Federal Court  Cour fédérale

Date: 20170131

Docket: T-956-16

Citation: 2017 FC 119

Ottawa, Ontario, January 31, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

THOMAS GORDON GERARD LESLIE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Upon his return to Canada, the applicant – a Canadian resident who had been in the United States [US] for one day – failed to report goods purchased that day in the US. The non-declared goods were seized and forfeited under the applicable provisions of the *Customs Act*, RSC 1985, c 1 (2nd Supp). Their value is US$220.45. The applicant had to pay CAN$155.20 in order to retrieve them after they were seized. Moreover, his NEXUS membership was also cancelled following this incident.

[2] The applicant asks this Court to review the actions taken on May 26, 2016 by the Recourse Directorate of the Canada Border Services Agency [CBSA], acting on behalf of the Minister of Public Safety and Emergency Preparedness [respondent or Minister], which were to forfeit the amount of CAN$155.20 paid by the applicant for the return of the seized goods. The applicant requests this Court to quash this decision by way of writ of *certiorari*. Furthermore, the applicant asks this Court to order the respondent to execute an external review of the customs officers' conduct, which he alleges demonstrates bias and constitutes a breach of procedural fairness.

Inadmissible evidence

[3] The applicant has submitted with his affidavit letters from his peers to prove his good behavior as a citizen (letters of recommendation for the nomination of the applicant for the Wilfrid Laurier University Alumnus of the Year Award and for the Queen Elizabeth II Diamond Jubilee Medal). Be that as it may, the respondent asks this Court to exclude those letters since those documents were not part of the record that was before the delegate.

[4] The objection of the defendant is well-founded. Normally, an applicant cannot rely on extrinsic evidence that was not presented to the administrative decision-maker (*Toney v Canada (Public Safety and Emergency Preparedness),* 2009 FC 904, [2009] FCJ No 1128 at para 63 referring to *Asafov v Canada (Minister of Employment and Immigration),* [1994] FCJ No 713 at para 2; *Tursunbayev v Canada (Minister of Public Safety and Emergency Preparedness),* 2012 FC 532, [2012] FCJ No 1700 at paras 47 and 51). The documents in question do not come within the scope of some recognized exceptions (e.g. evidence establishing an apprehension bias)

(*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22, [2012] FCJ No 93 at paras 19-20; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, [2015] FCJ No 1396 at para 25). Consequently, the letters provided by the applicant should have been excluded from the Court's record, and therefore they shall not be considered by this Court.

[5] For the reasons that follow, this application is dismissed.

Background

[6] On January 31, 2016, the applicant and his common-law partner, made a one-day trip to Burlington. During their stay, the applicant had to purchase new clothes to replace his pants which had been accidently ripped during their journey. At 3:56 p.m. that same day, the applicant arrived at the border crossing of St-Armand and passed through the NEXUS line. The NEXUS program is designed to speed up border crossings for low-risk, pre-approved travellers into Canada and the US. It is jointly run by the CBSA and US Customs and Border Protection.

[7] The primary customs officer [primary officer] questioned the applicant and his partner on the purpose of their visit in the US. The applicant declared having spent the day at Burlington and that they only spent $60 on groceries. Considering that it was odd to travel such distance to only purchase grocery items, the primary officer suspected undeclared merchandise and referred them to a secondary inspection line (Certified record at tab 5). During the search of the vehicle, the customs officers found evidence of undeclared purchases from a pharmacy receipt and a receipt for dog products. They also found a new pair of pants, a pair of gloves, and a coat in the

trunk of the car without any tags. Furthermore, the customs officers found an empty plastic bag from MACY'S carefully folded in one of the pockets of the applicant's partner's bag. When questioned about these items, the applicant first explained that the clothes were an exchange from MACY's. However, the applicant was unable to find his paper receipt to prove the latter. The primary officer then informed him that, without a receipt or any proof of exchange, they would have to presume that these items were purchased on the same day. Upon this information, the applicant tried to find some proof to support his position. The applicant then showed an electronic receipt which displayed the purchase of 2 pairs of pants, 1 pair of gloves and 1 coat at MACY'S which amounted to US$220.45 (Certified record at tab 5). The applicant's partner then argued with the customs officers that these clothes, especially the pair of pants that the applicant was wearing at the time, could not be considered as new since he had worn them during the day.

[8] With all these allegations and the evidence found in the vehicle, the customs officers concluded that the applicant and his partner had made an effort to conceal undeclared goods, even though they were aware of the strict regulations and conditions imposed by their NEXUS membership. Consequently, the customs officers proceeded to the seizure of the clothes and the NEXUS cards of both the applicant and his partner, who was considered as co-offender. Since the NEXUS participants are held at a higher level of trust, the seizure of the applicant's goods was issued at level 2, instead of at level 1. The applicant then paid CAN$155.20, which is 50% of the value of the non-declared goods, in order to retrieve the seized clothes.

[9] Following this event, the applicant was informed that his NEXUS membership had been cancelled due to his contravention of the *Customs law* and *Regulations* (Certified record at tab 18). Consequently, the applicant is not eligible to re-apply before a period of six years, unless he obtains a favorable decision on a formal appeal against the customs enforcement action or a formal dismissal of the charge against him (Certified report at tab 19). Be that as it may, at the hearing, the Court was informed by the applicant that he has subsequently made representations to the persons responsible of the NEXUS program and he was informed last October 2016 that the matter was held in abeyance pending a final determination of the present judicial review application.

[10] In the meantime, on February 17, 2016, pursuant to section 129 of the *Customs Act*, the applicant filed a letter with CSBA requesting the Minister to review the enforcement action undertaken against him and his partner, especially regarding the seizure of their NEXUS cards. The applicant submitted that, at the time of the incident, he had a medical condition which impaired his cognitive abilities. The applicant "accepted" that he had been negligent, but due to the "accidental nature of his omission", he asked the Minister to use his discretion by reversing the suspension of his NEXUS card (Certified record at tab 15).

[11] On March 11, 2016, the adjudicator appointed to the file [adjudicator], sent her notice of reason as for action [NRA] to the applicant along with the copy of the narrative report of the customs officers involved in this case. In her NRA, the adjudicator explicitly underlined that the

scope of the review under section 129 of the *Customs Act* does not include a review of NEXUS membership or a review of his concerns regarding the customs officers' conduct.

[12] On March 22, 2016, the applicant provided further information regarding the incident and raised some concerns about the primary officer's behavior during the seizure process as she disregarded his dog's well-being, made untrue statements and violated his expectation of privacy by requesting his cellphone's password. Moreover, the applicant questioned the time lapse between the different narrative reports of the customs officers and appealed the level of the seizure applied against him.

[13] On April 8, 2016, the adjudicator provided an additional NRA to respond to the applicant's concerns (Certified record at tab 42). First, she reminded him that under the *Customs Act*, all goods brought to Canada had to be reported whether they were new or used. Secondly, although the circumstances of the seizure would normally warrant a seizure at level 1, there is a zero tolerance for non-compliance for members of an accelerated release program. Moreover, the NEXUS procedure commands the customs agents to take the member's card in the enforcement of a seizure. Thirdly, the adjudicator found that the applicant voluntary gave his cellphone's password to the customs agents. It was established later in the process that the customs agents had a suspicion that they might find an element of proof regarding undeclared goods in the cellphone. As such, the customs agents had reasonable ground to look for further evidence in his cellphone. Finally, despite all the applicant's complaints regarding the seizure process, the adjudicator stated that the many "he said-she said" do not change the simple fact that he had contravened section 12 of the *Customs Act*.

[14] On May 25, 2016 the adjudicator made her final recommendations, in which she confirmed that the applicant had contravened section 12 of the *Customs Act* by not declaring all his purchases made in the US. Whether it was a simple omission or a side effect from medication, the adjudicator found that the applicant was not exempted from meeting his reporting obligation, thus making the seizure justified. Finally, the adjudicator recommended maintaining this forfeiture. Although the applicant made several complaints about the seizure process, the adjudicator underlines that the scope of the review is limited to the enforcement action, for which there was enough evidence to confirm the infraction.

Final disposal of the appeal by the delegate

[15] On May 26, 2016, the delegate at the Appeals Division of the Recourse Directorate [delegate], wrote a letter informing the applicant of the "ministerial decision [sic] on the above noted appeal": (a) In the first place, the delegate decided, pursuant to section 131 of the *Customs Act*, that there has been a contravention of the *Customs Act* or the Regulations in respect of the seized goods [contravention decision]; (b) Secondly, the delegate also found that the amount of $155.20 should be held as forfeit pursuant to section 133 of the *Customs Act* [penalty decision].

Procedural and jurisdictional issues

[16] Although the findings made by the delegate with respect to the contravention committed by the applicant and the penalty imposed on the applicant are closely linked, legally speaking, they must be treated as separate decisions. Moreover, both follow a very different procedural path in case of contestation.

[17] Subsections 131(1) and (3), which must read with section 135 of the *Customs Act*, govern the contravention decision:

131(1) After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide	131(1) Après l'expiration des trente jours visés au paragraphe 130(2), le ministre étudie, dans les meilleurs délais possibles en l'espèce, les circonstances de l'affaire et décide si c'est valablement qu'a été retenu, selon le cas :
(a) in the case of goods or a conveyance seized or with respect to which a notice was served under section 124 on the ground that this Act or the regulations were contravened in respect of the goods or the conveyance, whether the Act or the regulations were so contravened;	a) le motif d'infraction à la présente loi ou à ses règlements pour justifier soit la saisie des marchandises ou des moyens de transport en cause, soit la signification à leur sujet de l'avis prévu à l'article 124;
[…]	[…]
(3) The Minister's decision under subsection (1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).	(3) La décision rendue par le ministre en vertu du paragraphe (1) n'est susceptible d'appel, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1).
[…]	[…]
135(1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an	135(1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette

action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.	décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.
(2) The Federal Courts Act and the rules made under that Act applicable to ordinary actions apply in respect of actions instituted under subsection (1) except as varied by special rules made in respect of such actions.	(2) La Loi sur les Cours fédérales et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.
[Emphasis added]	[Je souligne]

[18] On the other hand, subsection 133(1) of the Customs Act governs the penalty decision:

133(1) Where the Minister decides, under paragraph 131(1)(a) or (b), that there has been a contravention of this Act or the regulations in respect of the goods or conveyance referred to in that paragraph, and, in the case of a conveyance referred to in paragraph 131(1)(b), that it was used in the manner described in that paragraph, the Minister may, subject to such terms and conditions as the Minister may determine,	133(1) Le ministre, s'il décide, en vertu des alinéas 131(1)a) ou b), que les motifs d'infraction et, dans le cas des moyens de transport visés à l'alinéa 131(1)b), que les motifs d'utilisation ont été valablement retenus, peut, aux conditions qu'il fixe :
(a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount determined under subsection (2) or (3), as the case may be;	a) restituer les marchandises ou les moyens de transport sur réception du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;
(b) remit any portion of any money or security taken; and	b) restituer toute fraction des montants ou garanties reçus;

(c) where the Minister considers that insufficient money or security was taken or where no money or security was received, demand such amount of money as he considers sufficient, not exceeding an amount determined under subsection (4) or (5), as the case may be.	c) réclamer, si nul montant n'a été versé ou nulle garantie donnée, ou s'il estime ces montant ou garantie insuffisants, le montant qu'il juge suffisant, à concurrence de celui déterminé conformément au paragraphe (4) ou (5), selon le cas.
[Emphasis added]	[Je souligne]

[19] The case law has clearly established that the contravention and the penalty decisions are distinct and must be challenged separately by way of an action and/or an application, as the case may be (*Pounall v Canada (Border Services Agency)*, 2013 FC 1260, [2013] FCJ No 1390 at para 15; *Mohawk Council of Akwesasne v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1442, [2012] FCJ No 1685 at para 21; *Akinwande v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 963, [2012] FCJ No 1025 at paras 10-11; *Nguyen v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 72, [2009] FCJ No 8844 at paras 19-22 [*Nguyen*]; *Hamod v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 937, [2015] FCJ No 952 at paras 16-19).

[20] Although the letter of May 26, 2016 could have provided further details, it remains that it minimally informs the applicant that the decision rendered under section 131 of the *Customs Act* may be appealed within 90 days by way of an action before the Federal Court, while the decision regarding the penalty under section 133 of the *Customs Act* may in turn be appealed within 30 days through an application for judicial review before the same Court.

Submissions of the parties

[21] In a nutshell, the applicant does not challenge the earlier findings, made by the custom officers and confirmed in appeal by the delegate, that he had failed to declare the seized goods and that, in so doing, he had contravened section 12 of the *Customs Act* [infraction]. However, he submits that the delegate erred in appeal by refusing to use his discretion to ease his penalty. As such, the applicant alleges that many elements in the case would have favored a lower sanction, such as the misconduct of the customs officers, his collaboration during the seizure and his good behavior. Indeed, the applicant notes that the customs officers did not have the right to request his cellphone's password, nor to unlock his phone to retrieve personal data. The applicant submits that, according to the Privacy Commissioner of Canada, the issue of expectation of privacy regarding cellphone devices at borders remains undefined in the case law. Consequently, the delegate should have given more importance to this factor in his global appreciation of the forfeiture. Furthermore, the applicant argues that his failure to ask for clarification to the border officer was influenced by his medical condition (applicant's exhibit A). Although he does not contest his omission, the applicant respectfully submits to this Court that he had no intention to hide his purchases or to deceive the customs officers. At the time of the declaration, he was under the false impression that he did not need to declare those items since they were necessary purchases. Accordingly, the only reasonable conclusion that should have been reached by the delegate would have been to reduce his forfeiture to zero and to erase his CSBA record, in order for him to regain his NEXUS privileges.

[22] The respondent submits that the delegate's decision was reasonable. The applicant admitted, in numerous occasions, having contravened to *Customs Act* and acknowledged that he

owed the $155.20 as a result of his negligence in reporting. Hence, the delegate rightfully assessed the level of the seizure according to the applicant's NEXUS membership. The delegate then considered that the amount requested by the customs officers was reasonable and he chose to uphold the forfeiture of such amount, as it represents 50% of the value of the goods seized. Consequently, the respondent alleges that, when read in light of the evidence before him and the nature of his statutory task, the delegate's reasons adequately explain the bases of his decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 18). Furthermore, the applicant's arguments are not convincing. Rather, he contends that the impact of his contravention of the *Customs Act*, which was admitted, was too harsh as it indirectly cost him his NEXUS membership for the next 6 years. As such, the applicant is essentially asking this Court to do what the Minister could not do which is "to remit the penalty and pave the way for him to regain his NEXUS card". The respondent invites this Court to disregard any submission made by the applicant regarding his NEXUS membership since his eligibility is irrelevant to the scope of the judicial review of forfeiture.

Analysis

[23] In his written submissions and before this Court at the hearing, the applicant has submitted multiple issues regarding the alleged false statements made by the customs officers in their Narrative reports and the different anomalies in the seizure process. According to the applicant, the assisting officers have erroneously accused him of deceit when he allegedly refused to give access to his cellphone. The applicant also submits that the primary officer made a false statement regarding the policy for animals in the interior premises which ultimately

caused undue stress and trauma to the applicant and his family unit. The applicant submits that those allegations demonstrate an apprehension of bias on part of the delegate's decision, and thus breach the rules of natural justice and procedural fairness. However, the scope of this judicial review is limited. Under section 131 of the *Customs Act*, the delegate did not have the jurisdiction to review the customs officers conduct, nor does this Court in the present application. Besides, the adjudicator and the delegate have both informed the applicant that their mandate did not allow them to review the behavior of the customs agents but merely to review the enforcement of the seizure according to the circumstances of the case. Nevertheless, the applicant has not provided any argument or evidence to support any breach of procedural fairness from the respondent, or any evidence that could support an apprehension of bias. On the contrary, throughout the adjudication process conducted by the CBSA, full explanations were given to the applicant and he had several opportunities to make submissions.

[24] Once the delegate confirmed that the applicant had contravened the *Customs Act*, the delegate had to choose whether or not he would exercise his discretion under section 133 of the *Customs Act* to remit a portion of the forfeiture paid by the applicant. Such a decision is discretionary and fact-dependent. Indeed, the Minister is granted significant discretion in determining the amount of money for the return of the goods (*Shin v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1106, [2012] FCJ No 1191 at para 53 [*Shin*]; *United Parcel Service Canada Ltd v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 204, [2011] FCJ No 235 at paras 40-43). Therefore, the Court should not intervene unless the delegate came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (*Dunsmuir v New*

Brunswick, 2008 SCC 9, [2008] 1 SCR 190 at para 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59 [*Khosa*]).

[25] The impugned decision is reasonable. The delegate duly considered the arguments made by the applicant, including any mitigating circumstances, as it appears from a reading of the following reasons:

> As per section 12 of the *Customs Act*, all goods acquired outside Canada must be reported upon importation.
>
> You disputed this seizure on the basis that at the time of the enforcement action, you were taking medication that you suspected impaired your cognitive abilities. You also raised many concerns concerning the seizing officer's behavior with regards to your dog. You added that the officers involved have changed the dates of their reports to conveniently address some of the issues raised in your appeal letter and you accused the seizing officer of making false statements with regards to your coat and gloves. Based on the fact that you did not try to conceal the receipt and you did not make false statements during the examination or seizure process, you believe there were grounds for mitigation and requested that this enforcement action be cancelled and your NEXUS card be reinstated.
>
> Please note that the scope of this review was limited to the issuance of the enforcement action. Based on your primary declaration and what was found at the time of examination, it could be clearly established that an infraction did occur. In fact, you also admitted in your letter dated February 12, 2016, that you neglected to report the purchase of the clothing. The failure to report may have been taken unintentional and, as you previously stated in your submissions, maybe the medication you were taken did play a role in your omission to report the goods but these factors did not exempt you, nor would in fact exempt anyone, from complying with the law. I wish to reiterate that a lack of intent is not a mitigating factor when the law is contravened. In fairness to all travellers, as a federal Agency, Canada Border Services Agency (CBSA) has to enforce the law in the same impartial and consistent manner for everyone. Since there has been a failure to report the goods purchased at Macy's, an infraction did occur and as such, the seizure is maintained.

> With regards to the penalty assessed, the terms of release are based on the nature of the contravention and the type of commodity. As it is the Agency's policy to issue penalties at one level higher for participants in accelerated release program participants such as NEXUS, the seizure issued at the level 2 was properly assessed in the circumstance. Consequently the seizure is maintained as issued.

[26] It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (*Shin* at para 48 referring to *Khosa* at paras 59 and 61). It is a clearly established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because they might have exercised the discretion in a different manner had it been charged with that responsibility (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, [2009] 2 FCR 576 at para 38 [*Sellathurai*]). As stated by the Federal Court of Appeal, there may be various approaches to this exercise of discretion, but as long as this discretion is reasonably exercised, there is no basis for this Court to intervene (*Sellathurai* at para 53). In the present case, the delegate did consider the applicant's concerns but ultimately found that there was no valid basis to use his discretion regarding the forfeiture. At this point, the delegate's discretion is limited merely to the forfeiture or to the seized good. It is not within his power to expunge any CSBA record or to order the reinstatement of the NEXUS membership. In light of the evidence on record and the legal principles at play, the Court finds that the impugned decision falls within the range of possible outcomes.

Conclusion

[27] Overall, the applicant did not convince this Court that the delegate committed any reviewable error whatsoever which would require the intervention of this Court. The present application for judicial review is dismissed.

[28] Considering all the circumstances of the case, the small value of the seized goods and the low amount of the penalty, the fact that this is a rather simple case and that the applicant is self-represented, the Court finds that an award of costs of $700 in favour of the respondent is reasonable.

JUDGMENT

THIS COURT ADJUGES AND ORDERS that the judicial review application is dismissed with costs in the amount of $700 in favour of the respondent.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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