

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140930

Docket: A-69-14

Citation: 2014 FCA 220

**CORAM: NADON J.A.
WEBB J.A.
SCOTT J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

TING TING TAM

Respondent

Heard at Ottawa, Ontario, on September 30, 2014.
Judgment delivered from the Bench at Ottawa, Ontario, on September 30, 2014.

REASONS FOR JUDGMENT OF THE COURT BY:

NADON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on September 30, 2014).

NADON J.A.

[1] On November 7, 2012, the respondent, coming from China, entered Canada at the MacDonald-Cartier International Airport in Ottawa.

[2] She was asked by an officer of the Canada Border Services Agency (CBSA) whether she was bringing into Canada any food items, plants/vegetation, candies or anything edible.

[3] Her answer to the question was no.

[4] Because of her demeanour and her answers to his questions, the officer referred her to another officer for a secondary examination.

[5] The inspection conducted by this second officer revealed that the respondent was importing into Canada assorted pork products which she had purchased in China.

[6] As a result, the respondent was issued a Notice of Violation with a penalty of \$800.00.

[7] On December 4, 2012, the respondent filed a request for review and on December 24, 2013 the Canada Agricultural Review Tribunal (the Tribunal) determined that Notice of Violation YOW-12-071 of November 7, 2012 was a nullity and that consequently the respondent was not liable to pay the penalty imposed by the CBSA.

[8] The Tribunal so held because of its view that the first officer's decision to refer the respondent to a secondary examination constituted a discriminatory practice, *i.e.* racial profiling.

[9] More particularly, the Tribunal relied on the following words from the first officer's statement to support its view of racial profiling (para. 6 v)):

...

That I asked her this because it has been my experience working in the air mode stream that it is more than common that individuals of Chinese origin returning from China to bring agricultural products with them.

...

[10] In our view, the Tribunal's decision cannot stand.

[11] First, it is clear that the respondent did bring into Canada pork products which she failed to declare upon entry.

[12] Second, the Tribunal failed to examine the whole of the evidence surrounding the first officer's decision to refer the respondent to secondary examination. More particularly, it failed to consider that the officer not only considered his experience in making his decision but that he made his decision based on the respondent's demeanour and the manner in which she answered its questions. The full text of the officer's statement reads as follows.

...

That I specifically asked her if she had any food items, plants/vegetation, candies or anything edible.

That she told me that she did not have any food or agricultural products in her bags.

That I asked her this because it has been my experience working in the air mode stream that it is more than common that individuals of Chinese origin returning from China to bring agricultural products with them.

That I noticed that the manner in which she responded to the question regarding the importation of food products was more sharp, and quick than the other questions I had previously asked her. She appeared nervous. I even asked her again about food, at which point I was convinced that she was importing food or agricultural items.

...

[13] Third, there was no evidence of racial profiling. The officer simply asserted in his statement that in his experience it was not uncommon for Chinese persons to bring agricultural

products with them upon returning from China. The officer's hunch, based on his experience and his observance of the respondent's demeanour, was confirmed by the secondary examination.

[14] Fourth, officers on the front line, such as the first officer herein, cannot be expected to leave their experience, acquired usually after many years of observing people from different countries entering Canada, at home or at a place far removed from their place of work.

[15] To find, as the Tribunal did in this case, that the first officer had exercised racial profiling and that to not declare the Notice of Violation a nullity would tend to bring the system of justice into disrepute is, in our respectful opinion, a view which is unsupportable in the circumstances of this case and is therefore totally devoid of merit.

[16] For these reasons, the judicial review application will be allowed, the decision of the Tribunal will be set aside and the matter will be returned to the Tribunal for reconsideration, in the light of these reasons, of whether the respondent committed the violation and whether the amount of the penalty is established.

“Marc Nadon”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CANADA v. TING TING TAM

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REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A.
WEBB J.A.
SCOTT J.A.

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APPEARANCES:

Adrian Bieniasiewicz FOR THE APPLICANT

SOLICITORS OF RECORD:

William F. Pentney FOR THE APPLICANT
Deputy Attorney General of Canada