

Federal Court



Cour fédérale

Date: 20130312

Docket: T-168-12

Citation: 2013 FC 222

Ottawa, Ontario, March 12, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

JURGEN JERRY LUKING

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2008, Mr Jurgen Jerry Luking purchased a 53' pleasure craft, the "Seaesta 11," in the United States for \$418,000 USD. Mr Luking phoned Transport Canada to find out how to register the boat in Canada. He followed up with a letter to the Registrar of Vessels, attaching an application to register the boat and a copy of the bill of sale. He paid the registration fee of \$250.00 and received a certificate of registry.

[2] In March 2008, Mr Luking sailed the boat from the US to Bedwell Harbour, BC. He reported to an agent of the Canada Border Services Agency (CBSA), who told him to report to the larger port in Sidney, BC. Mr Luking told the officer that he would do so at a later date. In May 2008, Mr Luking sailed to Sidney and reported to the CBSA by phone. The CBSA officer's notes state that Mr Luking was "out to do a tour" and had nothing to declare. The officer gave Mr Luking a clearance number.

[3] In June 2008, Mr Luking received a notice from the BC Ministry of Small Business and Revenue about the provincial sales tax owing on the boat. Mr Luking duly paid the amount of \$29,260.

[4] Mr Luking made a number of subsequent trips to Canada, each time reporting to the CBSA. In August 2009, an officer noticed that Mr Luking had apparently not paid any Goods and Services Tax (GST) on the boat and asked Mr Luking about it. Mr Luking replied that he thought he had already paid the taxes owing on the boat. He offered to check his records and then contact CBSA.

[5] On review, Mr Luking found that he had paid the provincial tax, but not the GST. He called the CBSA officer to explain. The officer told him that his file had been transferred to the Criminal Investigations Division.

[6] In 2010, another CBSA officer sent Mr Luking a Notice of Ascertained Forfeiture assessing him a penalty of \$166,664.96, 40% of the boat's value, for failing to report to customs and to pay the duty owing on the boat. The actual GST payable was much less - \$20,883.12.

[7] Mr Luking acknowledges that he failed, as a result of an innocent error, to report the importation of the boat. He seeks to overturn the decision, taken on behalf of the Minister of Public Safety and Emergency Preparedness, requiring him to pay such a large penalty. He contends that the Minister's delegate failed to treat him fairly and rendered an unreasonable decision.

[8] Therefore, the issues are:

1. Did the Minister treat Mr Luking unfairly?
2. Was the Minister's decision unreasonable?

II. The decision under review

[9] The decision under review was rendered primarily by a CBSA adjudicator acting on the Minister's behalf. The adjudicator found that Mr Luking had made a false statement when he told a CBSA officer in August 2009 that he had already paid GST on the boat. Further, while Mr Luking had consistently reported to the CBSA each time he entered Canada, he had not reported the importation of the boat itself. In fact, he informed the CBSA that the boat was registered in Canada, which led the officer to conclude that it was a Canadian vessel.

[10] The adjudicator also noted that Mr Luking was a NEXUS member at the relevant time. Higher penalties are assessed against members of NEXUS, regardless of their intent. After Mr Luking pointed out that he was not a member of NEXUS, which the CBSA subsequently acknowledged, the adjudicator found that Mr Luking was a member of another program, CANPASS, whose members have comparable responsibilities. That, too, was incorrect. Still, the adjudicator found that the penalty imposed on Mr Luking was justified because of the false statement he had made to a CBSA officer about having paid the GST.

[11] In 2010, Mr Luking requested a meeting with the Minister or a delegate to explain his lack of intent to contravene his statutory obligations. The adjudicator offered to meet with Mr Luking but stated that it was not necessary as all submissions had to be made in writing. Subsequently, Mr Luking asked for copy of the CBSA's policies and guidelines. The adjudicator provided Mr Luking with some excerpts of the CBSA Enforcement Manual. Mr Luking asked for a complete copy of the Manual, but was denied.

[12] In 2011, another decision-maker in the CBSA's Appeals Division found that Mr Luking had tried to evade Canadian duties by disguising his boat with "Canadian plates with a Canadian registration number". Further, he had misled the CBSA officer in Sidney when he stated that he was simply "out to do a tour".

[13] Accordingly, Mr Luking's objections to the assessed penalty of \$166,664.96 were rejected.

III. Issue One – Did the Minister treat Mr Luking unfairly?

[14] Mr Luking argues that he was treated unfairly when the adjudicator denied him an oral hearing where he could put forward evidence and submissions on issues relevant to the amount of any penalty against him, including his lack of intent. Since he swore an affidavit that he made an innocent mistake, the adjudicator's conclusion that he actively attempted to deceive the CBSA amounted to an adverse credibility assessment, which should not have been made without a hearing. In addition, there was no valid reason for refusing to provide Mr Luking with a copy of the Enforcement Manual. Given the amount of the penalty in issue, the CBSA must abide by substantial fairness requirements.

[15] I am not satisfied that Mr Luking was treated unfairly. Obviously, CBSA decision-makers must act fairly, especially when the impact of their decisions is substantial. But here, Mr Luking was given a number of opportunities to make written submissions. The adjudicator did not make any express credibility finding. She found Mr Luking's statements to the CBSA and his conduct to be misleading, but in doing so simply weighed the available evidence. In any case, the question whether Mr Luking had intentionally misled the CBSA was merely one factor to take into account. It was not the sole basis for the CBSA's decision about the appropriate penalty.

[16] Regarding the failure to provide Mr Luking with a complete copy of the Enforcement Manual, the adjudicator did provide him with the relevant excerpts. I do not accept Mr Luking's argument that he was entitled to more.

IV. Issue Two – Was the Minister's decision unreasonable?

[17] Since Mr Luking accepts that he contravened his statutory obligations, the only question is whether the amount of the penalty was unreasonable. In support of the amount assessed, the Minister points out the following:

- Mr Luking brought the boat into Canada with Canadian plates and a Canadian registration number, claiming that he was merely out for a “tour”;
- Mr Luking falsely told an officer that he had paid the GST on the boat; and
- An elevated penalty (at Level 2, 40% of the boat’s value) applies when goods are concealed or disguised, or untrue statements are made following their discovery.

[18] The question, therefore, is whether there was evidence showing that Mr Luking had concealed or disguised the boat, had misled the CBSA officer about whether he had paid the GST on it, or had made any other untrue statement.

[19] Mr Luking acknowledges that he failed to explicitly report the importation of his boat. However, there is no evidence that he concealed or disguised it. In fact, he duly reported to the port of Sidney as he was asked to do. He contacted CBSA on numerous occasions. Further, contrary to the adjudicator’s findings, a boat does not display license plates. Mr. Luking could not have concealed the boat’s origins with false plates. In addition, he had duly registered his boat as he was

required to do. The fact that he registered his US-purchased boat in Canada cannot constitute evidence that he disguised its origins.

[20] As for his statement about paying GST, Mr Luking simply told a CBSA officer that he *believed* he had paid it. He undertook to check his records and did so, after which he contacted CBSA to disclose his error. Mr Luking never told the CBSA that he had, in fact, paid the GST, only that he believed he had. An expression of honest belief that on further investigation turns out to have been mistaken is not an untrue statement. The evidence does not indicate that Mr Luking knowingly made a false statement about having paid the GST.

[21] Finally, the fact that Mr Luking told the CBSA in Sidney that he was out for a “tour” does not, in itself, indicate an intention to deceive. He initially reported to Bedwell Harbour and was told to check in at Sidney, which he did. The fact that he did so in the course of a subsequent excursion is not indicative of deception on his part.

[22] The Minister directed my attention to the recent case of *Shin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1106. There, Mr Justice John O’Keefe found that a Level 2 penalty was not warranted in circumstances where the person was unsure about her obligations under the *Customs Act*, RSC, 1985, c 1 (2nd Supp), and might have been confused, because of language difficulties, when questioned about the valuable watch she was importing into Canada, even though she had made a false statement about when she had acquired the watch. I fail to see how this case advances the Minister’s position. Justice O’Keefe clearly concluded that a Level 2 penalty was not warranted in the circumstances. Here, the evidence shows that Mr Luking

acted in a good faith, and had not disguised or misrepresented the origins of his boat. I do not see a reasonable basis for imposing a Level 2 penalty on him.

V. Conclusion and Disposition

[23] Mr Luking's intent is not relevant to the question whether he violated the *Customs Act* (*Leasak v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1397 at para 50). Indeed, that issue does not even arise here because Mr Luking concedes his contravention. However, intent is relevant to the quantum of the penalty.

[24] The Customs Enforcement Manual notes that a lack of intention is a mitigating factor and that offences of omission are less culpable. The Manual provides that a Level 1 penalty should apply when: (i) goods are not reported to CBSA or, they are reported, but untrue statements are made about their acquisition; (ii) the goods are not concealed; and (iii) full disclosure is made at the time of discovery. A Level 2 penalty applies when (i) goods are concealed or disguised; (ii) untrue statements are made at the time of discovery; or (iii) the person has been the subject of a previous seizure action.

[25] I need not decide whether a Level 1 penalty would be appropriate in the circumstances. However, in my view, the decision to impose a Level 2 penalty is not reasonably supported by the evidence. There is no evidence that could support a reasonable finding that Mr Luking disguised his boat or made an untrue statement when the boat's importation was discovered. There is no evidence that he expressed anything other than his honest belief regarding payment of the GST. Further, he

voluntarily disclosed his error in a timely way.

[26] Accordingly, I find that the amount of the penalty imposed on Mr Luking was unreasonable. I must, therefore, allow this application for judicial review, with costs, and order another decision-maker within CBSA to reconsider the penalty imposed on Mr Luking.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is allowed, with costs, and reconsideration by another decision-maker within CBSA of the penalty imposed is ordered.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-168-12

STYLE OF CAUSE: JURGEN JERRY LUKING
v
THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 11, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: March 12, 2013

APPEARANCES:

Kimberley L. Cook

FOR THE APPLICANT

Michelle Shea

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Thorsteinssons LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Vancouver, British Columbia

FOR THE RESPONDENT