Federal Court  Cour fédérale

Date: 20120921

Docket: T-1037-11

Citation: 2012 FC 1106

Ottawa, Ontario, September 21, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

EUN KYUNG SHIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS and THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, for judicial review of a decision made by a senior program advisor, Appeals Division, Recourse Directorate (the delegate) on May 25, 2011 for the Minister of Public Safety and Emergency Preparedness (the Minister). Pursuant to section 131 of the *Customs Act*, RSC 1985, c 1 (2nd Supp), the delegate decided that there was a contravention of the *Customs Act* and that under section 133 of the *Customs Act*, the seized watch be returned to the applicant upon receipt of $47,455.78, held as forfeit. This conclusion was based on the delegate's finding that the applicant did not declare the

watch on importation and that she made untrue statements regarding its acquisition date. This application is for judicial review of the delegate's decision under section 133 of the *Customs Act*.

[2] The applicant requests that the delegate's decision be set aside and referred back for redetermination by a different adjudicator with instructions requiring that:

1. The new adjudicator reconsider the appropriateness of the amount to be paid by the applicant under section 133 of the *Customs Act*;

2. The reconsideration be made without reference to the decision previously made;

3. The applicant be granted an opportunity to respond to or comment on all reports and correspondence from the seizing officer and that the reconsideration be made in a manner consistent with the statutory scheme and judgment of the Court.

[3] In the alternative, the applicant requests an order quashing the Minister's decision and substituting a determination that the watch be returned upon payment of $17,773.24, being 25% of the value for duty of the watch plus GST.

[4] The applicant, Eun Kyung Shin, is a citizen of South Korea. She became a permanent resident of Canada on August 16, 2005.

[5] The applicant travels frequently between South Korea, where her husband is employed and resides, and Canada, where she resides. In 1994 and in 2002, the applicant had cancer surgery in South Korea. Since her surgeries, she has returned intermittently for post-surgical treatment.

[6] On March 12, 2008, the applicant arrived in Vancouver after a ten hour flight from Korea. She was travelling with a friend from Korea. On arrival at the Vancouver International Airport, the applicant was approached by Customs Officer Maier of the Canadian Border Services Agency (CBSA). Officer Maier asked to see the applicant's customs declaration card, on which she had indicated that she was importing $550 Canadian worth of goods into Canada. While verifying the applicant's declaration card, Officer Maier noticed the Rolex wrist watch (the watch) that the applicant wore. Officer Maier thereby directed the applicant and her friend for secondary questioning.

[7] On questioning, the applicant indicated that she received the watch as a gift from her husband. Allegedly, she initially indicated that she received the watch prior to immigrating to Canada in 2005. However, due to the level of wear of the watch, Officer Maier suspected that the watch was newer. On further questioning, the applicant indicated that she first imported the watch from Korea in the summer of 2007. She did not declare it to Canadian customs at that time as she believed only purchases, not gifts, needed to be declared. This incident was described as follows in Officer Maier's narrative report:

> Upon the verification of SHIN's declaration card, a Rolex DateJust watch with clear stones was observed on her wrist. She stated she received this prior to immigrating to Canada, as a gift from her husband, in Korea. She could not recall exactly (the date) when she received it. Ms. SHIN displayed numerous verbal and non-verbal indicators throughout the examination. Such indicators lead me to believe that she was not being entirely truthful in regards to the age of the watch. The watch appeared to be of a newer nature. I questioned her repeatedly about when the watch was first acquired and first imported into Canada. SHIN continued to state she had received it many years ago, prior to immigrating to Canada, and that she brought it when she immigrated to Canada.

> I was of the opinion, due to my experience in dealing with higher end watches, and due to the appearance and condition of the watch that it was newer then [*sic*] SHIN was stating. I repeatedly challenged SHIN in regards to the age of the watch. After a lengthy fabrication of the facts, Ms. SHIN admitted she first imported the watch in question, from Korea, in the summer of 2007. She stated she did not declare the watch upon first time import because it was a gift from her husband, in Korea.

[8] In a supplementary narrative report, Officer Maier expanded on the non-verbal and verbal indicators that the applicant displayed on questioning:

> To be more of a specific nature, SHIN displayed multiple non verbal and verbal indicators. Such as avoiding eye contact, turning away from the exam and officer. Changing the volume of her voice. Contradicting previous statements repeatedly and showing signs of nervousness, such as shaking of the hands, and crying.

[9] Conversely, the applicant submits that she never stated that she received the watch before immigrating to Canada; rather, it was her friend who suggested during the questioning that it had been given to her prior to her immigration to Canada in 2005. The applicant notes that confusion arose during the interview because it was conducted and interpreted simultaneously with that of her Korean friend.

