

Federal Court



Cour fédérale

Date: 20120802

Docket: T-845-11

Citation: 2012 FC 963

Ottawa, Ontario, August 2, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

BAWO STELLA AKINWANDE

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2009, when Ms Bawo Stella Akinwande arrived at Pearson International Airport, she declared that she had made purchases abroad amounting to \$260. On inspection, she was found to possess some very expensive items – three sets of jewellery, shoes, cologne, and a handbag. The jewellery was held for appraisal while the other items were returned to her on payment of the

required tariff. The jewellery was subsequently valued at \$121,700. The import duty payable was \$21,419.20.

[2] Ms Akinwande asked for a review of the seizure of her jewellery claiming that it was exempt from import duty. She maintained that one of the jewellery sets was loaned to her and provided a copy of the rental agreement. She also stated that the rest of the jewellery had been purchased before she immigrated to Canada from Nigeria, and submitted photographs showing her wearing the jewellery on earlier occasions in Canada. She provided a receipt showing that her pearls had been purchased in 1997.

[3] An adjudicator concluded that Ms Akinwande's pearls were not subject to duty and should be returned to her. However, the rented jewellery was still subject to duty, even though it was owned by Nigerian jeweller. The adjudicator asked Ms Akinwande for proof that the remaining jewellery was among her effects at the time she originally entered Canada, but she could not do so. The adjudicator recommended to the Minister that the jewellery, other than the pearls, be subject to duty. The Minister, through a delegate, agreed and concluded that Ms Akinwande had not complied with the requirements of the *Customs Act*, RSC 1985, c 1 (2nd Supp) [Act] (provisions cited are set out in an Annex). The jewellery could be released only on payment of the remaining duty in the amount of \$15,875.20.

[4] The Minister subsequently accepted that some of the jewellery could be released without payment.

[5] Ms Akinwande argues that she was treated unfairly, and that the Minister's decision was unreasonable. The Minister disputes Ms Akinwande's submissions and raises a threshold issue as to whether Ms Akinwande can challenge the substance of the Minister's decision at all. The Minister argues that a decision can be challenged only by way of an action in Federal Court under s 135 of the Act. This proceeding is not an action; it is an application for judicial review. On judicial review, Ms Akinwande can only challenge the terms of release of her seized goods, not the seizure itself (according to s 133(1) of the Act).

[6] I agree that Ms Akinwande cannot challenge the decision finding her in contravention of the Act. Therefore, I can only consider her claim to have been treated unfairly and cannot address her argument that the Minister's decision was unreasonable. In any case, however, I cannot conclude that Ms Akinwande was treated unfairly. I must, therefore, dismiss this application for judicial review.

[7] There are two issues:

1. Can Ms Akinwande challenge the Minister's decision in this application for judicial review?
2. Was Ms Akinwande treated unfairly?

II. Issue One – Can Ms Akinwande challenge the Minister's decision in this application for judicial review?

[8] The only available relief against a Minister's finding that a person has contravened the Act is an appeal by way of an action in the Federal Court (s 135). The only available relief against the terms and conditions for the release of seized goods, including the payment of duty, is an application for judicial review in the Federal Court: *Jacques Germain – Arts Ethnographiques Inc v Canada (Attorney General)*, 2011 FC 539, at paras 9-12; *United Parcel Service Canada Ltd v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 204, at paras 34-39.

[9] Ms Akinwande was informed of her available remedies. The Minister's letter to her stated:

To appeal the decision made pursuant to section 131, you may file an action in the Federal Court, in accordance with section 135 of the *Customs Act*. You must file your action within 90 days of the date of the mailing of this decision.

To appeal the decision made pursuant to section 133, you may appeal this decision by way of an application for judicial review under section 18.1(1) of the *Federal Courts Act*. An application to the Court must normally be filed within 30 days of the date of the mailing of this decision.

[10] In fact, Ms Akinwande did attempt to appeal the Minister's decision. She filed a statement of claim, but that was struck by an order of Prothonotary Aalto on a motion by the Minister (*Bawo Stella Akinwande v Minister of Public Safety and Emergency Preparedness*, T-1178-11, dated August 22, 2011). The problem with the statement of claim was that it purported to challenge the Minister's decision under s 133 of the Act. As noted above, decisions under s 133 can only be challenged by an application for judicial review, not by way of an action. Further, the statement of claim could not be amended because it was statute-barred, being outside the 90-day deadline.

[11] Now, Ms Akinwande has brought her application for judicial review and has framed it, properly, as a challenge to the Minister's decision under s 133 – the setting of the terms of release. But at no time has Ms Akinwande properly challenged the Minister's decision under s 131 – the finding that she contravened the Act, which resulted in the seizure of her jewellery.

[12] Therefore, I cannot entertain Ms Akinwande's argument that the Minister's decision was unreasonable. However, I will consider her contention of unfair treatment (even though there is some doubt whether I can do so: *United Parcel Service*, above, at para 41-42).

[13] This statutory arrangement has been described as “awkward and inconvenient” (*Nguyen v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 724, at para 21). It is no doubt confusing and frustrating to those who find themselves in Ms Akinwande's circumstances. But I cannot change it.

III. Issue Two – Was Ms Akinwande treated unfairly?

[14] Ms Akinwande submits that the adjudicator treated her unfairly by failing to advise disclose concerns about the authenticity of some of the receipts she had provided, and to afford her an opportunity to respond to those concerns. She maintains that the adjudicator should have held an oral hearing, as Ms Akinwande had requested.

[15] Ms Akinwande also submits that the adjudicator fettered her discretion by describing the photographs she had provided as not “evidentiary in nature.”

[16] Finally, Ms Akinwande suggests that the Minister breached the duty of fairness by failing to give adequate reasons. While she acknowledges that there exists a document called “Case Synopsis and Reasons for Decision” in the record, this was not provided to her at the time of the decision. All she received was the Minister’s letter, which did not adequately explain the basis for the decision. In fact, the record includes two or three versions of the Minister’s decision, making it difficult to understand the basis for the decision.

[17] I cannot conclude that Ms Akinwande was treated unfairly.

[18] After she submitted her receipts, she was informed that this evidence was not satisfactory:

[W]here there is no proof that the jewellery had been previously imported the burden rests on the importer to establish that the provisions of the Customs Act have been complied with (...)

[B]ased on the documentation on file, it appears that the jewellery in question was acquired outside of Canada and was not properly reported to Customs. Consequently, it appears a contravention of the Customs Act did occur, and the enforcement action was warranted.

[19] In my view, this was sufficient notice that the adjudicator was concerned about the authenticity of some of the documentation Ms Akinwande had provided. Ms Akinwande had an opportunity to address those concerns in writing before the final decision was made. An oral hearing was not required.

[20] I agree with Ms Akinwande that the adjudicator’s statement that the photographs were not “evidentiary in nature” was confusing. However, in the circumstances, it is reasonably clear what

the adjudicator meant. Since there was no evidence of when or where the photographs were taken, they obviously carried little evidentiary weight. An affidavit from Ms Akinwande's friend, Ms Tokunbo Caxton-Idowu, attached more photographs, but the affidavit did not identify the jewellery. The adjudicator's statement amounted to a conclusion that the photographs did not constitute satisfactory proof of the jewellery's provenance. Ms Akinwande's submissions really go to the weight the adjudicator assigned the photographs, which is not an issue that arises on an application for judicial review, even one challenging the merits of a decision, which is not the case here.

[21] Regarding the Minister's reasons, it is clear from the record that the Case Synopsis was prepared by the adjudicator for the Minister. The Minister, through a delegate, then made his decision. The Minister's reasons are reasonably clear, pointing out the basis for the finding that Ms Akinwande had contravened the Act and the reason why her evidence was not satisfactory (*i.e.*, the receipts were vague and did not identify the seized items).

[22] Overall, I am satisfied that Ms Akinwande was treated fairly by being informed of the progress of her case and being offered a number of opportunities to show that her jewellery was not subject to import duty. She was given adequate reasons why she had not been able to show that the jewellery was exempt. Ms Akinwande was also given the adjudicator's telephone number in case she had any further questions. There is no evidence that she called for clarification of the reasons.

IV. Conclusion and Disposition

[23] Ms Akinwande's application for judicial review relates only to the terms and conditions of release of her jewellery. However, her arguments relate primarily to the substance of the Minister's decision, which can only be challenged by way of an action. Therefore, I could only consider whether she had been treated unfairly. In my view, Ms Akinwande was given a fair chance to demonstrate that her jewellery was not subject to duty and she was given a satisfactory explanation of why she failed. I must, therefore, dismiss this application for judicial review. I make no order as to costs.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no order as to costs.

“James W. O’Reilly”

Judge

Annex

Customs Act, RSC 1985, c 1 (2nd Supp)

Loi sur les douanes, LRC (1985), ch 1 (2e suppl.)

Decision of the Minister

Décision du ministre

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 possible 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;

(b) in the case of a conveyance seized or in respect of which a notice was served under section 124 on the ground that it was made use of in respect of goods in respect of which this Act or the regulations were contravened, whether the conveyance was made use of in that way and whether the Act or the regulations were so contravened; or

b) le motif d'utilisation des moyens de transport en cause dans le transport de marchandises ayant donné lieu à une infraction aux mêmes loi ou règlements, ou le motif de cette infraction, pour justifier soit la saisie de ces moyens de transport, soit la signification à leur sujet de l'avis prévu à l'article 124;

(c) in the case of a penalty assessed under section 109.3 against a person for failure to comply with subsection 109.1(1) or (2) or a provision that is designated under subsection 109.1(3), whether the person so failed to comply.

c) le motif de non-conformité aux paragraphes 109.1(1) ou (2) ou à une disposition désignée en vertu du paragraphe 109.1(3) pour justifier l'établissement d'une pénalité en vertu de l'article 109.3, peu importe s'il y a réellement eu non-conformité.

Where there is contravention

Cas d'infraction

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,

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 :

the Minister may, subject to such terms and conditions as the Minister may determine,

- (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;
- (b) remit any portion of any money or security taken; and
- (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.

Federal Court

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 action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

a) restituer les marchandises ou les moyens de transport sur réception du montant déterminé conformément au paragraphe (2) ou (3), selon le cas;

b) restituer toute fraction des montants ou garanties reçus;

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.

Cour fédérale

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 décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-845-11

STYLE OF CAUSE: BAWO STELLA AKINWANDE
v
MPSEP

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: April 24, 2012

REASONS FOR JUDGMENT
AND JUDGMENT: O'REILLY J.

DATED: August 2, 2012

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