



Citation: Adnane Ben Khalifa v. Canada (CBSA), 2012 CART 26

Date: 20121221
Docket: CART/CRAC-1591

Between:

Adnane Ben Khalifa, 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 the facts of a violation of section 39 of the *Plant Protection 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 penalty in the amount of \$800.00 to the respondent within thirty (30) days after the day on which this decision is served.

The hearing was held in Montréal, Quebec,
on December 12, 2012.

REASONS

Alleged incident and issues

[2] The respondent, the Canada Border Services Agency (the Agency), submits that on August 6, 2011, at P.-E. Trudeau International Airport in Montréal, Quebec, the applicant, Adnane Ben Khalifa (Khalifa), imported garlic into Canada without declaring it, contrary to section 39 of the *Plant Protection Regulations*.

[3] Section 39 of these Regulations reads as follows:

39. Every person shall, at the time of importation into Canada of any thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest, declare that thing to an inspector or customs officer at a place of entry set out in subsection 40(1).

[4] The Tribunal must determine whether the Agency has established all of the elements in support of the Notice of Violation in issue and, more specifically, whether

- Khalifa had plant material in his luggage when he entered Canada;
- the plant material in the form of plant products, which was found in his luggage, was or could have been infested or constituted or could have constituted a biological obstacle to the control of a pest;
- Khalifa failed to declare this material to the Agency's inspector on August 6, 2011.

Procedural history

[5] In Notice of Violation # 3961-11-M-0244, dated August 6, 2011, it is alleged that on that same day, at P.-E. Trudeau International Airport in Montréal, Quebec, Khalifa [TRANSLATION] "committed a violation, namely, failure to declare garlic, contrary to section 39 of the *Plant Protection Plant Protection Regulations*", which is a violation within the meaning of 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 on Khalifa personally on August 6, 2011. The Notice of Violation informed Khalifa that the alleged violation is, under section 4 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, a serious violation for which a penalty of \$800 was imposed on him.

[7] In his letter dated September 6, 2011 (received by the Tribunal by fax that same day), Khalifa made a request under paragraph 9(2)(c) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act* for the Tribunal to review the facts of the violation. Tribunal staff confirmed with Khalifa that he wanted an oral hearing in French, in accordance with subsection 15(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*.

[8] On September 23, 2011, the Agency sent a copy of its report (Report) regarding the Notice of Violation to Khalifa and to the Tribunal, which received it on September 26, 2011.

[9] In a letter dated October 3, 2011, the Tribunal asked the parties to file any additional submissions related to this case by no later than November 2, 2011. In response to the Tribunal's invitation, neither party filed any additional submissions or other material in this case.

[10] In its letter dated October 9, 2012, the Tribunal notified the parties that the oral hearing would be held in Montréal on December 12, 2012.

[11] The hearing, requested by Khalifa, was held in Montréal, Quebec, on December 12, 2012, with both parties in attendance. Khalifa represented himself, and the Agency was represented by Denise Bergeron.

Evidence

[12] In this case, the evidence submitted to the Tribunal consists of the Agency's written submissions (the Notice of Violation and the Report) and those of Khalifa (set out in his request for review), as well as oral testimony given by witnesses at the hearing. The Agency called one witness, Customs Inspector No. 25643 (Inspector 25643), while Khalifa called one witness—himself—at the oral hearing held on December 12, 2012.

[13] The Agency presented the following evidence:

- a. Khalifa, accompanied by his family, arrived in Canada from Tunisia at P.-E. Trudeau International Airport on August 6, 2011 (Customs Declaration Card E311(09) at Tab 2 of the Report).
- b. Khalifa filled out and signed the Agency's Customs Declaration Card E311(09) (the Declaration Card) on August 6, 2011, on both sides, in English and in French. He and his wife both signed the English side of the Declaration Card (Declaration Card at Tab 2 of the Agency's Report).

- c. Khalifa ticked the “No” box next to the 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” and ticked the box “Non” next to the same statement in French on the French side (Declaration Card at Tab 2 of the Report).
- d. After primary inspection, Khalifa and his family were referred to secondary inspection. At the beginning of the secondary inspection, Inspector 25643 asked Khalifa if he had packed his own bags and if he was aware of their contents. He answered [TRANSLATION] “Yes” to each of these questions. Inspector 25643 does not remember whether he asked him if there were plant products in his luggage but is sure that Khalifa never declared that there were any. Inspector 25643 then searched Khalifa’s luggage and found a plastic bag full of garlic (approximately two kilos) inside his suitcase ((i) Agency tag for intercepted item BSF 156 at Tab 2 of the Agency Report; (ii) Inspector’s Non-Compliance Report for Travellers at Points of Entry (Non-Compliance Report) at Tab 6 of the Report; and (iii) the oral testimony of Inspector 25643).
- e. Inspector 25643 stated in the Non-Compliance Report that, because they had not been declared, the products were seized and destroyed (Non-Compliance Report at Tab 6 of the Report).
- f. Inspector 25643 took photographs of the products he found, but the quality of the copy of the photograph included in the Report is poor. However, Inspector 25643 gave clear testimony to the effect that the product he seized and photographed was indeed garlic ((i) photograph at Tab 7 of the Report; and (2) oral testimony of Inspector 25643).
- g. On the basis of his professional experience, Inspector 25643 recognized that the products that he found are to be refused entry to Canada, and he testified that Khalifa did not present any permits or certificates that would have permitted the products in question to be imported (oral testimony of Inspector 25643).
- h. The plant products discovered in Khalifa’s luggage are inadmissible to Canada unless the required permits and certificates are obtained from the Canadian authorities before these products are imported into Canada (report on the importation of garlic from Tunisia, Automated Import Reference System (AIRS) at Tab 8 of the Report).

[14] Inspector 25643 was not asked any questions on cross-examination.

[15] The written evidence, provided by Khalifa, is contained in the submissions appearing in his request for a review filed with the Tribunal in September 2011, in which he states the following:

[TRANSLATION]

. . . However, I wish to challenge this notice for the following reason:

- The declaration was made at the last minute (when the plane was landing) after a long trip (Tunisia–France with a five-hour stopover), and my wife (who filled out the declaration) forgot that we had garlic (and what is more, we had four suitcases and four carry-on bags, given that we were travelling with our young children).*
- In our view, the officer did not try to accommodate us even though he noticed we were tired and had our two children with us. He even noted in his file that there were 2 kg of garlic, when there was maybe 500 g or 1 kg. In addition, our files show that we have not committed any offences in the past, even though on every trip, we are sent through the customs office (although we have no idea why).*
- We do not deny the facts, but we did not think this is so serious.*
- The officer called for his supervisor. The supervisor intimidated us by speaking loudly about the offence so everyone around us could hear while our children looked on in fear, and she kept talking about the duty to be responsible and the like with a tone and manner implying that we were irresponsible. I felt obliged to respond, saying that we are responsible people and that my wife and I, both university graduates in computer science who work for major corporations, fulfil our duties and contribute to Canada's development.*
- The supervisor did not like my response. Moreover, she told me that you were told not to bring back plants, you should apologize, and "that's it". Also, she spoke to the officer in English maybe once or twice even though she had spoken with him and us in French!*

That being said, we do not deny that we brought back garlic, but it was absolutely not our intention to hide it or not declare it. It was, rather, an oversight, as I mentioned. Also, maybe our fatigue and our responses pushed the officers to not give us a chance before issuing the fine, which we think is very severe. . . .

[16] At the hearing, Khalifa represented himself and stated that he travelled with his wife and their two children from Tunisia to Montréal on August 6, 2011. He told the Tribunal that his trip had been long and that his family was very tired when they arrived in Montréal. Khalifa stated to the Tribunal that he did not doubt the truth of Inspector 25643's testimony. However, as his wife had filled out their Declaration Card and they had simply forgotten to mention the garlic that was in their luggage, Khalifa thought that he had not been given the opportunity to declare the garlic found in his luggage.

[17] Khalifa gave oral testimony regarding the facts alleged in his request for a review, such as the presence and activities of Inspector 25643, as well as the presence of the supervisor and her somewhat disrespectful, even rude attitude towards him and his family. Khalifa testified that Inspector 25643 seized the garlic and made the entire family wait more than an hour while he filled out the Notice of Violation, even though his family was very tired.

[18] On cross-examination, Khalifa confirmed that he had signed the Declaration Card, as had his wife, and that they had garlic in their luggage. He also said that he did not remember whether the inspector on primary inspection, or Inspector 25643 on secondary inspection, had asked if they had any plant products. At any rate, Khalifa stated that he never intended to not declare the garlic.

Analysis and applicable law

[19] The Tribunal's role is to determine the validity of agriculture and agri-food administrative monetary penalties imposed under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* (the Act). Section 3 sets out the purpose of the Act:

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.

[20] Section 2 of the Act defines "agri-food Act" as follows:

"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.

[21] Under 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 . . .

if the contravention . . . is an offence under an agri-food Act

[22] The Minister of Agriculture and Agri-Food did make such regulations, that is, the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, which define, as a violation, the contravention of a number of express provisions of 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 39 of the *Plant Protection Regulations*.

[23] The administrative monetary penalty (AMP) regime set out in the Act, as enacted by Parliament, is severe in its application. At paragraphs 27 and 28 of *Doyon v. Attorney General of Canada*, 2009 FCA 152, the Federal Court of Appeal describes the AMP regime in these terms:

[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.

[24] 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.

[25] Section 19 of the Act states 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.*

[26] Therefore, the Agency must prove every element of the violation on a balance of probabilities. In the case of a violation of section 39 of the *Plant Protection Regulations*, the Agency must prove the following:

- (1) Khalifa is the person who committed the violation;
- (2) Khalifa brought (imported) the plant material at issue into Canada;
- (3) The imported plant material was or could have been infested or constituted or could have constituted a biological obstacle to the control of a pest;
- (4) Khalifa did not declare this material to an Agency inspector.

[27] The Agency filed evidence, and Khalifa did not contradict it. He even admitted having imported plant material without having declared it on his Declaration Card or during the primary inspection. Therefore, the Tribunal finds that the Agency has proved, on a balance of probabilities, the first, second and fourth elements of the alleged violation.

[28] Regarding the third element, Inspector 25643 testified on behalf of the Agency that the plant material he had found in the applicant's luggage was garlic. Referring to the AIRS system for the import of such products, he concluded that these products did indeed have to be declared because they were "... *[a] thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest...*" (section 39 of the *Plant Protection Regulations*). Furthermore, regarding this element, the Tribunal is satisfied that the Agency has provided sufficient evidence, on a balance of probabilities, that the plants thus imported should be declared as each is "... *[a] thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest...*".

[29] The Act creates a near-absolute liability scheme because 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.

[30] Where a provision setting out administrative monetary penalties has been enacted for a particular violation, as is the case with section 39 of the *Plant Protection Regulations*, Khalifa has very few defences. In the present case, section 18 of the Act excludes practically every excuse that may be raised, such as [TRANSLATION] "[t]he declaration was made at the last minute (when the plane was landing) after a long trip

(Tunisia–France with a five-hour stopover), and my wife (who filled out the declaration) forgot that we had garlic” or [TRANSLATION] “[i]n our view, the officer did not try to accommodate us even though he noticed we were tired and had our two children with us” or even [TRANSLATION] “[t]hat being said, we do not deny that we brought back garlic, but it was absolutely not our intention to hide it or not declare it. It was, rather, an oversight, as I mentioned”. Considering Parliament’s clearly expressed intention on this question, the Tribunal acknowledges that none of the statements made by Khalifa in his request for review can be used as a defence under section 18.

[31] 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. The identity of the person who allegedly committed the violation is not in question. The Tribunal’s view is that Khalifa did not declare the plant material in his luggage before he went through the secondary inspection and that this plant material was “. . . [a] thing that is a pest, is or could be infested or constitutes or could constitute a biological obstacle to the control of a pest . . .”.

[32] The Tribunal finds that the Agency has discharged its burden of proof in the present case. The fact that Khalifa or his wife ticked the “No” box on his Declaration Card and that he failed to declare the garlic to the Agency at any time before Inspector 25643 found it in Khalifa’s luggage during secondary inspection is sufficient to prove that Khalifa committed the alleged violation. He had a reasonable opportunity to declare the product or present a certificate, permit or other document that could possibly have allowed the product to be imported. However, it goes without saying that the evidence filed by both parties does not allow the Tribunal to find that Khalifa did indeed have such a permit or certificate in his possession on August 6, 2011.

[33] 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 plant products by Khalifa 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.

[34] The Tribunal is aware that the Agency has its own procedure for reviewing traveller complaints against inspectors who have conducted themselves improperly towards travellers. The legal effects of such actions are—except perhaps in extreme cases, which is not the case here—beyond the Tribunal’s jurisdiction. 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 reasonable conduct of Agency inspectors towards an applicant, or for humanitarian or financial reasons.

[35] Following a review of all written submissions of the parties, the Tribunal, therefore, finds that Khalifa 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.

[36] The Tribunal wishes to point out to Khalifa 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 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 21st day of December, 2012.

Donald Buckingham, Chairperson