[10] Nevertheless, as the watch had not properly been reported and as the applicant had made untrue statements regarding it contrary to sections 12 and 13 of the *Customs Act*, Officer Maier seized it as forfeit. Officer Maier classified it as a Level 2 seizure because the applicant did not declare the watch and made contradictory and untrue statements regarding its importation date.

[11] CBSA's general policy, as set out in its Customs Enforcement Manual (the Manual), states that a watch seized at Level 2 may be returned upon payment of 60% of its value for duty. In this case, the watch was appraised at a replacement value of $87,200 with a corresponding value for duty of $79,092.27. Thus, in accordance with the Manual, an amount of $47,455.78 was determined as a condition of return (i.e., 60% of its value for duty).

[12] On June 9, 2008, applicant's counsel wrote to CBSA to appeal the seizure of the watch. CBSA treated this request as a request for a Minister's decision pursuant to section 29 of the *Customs Act* and on June 26, 2008, informed the applicant of his intent to conduct a ministerial review of the seizure. In a letter to the applicant dated August 19, 2008, Ivan Chaput, an adjudicator with the CBSA Recourse Directorate, provided reasons for the seizure and enclosed narrative reports from the CBSA officers who dealt with the applicant on March 12, 2008. This letter included a request that the applicant provide information and documents relating to her watch.

[13] In a letter dated June 16, 2009, M. Berthiaume, an adjudicator with the Recourse Directorate, sent Officer Maier's supplementary narrative report to the applicant. M. Berthiaume also invited the applicant to provide written submissions on the seizure and the watch.

[14] The applicant made written submissions on April 15, 2010 and July 2, 2010.

Delegate's Decision

[15] On May 25, 2011, the delegate issued a Ministerial decision. The delegate stated that she fully considered the documentation provided by the applicant as well as the reports from the issuing office.

[16] The delegate found that there had been a contravention of the *Customs Act* or Regulations in respect to the watch that was seized. In accordance with section 133 of the *Customs Act*, the delegate determined that the watch should be returned to the applicant upon receipt of $47,455.78 to be held as forfeit.

[17] The delegate noted that on March 12, 2008, the applicant returned to Canada and declared that she was importing $550 Canadian worth of clothing, alcohol and tobacco. A CBSA officer (Officer Maier) verified the applicant's declaration. The delegate noted that although the applicant's ability to communicate in English was adequate, a Korean interpreter was utilized for language clarification during the secondary examination of the applicant's declaration.

[18] The delegate noted that when questioned about the watch, the applicant stated that she had received it as a gift from her husband. Several times, the applicant indicated that the watch was part of her belongings when she immigrated in 2005. However, after further questioning, the applicant admitted that she first imported the watch from Korea in the summer of 2007, at which time she did not declare it. As the applicant made contradictory and untrue statements about the watch's importation, it was seized for non-report at Level 2.

[19] The delegate acknowledged the statements made by the applicant's representative that there was nothing indicating that the applicant knew where the watch had been purchased or its value. The representative also stated that the applicant did not inform CBSA that she received the watch before immigrating and that she did not know that she had to declare gifts. However, the delegate noted that lack of knowledge is not a mitigating circumstance as importers bear the onus of awareness of the law. As the watch was not declared upon importation and as untrue statements were made regarding its acquisition date, the delegate concluded that the enforcement action should be maintained as issued.

Issues

[20] The applicant submits the following points at issue:

The penalty of $47,455.78 is excessive, is based upon errors in fact, errors in law and/or irrelevant and extraneous considerations, is patently unreasonable, in breach of procedural fairness, and without or in excess of jurisdiction considering the nature of the applicable legislation and the relevant circumstances (which are common ground between the parties) that the prescribed duty payable is $3,954.65, that the applicant answered honestly to the best of her ability that the watch was acquired outside Canada and that no duty had been paid and that she made no attempt to conceal the watch.

[21] I would rephrase the issues as follows:

1. What is the standard of review?

2. Did the delegate err in the determination of the amount of return for the applicant's seized watch?

3. Was there a breach of procedural fairness?

Applicant's Written Submissions

[22] The applicant notes that she was criminally charged under subsection 153(a), subsection 153(c) and section 155 of the *Customs Act* in relation to the importation of the watch. At trial, the Crown stayed the charge under subsection 153(a). Convictions on the other two charges were entered on March 4, 2010, but later set aside on appeal to the Supreme Court of British Columbia.

[23] The applicant acknowledges that she was mistaken regarding Canadian law and that the applicable legislation requires that the watch be declared notwithstanding that it was acquired as a gift and that the applicant was unaware of its reported value. However, the applicant submits that what is at issue is the redemption amount determined pursuant to paragraph 133(2)(b) of the *Customs Act* and the fairness of the process by which it was determined.

