Federal Court of Appeal | Cour d'appel fédérale

Date: 20190607

Docket: A-144-18

Citation: 2019 FCA 170

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

WEN-TONG CHEN
CHIN YUN HUANG CHEN

Appellants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Montréal, Quebec, on May 15, 2019.

Judgment delivered at Ottawa, Ontario, on June 7, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Wen-Tong Chen and Chin Yun Huang Chen (the appellants) appeal from a judgment of Justice Lafrenière (the Federal Court), dated May 4, 2018 (Reasons), rejecting their application for judicial review of a decision made by the delegate for the Minister of Public Safety and Emergency Preparedness (the Minister). The Minister's delegate had partly allowed their request

for review of the seizure, by the Canada Border Services Agency [CBSA], of two jewellery rings they failed to declare when arriving in Montréal aboard a flight from the United States. While the seizure of the first ring was cancelled, forfeiture of the amount of $692.62 taken in place of the second ring was upheld.

[2] For the reasons that follow, I would dismiss the appeal, with costs.

I. Background

[3] On March 26, 2016, the appellants returned home from a trip to the United States via the Montréal-Trudeau International Airport. At customs, the appellants were referred to secondary examination where the secondary-screening CBSA officer noticed two rings worn by Mrs. Chen, which had not been declared in the appellants' joint customs declaration card. After consulting with her supervisor, the CBSA officer concluded that a seizure was warranted. The two rings were subsequently released upon payment of 30 percent of their estimated value ($1,393.24).

[4] The seizure of the rings and their subsequent return to the appellants were made pursuant to the following provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (the Act). First, subsection 12(1) of the Act mandates that all imported products must be reported at the nearest customs office in accordance with the *Reporting of Imported Goods Regulations,* S.O.R./86-873. According to subsection 12(3) of the Act, goods should notably be reported under subsection 12(1) in the following situations:

(a) in the case of goods in the actual possession of a person arriving in Canada, or that form part of the	a) la personne ayant en sa possession effective ou parmi ses bagages des marchandises se trouvant à bord du

person's baggage where the person and the person's baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;	moyen de transport par lequel elle est arrivée au Canada ou, dans les circonstances réglementaires, le responsable du moyen de transport;
…	[…]
(c) in any other case, by the person on behalf of whom the goods are imported.	c) la personne pour le compte de laquelle les marchandises sont importées.

[5] Subsection 12(3.1) of the Act provides, "[f]or greater certainty", that for the purposes of subsection 12(1), the return of goods to Canada after they are taken out of Canada is an importation of those goods.

[6] Pursuant to section 110 of the Act, an officer may, where he or she believes on reasonable grounds that the Act or its regulations were contravened in respect of such goods, seize them as forfeit. Section 113 of the Act provides, with respect to the limitation period, that no seizure may be made more than six years after the contravention in respect of which the seizure is made.

[7] Subject to exceptions explicitly set out in subsection 117(2), subsection 117(1) of the Act provides that the seized goods can be returned by the officer "to the person from whom they were seized or to any person authorized by [that] person … on receipt of":

(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 thereon, if any, calculated at the rates applicable thereto	(i) soit du total de la valeur en douane des marchandises et des droits éventuellement perçus sur elles, calculés au taux applicable :

…	[…]
(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.

[8] As provided by sections 129 and 131 of the Act, anyone who has had goods seized may request that the Minister, "having regard to the circumstances", determine whether there was a contravention of the Act. If the Minister finds that there was no contravention, paragraph 132(1)(a) of the Act provides that he "shall forthwith authorize the removal from custody of the goods … or the return of any money or security taken in respect of the goods …". If, on the other hand, the Minister determines that there was a contravention, then the Minister may:

133(1) … (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;	133(1) […] 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 …	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 […]

[9] It is accepted in the case law that the contravention and penalty decisions are distinct and must be challenged separately, by way of an action and an application, respectively (see *Hamod v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 937 at paras. 16-19 [*Hamod*]; *Pounall v. Canada (Border Services Agency)*, 2013 FC 1260 at para. 15; *Mohawk Council of Akwesasne v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012

FC 1442 at para. 21; *Akinwande v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 963 at paras. 10-11; *Nguyen v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 724 at paras. 19-22). A decision by the Minister as to whether there has been a contravention of the provisions relating to the importation of goods may be appealed within 90 days after being notified by way of an action (subsection 135(1) of the Act). A decision regarding the penalty under section 133 of the Act may be challenged within 30 days through an application for judicial review (subsection 18.1(2) of the *Federal Courts Act*, R.S.C., 1985, c. F-7).

[10] On June 9, 2016, Mr. Chen made a written request to the CBSA's Recourse Directorate under section 129 of the Act for ministerial review of the seizure of the rings. He requested that the decision to seize and forfeit the rings be reviewed and reversed and that the notes in the appellants' files - which he said could lead to further screening in the future - be removed. He claimed that they were acting in good faith, that they do not grasp "all the inherent complexities" of the Act, and that English is not their native language.

[11] Based on the appellants' account, the first ring was acquired by Mrs. Chen while visiting her daughter in New York in November 2009, as a gift for herself from her husband. Mr. Chen argued that, since it was a gift from him, his wife mistakenly believed that she had no obligation to declare the ring upon returning to Canada. Moreover, he added that the seizure occurred well beyond the limitation period of six years.

[12] As for the second ring, Mr. Chen indicated that it was brought into Canada in 2011 by his daughter, then a resident of the United States. He apparently bought it from his daughter as a birthday gift to his wife, and says he was unaware that it would become liable to forfeiture because he had refunded his daughter for its cost.

[13] On July 11, 2016, Danielle Lacroix, a senior appeals officer of the CBSA Recourse Directorate, served upon Mr. Chen a Notice of Reasons for Action proposing to uphold the first officer's decision. She explained that information about previous border violations may be used to determine the level of examination for travellers entering Canada but that, over time, the rate of secondary examination would decrease if no further violations occurred. She also noted that, if it was determined on appeal that no contravention occurred here, their names would be removed from the database. If not, the record would still only be retained for six years after the seizure.

[14] On August 9, 2016, counsel for Mr. Chen made further submissions to the Recourse Directorate, essentially repeating the arguments contained in the June 9, 2016 letter.

[15] On November 3, 2016, Ms. Lacroix completed her Case Synopsis and Recommendation. Upon her review of the appellants' submissions, she recommended that the portion of the seizure relating to the first ring be cancelled, as it was beyond the limitation period. The purchase history provided by the appellants showed that this ring was purchased in 2009, six years before the seizure. However, having not been provided with any documentation for the importation of the second ring, she recommended that the seizure action for that ring be maintained. She noted that

knowledge and intent are not considered necessary conditions of a contravention, and that the onus is on the importer to be aware of the contents of his or her luggage.

II. Decisions below

A. *Decision of the Minister's Delegate*

[16] On December 5, 2016, Jonathan Ledoux-Cloutier, the delegate for the Minister, issued decisions in respect of both seized items. Regarding the first ring, he held that, as a result of the limitation period provided for in section 113 of the Act, the forfeiture amount taken in this respect should be remitted to Mr. Chen. Regarding the second ring, he found that there had been a contravention of section 12 of the Act, and upheld the seizure of the ring and the forfeiture of $692.62 as terms of release for the item. Although Mr. Chen in his submissions had confirmed the purchase price of the ring to be higher than the value determined by the seizing officer at the time of the seizure, the terms of release were not amended by the Minister's delegate.

[17] On January 4, 2017, the appellants applied for judicial review of the decision rendered by the Minister's delegate in respect of the second ring pursuant to section 133 of the Act. It is noteworthy that they did not appeal the decision rendered pursuant to section 131 of the Act, finding a contravention of section 12 of the Act. The appellants only sought an order quashing the decision establishing the amount of $692.62 as forfeit for return of the seized ring. They also sought the removal of the notes in their files which, they say, may subject them to secondary examination each time they re-enter Canada.

B. *Decision of the Federal Court*

[18] On May 4, 2018, the Federal Court dismissed the application for judicial review, holding that the decision of the Minister's delegate with respect to the Enforcement Action was reasonable. It found that the appellants had been duly informed that their contravention was a failure to declare the ring in accordance with section 12 of the Act, and that any question about the merits of this determination under section 131 was outside the scope of their judicial review application (Reasons at para. 23).

[19] With respect to the appellants' claim that it was unreasonable for the CBSA to maintain a record of their contravention, one that could lead to enhanced scrutiny in the future, the Federal Court found that relief could not be sought in respect of the records in the context of this judicial review application. More specifically, the Federal Court held that referral to secondary examination does not constitute an additional sanction, and that the keeping by CBSA of a contravention record is "an administrative and automatic consequence" of having contravened the Act (at paras. 24-26).

[20] The Federal Court also held that the amount of terms of release, set below the minimum recommended by the *CBSA Enforcement Manual* (the *Manual*) for the lowest level of violations, was reasonable (at para. 31). In its view, the appellants failed to establish that mitigating factors, if they existed, had not properly been taken into account by the Minister's delegate (at para. 28). In reaching this conclusion, the Court pointed notably to the fact that the appellants had provided "evasive and contradictory answers" when questioned by the CBSA officer (at para. 29).

[21] The application was therefore dismissed, and costs were set at $3,000 (at para. 37).

III. Issues

[22] The present appeal raises two main questions, which can be formulated as follows:

A. Was the decision of the Minister's delegate upholding the Enforcement Action reasonable?

B. Did the Federal Court err in awarding costs in the amount of $3,000?

IV. Analysis

[23] The parties are in agreement that on appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative decision-maker, the appropriate approach is that set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47 [*Agraira*]. This approach requires this Court to "step into the shoes" of the Federal Court, determine whether it identified the appropriate standard of review, and whether it applied this standard properly. In other words, the focus of an appellate court should be on the administrative decision itself, and not on potential errors by the reviewing court (*Hoang v. Canada (Attorney General)*, 2017 FCA 63 at para. 26 [*Hoang*]).

[24] The Federal Court was right to conclude, at paragraph 19 of its reasons, that the standard of review applicable to the decision of the Minister's delegate to uphold part of the Enforcement Action under section 133 of the Act is that of reasonableness (*Dutton v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1170 at para. 13; *Gagliano v. Goodale*, 2018 FC 820 at

paras. 64 and 70; *Leslie v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 119 at para. 24 [*Leslie*]).

[25] It is trite law that decision-makers' interpretation of their home statute, with which they have particular familiarity, calls for deference when judicially reviewed (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 22). As long as the decision demonstrates "justification, transparency and intelligibility" and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", it will be regarded as reasonable (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47 [*Dunsmuir*]).

[26] The question before this Court, therefore, is whether the Federal Court applied that standard properly.

A. *Was the decision of the Minister's delegate upholding the Enforcement Action reasonable?*

[27] The appellants submit that the contravention was never identified, thereby making it impossible to assess the reasonableness of the decision. They also claim that the decision is unreasonable as it was premised on the belief that seizure and the keeping of a contravention record are automatic consequences of any contravention of the Act, rather than an exercise of discretion. In their view, the Minister's delegate erroneously proceeded on the basis that he could not provide relief if there was a contravention, regardless of the circumstances of the case. The appellants further argue that the delegate disregarded the *Manual*, which provides, in relevant

parts, that the benefit of the doubt should be afforded to those travellers who clearly were not aware of CBSA requirements. Lastly, the appellants submit that the delegate failed to take into account the "relevant factors that favored clemency" in this case (Memorandum of Fact and Law of the Appellants at para. 54).

[28] For the reasons that follow, I find that all of these submissions ought to be rejected.

(1) Details of the Contravention

[29] First, it is very clear from the Record that the appellants were properly advised of the contravention which grounded the forfeiture, and that all the information required to contest the decision was made available to the appellants. The Notice of Reasons for Action, which was served on Mr. Chen on July 11, 2016, made it clear that "the enforcement action was taken because the seized goods were unlawfully imported by reason of [n]on-report pursuant to section 12 of the Customs Act" (Appeal Book at p. 49). It also explained the circumstances underlying the seizure, enclosed a copy of the secondary CBSA officer's Narrative Report, and summarized the submissions filed by the appellants.

[30] It is true that the decision of the Minister's delegate is not as explicit, and does not identify the contravention with as much specificity, as the Notice of Reasons for Action. It cannot be said, however, that the decision of the Minister's delegate "failed to identify the contravention at all" as is argued by the appellants (Memorandum of Fact and Law of the Appellants at para. 59). The decision explicitly mentions that the examination at the airport

revealed that the appellants failed to declare two rings, and that no evidence was submitted that the second ring was legally imported to Canada (Appeal Book at pp. 25-26).

[31] Furthermore, the decision of the Minister's delegate must be read alongside the Notice of Reasons for Action issued by the CBSA's Recourse Directorate (see, on the necessity to read the reasons in light of the record, *Hamod* at para. 38). When read in that light, it is very clear that the Minister's delegate was well aware of the contravention and of the circumstances surrounding it, and was in a position to assess the appropriateness of the CBSA's forfeiture action.

[32] The appellants further argue, in this regard, that a Canadian receiving goods in Canada has no obligation to declare them, that Mr. Chen had no obligation, upon buying the ring in Canada, to declare it, and that upon receiving the ring in Canada as a gift, Mrs. Chen had no obligation to declare it (Memorandum of Fact and Law of the Appellants at para. 62). I agree with the Federal Court that, in making these submissions, the appellants are attempting to "collaterally attack the Contravention Finding" (Reasons at para. 22). Such a course of action is impermissible and, to that extent, the appellants' submissions in this regard should be disregarded.

(2) Exercise of Discretion

[33] As for the appellants' argument that the Minister's delegate proceeded on the assumption that he could not provide any relief if there was a contravention, it is not substantiated by the reasons or the record. The appellants make much of paragraph 19 of the decision of the Minister's delegate, which reads as follows:

> As for item 2 [the Ring], no evidence was submitted establishing that item 2 was legally imported to Canada even if it was purchased in 2011. Consequently, this portion of the seizure is maintained. [Emphasis added.]
>
> (Appeal Book at p. 26.)

[34] In my view, the appellants read too much into the mere use of the word "consequently". I fail to see how it can reasonably be inferred from the decision, when read in its entirety and in the context of the record, that the seizure was treated as an automatic consequence of any contravention of the Act. In his decision, the Minister's delegate expressly referred to section 133 of the Act, which sets out the options open to the Minister in reviewing an enforcement action (*i.e.* returning the seized good, remitting any portion of any money or security taken, or increasing the required security). There is simply no reason to think that the Minister's delegate, who has undeniable expertise in interpreting and applying the Act, was unaware of his discretion with respect to possible relief under that provision.

[35] There is no dispute that the Minister's delegate is afforded a broad discretion when determining the amount of money to be paid (if any) for the return of goods seized as forfeit (see *Leslie* at para. 24). The sole statutory limit placed on the Minister by subsections 132(2) and (4) of the Act is that the amount must not exceed the value for duty of the goods plus the amount of duties levied thereon (*Shin v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1106 at paras. 34 and 58 [*Shin*]).

[36] It is clear from the reasons of the Minister's delegate and the record before us that he was aware of that wide discretion, and that he exercised it reasonably, taking into account both the guidelines set out in the *Manual* and the particular circumstances of the case. The terms of

release that were applied to the ring at issue by the secondary CBSA officer consisted of a "Level 1" enforcement action (Appeal Book at pp. 134-137). According to the *Manual*, this level is recommended for "violations of lesser culpability" or "offences of omission, rather than commission" (Appeal Book at pp. 135-136). It is commonly applied when goods are not reported, but are not hidden and full disclosure is made upon discovery (Appeal Book at p. 136). For such a violation, the suggested terms of release for the failure to report jewellery are set at 30 percent of the item's value (Appeal Book at pp. 135, 141).

[37] Yet, in the case at bar, the terms of release were set by the secondary CBSA officer below the minimum amount suggested in the *Manual*. In fact, the documentary evidence and the submissions of the appellants showed that the value of the item was actually higher than the value determined by the CBSA officer at the time of seizure ($2,322.08 CAD vs $2,100 USD). Still, the Minister's delegate decided to exercise his discretion not to modify the terms of release to reflect the amount recommended by the *Manual* - even though he could have done so under paragraph 133(1)(*c*) of the Act - as he found this was "unfavourable" to the appellants (Appeal Book at p. 26). That decision, it seems to me, clearly shows that the Minister's delegate was aware of his discretion and reasonably exercised it in upholding the terms of the release.

[38] The criticism leveled by the appellants against the Minister's delegate for having "violated his own policy" in not extending them the benefit of the doubt is equally unfounded. It is clear from both the reasons and the record that the customs officials afforded the "benefit of the doubt" to the appellants by accepting their final version of events regardless of their earlier contradictory statements to the CBSA officer (Appeal Book at pp. 25-26, 49-51 and 66-67). It

may even be said that, in maintaining the terms of release set by the CBSA officer, that is a "Level 1" sanction usually reserved for "offences of omission, rather than commission", the Minister's delegate did, in practice, consider the appellants' "lack of knowledge" as a "mitigating factor", in conformity with the Seizure Policy found in section 16 of the *Manual* ("Negligence, 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 seizure action").

[39] It is worth adding, moreover, that the *Manual* only provides "guidelines" for establishing the value for duty of goods imported or exported in contravention of the Act as well as the terms of release for seized goods (*Shin* at paras. 62-68). It is not to be applied as if it were binding law (at para. 70). If the submission of the appellants - that the *Manual* "provides a clear instruction with an equally clear outcome", *i.e.* the cancellation of all enforcement actions imposed on good faith importers (Memorandum of Fact and Law of the Appellants at para. 53) - was to succeed, this would mean depriving the Minister of any discretion in such cases. This is, paradoxically, precisely what the appellants cautioned against in other parts of their submissions.

[40] Finally, the appellants are wrong to claim that the Minister's delegate failed to take into consideration the relevant factors that favoured clemency, notably their alleged lack of awareness of the requirement to report and pay duties on the ring and their good faith. Far from being disregarded, these elements were duly noted and thrice considered, in the Notice of Reasons for Action (Appeal Book at pp. 49-51), in the Case Synopsis and Recommendation (Appeal Book at pp. 63-66) as well as in the Final Decision (Appeal Book at pp. 25-26).

[41] The mere fact that the Minister's delegate did not find these factors to warrant the terms of release to be set at zero in no way shows that he unreasonably exercised his discretion in this regard. In reality, the appellants are not concerned with whether the Minister's delegate considered these factors, but rather how he did it. The weighing of such factors by the Minister's delegate, as previously mentioned, is subject to considerable deference on judicial review. Before us, the appellants have simply not shown this weighing of the factors to be unreasonable.

(3) Reviewability of the Recordkeeping

[42] The appellants also challenge the keeping by CBSA of a contravention record for a period of six years, which they say may subject them to increased scrutiny at border crossings. They argue that the Federal Court was wrong to conclude that relief could not be sought in this proceeding from the recordkeeping as this is merely "an administrative and automatic consequence of having contravened" section 12 of the Act (Reasons at para. 26). In the appellants' view, the keeping of a contravention record, which may subject an individual to increased scrutiny at border crossings, arises out of CBSA's statutory mandate and is thus a reviewable "matter" coming within the scope of section 18.1 of the *Federal Courts Act*. They also claim that the recordkeeping was, in the present case, unreasonable.

[43] Once again, I am unable to agree with the appellants. It is clear that the retention of a record of the appellants' contravention is neither a separate decision nor an additional sanction for the contravention of the Act. In the Notice of Reasons for Action, the officer explained to the appellants that the CBSA has a policy of retaining a record of contraventions of the Act for a period of six years from the date of seizure (Appeal Book at p. 51). Customs officials may then

use such information concerning previous border violations to determine the appropriate level of examination for travellers entering Canada. Travellers with a recent customs infraction could therefore be subject to more frequent referrals for secondary examination. The rate of secondary examination decreases over time, if no further infractions occur, and the record is deleted from the CBSA's system after six years. The details of that policy are carefully canvassed and reviewed in *Dhillon v. Canada (Attorney General)*, 2016 FC 456 at paras. 5-11 [*Dhillon*].

[44] It appears that CBSA officials do not possess any discretionary authority over the inclusion of an individual's record of contravention in their database. As found by the Federal Court in *Dhillon*, the system "functions as part of CBSA's institutional memory" (at para. 40) and is intended to enhance the efficiency of the examination process at points of entry and also recognize future consistent compliance by decreasing the frequency of secondary examinations over time.

[45] That the referral of the appellants to secondary examination upon entry to Canada as a result of their record of prior contravention does not constitute an additional sanction is evidenced by the fact that it is not mentioned in the Ministerial Decision of December 5, 2016. It is only referred to in the written Notice of Reasons for Action, in response to the appellants' queries in that respect. As a result, I find that the potential for increased frequency of referrals to secondary examination is an administrative and automatic consequence flowing from the existence of the contravention, and is not reviewable in the context of an application challenging the reasonableness of a penalty imposed under the Act.

[46] Even if I were prepared to accept, for the sake of the argument, that this policy does not (or should not) apply automatically and that the matter to be reviewed is the decision to implement it with respect to the appellants, I would still be of the view that there is nothing unreasonable in that "decision". It is well established that CBSA has the right to conduct a full examination of every traveller seeking to enter Canada, including both a primary and secondary examination. Because of the challenges of subjecting every traveller to a secondary examination, CBSA relies on a risk management policy pursuant to which records of previous border violations may increase the frequency of referrals to secondary examination. The jurisprudence does not distinguish between these two steps of searches, and neither attracts the Charter protections or procedural fairness obligations required for more intrusive searches (see *R. v. Simmons*, [1988] 2 S.C.R. 495 at p. 517; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053 at pp. 1071-1072). Therefore, to the extent that the keeping by CBSA of the appellants' contravention record is reviewable, I would have no hesitation to find it reasonable in light of CBSA's mandate and its difficult task to balance the efficient movement of goods and people across the border with public safety priorities.

(4) The *Audi Alteram Partem* Issue

[47] Before turning to the issue of costs, I would like to comment briefly on the Federal Court judge's observations with respect to the appellants' behaviour when undergoing secondary examination at the border. The appellants argue that it was unfair for the judge to dismiss their application on the basis that they were "at best evasive and at worst simply untruthful" when questioned by the CBSA officer (Reasons at para. 29). They claim that these allegations, raised at the hearing by the judge himself when the record was complete and could not be supplemented

with rebutting evidence, resulted in a breach of the *audi alteram partem* rule and tainted his entire analysis. They also contend that these remarks amount to an alternative, different basis for the decision of the Minister's delegate, and that they reveal a misunderstanding of the role of a reviewing court.

[48] First of all, it should be recalled that, on appeal from the Federal Court sitting on judicial review of an administrative decision, it is on the initial decision that the appeal court should focus its attention, not the decision of the Federal Court (see *Hoang* at para. 26; *Administration de pilotage des Laurentides c. Corporation des pilotes du Saint-Laurent Central Inc.,* 2019 CAF 83 at para. 28*; Canada (Attorney General) v. Herrera-Morales,* 2017 FCA 163 at para. 53; *Agraira* at paras. 45-47). It is thus not sufficient for the appellants to point to alleged errors by the reviewing court to show that the application for judicial review should be allowed. They must demonstrate that the administrative decision itself does not meet the requirements of justification, transparency and intelligibility (*Dunsmuir* at para. 47).

[49] In any event, the arguments put forward by the appellants are far from persuasive.

[50] First, I fail to see how it can be said that the reference by the Federal Court to the inconsistent statements given by the appellants at the secondary inspection amount to a breach of procedural fairness. The Narrative Report of the CBSA officer who performed the secondary inspection (Appeal Book at pp. 52-54), which relates the inconsistencies relied on by the Federal Court with respect to the appellants' behaviour, was sent to the appellants in July of 2016 along with the Notice of Reasons for Action. It was also part of the Certified Tribunal Record before

the Federal Court. Moreover, this document was raised during oral argument before the Federal Court (Appeal Book at pp. 226-227), and counsel for the appellants was asked whether there was any evidence in the record contradicting the version in the report (Appeal Book at pp. 318-320). Therefore, the appellants had every opportunity to provide evidence and make representations in this regard, both before the Minister's delegate and the Federal Court.

[51] As for the role of the judge sitting on judicial review of the Minister's delegate's decision, I wish to make the following comments. There is at least an apparent tension in the Supreme Court jurisprudence as to how far a reviewing court can supplement the reasons given by a decision-maker in order to uphold an impugned decision, as noted by this Court in *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 at paras. 27-37 and *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at paras. 45-46 [*Kabul Farms*].

[52] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*], Justice Abella (writing for a unanimous Court) endorsed Professor Dyzenhaus' observation that deference requires "a respectful attention to the reasons offered or which could be offered in support of a decision" (at para. 12), suggesting that a reviewing court is entitled to supplement the reasons provided. The majority had already expressed that view in *Dunsmuir* (at para. 48). Mindful of the need to show respect for the decision-making process of adjudicative bodies, the Court tried to square the circle in adding that "…courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome" (at para. 15).

[53] In another decision rendered one day earlier, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 [*Alberta Teachers*], the majority of the Supreme Court had stressed, however, that a reviewing court was not free to come up with its own, alternative set of reasons to save a decision when the reasons offered by the decision-maker are deficient. As stated by Justice Rothstein, the direction that "courts are to give respectful attention to the reasons 'which could be offered in support of a decision' is not a 'carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result'" (at para. 54).

[54] More recently, the Supreme Court added another layer of complexity, distinguishing between cases where the reasons are either non-existent (as in *Alberta Teachers*) or insufficient (as in *Newfoundland Nurses*), and cases where detailed reasons are provided. In *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6 [*Lukács*], the majority reiterated Justice Rothstein's comments, quoted in the preceding paragraph, and added:

> In other words, while a reviewing court may supplement the reasons given in support of an administrative decision, it cannot ignore or replace the reasons actually provided. Additional reasons must supplement and not supplant the analysis of the administrative body.
>
> (*Lukács* at para. 24, *in fine*.)

[55] However, two weeks after *Lukács*, the Supreme Court released its decision in *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 [*Williams Lake*], and once again shed doubt on the extent to which reviewing courts can supplement the reasons of administrative decision-makers (on these seemingly contradictory decisions, see David Stratas, "A Decade of Dunsmuir: Please No More" (8 March

2018), in *Administrative Law Matters* (blog) (online: https://bit.ly/30RyNUK)). The dissenting opinions in that case suggested that the majority failed to follow the principles in *Lukács* and engaged in impermissible supplementing of the tribunal's reasons (see *Williams Lake* at paras. 141-146, 151-155, 206-207).

[56] In the case at bar, I do not think it can fairly be argued that the Federal Court supplanted the analysis of the Minister's delegate. The Federal Court found that the appellants failed to establish mitigating circumstances that were not properly taken into account, or that there was any failure to extend the proper degree of flexibility or benefit of the doubt to the appellants. Having taken the record as a whole, it determined that the imposition of a forfeiture amount by the Minister's delegate was not unreasonable and did not fall outside the range of possible, acceptable outcomes defensible in view of the facts and the law.

[57] It is no doubt true that the Minister's delegate ultimately assumed to be true the version of the facts submitted by the appellants in June 2016 and did not base his decision on the conflicting versions given by the appellants to the secondary officer in March 2016. However, this did not prevent the Federal Court from considering the entire record before the decision-maker and to conclude that the previous versions recounted by the appellants provide further, additional reasons supporting the reasonableness of the decision. This is a far cry from impermissibly replacing the flawed or inexistent reasons of the decision-maker with those of the reviewing court. And it bears no resemblance to the situation in *Kabul Farms*, cited by the appellants, where neither the decision-maker's reasons nor the record disclosed any rationale whatsoever for the selection of the base amount reflecting the harm caused by a violation, and

upon which the penalties under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 were to be assessed. In such a scenario, the Court wrote, "fashioning reasons that might have been given in order to save the decision would turn a blind eye to our role as a reviewing court" (at para. 47). Needless to say, this is clearly not the situation we are faced with here.

[58] Having said this, I appreciate the appellants' concern that their reputation has now been overshadowed with innuendos of dishonesty in a public judgment of the Federal Court. It may have been best for the judge to stick with the language used in the Case Synopsis, and to refrain from casting aspersions of untruthfulness nowhere to be found in the record. To that extent, the decision of this Court is not to be taken as an endorsement of the Federal Court's characterization of the appellants' behaviour at paragraph 29 of his reasons.

B. *Did the Federal Court err in awarding costs in the amount of $3,000?*

[59] The appellants submit that the Federal Court's cost award, fixed in the amount of $3,000, should be reduced to the amounts agreed upon by the parties, which they say was $2,500. This argument must also fail.

[60] As a general principle, it is accepted that costs may not be awarded when they have not been requested (see *Exeter v. Canada (Attorney General)*, 2013 FCA 134 at para. 12 [*Exeter*]; *Balogun v. Canada*, 2005 FCA 350). The idea behind this general prohibition is that awarding costs in these circumstances would be a breach of the duty of fairness as it would "subject the

party against whom they are awarded to a liability when the party had had no notice or an opportunity to respond" (*Exeter* at para. 12).

[61] What is less clear, however, is whether an agreement between parties as to the quantum of costs is binding on the Court. Indeed, no decision in support of that proposition was provided.

[62] I am inclined to the view that the discretion of the Court remains unfettered, whether there is an agreement between the parties or not, provided of course that the parties are given an opportunity to make submissions. Rule 400(1) of the *Federal Courts Rules*, S.O.R./98-106 provides that the Federal Court has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". So broad is the discretion of the Federal Court in this matter that this Court will rarely intervene on appeal, unless the party challenging an award can show either an extricable error of law, or an overriding and palpable error of fact or of mixed fact and law (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Alani v. Canada (Prime Minister)*, 2017 FCA 120 at para. 12). Of course, courts will almost always give effect to the agreement reached by the parties, except in the most exceptional circumstances.

[63] In any event, this question need not be answered in the present case, as I have not been convinced that there was, indeed, any agreement between the parties as to the quantum of the costs to be awarded. The transcript of the hearing shows that, far from agreeing on a quantum for the award, the parties rather agreed on a "range" within which the Federal Court, in its discretion, would pick what it considered to be the appropriate amount for the costs. This is not

to mention that the judge made clear, in his last comments of the day, that he was going to proceed on that basis. While it was entirely open to the appellants' counsel to object at that time, they refrained from doing so. In my view, they have implicitly waived their right to raise the issue of procedural fairness at this stage (see, e.g., *Sharma v. Canada (Attorney General)*, 2018 FCA 48 at para. 11).

V. Conclusion

[64] For all of the above reasons, I would dismiss the appeal, with costs.

"Yves de Montigny"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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