a) terminate the appointment or remove or suspend the public officer;*
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> *(b) re-appoint or reinstate the public officer; and*
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> *(c) appoint another person in the stead of, or to act in the stead of, the public officer.*
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> *(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include*

(a) a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;

(b) the successors of that minister in the office;

(c) his or their deputy; and

(d) notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

(3) Nothing in paragraph (2)(c) or (d) shall be construed as authorizing the exercise of any authority conferred on a minister to make a regulation as defined in the Statutory Instruments Act.

(4) Words directing or empowering any public officer, other than a minister of the Crown, to do any act or thing, or otherwise applying to the public officer by his name of office, include his successors in the office and his or their deputy.

(5) Where a power is conferred or a duty imposed on the holder of an office, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

[30] There is no indication that Minister of Agriculture and Agri-Food personally made the decision in the letter dated December 1, 2011, issued to Puia. *However, paragraph 24(2)(a) of the* Interpretation Act *would still permit that decision to be validly made if it was made by another "minister acting for that minister". There is no indication that Minister of Public Safety and Emergency Preparedness personally made the decision either. As well, paragraph 24(2)(d) of the* Interpretation Act *would appear to also permit that decision to be validly made if it was made by another "a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing."*

[31] It is important to recall that the Act gives an applicant a right to seek a review of an administrative decision, in this case the issuing of a Notice of Violation from an enforcement agency, to the Minister of Agriculture and Agri-Food, or the Minister of Health, as the case may be. Sections 12 and 13 of the Act are explicit:

> ***12.*** *(1) After concluding a review requested under section 8, the Minister shall determine whether or not the person committed the violation, and the Minister shall cause a notice of any decision under this subsection to be served on the person who requested the review.*
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> *(2) Where the Minister decides under subsection (1) that a person has committed a violation, the person may, in the prescribed time and manner, request a review of the Minister's decision by the Tribunal.*
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> ***13.*** *(1) After concluding a review requested under paragraph 9(2)(b), the Minister shall determine whether or not the person requesting the review committed a violation and, where the Minister decides that the person committed a violation but considers that the amount of the penalty for the violation was not established in accordance with the regulations, the Minister shall correct the amount of the penalty for the violation, and the Minister shall cause a notice of any decision under this subsection to be served on the person who requested the review.*
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> *(2) Where the Minister decides under subsection (1) that a person has committed a violation, the person may, in the prescribed time and manner,*
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> > *(a) pay the amount of the penalty set out in the notice referred to in subsection (1), in which case*
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> > *(i) the Minister shall accept the amount as and in complete satisfaction of the penalty, and*
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> > *(ii) the proceedings commenced in respect of the violation under section 7 are ended; or*
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> > *(b) request a review of the Minister's decision by the Tribunal.*

[32] No doubt, where a Minister of the Crown is explicitly empowered to do something, others in the department or ministry over which the minister presides may exercise that power. The delegation of authority by subsection 24(2) is not, however, unlimited. Subsection 24(2) limits the sub-delegation of an administrative, legislative or quasi-judicial decision-making action on behalf of the Minister to: (a) persons within the Minister's Department, and persons within the ministry of state over which the minister presides, or (b) another minister acting for that minister. It would be a strained reading of the subsection that would permit both at the same time, that is as might be argued to have occurred in this case, a delegation from the Minister of Agriculture and Agri-Food to the Minister of Public Safety and Emergency Preparedness, and then a sub-delegation by the Minister of Public Safety and Emergency Preparedness to persons within his ministry. The Latin phrase delegates non potest delegare is applicable.

[33] Even employing the expanded authority granted to officials under the Interpretation Act, there are at least three reasons why that expanded authority does not reach to the Agency official who reviewed the evidence for, and then wrote and issued, the Ministerial decision in the present case. First, the exercise of the Minister's powers under the Interpretation Act, as set out in paragraph 24(2)(d), is limited to those in his "department or ministry" over which the Minister of Agriculture and Agri-Food presides. Canada Border Services Agency officials are not within this purview. Second, the Agency officials have offered the Tribunal no evidentiary or legal basis that they have been delegated or empowered to exercise the Minister of Agriculture and Agri-Food's authority to review Notice of Violation. In fact, to the contrary, the decision in this case has all the indicia to the outside world and to Puia, the applicant, that it is a decision of the Minister of Public Safety and Emergency Preparedness. Third and finally, from a procedural fairness perspective, it makes little sense for the exact same body—the Canada Border Services Agency—to review a decision under the guise of it being conducted by, or for, the Minister of Agriculture and Agri-Food, when in fact, the review is being conducted by an official in the same Agency, if not the same division, as the one who issued the Notice of Violation in the first place, on January 12, 2011. Even without the issue of invalid sub-delegation of Ministerial authority, the Tribunal questions if an Agency that both issues the Notice of Violation and then reviews the facts of the case when so requested by the applicant, has sufficient safeguards in place to satisfy the requirements for procedural fairness in such a review process.

> *[34] The Tribunal, therefore, finds that the person who completed the review of the facts of the Notice of Violation issued to Puia, and who then issued a decision purported on behalf of the Minister of Agriculture and Agri-Food, acted without statutory authority. As a result, the purported Minister's decision of December 1, 2011, is invalid and must be set aside.*

[16] In the view of the Tribunal, the essence of the *Puia* decision falls within the "correctness" criterion of reviewability, as particularized by the Supreme Court of Canada in the *Dunsmuir* decision, as contrasted with the "reasonableness' criterion of reviewability, also particularized in that decision. In other words, the reasonableness of the Minister's decision is not the focus here. It matters not whether the Minister's decision was reasonable or unreasonable. The essence of reviewability relates to jurisdictional fault, as such relates to the Canada Border Services Agency purporting to act on behalf of the Minister of Agriculture and Agri-Food, in relation to a request for review by that Minister.

[17] The remedy in *Puia* was particularized as follows (at para. 44)

> *[44] In the present case, an appropriate remedy for an applicant like Puia, who has exercised his rights to have the validity of an executive act taken against him reviewed, and for which a review has been undertaken and completed by a person other than one authorized to do so, has exposed Puia already to a great deal of concern, trouble and even expense. In this case then, it would appear to be most appropriate for the remedy from this Tribunal to include not only a finding of invalidity of the ministerial decision and that it must as a consequence be set aside, but also that as a result of this finding, the Tribunal order that the Notice of Violation YYZ4971-0257 issued to Puia pursuant to the Act and Agriculture and Agri-Food Administrative Monetary Penalties Regulations, on January 12, 2011, is null and void. The Tribunal therefore so orders and as a result, no monetary penalty is payable by the applicant to the respondent.*

[18] The Tribunal in the present case adopts the reasoning in *Puia*, as followed in *Abdul-Aziz* and therefore holds that the ministerial decision of August 15, 2012, issued to Dr. Vovobyov, is set aside. As a consequence of this finding, the Tribunal, as it did in *Puia* and *Abdul-Aziz*, orders that the related Notice of Violation-in this case, Notice of Violation YEG-11-0023, issued on Jun 15, 2011-is null and void. As such, no monetary penalty is payable by the applicant to the respondent.

Dated at Ottawa, this 11th day of December, 2012.

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Dr. Bruce La Rochelle, Member