

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140317

Docket: A-256-13

Citation: 2014 FCA 63

**CORAM: NOËL J.A.
PELLETIER J.A.
MAINVILLE J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

Youssef BOUGACHOUCH

Respondent

Heard at Montréal, Quebec, on February 24, 2014.

Judgment delivered at Ottawa, Ontario, on March 17, 2014.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**PELLETIER J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review of a decision of the Canada Agricultural Review Tribunal (the Tribunal) (2013 CART 20 – CART/CRAC-1624) cancelling the notice of violation issued against Youssef Bougachouch (the respondent) under section 40 of the *Health of Animals Regulations*, C.R.C., c. 296 (Animals Regulations), respecting the prohibition against importing meat by-products into Canada.

[2] The notice of violation was issued against the respondent by the Canada Border Services Agency (CBSA) for having unlawfully imported meat-based products in his luggage, contrary to section 7 of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, S.C. 1995, c. 40 (Penalties Act), section 2 of the *Agriculture and Agri-Food Administrative Monetary Penalties Regulations*, SOR/2000-187, and section 40 of the *Animals Regulations*.

[3] The Tribunal stated that it was satisfied that the alleged violation had been committed, but it cancelled the notice of violation because of alleged discrimination in the inspection process that had led to the notice being issued.

[4] For the reasons that follow, I am of the opinion that the Tribunal acted unreasonably in cancelling the notice of violation on this basis, and that the matter should be referred back to the Tribunal for redetermination on the basis of the evidence of the impugned conduct.

[5] The statutory provisions that are relevant to the following analysis are reproduced in an appendix to these reasons for judgment.

RELEVANT FACTS

[6] The events occurred on March 27, 2012, at Pierre-Elliot Trudeau International Airport, when the respondent arrived in Canada on a flight from Morocco (Applicant's Record at pages 56 and 61). The record shows that the respondent failed to declare some sausages that he had in his luggage, either on his Declaration Card or when he was questioned in this regard by the primary inspection line officer (Applicant's Record, at pages 59 and 61). When he was directed to the

secondary inspection line, the respondent again denied having imported any food (Applicant's Record, at page 56).

[7] When the respondent was searched on secondary inspection, three commercially packaged turkey sausages were discovered in his luggage (Applicant's Record, at pages 56, 67 and 74). Because he did not have a permit to import the sausages, the respondent was given a "Notice of Violation at the Point of Entry", along with a monetary penalty of \$800 (Applicant's Record at pages 68 and 69).

[8] On or about April 1, 2012, the respondent filed a request to have the Tribunal review the notice of violation (Applicant's Record, at pages 80 et seq.). In his request, the respondent argued, *inter alia*, that the CBSA had discriminated against him on the basis of his ethnic origins because [TRANSLATION]"only Arabs were targeted *en masse* for baggage inspection" (Applicant's Record, at pages 82 and 83).

[9] At the hearing, the Tribunal wanted to hear the parties on the respondent's allegations of discrimination. The CBSA's representative argued that the conduct of the inspectors was not relevant to the Tribunal proceeding and should instead be handled through the CBSA's internal complaint resolution mechanism (Reasons at paragraph 21). A witness for the CBSA explained that the respondent may have had the impression that only Arabs were targeted because this was a flight from Morocco and newcomers to Canada are automatically sent for secondary inspection (Reasons at paragraph 22; Applicant's Record at pages 123 and 124).

[10] The Tribunal was not satisfied with these answers and asked the CBSA to submit additional evidence regarding the allegations of discrimination, suggesting that all the notices of violation issued to passengers on the same flight as the respondent be reviewed (Reasons at paragraphs 23 and 24; Applicant's Record at pages 35 et seq., 125 to 134). The CBSA did not want to adduce new evidence, arguing that the notice of violation had to be analyzed independently of the allegations of discrimination, that the Penalties Act did not require it to provide reasons why an individual is referred for secondary inspection, and that, in any event, the Tribunal does not have the power to review notices of violation on that basis (Reasons at paragraphs 25 to 29; Applicant's Record at pages 21 et seq.).

[11] On June 24, 2013, the Tribunal rendered a decision exonerating the respondent on the ground that the evidence supporting the notice of violation had to be excluded, hence the application for judicial review before this Court.

DECISION OF THE TRIBUNAL

[12] At the review hearing, the Tribunal declared that it was satisfied that the evidence proved that the respondent had committed the alleged act (Applicant's Record, transcription, at page 128). It nevertheless cancelled the notice of violation on the ground that the evidence of the violation had been obtained in an arbitrary or discriminatory manner (Reasons at paragraphs 34 and 35).

[13] In support of this conclusion, the Tribunal noted, first, the respondent's allegation of discrimination, presented in the following terms (Reasons at paragraph 19):

[TRANSLATION]

. . . I am of Moroccan origin. I arrived on an airplane on which half the passengers were of European, American or Canadian origin, and only Arabs were targeted en masse for baggage inspection

[14] Citing the decision of the Tribunal in *Zhou v. Canada (Border Services Agency)*, 2010 CART 20, the Tribunal stated that in most cases, the conduct of CBSA inspectors is an issue that is relevant to a request to review a notice of violation (Reasons at paragraph 30). It nevertheless found that it had a duty to “determine whether the reasons and actions of the inspector demonstrate that she abused her discretionary power and thus based her decision to issue a Notice of Violation to Mr. Bougachouch on arbitrary and discriminatory criteria” (Reasons at paragraph 30).

[15] Declaring that it was not satisfied with the explanations provided by the CBSA to rebut the impression of discrimination alleged by the respondent, the Tribunal concluded that there was bias in the secondary inspection of passengers (Reasons at paragraphs 32 and 33):

. . . For some reason, without any convincing explanation, only Arabs were referred to secondary inspection in this case. Discretion is not being exercised when only Arabs, arriving on a flight with many other individuals, are required to undergo secondary inspection. The Tribunal remains without a convincing explanation from the [CBSA] for this “Arab waiting line”.

[16] Citing *R. v. Johnson*, 55 CR (6th) 118, 2007 CanLII 57813 (ON SC); *R. v. Nguyen*, 139 CRR (2d) 65, 2006 CanLII 1769 (ON SC); and *Amalia Eustergerling v. Canada (Border Services Agency)*, 2012 CART-1593, 2012 CART 19 (CanLII) (*Amalia*), the Tribunal cancelled the notice of violation by invoking its discretion to “bar evidence” obtained as a result of “highly egregious”

conduct on the part of CBSA officials, in order to avoid bringing the administration of justice into disrepute (Reasons at paragraphs 31 and 34).

POSITION OF THE PARTIES

[17] The Attorney General of Canada (the applicant) raises two main grounds in support of his application for judicial review. First, he argues that the reasons of the Tribunal lack the transparency and intelligibility required of a decision of an administrative tribunal (Applicant's Memorandum at paragraphs 31 and 32). In this regard, the applicant notes that [TRANSLATION] "it is extremely difficult, if not impossible, to determine which legal concept the Review Tribunal did indeed apply to arrive at its conclusion" (Applicant's Memorandum at paragraph 36).

[18] Second, the applicant is of the view that in excluding the evidence supporting the notice of violation, the Tribunal exceeded its authority under the Penalties Act and acted unreasonably (Applicant's Memorandum at paragraphs 39 to 62).

[19] More specifically, it is submitted that the Tribunal made an unreasonable error in disregarding the evidence supporting the notice of violation because the conditions for excluding it had not been met. The applicant accepts that a tribunal may reject certain pieces of evidence where fundamental rights have been violated in obtaining them and the use of that evidence would bring the administration of justice into disrepute (Applicant's Memorandum at paragraph 41, citing *Bellefeuille c. Morisset*, 2007 QCCA 535 at paragraphs 23 and 24 (*Bellefeuille*)). He submits, however, that none of these conditions have been met in this case.

[20] Regarding the conditions under which the evidence was obtained, the applicant argues that the Tribunal erred in inferring bias on the part of the CBSA strictly on the basis of the subjective impression of the applicant. The Tribunal cannot base its decision on mere conjecture when there could be a multitude of reasons other than discrimination for the presence of people of Arab origin in the secondary inspection line.

[21] The applicant submits that it was impossible to provide statistics on the proportion of people of Arab origin referred for secondary inspection because passengers' ethnic origins cannot be determined from their declaration cards (Applicant's Memorandum at paragraph 53). Moreover, such statistics would not explain the reasons for sending certain passengers for secondary inspection (Applicant's Memorandum at paragraphs 52 and 54).

[22] The applicant adds that the Tribunal's reasoning was also unreasonable with regard to the question of whether admitting the evidence would bring the administration of justice into disrepute. The Tribunal failed to apply the proportionality test established by the case law, which requires balancing respect for fundamental rights with the search for truth (Applicant's Memorandum at paragraphs 59 and 60, citing *Bellefeuille* at paragraphs 70 and 71). If the Tribunal had applied that test, it would have concluded that the balance favoured the search for truth in this case because of the scheme and purposes of the legislation in issue (Applicant's Memorandum at paragraph 61).

[23] The respondent, on the other hand, did not submit any written representations, which leads me to conclude that he relies on the decision of the Tribunal.

ANALYSIS

Applicable standard of review

[24] The applicant simply states the law regarding the standard of review applicable on judicial review without actually identifying the nature of the issues decided by the Tribunal and the appropriate standard of review for each of them (Applicant's Memorandum at paragraphs 22 and 23).

[25] The intelligibility of the reasons must be assessed on a standard of reasonableness, while the issue of whether the Tribunal acted within its jurisdiction calls for the standard of correctness.

Intelligibility and transparency of the Tribunal's reasons

[26] The first question raised by the applicant is whether the reasons of the Tribunal are sufficient to meet the criteria of intelligibility and transparency in the decision-making process as established in *Dunsmuir v. New Brunswick*, 2008 SCC 9. To meet these requirements, the reasons in question must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16 (*Newfoundland Nurses*)). It should be noted that the evidentiary burden of the party challenging the sufficiency or reasonableness of the reasons is a particularly heavy one. Indeed, as the Supreme Court recently noted in *Newfoundland Nurses* at paragraph 16,

[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion

[27] In my opinion, the first ground of appeal must fail. It is true that the Tribunal refers in several places to its discretion to “[refuse] to admit evidence obtained” (Reasons at paragraph 31), or “to bar evidence obtained” [emphasis added] (Reasons at paragraphs 31 and 34). The choice of words is unfortunate, in that it does indeed seem to refer to the Tribunal’s powers regarding the administration of the evidence.

[28] However, when read in their context, the reasons show that the Tribunal did in fact exclude the evidence, once it was filed and submitted, on the ground that it had been obtained through an unreasonable search. This interpretation is confirmed by the fact that the Tribunal cites, at paragraph 31 of its reasons, two judgments of the Ontario Superior Court of Justice regarding the exclusion of evidence obtained in violation of the fundamental rights of an accused in a criminal context, under subsection 24(2) of the *Canadian Charter of Rights and Freedoms*. The Tribunal also cites *Amalia* at paragraph 45, in which a different panel apparently admitted that the Tribunal might, in certain circumstances, be able to intervene “where the improper purpose contributed to a material extent in the issuance of the Notice of Violation with Penalty” (Reasons at paragraph 31).

[29] Although the Tribunal’s decision might appear to be deficient in certain respects, a reviewing court should “first seek to supplement [the reasons] before it seeks to subvert them” (*Newfoundland Nurses* at paragraph 12, citing David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at page 304). Taking this approach, I must conclude that the application for judicial review cannot be allowed on this basis alone, as the applicant claims. However, the application for judicial review must in my view be allowed for the following reason.

Grounds for excluding the evidence

[30] It is neither necessary nor appropriate to consider the question of whether the Tribunal had the power to exclude the evidence because in any event exclusion, although permitted, is unreasonable. The evidence of discrimination as accepted by the Tribunal is based on the respondent's perception that, on his flight (Reasons at paragraph 19),

[TRANSLATION]

. . . half the passengers were of European, American or Canadian origin, and only Arabs were targeted *en masse* for baggage inspection

[31] It is from that allegation, as worded or reformulated above, that the Tribunal concluded that the onus was on the CBSA to prove that no racial profiling had occurred. Since the CBSA did not respond to the invitation to provide evidence to the contrary, the Tribunal accepted the respondent's testimony and found that the CBSA had conducted a secondary inspection on the basis of the racial profile of the passengers.

[32] The full reasons of the Tribunal on this point are found at paragraph 23 of its decision:

The [CBSA] did not provide any explanation why only Arabs (who could have been Canadians or citizens of another country) were directed to the secondary inspection line. The Tribunal decided to give the [CBSA] an opportunity to demonstrate that the preliminary impression of bias was not correct. One of the Tribunal's suggestions was that the [CBSA] could submit the information to the individuals on the flight to whom Notices of Violation had been issued. The Tribunal suggested a deadline of thirty days to submit a response, with the possibility of an extension, in order to gather the information.

[Emphasis added.]

[33] As the Tribunal acknowledges in that passage, the respondent's statement is based on a mere impression. However, an impression is not proof. As this Court stated in *Doyon v. Canada (Attorney General)*, 2009 FCA 152 at paragraph 28, the Tribunal had to "rely on evidence based on facts and not mere conjecture, let alone speculation, hunches, impressions or hearsay".

[34] This is especially so since the Tribunal had evidence before it that admitted a different explanation for the respondent's impression. Indeed, the border services officer who was working on the secondary inspection line when the respondent's flight arrived testified as follows (Transcript, Applicant's Record, at pages 123 and 124):

[TRANSLATION]

You have to understand that many passengers are newcomers to Canada, so they have a lot of forms to fill out. When you arrive in Canada for the first time, you absolutely must go through secondary to be checked. There are a lot of papers to fill out. So, that's one of the reasons why many immigrants end up at secondary, for formal matters concerning forms to be filled out.

Then there are all the times when the system at primary is programmed to have random checks, upon random referrals to secondary. So, all those people who have a random referral have to go to secondary. So, there are many reasons why someone would end up at secondary, and just the fact that many immigrants have to fill out forms, that explains a bit why there are often many immigrants at secondary.

[35] Regardless of the preceding, the Tribunal erred in criticizing the CBSA for not having filed the declaration cards of the passengers in question and the related statistics to show that there was no profiling. As the applicant notes, it is impossible to identify the ethnic origins of individuals from these cards, and at any rate, the statistics regarding the ethnic origins of passengers in a secondary inspection area would not have taken into account the many reasons that could explain why they

ended up there, such as the payment of customs duties, immigration procedures, refugee protection claims and random searches. Nothing useful or probative could have come from such evidence.

[36] To sum up, the Tribunal acted unreasonably in shifting the burden of proof on the basis of a mere impression and in criticizing the CBSA for not having entered in evidence the declaration cards and related statistics.

[37] Moreover, since the Tribunal declared that it was satisfied that the respondent had committed the alleged act, I would allow the application for judicial review, quash the decision of the Tribunal and refer the matter back to it for redetermination on the basis of the finding that it was satisfied that the violation had been committed.

“Marc Noël”

J.A.

“I agree

J.D. Denis Pelletier J.A.”

“I agree

Robert M. Mainville J.A.”

Certified true translation
François Brunet, Revisor

APPENDIX

RELEVANT STATUTORY PROVISIONS

*Agriculture and Agri-Food
Administrative Monetary Penalties
Regulations Respecting the Pest
Control Products Act and
Regulations (SOR/2000-187)*

2. The contravention of any of the following provisions is a violation that may be proceeded with in accordance with the Act:

(a) a provision of the *Pest Control Products Act* that is set out in column 1 of Part 1 of Schedule 1;

(b) a provision of the *Pest Control Products Regulations* that is set out in column 1 of Part 2 of Schedule 1;

(c) a provision of the *Pest Control Products Sales Information Reporting Regulations* that is set out in column 1 of Part 3 of Schedule 1; and

(d) a provision of the *Pest Control Products Incident Reporting Regulations* that is set out in column 1 of Part 4 of Schedule 1.

*Règlement sur les sanctions
administratives pécuniaires en matière
d'agriculture et d'agroalimentaire
(DORS/2000-187)*

2. La contravention aux dispositions ci-après est une violation punissable au titre de la Loi :

a) toute disposition de la *Loi sur les produits antiparasitaires* qui figure à la colonne 1 de la partie 1 de l'annexe 1;

b) toute disposition du *Règlement sur les produits antiparasitaires* qui figure à la colonne 1 de la partie 2 de l'annexe 1;

c) toute disposition du *Règlement concernant les rapports sur les renseignements relatifs aux ventes de produits antiparasitaires* qui figure à la colonne 1 de la partie 3 de l'annexe 1;

d) toute disposition du *Règlement sur les déclarations d'incident relatif aux produits antiparasitaires* qui figure à la colonne 1 de la partie 4 de l'annexe 1.

***Agriculture and Agri-Food
Administrative Monetary Penalties
Act (S.C. 1995, c. 40)***

***Loi sur les sanctions administratives
pécuniaires en matière d'agriculture
et d'agroalimentaire (L.C. 1995, ch.
40)***

7. (1) Every person who

(a) contravenes any provision of an agri-food Act or of a regulation made under an agri-food Act,

(b) contravenes any order made by the Minister under the Plant Protection Act, or

(c) refuses or neglects to perform any duty imposed by or under the Plant Protection Act or the Health of Animals Act the contravention of which, or the refusal or neglect of which, is designated to be a violation by a regulation made under paragraph 4(1)(a) commits a violation and is liable to a warning or to a penalty in accordance with this Act.

(2) Where a person designated under paragraph 6(a) has reasonable grounds to believe that a person has committed a violation, the designated person may issue, and shall cause to be served on the person, a notice of violation that names the person, identifies the violation and

(a) contains a warning that the person has committed a violation; or

(b) sets out
(i) the penalty, established in accordance with the regulations, for the violation that the person is liable to pay,

7. (1) Toute contravention désignée au titre de l'alinéa 4(1)a) constitue une violation pour laquelle le contrevenant s'expose à l'avertissement ou à la sanction prévus par la présente loi.

(2) L'agent verbalisateur qui a des motifs raisonnables de croire qu'une violation a été commise peut dresser un procès-verbal qu'il fait notifier au contrevenant. Le procès-verbal comporte, outre le nom du contrevenant et les faits reprochés, soit un avertissement, soit le montant, établi en application du règlement, de la sanction à payer — auquel cas il précise le délai et les modalités de paiement — et, sous réserve des règlements, le montant inférieur de la sanction infligée prévu au procès-verbal dont le paiement, dans le délai et selon les modalités, vaut règlement.

(ii) particulars concerning the time for paying and the manner of paying the penalty, and

(iii) subject to the regulations, a lesser amount that may be paid in complete satisfaction of the penalty if paid within the time and manner specified in the notice.

(3) A notice of violation must clearly summarize, in plain language, the rights and obligations under this Act of the person on whom it is served, including the right to have the facts of the violation reviewed by the Minister or the Tribunal, and the procedure for requesting such a review.

(3) Figurent aussi au procès-verbal en langage clair un sommaire des droits et obligations du contrevenant prévus par la présente loi, notamment le droit de contester les faits reprochés auprès du ministre ou de la Commission et la procédure pour le faire.

Canadian Charter of Rights and Freedoms

24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Charte canadienne des droits et libertés

24. (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

***Health of Animals
Regulations (C.R.C., c. 296)***

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.

***Règlement sur la santé des
animaux (C.R.C., ch. 296)***

40. Il est interdit d'importer un sous-produit animal, du fumier ou une chose contenant un sous-produit animal ou du fumier, sauf en conformité avec la présente partie.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CANADA v. Youssef
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BY: NOËL J.A.

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

DATED: MARCH 17, 2014

APPEARANCES:

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