

Federal Court



Cour fédérale

Date: 20161216

Docket: T-1986-15

Citation: 2016 FC 1382

Ottawa, Ontario, December 16, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

MONTASSER SAAD

Applicant

and

**RECOURSE DIRECTORATE - CANADA
BORDER SERVICES AGENCY**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review concerning the actions taken against Mr. Saad by the Canada Border Services Agency (CBSA) at the Rainbow Bridge on July 12, 2015. Mr. Saad claims he was not given the opportunity to make a truthful declaration. He says the CBSA Agents he encountered were aggressive and refused to give him the opportunity to explain himself. The events which unfolded resulted in his vehicle being seized and a penalty of \$355.59 being

assessed against him for his failure to declare a swimming pool cover. He says it was all the result of a misunderstanding.

[2] I believe Mr. Saad when he says this happened as a result of a misunderstanding. A contributing factor is that Mr. Saad's first language is neither English nor French. However, the issue of whether Mr. Saad contravened the *Customs Act*, RSC, 1985, c 1 (2nd Supp) [*Customs Act*] cannot be considered on this application. The only issue is if the penalty assessed is within the range of discretion afforded to the CBSA and if it is reasonable. For the reasons that follow, I find that it was, and therefore the judicial review is dismissed.

II. Events at the Border on July 12, 2015

[3] On his wedding anniversary on July 12, 2015, Mr. Saad and his wife travelled to the United States to pick up a cover for their swimming pool which they had ordered online from Walmart. They were only in the U.S. for a couple of hours. They returned to Canada via the Rainbow Bridge. They advised the first CBSA Officer they encountered that they had only been in the U.S. for a couple of hours. Following this, what was, or was not, declared or said by Mr. Saad to this Officer, is in dispute. Mr. Saad claims that he immediately told the first Officer that he had been to the U.S. to see that side of Niagara Falls and to pick up an order. The Officer denies that Mr. Saad declared any goods. This Officer checked the trunk of the Saad vehicle, saw a large box, and referred Mr. Saad and his wife for secondary examination.

[4] At the secondary examination, the CBSA Officers [the Secondary Officers] found a box containing the pool cover in the trunk. Mr. Saad says that the Secondary Officers asked if he

bought the pool cover that day. He states that he tried to explain that it had previously been purchased online. However, according to Mr. Saad, the Secondary Officers insisted that he was lying, and threatened seizure of his vehicle and the pool cover.

[5] At some point, a receipt in the amount of \$422.63 USD for the pool cover was provided. According to Mr. Saad, he produced the receipt voluntarily. According to the CBSA, it was discovered after a search of Mr. Saad's wallet. Mr. Saad claims that he tried to explain the situation, but the Secondary Officers were aggressive and he was told not to speak. Mr. Saad states that at one point he asked the Secondary Officers if he could get his medication from his car, as he suffers from serious health conditions, but his request was refused.

[6] The Secondary Officers seized the pool cover and Mr. Saad's vehicle on the basis that the pool cover had been unlawfully imported due to his failure to report it, contrary to section 12 of the *Customs Act*. Release of the vehicle and the pool cover was offered to Mr. Saad upon payment of a penalty in the amount of \$355.59. The penalty was calculated based on 40% of the value of the pool cover plus an additional 50%. Mr. Saad paid the penalty, and his vehicle and the pool cover were released to him.

[7] During this process, the Secondary Officers also seized and revoked Mr. Saad's NEXUS card on the basis that he had violated the terms of the NEXUS program. His wife's NEXUS card was also seized, but apparently it has since been returned.

[8] Mr. Saad requested a review of these actions pursuant to the *Customs Act*. On July 27, 2015, Notice of Reasons for Action were provided to Mr. Saad by a Senior Appeals Officer. Over the following months, Mr. Saad communicated several times with the Senior Appeals Officer regarding the adjudication of his case. On October 27, 2015, the Senior Appeals Officer provided a recommendation to the Minister's delegate.

III. Minister's Decision

[9] The October 29, 2015 decision of the Minister upheld the finding of a contravention of the *Customs Act* and upheld the penalty of \$355.59.

[10] The Minister accepted the version of events as provided by the CBSA Officers. Namely, the Minister accepted that Mr. Saad initially indicated that he had nothing to declare, and after the pool cover was discovered, he claimed that it came from Canada. The Minister noted that the receipt for the purchase of the cover was located during secondary examination. The pool cover was seized because it was not reported. The Saad vehicle was also seized.

[11] In the decision, the Minister acknowledged that Mr. Saad has a different version of the events that transpired.

[12] On the issue of contravening the *Customs Act*, the Minister noted that "the lack of any intention to circumvent the reporting requirements or to deceive CBSA officials is not relevant to the determination of whether or not the obligation to report has been contravened." The Minister

also noted that the onus is on the importer (Mr. Saad) to declare all of the goods purchased, received, or acquired.

[13] The Minister concluded that Mr. Saad had been afforded sufficient opportunity to declare the pool cover and that he failed to do so. The finding of contravention of the *Customs Act* was upheld.

[14] With respect to the penalty, the Minister concluded that it was in accordance with the CBSA guidelines.

[15] Finally, the Minister outlined the options available to Mr. Saad to appeal the decision. To appeal against the finding pursuant to section 131, that he contravened the *Customs Act*, Mr. Saad must file an action in the Federal Court. Whereas, an appeal of the penalty decision made pursuant to section 133 may be done by way of an application for judicial review to the Federal Court.

[16] The option Mr. Saad chose was to file an application for judicial review pursuant to section 133 of the *Customs Act*.

IV. Issues

[17] Mr. Saad raises a number of issues which I have framed as follows:

- A. Can this court review the finding that Mr. Saad contravened the *Customs Act*?
- B. Was the penalty assessed against him reasonable?

V. Analysis

A. *Can this court review the finding that Mr. Saad contravened the Customs Act?*

[18] In his submissions, Mr. Saad explained that he is an honest person and that the events that happened on July 15, 2015 are the result of a misunderstanding. He says that each time he tried to offer an explanation to the CBSA Officers, he was cut off and told he had already committed an offence. The desire to clear his name is what drove Mr. Saad to undertake the various administrative appeals and it is what drove him to file this application for judicial review.

[19] However, unfortunately for Mr. Saad, he has chosen the wrong option. As noted above, in response to the Minister's decision, Mr. Saad had two options. His first option was to file an action against the Minister regarding the finding that he breached the *Customs Act*. He did not take this option. The other option was to file a judicial review application against the penalty imposed. This is the option he chose. Therefore, the only issue for consideration on this judicial review application is the penalty assessed against him by the CBSA.

[20] Again, the issue of contravention of the *Customs Act* can only be challenged by way of an action (*Pounall v. Canada (Border Services Agency)*, 2013 FC 1260 at para 15).

[21] Because the contravention of the *Customs Act* cannot be considered on this application, I will not address any arguments made by Mr. Saad on whether any contravention in fact occurred.

B. *Was the penalty assessed against him reasonable?*

[22] The majority of Mr. Saad's submissions dispute the version of events accepted by the Minister. Mr. Saad claims that he was not asked whether he had any goods to declare. This is contradicted by the CBSA Officers' reports.

[23] However, this factual dispute is largely irrelevant because of the operation of section 12 of the *Customs Act* which imposes a positive obligation on Mr. Saad to report. This obligation to report exists regardless of whether he was asked if he was bringing anything with him. Section 12 requires that all imported goods are to be reported to the CBSA at the time of entry (*Prue v. Canada (Public Safety & Emergency Preparedness)*, 2010 FC 1234, rev'd on other grounds 2012 FCA 108).

[24] What this means for Mr. Saad is that an honest mistake or a misunderstanding is no defence. The fact that Mr. Saad did not intend to contravene the *Customs Act* is irrelevant in assessing whether or not a seizure and penalty is valid.

[25] As the court in *Trites v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1365 at para 18, stated:

[18] The *Customs Act* depends, for its effective operation, on voluntary reporting and strict liability attaches to those that fail to report: *Prue v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1234. The lack of intention is thus irrelevant in assessing whether or not a seizure and penalty is valid. The violation occurs when there is a failure to report.

[26] With respect to the amount of the penalty, because it is within the discretion of the CBSA, this court will only consider if it is reasonable (*United Parcel Service Canada Ltd. V. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 204 at paras 43, 45, and *Thomas v. Canada (Public Safety and Emergency Preparedness)*, 2011 FC 734 at para 26).

[27] As well, this court will not interfere if the discretion was properly exercised and if the decision falls within the range of possible outcomes (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47).

[28] Section 117 of the *Customs Act* authorizes an Officer to offer a traveller an amount payable for the release of goods and conveyance from seizure. This amount may equal up to the aggregate of the value for duty of the goods and the amount of any duties levied. Based on the Enforcement Manual, the calculation of the terms of release depends on two factors: (1) the group that the commodity falls into and (2) the level of infraction. The Enforcement Manual states that Level 2 “applies to violations where the circumstances demonstrate an active attempt by the importer to contravene the Customs Act.” Specifically, under the heading of “Non-Report and Inaccurate Information”, the Enforcement Manual states that Level 2 is applied when the circumstances are the same as for Level 1, but “inaccurate information is given concerning the goods following their discovery”.

[29] Here the penalty was assessed at Level 2 because, according to the CBSA, not only was there an active attempt to contravene the law, but Mr. Saad provided inaccurate information concerning the pool cover following its discovery. Further, the CBSA submits that the amount

charged for the return of the pool cover and release of the vehicle (40% of the value of the pool cover plus an additional 50%) is reasonable because it is within the range allowed by the *Customs Act*.

[30] Mr. Saad did not identify any material fact relevant to the penalty decision which the Minister misapprehended. I also note that this was not the maximum penalty that could have been assessed against Mr. Saad under the *Customs Act*.

[31] Considering the provisions of the *Customs Act* and the applicable guidelines, the penalty prescribed is justifiable and is within the limits of the discretion afforded to the CBSA in subsections 117(1) and 133(4) of the *Customs Act*, it is therefore reasonable.

[32] The judicial review is dismissed. I decline to award costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review is dismissed without costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1986-15

STYLE OF CAUSE: MONTASSER SAAD v RECOURSE DIRECTORATE -
CANADA BORDER SERVICES AGENCY

PLACE OF HEARING: KITCHENER, ONTARIO

DATE OF HEARING: OCTOBER 13, 2016

JUDGMENT AND REASONS: MCDONALD J.

DATED: DECEMBER 16, 2016

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