



Citation: Ana Delia Acevedo de Vargas v. Canada (CBSA), 2012 CART 15

Date: 20120830
Docket: CART/CRAC-1589

Between:

Ana Delia Acevedo de Vargas, Applicant

- and -

Canada Border Services Agency, Respondent

[Translation of 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 an oral hearing and a review of all oral and written submissions of the parties, the Canada Agricultural Review Tribunal (Tribunal), by order, determines that the applicant committed the violation and is liable for payment of the monetary penalty in the amount of \$800 to the respondent within thirty (30) days after the day on which this decision is served.

The hearing was held in Montréal, Quebec,
on April 24, 2012.

REASONS

Alleged Incident and Issues

[2] The respondent, the Canada Border Services Agency (Agency), alleges that, on August 6, 2011, at P.E. Trudeau International Airport in Montreal, Quebec, the applicant, Ana Delia Acevedo de Vargas (Acevedo), imported meat products into Canada contrary to section 40 of the *Health of Animals Regulations*, from the Dominican Republic, a country from which it is unlawful to import meat products unless she meets the requirements of Part IV – Importation of Animal By-Products, Animal Pathogens and Other Things of the *Health of Animals Regulations*.

[3] The applicable provisions of Part IV of the *Health of Animals Regulations* are reproduced below:

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.

41. (1) A person may import into Canada an animal by-product, manure or a thing containing an animal by-product or manure, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if

(a) the country of origin is the United States and the by-product, manure or thing is not derived from an animal of the subfamily *Bovinae* or *Caprinae*;

(b) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; or

(c) the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in a manner that would prevent the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product, manure or thing was derived is susceptible and that can be transmitted by the by-product, manure or thing, and the person produces a certificate signed by an official of the government of the country of origin that

(i) attests that the by-product, manure or thing has been collected, treated, prepared, processed, stored and handled in that manner, and

(ii) shows the details of how it was collected, treated, prepared, processed, stored and handled.

(2) Subsection (1) does not apply in respect of manure found in or on a vehicle that is entering Canada from the United States if the manure was produced by animals, other than swine, that are being transported by the vehicle.

41.1 (1) Despite section 41, a person may import into Canada an animal by-product or a thing containing an animal by-product, other than one described in section 45, 46, 47, 47.1, 49, 50, 51, 51.2 or 53, if an inspector has reasonable grounds to believe that the importation of the by-product or thing, by its nature, end use or the manner in which it has been processed, would not, or would not be likely to, result in the introduction into Canada of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the by-product was derived is susceptible and that can be transmitted by the by-product, and the by-product or thing is not intended for use as animal food or as an ingredient in animal food.

(2) No person shall, in respect of any animal by-product or thing containing an animal by-product that has been imported in accordance with subsection (1), use or cause it to be used as animal food or as an ingredient in animal food.

...

43. A person may import into Canada cooked, boneless beef from a country or a part of a country not referenced to in section 41 if

(a) it was processed in a place and in a manner approved by the Minister;

(b) it is accompanied by a meat inspection certificate of an official veterinarian of the exporting country in a form approved by the Minister; and

(c) on examination, an inspector is satisfied that it is thoroughly cooked.

...

46. No person shall import into Canada meat and bone meal, bone meal, blood meal, tankage (meat meal), feather meal, fish meal or any other product of a rendering plant unless, in addition to the requirements of sections 166 to 171,

(a) the country of origin, or the part of that country, is designated under section 7 as being free of, or as posing a negligible risk for, any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the product was derived is susceptible and that can be transmitted by the product, and the person produces a certificate of origin signed by an official of the government of that country attesting to that origin; and

(b) an inspector has reasonable grounds to believe that the product has been processed in a manner that would prevent the introduction of any reportable disease, any disease referred to in Schedule VII and any serious epizootic disease to which the species from which the product was derived is susceptible and that can be transmitted by the product.

...

52. (1) Despite anything in this Part, a person may import into Canada an animal by-product if the person produces a document that shows the details of the treatment of the by-product and an inspector has reasonable grounds to believe—based on the source of the document, the information contained in the document and any other relevant information available to the inspector and, if necessary, on an inspection of the by-product—that the importation of the by-product would not, or would not be likely to, result in the introduction into Canada, or the spread within Canada, of a vector, disease or toxic substance.

(2) Notwithstanding anything in this Part, a person may import an animal by-product under and in accordance with a permit issued by the Minister under section 160.

[4] The Tribunal must determine whether the Agency has established all the elements required to support the impugned Notice of Violation and, if Ms Acevedo did import meat into Canada, whether she met the requirements that would have permitted such importation.

Procedural History

[5] Notice of Violation 3961-11-M-0246, dated August 7, 2011, alleges that on August 6, 2011, at P.E. Trudeau International Airport in Montréal, Quebec, Acevedo [TRANSLATION] “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*”, which is a violation under section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[6] The Agency served the Notice of Violation personally on Ms Acevedo on August 7, 2011. The Notice of Violation indicates to Acevedo that the alleged violation is a serious violation under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, for which the penalty assigned is in the amount of \$800.00.

[7] By letter dated August 19, 2011 (received by the Tribunal by fax on August 22, 2011), Acevedo 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*. Tribunal staff confirmed with Acevedo that she wanted the oral review to be conducted in French, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On August 31, 2011, the Agency sent copies of its report concerning the Notice of Violation (the Agency Report) to Acevedo and to the Tribunal, the latter receiving it on September 1, 2011.

[9] By letter dated September 1, 2011, the Tribunal invited Acevedo to file with it any additional submissions (Additional Submissions) in this matter, no later than October 3, 2011. Acevedo did not file any additional submissions further to this invitation, and no other documents were filed by either party.

[10] By letter dated March 16, 2012, the Tribunal notified the parties that the hearing of this matter would take place in Montréal on April 24, 2012.

[11] The oral hearing requested by Acevedo took place in Montréal, Quebec, on April 24, 2012, with both parties in attendance. Acevedo represented herself with the assistance of a family member, Stacey Vargas, as her interpreter. The Agency was represented by Mélanie Charbonneau.

Evidence

[12] The evidence presented to the Tribunal in this case consists of written submissions from the Agency (the Notice of Violation and the Agency Report) and from Acevedo (submissions contained in her request for review) and oral testimony given by witnesses at the oral hearing. The Agency called one witness, Customs Inspector 17447, while Acevedo called one witness, herself, at the oral hearing held on April 24, 2012.

[13] The parties agreed on the following fact: Acevedo came to Canada from the Dominican Republic, landing at P.E. Trudeau International Airport just before midnight on August 6, 2011.

[14] The Agency presented the following evidence:

- a. Acevedo completed and signed a Canada Border Services Agency Declaration Card E311(09) (Declaration Card) dated August 6, 2011, without ticking the “No” box or the “Yes” box 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.” However, after asking Acevedo certain questions, the officer who conducted the primary inspection marked “No” next to this statement (see (1) the Declaration Card signed by Acevedo, at Tab 2 of the Agency Report; (2) the “Agricultural Monetary Penalty Report – 07/08/2011” by Inspector 17447, at Tab 7 of the Agency Report; and (3) the oral testimony of Inspector 17447).
- b. At the beginning of the secondary inspection, Inspector 17447 asked Acevedo if she had packed her bags herself and if she knew what they contained. She answered “yes” to both questions. Inspector 17447 did not remember whether he had asked her if she had animal products in her luggage, but he was sure that Acevedo never declared that she did. Inspector 17447 then searched Acevedo’s luggage and found approximately 0.5 kilograms of salami, a box of chicken-flavoured “Maggi” cubes and a hundred small packages of butter (see (1) Canada Border Services Agency Tag for intercepted item BSF 156 (BSF 156) at Tab 5 of the Agency Report; (2) Inspector’s Non Compliance Report for Travellers at Points of Entry (Non Compliance Report) at Tab 6 of the Agency Report; and (3) the oral testimony of Inspector 17447).
- c. Inspector 17447 stated in his “Agricultural Monetary Penalty Report – 07/08/2011”, at Tab 7 of the Agency Report, that he had asked Acevedo why she had not declared anything and that she had answered that she was not aware that she had to declare such items. She also explained that she could not read the Declaration Card and was suffering from a migraine when she arrived at the airport in Montréal that day. Inspector 17447 also wrote in his report that since the products had not been declared, they were seized, confiscated and destroyed (Non Compliance Report, at Tab 6 of the Agency Report).
- d. Inspector 17447 took photographs of the products he found, and it appears that the product in question is salami (see (1) the photograph, at Tab 8 of the Agency Report; and (2) the oral testimony of Inspector 17447).
- e. Inspector 17447 acknowledged that, in his experience, the products he found are refused entry to Canada, and he testified that Acevedo never presented any permits or certificates allowing her to import the products in question (see the oral testimony of Inspector 17447).

[15] There were no questions for Inspector 17447 in cross-examination.

[16] The written evidence provided by Acevedo is contained in the submissions appearing in her request for review filed with the Tribunal in August 2011, in which she states as follows:

[TRANSLATION]

. . . I had to make a long, 17-hour trip by car and plane, which gave me a terrible migraine. This was the first time I had to fill out the declaration paper, since I usually travel with my family. Despite the time I have been in Canada, my understanding of French is not the greatest because I had to leave school, owing to the fact that my youngest daughter is autistic and I have to devote a lot of time to her.

The person who served me at Customs asked me if I had any chicken, firearms or knives, questions to which I answered no. They then started asking me questions about my private life and pressuring me for no reason. I told them that I was returning from my mother's funeral and was not feeling well, that I was seriously depressed and that they had no idea what I was going through. The Customs officers held me for nearly three hours, just because I brought back some chicken broth and a small piece of salami.

I therefore request a review because I believe the facts have been exaggerated. I was treated disrespectfully and made to feel very bad for no valid reason.

[17] At the hearing, Acevedo represented herself and stated that she had travelled from the Dominican Republic to Montréal on August 6, 2011. She told the Tribunal that her trip had been very long and that she had taken medication to relax during the trip. For this reason, she was not feeling well and was sleeping when her airplane landed in Montreal. She said that she answered [TRANSLATION] "No" when the inspector conducting the primary examination asked the question [TRANSLATION] "do you have any chicken in your bags" because she thought she had to say yes only if there was chicken meat in her bags, not just chicken-flavoured "Maggi" cubes. She testified that she had forgotten to declare the sausage she had acquired in the Dominican Republic and then brought to Canada.

[18] Acevedo stated that the inspector conducting the secondary examination that day had asked her very personal questions and had made her read out documents to him. The inspector detained her for a long time while he completed the Notice of Violation, even though he knew that Acevedo had an agitated autistic daughter who was waiting for her at the airport. Acevedo stated to the Tribunal that she is now aware that she broke the law in bringing certain items back to Canada, but she thought that she should have been given a warning instead of a fine because it was the first time.

[19] In cross-examination, Acevedo confirmed that she could understand, read and speak a little French but that the officer who had conducted the primary inspection had spoken to her in Spanish, Acevedo's first language. It was this inspector who had ticked all the boxes on her Declaration Card, in accordance with Acevedo's answers.

Analysis and Applicable Law

[20] 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.

[21] Section 2 of the Act defines "agri-food Act":

"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.

[22] Pursuant to paragraph 4(1)(a) of the Act, the Minister of Agriculture and Agri-Food, or the Minister of Health depending on the circumstances, may make regulations:

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 . . .

[23] The Minister of Agriculture and Agri-Food has made one such regulation, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, which designates as a violation several specific 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* and include a reference to section 40 of the *Health of Animals Regulations*.

[24] The Act's system of administrative monetary penalties (AMP), as set out by Parliament, is very strict in its application. In *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes 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.

[25] Moreover, the Federal Court of Appeal, in Doyon, points out that the Act imposes an important 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.

[26] 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.*

[27] Therefore, it is incumbent on the Agency to prove, on the balance of probabilities, all the elements of the violation that form the basis of the Notice of Violation. In the case of a violation of section 40 of the *Health of Animals Regulations*, the Agency must prove the following:

- (1) Ms Acevedo is the person who committed the violation;
- (2) Ms Acevedo imported an animal by-product, in this case, a sausage and chicken-flavoured "Maggi" cubes, into Canada; and
- (3) if Ms Acevedo did import meat products into Canada, Agency officials gave her a reasonable opportunity to justify the importation in accordance with Part IV of the *Health of Animals Regulations*.

[28] The Tribunal must consider all the evidence, both written and oral, before it to determine whether the Agency has proven, on the balance of probabilities, each of the elements of the alleged violation.

[29] With respect to Element 1, Acevedo's identity as the alleged violator is not in dispute. Throughout the secondary inspection process, the identity of Acevedo, the alleged violator, and the identity of the person having the care, control and ownership of the luggage that was searched have not been disputed. The Tribunal finds that Acevedo is the alleged violator identified by Inspector 17447 and that the luggage searched did belong to Acevedo.

[30] With respect to Element 2, the Tribunal accepts that the Agency has established on a balance of probabilities that the products Acevedo imported were a dry sausage weighing approximately 0.5 kilograms and chicken-flavoured "Maggi" cubes. The testimony of Inspector 17447 that, based on his experience, he recognized the product as meat, as well as the photograph he took, appearing at Tab 8 of the Agency Report, prove that it is more likely than not that the product in question contained meat or meat products.

[31] Therefore, all that remains to be examined is the evidence pertaining to Element 3 of the alleged violation. This third element is essential to proving a violation of section 40 of the *Health of Animals Regulations*. That section, as noted above, states as follows: "*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.*" Moreover, the Minister of Agriculture and Agri-Food, in the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, has found it necessary to designate in the listing of section 40 of the *Health of Animals Regulations* in Schedule 1, Part 1, Division 2 (Violation #79, section 40) of those *Regulations* that the violation relates to the importation of "an animal by-product without meeting the prescribed requirements". In both instances—in the *Health of Animals Regulations* themselves and in the listing of the violation under the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*—the violation mentions and permits a justification from the alleged offender.

[32] The AMPs system is severe and draconian, as the Federal Court of Appeal noted in *Doyon*, an excerpt of which is reproduced above in paragraph 24. The Court requires that this Tribunal be very careful in determining the required elements for any alleged violation it is asked to review. In the case of an alleged violation of section 40 of the *Health of Animals Regulations*, clearly, the first two elements already analyzed—the identity of the alleged violator and whether that person imported an animal by-product—are necessary elements of the proof of a violation. However, a third element is also required to give any reasonable significance to the other words in section 40 of the *Health of Animals Regulations*, "*except in accordance with this Part*", or to the expression "without meeting the prescribed requirements" in the listing of the violation under schedule to the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[33] There can be no doubt, that alleged violators of section 40 may defend themselves by adducing evidence proving they met the prescribed requirements permitted under Part IV of the *Health of Animals Regulations*. Moreover, the responsibility for and burden of proving that a person has met the prescribed requirements of Part IV falls on the alleged violator, and he or she must take all necessary and reasonable steps to make such justification known to the Agency. Normally, this justification will take one of two forms:

- a. the traveller declares any animal by-products to the Agency either in writing on that person's Declaration Card or in person to an Agency official once that person has deplaned and entered Canada on his or her way through an airport, such that an Agency inspector could inspect the product and determine if it should be allowed entry into Canada pursuant to paragraph 41(1)(a) or subsection 41.1(1) of the *Health of Animals Regulations*; or
- b. the traveller produces a certificate (paragraph 41(1)(b); paragraph 41(1)(c); section 43; section 46), a document (subsection 52(1)) or a permit (subsection 52(2)) such that the meat product would be permitted to be imported into Canada under Part IV.

[34] The third element of the violation—that is, if Acevedo did import meat products into Canada, Agency officials gave her a reasonable opportunity to justify the importation in accordance with Part IV of the *Health of Animals Regulations*—would be very easily met by the Agency in most cases, as the threshold for adducing sufficient evidence is extremely low. Normally, the Agency would have only to prove to the Tribunal that (a) the traveller's Declaration Card was falsely marked with a "No" beside the question of whether the traveller was bringing meat products into Canada, or that the person understood and answered "No" to the primary inspector's question about whether the traveller was bringing meat products into Canada; and (b) that the traveller was given an opportunity to produce a certificate, document or permit, which would permit importation of a meat product. In the case of a person who understands either of Canada's official languages, the Agency's burden of proving that they had afforded a traveller a reasonable opportunity to justify any importation of meat products in accordance with Part IV of the *Health of Animals Regulations* would normally be quickly and easily met.

[35] The Tribunal finds, in this case, that the Agency has met this burden. Given that Acevedo spoke to the primary inspector in Spanish, her first language; that, in response to the questions asked, the inspector ticked the "No" box for Acevedo on her Declaration Card E311; and that she failed to declare the dry sausage to the Agency at any time before Inspector 17447 found it in her luggage during secondary inspection, this is sufficient to prove that she was given a reasonable opportunity to declare the product or to produce a certificate, document or permit which would permit importation of a meat product, even if there is no evidence that an Agency officer actually directly asked her for certificates or permits that would have allowed entry of the meat product into Canada. In any event, the evidence presented by both parties does not support any finding by the Tribunal that Acevedo actually had such a permit or certificate in her possession on August 6, 2011.

[36] The Tribunal is aware that the *Agriculture and Agri-Food Administrative Monetary Penalties Act* creates a scheme of near-absolute liability, as it allows no defence of due diligence or mistake of fact. Subsection 18(1) of the Act states as follows:

A person named in a notice of violation does not have a defence by reason that the person exercised due diligence to prevent the violation or reasonably and honestly believed in the existence of facts that, if true, would exonerate the person.

[37] When an AMP provision has been enacted for a particular violation, as is the case for section 40 of the *Health of Animals Regulations*, Acevedo has little room to mount a defence. In the present case, section 18 of the Act will exclude practically any excuse that she might raise, such as she did not declare it because she forgot or was ill or very tired. Given Parliament's clearly stated intentions regarding the issue, the Tribunal accepts that none of the statements made by Acevedo in her submissions to this Tribunal or in her communications with Agency inspectors may be raised as defences under section 18.

[38] The Tribunal appreciates that Agency inspectors are charged with the important task of protecting individuals, animals and plants, as well as agricultural production and the food system in Canada, from risks posed by pests, pathogens and parasites. In the present case, it is clear from the evidence that the Agency responded to a potential threat from the importation of meat products by Acevedo by examining the product and, after it was determined that it was a product that should be refused entry into Canada, by seizing and destroying it as they are validly empowered under Canadian law to do.

[39] The Tribunal is aware that the Agency has its own procedure for reviewing travellers' complaints against inspectors who have allegedly acted inappropriately towards them. Whether this was such a case is not for this Tribunal to determine. Moreover, the Tribunal's jurisdiction to review Notices of Violation comes from its enabling legislation. According to this legislation, 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.

[40] The Tribunal finds, following a review of all written submissions of the parties, that Acevedo committed the violation and is liable for payment of the penalty in the amount of \$800.00 to the respondent within thirty (30) days after the day on which this decision is served.

[41] The Tribunal wishes to inform Acevedo that this is not a criminal or a federal offence but a monetary violation, and that she has the right to apply, after five years, 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 30th day of August 2012.

Dr. Donald Buckingham, Chairperson