[24] The applicant submits that the amount of $47,455.78 plus GST was determined by application of fixed categories and levels that do not allow any exceptions. As such, they unlawfully fetter the Minister's discretion. In addition, the applicant submits that the determination is unreasonably punitive given the circumstances of the case and that the decisive factor upon which it is based (the timing of the acquisition) is extraneous to the *Customs Act*.

[25] The applicant submits that the fact that she was truthful and forthright in answering Officer Maier's questions to the best of her ability is relevant to the rational determination of the amount under paragraph 133(2)(b) of the *Customs Act*.

[26] The applicant notes that the normal duty payable on the watch is $3,954.65 plus GST (based on the agreed value of $79,092.97 and a duty rate of 5.00%). Further, pursuant to subsection 109.1(1) of the *Customs Act*, the maximum ministerial penalty for a failure to comply with any provision of this statute is $25,000. Based on the normal value and the maximum ministerial penalty, the applicant submits that a duty of $47,455.78 is excessive and beyond the contemplation of the statute.

[27] The applicant also notes that in the administrative appeal process, she was not given an opportunity to respond to CBSA's submissions. The applicant also highlights that no explanation was provided on how the amount was calculated. As such, the process was flawed and the delegate failed to consider relevant considerations. The applicant submits that the decision is therefore patently unreasonable.

[28] The applicant submits that a strict determination based on the Manual, without allowance for exceptions, results in an unlawful fettering of the Minister's discretion. The applicant notes that although consistency is desirable, it must still allow for flexibility to adjust the result in individual cases within the scheme and intent of the governing statute. Further, the applicant submits that in sections 68 to 70, the Manual effectively amends the scheme of the *Customs Act*. In support, the applicant notes that under the *Customs Act* statutory scheme, Parliament has chosen to set a lower

maximum rate increase or penalty for the category of goods that attract a higher rate of duty. However, the Manual reverses this scheme by categorizing goods attracting a higher rate of duty in Group 1 where the rate increase is the highest. As such, the Manual is inconsistent with Parliament's intent and is therefore irrational.

[29] Finally, the applicant submits that the delegate erred by taking into account extraneous considerations. Specifically, the applicant submits that the inconsistency in her responses as to when she acquired the goods prior to entering Canada is irrelevant and extraneous to the application of the *Customs Act*. The applicant notes that most people have trouble remembering, particularly without advance notice. It would therefore be unreasonable to increase the penalty based on her initial incorrect answer, as she was later able to answer correctly after having some time for reflection. Her honesty is further supported by the fact that she did not try to conceal the watch, but rather wore it on her wrist in plain sight.

Respondents' Written Submissions

[30] The respondents submit that there was no breach of procedural fairness and the delegate's decision was lawful and reasonable.

[31] At the outset, the respondents submit that two affidavits filed by the applicant in support of this application should not be considered by this Court as they were not before the delegate. The first affidavit was sworn by the applicant on July 14, 2011 and the second was sworn by Brian J. Konst, the applicant's solicitor, on June 23, 2011. The sole information contained in these affidavits

that was before the delegate was paragraph 9 and exhibits B, C and D from Mr. Konst's affidavit. Further, with regards to the allegation in the applicant's affidavit that she does not speak, read or write English, the respondents note that no indication was provided in the affidavit that it was first interpreted into Korean or another language that the applicant understands.

[32] With respect to the applicant's reference to criminal proceedings brought against her, the respondents submit that these are irrelevant to the present judicial review application. The delegate's decision was rendered independently and without reference to the evidence presented at, or the outcome of, those criminal proceedings.

[33] The respondents submit that the decision directing an amount of money for return of a seized good pursuant to section 133 of the *Customs Act* involves statutory discretion that warrants a high degree of deference. The appropriate standard of review is thus reasonableness.

[34] The respondents submit that the only condition imposed on the discretion under section 133 of the *Customs Act* is that the amount of money for return cannot exceed the value for duty of the goods plus the amount of duties levied thereon. The respondents note that section 109.1 of the *Customs Act* authorizes the Minister to impose a maximum penalty of $25,000 for any contravention of the legislation. However, an amount of money for return is not a penalty and thus, the maximum of $25,000 for penalties is inapplicable to decisions made pursuant to sections 117 and 133 of the *Customs Act*. As there is no obligation to accept the terms of release offered in exchange for forfeited goods, an amount of money for return under sections 117 and 133 is clearly distinguishable from penalties described in other sections of the *Customs Act*.

[35] The respondents also submit that there was no breach of procedural fairness. The respondents highlight that the applicant was given an opportunity to respond. The respondents note that where sufficient particulars have been provided, non-disclosure of internal reports or investigators' notes will not constitute a breach of procedural fairness.

[36] The respondents submit that the reasons were also adequate even though there is no legal duty to provide reasons for decisions issued under section 133 of the *Customs Act*. This differs from decisions made under section 131 that explicitly require reasons. The respondents also submit that the delegate's decision must be read in light of the reports on which it is based, especially the adjudicator's recommendation that the delegate ultimately followed.

[37] Collectively, the decision and these reports clearly explain that: the watch was seized due to non-report; the seizure was at Level 2 due to the applicant's inconsistent and untrue statements; and the terms of release were set at $47,455.78. This amount is considerably lower than the statutory maximum under section 133 of the *Customs Act*. In the alternative, if this Court finds the reasons inadequate, the respondents submit that the applicant was required to request further and better reasons.

[38] Turning to the alleged fettering of discretion, the respondents note that neither the applicant's notice of application, nor her supporting affidavits, raised this argument. It was first introduced in her memorandum of fact and law. The respondents note that Rule 301(e) of the *Federal Courts Rules*, SOR/98-106, provides that a notice of application shall set out a "complete and concise statement of the grounds intended to be argued". The respondents submit that where an

applicant has contravened this Rule, the Court may refuse to allow the advancement of an argument not provided in the notice of application.

[39] The respondents submit that allowing the applicant to advance the unlawful fettering of discretion argument would prejudice the Minister. As this ground was not included in the applicant's notice of application or supporting affidavits, the Minister was deprived of the opportunity to completely address it in his responding affidavit. In the alternative, should this Court allow the applicant to advance the fettering argument, the respondents submit that no adverse inference should be drawn from the fact that the Minister was not able to lead evidence to expressly address it.

[40] Nevertheless, the respondents submit that there was no unlawful fettering of discretion. As the party alleging that fettering occurred, the applicant bore the onus of identifying positive evidence of the delegate blindly applying policy. No such evidence was rendered. Rather, the respondents submit that the delegate's affidavit shows that she considered both the Manual and the *Customs Act* when establishing the amount of money for return of the watch.

[41] Further, the delegate took into account all the applicant's submissions when rendering her decision. The applicant's submissions are thus limited to the weighing of the evidence, a task that lies at the heart of the delegate's exercise of discretion. In addition, the mere absence of a statement in the Manual that the decision maker is not bound by the guidance contained therein does not automatically indicate a fettering of discretion.

[42] The respondents submit that policy will only fetter discretion if it is mandatory. The existence of optional language in the Manual, coupled with a reading of the Manual in its entire context, indicates that it does not impose mandatory requirements on the delegate. There is also no evidence that the delegate rigidly applied the Manual or that she was threatened with sanctions for non-compliance. The respondents submit that the mere fact that the Manual is intended to establish how discretion will normally be exercised is not sufficient to render it an unlawful fettering of discretion.

[43] The respondents also submit that the Manual is consistent with the *Customs Act*. The respondents submit that sections 117 and 133 of the *Customs Act* do not provide any statutory criteria imposing a specific amount of money for the return of a seized good; rather, these provisions only set out the maximum allowable amount of money for the return of a seized good. In this case, the delegate decided that the terms of release should be less than the allowable maximum on watches, namely, 60% of its value for duty. This decision was rendered after considering all the particular facts.

[44] The respondents submit that the delegate also took into account all relevant considerations. The CBSA officer's questions about the origin of the watch and whether it was acquired prior to the applicant's immigration to Canada were necessary questions for determining whether duties and taxes must be paid on importation. As the *Customs Act* imposes a requirement on all persons to answer questions truthfully, the applicant's inconsistent statements on when she acquired the watch were also relevant to whether she contravened the *Customs Act*. Thus, the applicant's statements

regarding the acquisition date were relevant to determining: whether there was a contravention of the *Customs Act*; the calculation of duties and taxes; and the terms of release.

[45] Finally, the respondents submit that a directed verdict, substituting the amount of return for the watch, is inappropriate in the circumstances of this case. The respondents note that the applicant has not provided any explanation to support the proposed amount of $17,773.24 as being reasonable and acceptable. A directed verdict is an exceptional power that should only be exercised in the clearest of cases. The respondents submit that a directed verdict in this case would be inappropriate as the determination of the amount of money for return is a matter of ministerial discretion.

Analysis and Decision

[46] **Issue 1**

What is the standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[47] A decision rendered under section 133 of the *Customs Act* is discretionary and fact-dependent. It is therefore reviewable on a standard of reasonableness (see *United Parcel Service Canada Ltd v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 204, [2011] FCJ No 235 at paragraphs 40 to 43).

[48] In reviewing the delegate's decision on the standard of reasonableness, 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 (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). 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 (see *Khosa* above, at paragraphs 59 and 61).

[49] Conversely, the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798, [2008] FCJ No 995 at paragraph 13; and *Khosa* above, at paragraph 43). No deference is owed to the delegate on these issues (see *Dunsmuir* above, at paragraph 50).

[50] **Issue 2**

Did the delegate err in the determination of the amount of return for the applicant's seized watch?

Statutory Framework

[51] Importation of goods into Canada is regulated under the *Customs Act*. The sections of the *Customs Act* relevant to this application are: Part II (importation); Part III (calculation of duty); and Part VI (enforcement).

[52] Subsection 110(1) of the *Customs Act* authorizes officers to seize goods as forfeit if they believe on reasonable grounds, that there has been a contravention of a statutory provision. Section 117 governs the return of such seized goods and specifies the amount of money required for such a return.

[53] Pursuant to sections 129 and 131 of the *Customs Act*, persons from whom goods have been seized may request that the Minister issue a decision on whether the contravention did indeed occur. In rendering this decision, the Minister must consider and weigh the specific circumstances of the case. If the Minister finds that the contravention did occur, he may, pursuant to section 133 of the *Customs Act*, return the goods on receipt of an amount of money calculated in the same way as outlined above under subsection 117(1) of the *Customs Act*. Under section 133, the Minister is granted significant discretion in determining the amount of money for the return of the goods. As indicated by the respondent, the sole limit is that the amount not exceed the value for duty of the goods plus the amount of duties levied thereon (as per paragraph 133(1)(c) and subsection 133(4) of the *Customs Act*).

[54] Although a determination made under section 133 of the *Customs Act* is often dependent on a finding of a contravention under section 131 of the *Customs Act*, the two decisions are separate and distinct and must be challenged separately. A decision under section 131 must be challenged by way of action, whereas a decision under section 133 must be challenged by way of an application for judicial review (see *Nguyen v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 724, [2009] FCJ No 884 at paragraphs 1 and 20).

[55] The amount of money for return established under section 133 of the *Customs Act* differs from the penalty provided under section 109.1 of the *Customs Act*. Subsection 109.1(1) states:

109.1 (1) Every person who fails to comply with any provision of an Act or a regulation designated by the regulations made under subsection (3) is liable to a penalty of not more than twenty-five thousand dollars, as the Minister may direct.	109.1 (1) Est passible d'une pénalité maximale de vingt-cinq mille dollars fixée par le ministre quiconque omet de se conformer à une disposition d'une loi ou d'un règlement, désignée par un règlement pris en vertu du paragraphe (3).

[56] This penalty provision is under the heading of "Penalties and Interest", whereas the amount of money for return of goods is under the heading of "Forfeitures". Although both provisions are included under Part VI (enforcement) of the *Customs Act*, they pertain to separate issues. The amount of money required for the return of goods under section 133 is therefore distinguishable from the penalty imposed under section 109.1 of the *Customs Act*. In *Hiebert v Canada (Attorney General)*, 2003 FC 1503, [2003] FCJ No 1905, Mr. Justice James Russell acknowledged Parliament's different intention for amounts ascertained on forfeiture as distinguished from penalties (at paragraphs 27 to 32).

Exercise of Discretion

[57] In this case, the applicant argues that the amount of $47,455.78 for the return of her watch was unreasonably punitive given the circumstances of the case, was based on the extraneous factor of the timing of acquisition and was based on an unlawful fettering of the Minister's discretion.

[58] At the outset, it is important to recall that any information provided to an officer in the administration or enforcement of the *Customs Act* must be true, accurate and complete (sections 7.1

and subsection 13(a) of the *Customs Act*). In addition, as mentioned above, a penalty, for which there is a statutory maximum of $25,000 under the *Customs Act*, differs from the amount for return of a seized item, whose only limit is the value for duty of the goods plus the amount of duties levied thereon.

[59] The respondents submit that the issue of the fettering of discretion should not be considered by the Court as it was not properly raised by the applicant in her notice of application. Rule 301(e) of the *Federal Courts Rules* does require that a "complete and concise statement of the grounds intended to be argued" be set out in the notice of application. In this case, the applicant listed the following grounds in her notice of application:

> that the Amount upon which the Decision was based is based upon errors in fact, errors in law and irrelevant considerations, is patently unreasonable, in breach of procedural fairness, *ultra vires*, discriminatory, injurious, and without or in excess of jurisdiction.

[60] This broad list could conceivably include a fettering of discretion. However, it also encompasses other grounds, such as discrimination, that do not emerge from the applicant's submissions. I therefore agree with the respondents that the applicant's notice of application does not meet the standard of a "concise statement of the grounds intended to be argued". However, the respondents did provide thorough submissions on the issue of fettering of discretion. I would therefore still proceed with the analysis of this issue, bearing in mind the applicant's inadequate framing of the grounds in her application and the corresponding impact on the respondents.

[61] In her affidavit, the delegate explained the method of calculation employed in determining the amount for the return of the watch. The value for duty ($79,092.97), derived from the

subtraction of 5% GST and 5% custom duty from the appraised replacement value, is uncontested by the parties. What is contested is the amount for release that was calculated based on guidance provided in the Manual.

Overview of Manual

[62] As the applicant submits that the delegate fettered her discretion by relying on the Manual, a brief overview of this policy is warranted. The stated purpose of the policy is to provide methods of determining the value for duty of goods imported or exported in contravention of the *Customs Act* (Part 2, Chapter 5, paragraph 15). The appraisal of the value of the item and the reduction of its value to account for duties and taxes, as was done in this case, is described in paragraphs 22, 23, 24 and 26 (Part 2, Chapter 5). For the purpose of calculating the terms of release, watches are considered as group 1 items (Part 2, Chapter 5, paragraph 44; and Part 5, Chapter 2, paragraph 68).

[63] With regards to the seizure policy, the Manual recognizes that not all contraventions of the *Customs Act* or the regulations are intentional: "[n]egligence, carelessness and lack of knowledge on the part of the importer are mitigating factors worthy of consideration when deciding whether or not to proceed with a penalty action" (Part 5, Chapter 2, paragraph 16). The Manual also recognizes the need to extend the benefit of doubt to forfeitures and seizures: "[i]n instances involving travellers, it is the policy of the CBSA to extend the benefit of doubt, in lieu of forfeiture and seizure, when it appears evident that the traveller was not aware of CBSA requirements" (Part 5, Chapter 2, paragraph 22).

[64] In this case, the contravention revolved around an allegation of non-report. In the Manual, the stated use of this allegation is for "seizures against travellers who have not reported the importation of personal goods, regardless of the method of concealment used to unlawfully introduce the goods into Canada" (Part 5, Chapter 2, paragraph 30).

[65] Perhaps of greatest importance to this case are the levels of infractions outlined in the Manual. Three different levels have been established for recognizing an individual's culpability (Part 5, Chapter 2, paragraph 71).

[66] Level 1 is described as follows in the Manual (Part 5, Chapter 2):

> 74. Level 1 applies to violations of lesser culpability. The degree to which the importer carried out a scheme to contravene the *Customs Act* was not furthered beyond an initial ineffectual attempt. This level might generally be applied to offences of omission, rather than commission. Commission offences require more active involvement by the importer.77. Level 1 is applied when:
>
> a) goods are not reported to CBSA or goods are reported by untrue statements are made concerning acquisition or entitlements; and
>
> b) the goods are not concealed; and
>
> c) a full disclosure of the true facts concerning the goods is made at the time of the discovery.

[67] Level 2 is described as follows in the Manual (Part 5, Chapter 2):

> 75. Level 2 applies to violations where the circumstances demonstrate an active attempt by the importer to contravene the *Customs Act*. It is also applicable to instances involving repeat offenders, where it has become apparent that a stronger deterrent factor is required.

> 78. Level 2 is applied when the circumstances are the same as for level 1 but:
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> a) goods are concealed or disguised, or
>
> b) untrue statements are made concerning the goods following their discovery; or
>
> c) the person has been the subject of a previous seizure action.

[68] The following guidance is provided in the Manual for determining the amount for release where there has been non-report or untrue statements on Group 1 items (including watches): 40% of value for Level 1; 60% of value for Level 2; and 80% of value for Level 3 (Part 5, Chapter 2, paragraph 90).

Application to this Case

[69] In this case, the delegate accepted the characterization of the applicant's non-report as Level 2. Therefore, in accordance with the Manual guidance, 60% was applied to the value for duty, which resulted in an amount for return of $47,455.78 (i.e., 60% of its value for duty).

[70] After reviewing the Manual, I do not agree with the applicant that it eliminates the flexibility required to adjust the result in individual cases. As is well recognized in the jurisprudence, non-legally binding legislative instruments such as the Manual can assist members of the public to predict how statutory discretion will be exercised while enabling government agencies to deal with problems comprehensively and proactively, thereby serving as a useful tool for good public administration (see *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA

198, [2007] FCJ No 734 at paragraphs 55 and 57). However, in relying on non-legally binding instruments, agencies must be careful not to apply guidelines or policy statements as if they are law (see *Thamotharem* above, at paragraph 62).

[71] As noted above, the Manual explicitly acknowledges and allows for flexibility in cases of negligence, carelessness and lack of knowledge on the part of the importer (Part 5, Chapter 2, paragraphs 16 and 22). It also recognizes that a benefit of doubt should be granted when it appears evident that the traveller was not aware of CBSA requirements. In so doing, the Manual promotes the evaluation of individual cases on their own merits and specific circumstances.

[72] As stated by Mr. Justice John Evans in *Thamotharem* above, "a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered" (at paragraph 62). In this case, the applicant argued that she never concealed the watch, was unaware of the legal requirement to disclose gifts and was tired from a long international flight when questioned by Officer Maier. The use of an interpreter and presence of her Korean friend during questioning further led to the confusion on when she stated that she received the watch. The delegate allegedly took these submissions into account in rendering her decision.

[73] However, neither the delegate's decision, nor the CBSA reports (including the reasons for seizure and narrative reports) provides any analysis on whether the Level 2 determination was in fact the appropriate level of infraction. This is exacerbated by the explicit guidance in the Manual

that the benefit of doubt, in cases of forfeiture and seizure, be extended "when it appears evident that the traveller was not aware of CBSA requirements" (Part 5, Chapter 2, paragraph 24).

[74] In this case, the facts clearly lent themselves more to a Level 1 infraction than to a Level 2 infraction. For example, the failure to declare the watch was indicative of an offence of omission, rather than one of commission (Level 1). The fact that the applicant wore the watch visibly on her wrist and had not been the subject of a previous seizure action suggested that the circumstances listed in the Manual for a Level 2 finding were not present. In addition, the applicant's allegation that the presence of her Korean friend and the interpreter during questioning led to the confusion on whether she actually stated that she received the watch before immigrating to Canada further rendered the existence of the Level 2 circumstance that "untrue statements are made concerning the goods following their discovery" questionable.

[75] By failing to consider whether the facts leant themselves to a Level 1 characterization, as opposed to a Level 2 characterization, I find that the delegate made an unreasonable finding that was not justifiable and intelligible based on the evidence before her. The delegate merely accepted the CBSA officer's characterization of the infringement as Level 2 without further analysis or evaluation. I therefore find that the delegate rigidly applied one provision of the Manual, without regard to the guidance provided therein as a whole to promote good public administration of the *Customs Act*.

[76] **Issue 3**

Was there a breach of procedural fairness?

The applicant also submits that she was not granted an opportunity to respond to CBSA's submissions, nor was she provided with an explanation on how the amount for return was calculated. This was a breach of procedural fairness.

[77] However, the facts in this case suggest otherwise. In letters dated August 19, 2008 and June 16, 2009, the applicant was provided with reasons for the seizure and copies of the narrative reports completed by the CBSA officers. In both letters, the applicant was invited to provide written submissions, which her counsel subsequently filed on two separate occasions (April 15, 2010 and July 2, 2010). The delegate stated that she considered these submissions and this was evidenced in the decision itself. Although the delegate's analysis of the level of infringement was inadequate, the reasons for the decision were clear and sufficient.

[78] For these reasons, I do not find that there was a breach of procedural fairness in this case.

[79] In conclusion, I am of the opinion that the decision should be set aside and the matter be referred to another decision maker for reconsideration with regard to the reasons for decision in this case.

[80] The applicant shall have her costs of the application.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, with costs to the applicant and the matter is referred to a different decision maker for reconsideration in accordance with the reasons for this decision.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Federal Courts Act, RSC 1985, c F-7

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Federal Court Rules, SOR/98-106

301. An application shall be commenced by a notice of application in Form 301, setting out	301. La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants :
. . .	. . .
(e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and	e) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable;

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

109.1 (1) Every person who fails to comply with any provision of an Act or a regulation designated by the regulations made under subsection (3) is liable to a penalty of not more than twenty-five thousand dollars, as the Minister may direct.	109.1 (1) Est passible d'une pénalité maximale de vingt-cinq mille dollars fixée par le ministre quiconque omet de se conformer à une disposition d'une loi ou d'un règlement, désignée par un règlement pris en vertu du paragraphe (3).
117. (1) An officer may, subject to this or any other Act of Parliament, return any goods that have been seized under this Act to the person from whom they were seized or to any person authorized by the person from whom they were seized on receipt of	117. (1) L'agent peut, sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale, restituer les marchandises saisies en vertu de la présente loi au saisi ou à son fondé de pouvoir :
(a) an amount of money of a value equal to	a) ou bien sur réception :
(i) the aggregate of the value for duty of the goods and the amount of duties levied	(i) soit du total de la valeur en douane des marchandises et des droits éventuellement

thereon, if any, calculated at the rates applicable thereto

perçus sur elles, calculés au taux applicable :

(A) at the time of seizure, if the goods have not been accounted for under subsection 32(1), (2) or (5) or if duties or additional duties have become due on the goods under paragraph 32.2(2)(b) in circumstances to which subsection 32.2(6) applies, or

(A) au moment de la saisie, s'il s'agit de marchandises qui n'ont pas fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5) ou de marchandises passibles des droits ou droits supplémentaires prévus à l'alinéa 32.2(2)b) dans le cas visé au paragraphe 32.2(6),

(B) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case, or

(B) au moment où les marchandises ont fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), dans les autres cas,

(ii) such lesser amount as the Minister may direct; or

(ii) soit du montant inférieur ordonné par le ministre;

(b) where the Minister so authorizes, security satisfactory to the Minister.

b) ou bien sur réception de la garantie autorisée et jugée satisfaisante par le ministre.

129. (1) The following persons may, within ninety days after the date of a seizure or the service of a notice, request a decision of the Minister under section 131 by giving notice in writing, or by any other means satisfactory to the Minister, to the officer who seized the goods or conveyance or served the notice or caused it to be served, or to an officer at the customs office closest to the place where the seizure took place or closest to the place from where the notice was served:

129. (1) Les personnes ci-après peuvent, dans les quatre-vingt-dix jours suivant la saisie ou la signification de l'avis, en s'adressant par écrit, ou par tout autre moyen que le ministre juge indiqué, à l'agent qui a saisi les biens ou les moyens de transport ou a signifié ou fait signifier l'avis, ou à un agent du bureau de douane le plus proche du lieu de la saisie ou de la signification, présenter une demande en vue de faire rendre au ministre la décision prévue à l'article 131 :

(a) any person from whom goods or a conveyance is seized under this Act;

a) celles entre les mains de qui ont été saisis des marchandises ou des moyens de transport en vertu de la présente loi;

(b) any person who owns goods or a conveyance that is seized under this Act;

b) celles à qui appartiennent les marchandises ou les moyens de transport saisis en vertu de la présente loi;

(c) any person from whom money or security is received pursuant to section 117, 118 or 119 in respect of goods or a conveyance seized under this Act; or

c) celles de qui ont été reçus les montants ou garanties prévus à l'article 117, 118 ou 119 concernant des marchandises ou des moyens de transport saisis en vertu de la présente loi;

(d) any person on whom a notice is served under section 109.3 or 124.

d) celles à qui a été signifié l'avis prévu aux articles 109.3 ou 124.

(2) The burden of proof that notice was given under subsection (1) lies on the person claiming to have given the notice.

(2) Il incombe à la personne qui prétend avoir présenté la demande visée au paragraphe (1) de prouver qu'elle l'a présentée.

133.(2) Goods may be returned under paragraph (1)(a) on receipt of an amount of money of a value equal to

133.(2) La restitution visée à l'alinéa (1)a) peut, s'il s'agit de marchandises, s'effectuer sur réception :

(a) the aggregate of the value for duty of the goods and the amount of duties levied thereon, if any, calculated at the rates applicable thereto

a) soit du total de leur valeur en douane et des droits éventuellement perçus sur elles, calculés au taux applicable :

(i) at the time of seizure, if the goods have not been accounted for under subsection 32(1), (2) or (5) or if duties or additional duties have become due on the goods under paragraph 32.2(2)(b) in circumstances to which subsection 32.2(6) applies, or

(i) au moment de la saisie, si elles n'ont pas fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), ou si elles sont passibles des droits ou droits supplémentaires prévus à l'alinéa 32.2(2)b) dans le cas visé au paragraphe 32.2(6),

(ii) at the time the goods were accounted for under subsection 32(1), (2) or (5), in any other case; or

(ii) au moment où elles ont fait l'objet de la déclaration en détail ou de la déclaration provisoire prévues au paragraphe 32(1), (2) ou (5), dans les autres cas;

(b) such lesser amount as the Minister may direct.

b) soit du montant inférieur que le ministre ordonne.

153. No person shall

153. Il est interdit :

(a) make, or participate in, assent to or acquiesce in the making of, false or deceptive statements in a statement or answer made orally or in writing pursuant to this Act or the regulations;

a) dans une énonciation ou une réponse orale ou écrite faite dans le cadre de la présente loi ou de ses règlements, de donner des indications fausses ou trompeuses, d'y participer ou d'y consentir;

. . .

(c) wilfully, in any manner, evade or attempt to evade compliance with any provision of this Act or evade or attempt to evade the payment of duties under this Act.

155. No person shall, without lawful authority or excuse, the proof of which lies on him, have in his possession, purchase, sell, exchange or otherwise acquire or dispose of any imported goods in respect of which the provisions of this or any other Act of Parliament that prohibits, controls or regulates the importation of goods have been contravened.

. . .

c) d'éluder ou de tenter d'éluder, délibérément et de quelque façon que ce soit, l'observation de la présente loi ou le paiement des droits qu'elle prévoit.

155. Nul ne peut, sans autorisation ou excuse légitime dont la preuve lui incombe, avoir en sa possession, acheter, vendre, échanger ou, d'une façon générale, acquérir ou céder des marchandises importées ayant donné lieu à une infraction à la présente loi ou à toute autre loi fédérale prohibant, contrôlant ou réglementant les importations.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Christopher Harvey, Q.C.	FOR THE APPLICANT
Jan Brongers Erica Louie	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

MacKenzie Fujisawa LLP Vancouver, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS