Federal Court of Appeal | Cour d'appel fédérale

Date: 20171208

Docket: A-546-15

Citation: 2017 FCA 242

CORAM: **PELLETIER J.A.**
STRATAS J.A.
DE MONTIGNY J.A.

BETWEEN:

OLUKAYODE ADEBOGUN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Regina, Saskatchewan, on November 30, 2017.

Judgment delivered at Ottawa, Ontario, on December 8, 2017.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20171208

Docket: A-546-15

Citation: 2017 FCA 242

CORAM: **PELLETIER J.A.**
STRATAS J.A.
DE MONTIGNY J.A.

BETWEEN:

OLUKAYODE ADEBOGUN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] On April 9, 2013 the Canada Border Services Agency issued to the applicant a Notice of Violation YQR-13-0001 with a penalty of $800 for allegedly importing meat products (bags of spicy beef snacks) into Canada without meeting the prescribed legal requirements for such importation. Relying on paragraph 9(2)(*b*) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act,* S.C. 1995, c. 40 (the Act), the applicant requested a review of the facts

by the Minister of Public Safety and Emergency Preparedness (the Minister). On September 14, 2015, the Minister issued his decision and upheld the Notice of Violation (the Minister's decision), which decision was sent to the applicant's address by registered mail on September 16, 2015 and delivered on the following day.

[2] As indicated in the letter informing him of the Minister's decision, the applicant could request a review of that decision by the Canada Agricultural Review Tribunal (the Tribunal). Pursuant to subsection 13(a) of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, S.O.R./2000-187 (the Regulations), the person named in the Notice of Violation may request, in writing, a review of the Minister's decision by the Tribunal within "15 days after the day on which the notice is served". The applicant filed his Request for Review of the Minister's decision with the Tribunal by fax on October 5, 2015, and sent it by courier on October 15, 2015.

[3] Pursuant to section 48 of the *Rules of the Review Tribunal (Canada Agricultural Review Tribunal)*, S.O.R./2015-103 (the Rules), the Tribunal must first determine the admissibility of the request prior to engaging in the review of the Notice of Violation or of the Minister's decision. In the case at bar, the Tribunal accepted the Minister's position that the decision was personally served on the applicant on September 17, 2015. Since the Request for Review by the applicant was sent by fax and received by the Tribunal on October 5th, the Tribunal had no difficulty concluding that Mr. Adebogun was outside his 15-day limit by three days.

[4] Relying on the jurisprudence of this Court, according to which the Tribunal does not have the jurisdiction to extend the timelines set out in the Act and the Regulations (see *Clare v. Canada (Attorney General)*, 2013 FCA 265 at para. 24, 451 N.R. 349 (*Clare*)), the Chairperson concluded that the applicant's Request for Review was not admissible. Accordingly, Mr. Adebogun was deemed to have committed the violation indicated in the Notice of Violation, and was required to pay the penalty amount of $800 on an immediate basis (the Tribunal's decision).

[5] The applicant now seeks judicial review of the Tribunal's decision under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Therefore, this Court is not called upon to decide the merits of the Minister's decision, but merely to determine whether the Tribunal erred in finding that Mr. Adebogun's Request for Review of the Minister's decision is inadmissible. Such a decision is reviewable on a standard of reasonableness, as it involves the application of the Regulations to the facts of this case. To the extent that it also turns on the proper interpretation of those Regulations, the applicable standard of review is also that of reasonableness, as they are closely connected to the Tribunal's function and fall within its expertise.

[6] Pursuant to subsection 8(1) of the Regulations, service of any document originating from the Minister on an individual named in the document may be made (a) personally or (b) by registered mail, courier, fax or other electronic means. In the case at bar, there is no dispute that service was made by registered mail. Indeed, proof of service rests on a copy of a Canada Post tracking sheet, apparently signed by the applicant, showing that the Minister's decision was successfully delivered on September 17, 2015.

[7] Before this Court, the applicant argued that he could not have been served with the Minister's decision on September 17, 2015, as he was on his way to Nigeria on that date. He also contended that the signature appearing on the tracking sheet does not match his signature on other documents. In support of his submission, the applicant filed a two paragraph affidavit dated January 22, 2016, attaching a statement of facts with a photocopy of his flight itinerary and boarding passes. The Attorney General of Canada (the AGC or Canada) objected to this affidavit on the ground that the documents were not before the Tribunal, and that the statement of facts is replete with opinion, statements of law, and inappropriate accusations of wrongdoing.

[8] I agree with Canada that the additional material filed by the applicant as exhibits to his latest affidavit are inadmissible. It is trite law that the evidentiary record before a reviewing court is restricted to the evidentiary record that was before the initial decision-maker, subject to a few exceptions that are not applicable in the case at bar. For example, the new materials are not provided by way of "general background" or to establish grounds of review, such as procedural fairness grounds, not otherwise evident from the existing record. As such, the affidavit and the documents attached to it must be struck out.

[9] That being said, the application for judicial review ought to be granted and the decision of the Tribunal quashed. At no point in its decision did the Tribunal turn its mind to section 9 of the Regulations, which complements section 8 (dealing with means of service) with the rules governing proof of service. Subsection 9(2) is of particular relevance, as it states that "[a] document sent by registered mail is served on the 10th day after the date indicated in the receipt issued by a post office".

[10] By Direction to the parties dated November 15, 2017, the presiding judge of this panel invited the parties to make oral submissions concerning section 9 of the Regulations and this Court's comments in *Clare*, at paragraphs 22 and 23 in which section 9 was briefly discussed. The Direction also explicitly stated that the Court was interested in knowing the impact of that provision and of that case on the timeline within which the applicant had to respond to the Notice of Violation.

[11] At the hearing, counsel for the AGC argued that subsection 9(2) of the Regulations was meant to provide a presumed date of service in cases where a person is unavailable or wilfully tries to avoid service or refuses to take delivery of registered mail. Whatever mischief this provision was designed to prevent, its wording is unambiguous and does not leave room for interpretation. A document sent by registered mail is deemed to be served on the 10th day after the date indicated in the receipt, whether it was actually received by the recipient or not. This was made abundantly clear by this Court in *Clare*, at paragraph 23, and counsel for Canada did not provide us with any compelling argument to depart from that ruling or distinguish this case on its facts.

[12] On that reading of subsection 9(2) of the Regulations, I am of the view that the only reasonable conclusion available to the Tribunal was that the applicant's Request for Review was timely. The Minister's decision was sent by registered mail on September 16, 2015 and delivered on September 17, 2015; the applicant having filed his Request for Review with the Tribunal on October 5, 2015, he was well within the 15-day limit set out in subsection 13(a) of the Regulations.

[13] For the foregoing reasons, I would allow the application for judicial review, quash the decision of the Tribunal and direct it to determine the Request for Review on its merits. I would award costs to the applicant in the amount of $250, all inclusive.

[14] Prior to the hearing, the Tribunal requested that it be removed from the style of cause as a respondent, pursuant to Rule 303(1)(a) of the *Federal Courts Rules,* S.O.R./98-106. I would be inclined to deal with this request as a written motion and to grant it. Accordingly, the amended style of cause should appear as noted in these reasons.

"Yves de Montigny"

J.A.

"I agree.

J.D. Denis Pelletier J.A."

"I agree.

David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-546-15
STYLE OF CAUSE:	OLUKAYODE ADEBOGUN v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 30, 2017
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	PELLETIER J.A. STRATAS J.A.
DATED:	DECEMBER 8, 2017

APPEARANCES:

Olukayode Adebogun	FOR THE APPLICANT (ON HIS OWN BEHALF)
Cailen Brust	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT