Federal Court  Cour fédérale

Date: 20161028

Docket: T-536-16

Citation: 2016 FC 1204

Ottawa, Ontario, October 28, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

FARZANEH KASHEFI

Applicant

and

CANADA BORDER SERVICES AGENCY
CS-77788/4531-0842

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Recourse Directorate of the Canada Border Services Agency ("CBSA") which found, on behalf of the Minister of Public Safety and Emergency Preparedness ("Minister") and pursuant to s 131 of the *Customs Act*, RSC, 1985, c 1 (2nd Supp) ("*Customs Act*"), that there had been a contravention of the *Customs Act* and, pursuant to s 133 of that Act, that goods seized and the amount of $220.00 received for the return of a seized vehicle, would be held as forfeit.

Factual Background

[2] On August 10, 2015 the Applicant, travelling by vehicle and accompanied by another person, was denied entry to the United States at the Detroit/Windsor crossing. CBSA had flagged the returning vehicle and the Applicant as of interest and, at the Canadian border checkpoint, a primary inspection was conducted by a border services officer. That Officer asked the occupants several standard questions and then referred them to a secondary inspection which was conducted by border services officer Cormier ("BSO Cormier") accompanied by a second officer. At that stage a search of the Applicant's purse revealed two bottles of various pills with the prescription information removed from the labels of the bottles. BSO Cormier reported that he suspected that the pills were controlled substances. The Applicant was arrested. BSO Cormier reported that a prescription was found in the vehicle but was dated for the following day, August 11, 2015. Ultimately, the pills in the Applicant's possession were determined to be Aleve, laxitive, roxycodone (x10), lorazepam (x6), amitryptaline (x6) and trimipraminel (x8). BSO Cormier reported that the lorazepam (valium) tablets were seized at a level 2 because the Applicant had a prior seizure of narcotics in 2011.

[3] Several hours later the Applicant was released from custody. The 6 seized lorazepam tablets were assessed at a value of $18.00 and were not returned. As a condition of the release of the seized vehicle, the Applicant was required to pay $220.00, which she did. She was provided with a copy of a Seizure Receipt which stated that if she wished to file an objection to the enforcement action she must file a request for review within 90 days of the date the enforcement action was taken. On October 5, 2015 she provided a copy of her prescription, a doctor's repeat

authorization form and her prescription refill history and requested that the $220.00 be returned and that the record of the matter be removed from her file. Her request was acknowledged by the Recourse Directorate on October 28, 2015. On October 30, 2015 a Senior Appeals Officer of the Recourse Directorate wrote to the Applicant providing the written notice of reasons for action as required by s 130 of the *Customs Act* and asked her to provide further specified information. That letter was also sent to the CBSA travellers operations at Windsor with a request for further information. CBSA's response was received by the Recourse Directorate on November 9, 2015 and relayed to the Applicant by a Senior Appeals Officer by letter dated November 12, 2015. The November 12, 2015 letter noted that the border services officer had reported that this was not the first incident when the Applicant had been found with controlled drugs without a prescription. It advised the Applicant that she had 15 days within which to submit any additional information or documentation which she believed would assist the Recourse Directorate reach a decision. A response was received by telephone on November 24, 2015. On May 18, 2016 counsel for the Minister sent a Written Examination to the Applicant seeking information about a prior seizure in February 2012, the Applicant provided Answers to Written Examination on July 18, 2016.

[4] On January 26, 2016 the Senior Appeals Officer issued a case Synopsis and Recommendation wherein she concluded that, pursuant to s 131 of the *Customs Act*, there had been a contravention of that Act or regulations in respect of the goods and conveyance that were seized and, pursuant to s 133 of the *Customs Act*, the amount of $220.00 received for the return of the seized vehicle, and the 6 seized lorazepam pills, would be held as forfeit. By letter dated February 16, 2016 from the Recourse Directorate the Applicant was advised of the Minister's

decision, which reflected the above recommendation. This is the decision under review in this application for judicial review ("Decision").

Decision Under Review

[5] The Recourse Directorate noted that the Decision had been reached following a review of the enforcement action, the evidence and the law applicable to the Applicant's case and that the documentation provided by the Applicant and the reports from the CBSA issuing office had been fully considered. The Recourse Directorate found that, pursuant to s 131 of the *Customs Act*, there had been a contravention of that Act or the regulations and, pursuant to s 133 of the *Customs Act*, that the seized 6 pills of lorazepam and the amount of $220.00 received for the release of the seized vehicle would be held as forfeit.

[6] In its reasons the Recourse Directorate acknowledged that the Applicant had provided a copy of her prescription for the pills. However, it found that the Applicant was required to report the pills to the CBSA pursuant to ss 12(3.1) of the *Customs Act*, regardless of their Canadian origin, as that provision specifies, for the purposes of reporting goods under s 12(1), the return of goods to Canada after they are taken out of Canada is importation of those goods. Further, the importation of lorazepam is controlled under s 6 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 and the Canadian origin of the goods did not affect the validity of the enforcement action under ss 12(7) of the *Customs Act*.

[7] The Decision stated that although the lorazepam may have been obtained in Canada through prescription, the pills were not contained in pharmacy or hospital dispensed packaging

with appropriate labelling and were not declared to the CBSA at the time of importation. As such, the pills were not imported in accordance with the provisions of the "Section 56 Class Exemption for Travellers Who Are Importing or Exporting Prescription Drug Products Containing a Narcotic or a Controlled Drug" which imposes specific conditions for the importation of controlled drugs for personal use.

[8] The Recourse Directorate stated that the available information confirmed that the lorazepam was not properly reported to the CBSA in contravention of s 12 of the *Customs Act*. Therefore, the pills and conveyance used to import them were lawfully subject to seizure and forfeiture in accordance with s 110 of that Act. As the import conditions of the s 56 class exemption were not met, the pills were held as forfeit. Further, the $220.00 conveyance penalty was determined to be appropriate given the circumstances of the enforcement action and was consistent with other enforcement actions involving similar circumstances.

[9] The Decision stated that to appeal the decision made pursuant to s 131, the Applicant may file an action in the Federal Court in accordance with s 135 of the *Customs Act*, which action must be filed within 90 days of the mailing date of the Decision. To appeal the decision made pursuant to 133 of the *Customs Act*, the Applicant may file an application for judicial review under s 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7 ("*Federal Courts Act*") which normally must be done within 30 days of the date of mailing of the Decision.

Jurisdiction

[10] The Respondent submits that the application for judicial review should be dismissed for lack of jurisdiction as the Applicant is attempting to challenge the Decision on the basis of whether, pursuant to s 131 of the *Customs Act*, a contravention of the Act has occurred, however, that challenge may only be brought by an action before this Court.

[11] The Respondent submits that when an individual seeks a Ministerial review, the Ministerial decision is comprised of two parts. First, pursuant to s 131, the Minister will review and make a finding with respect to whether there was a contravention of the Act. Second, pursuant to s 133, the Minister will review the appropriateness of the penalty assessed. These two decisions are distinct and, pursuant to the *Customs Act*, they must be challenged separately. Section 131 is concerned with the ground of the alleged contravention of the Act or regulation which justifies a seizure of the imported goods. Significantly, s 131(3) is a privative clause which states that a decision rendered pursuant to s 131(1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by s 135(1). Subsection 135(1) states that a person who requests a decision of the Minister under s 131 may, within 90 days after being notified of the decision, appeal the decision by way of an action in the Federal Court.

[12] Conversely, s 133 states that when the Minister decides, pursuant to s 131, that there has been a contravention of the Act or the regulations in respect of the goods or conveyance referred to in that section, then the Minister may impose a sanction as described in s 133. Thus, while the

decision made pursuant to s 133 is dependent upon the determination that there has been a contravention, it relates only to the penalty imposed in respect of the contravention. To appeal a decision under s 133, the penalized person may bring an application for judicial review before the Federal Court in accordance with s 18.1(1) of the *Federal Courts Act*.

[13] In the result, judicial review may only be used to challenge the Minister's s 133 decision pertaining to penalty, and not the s 131 decision which speaks to the fact of the contravention itself and which may only be challenged by way of an action (*Nguyen v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 724 at para 20 [*Nguyen*]).

[14] The Respondent submits that whether this Court has jurisdiction to hear a claim will depend on its determination on the essential nature of the dispute based on a "realistic appreciation of the practical result sought by the claimant" (*Leroux v Canada Revenue Agency*, 2012 BCCA 63 at para 20). Further, that because the essential character of the application for judicial review in this matter is an attempt to challenge the Recourse Directorate's decision that a contravention has occurred pursuant to s 131 of the *Customs Act*, the application should be dismissed for lack of jurisdiction.

[15] The Applicant, who is self-represented, made no substantive submissions on the question of jurisdiction.

[16] As stated by Justice Shore in *Nguyen*:

> [19] The Applicant is challenging the Minister's finding of a contravention of the Act made pursuant s. 131 of the Act of this

> application for judicial review. *Subsection 131(3) of the Act is a privative clause within the Customs Act that requires decisions made pursuant to s. 131 of the Act be subject to review only as described in s. 135(1) of the Act. Subsection 135(1) of the Act requires that a Minister's decision made under s. 131 of the Act be appealed by way of an action.*
>
> [20] No such statutory right of appeal exists with respect to Ministerial decisions taken under s. 133 of the Act. Section 133 of the Act provides that where the Minister finds under s. 131 of the Act that a contravention of the Act has occurred, the Minister may impose a penalty or other applicable remedial action such as the return of goods on receipt of an amount of money. Accordingly, a determination made pursuant s. 133 of the Act may often be dependent on a finding of a contravention of the Act. Nevertheless, the two decisions are separate and distinct, and must be challenged separately. The determination made pursuant to s. 131 of the Act in respect of a contravention of s. 12 of the Act may only be appealed by way of an action to this Court. Meanwhile, a determination made pursuant s. 133 of the Act regarding the release of the goods may be challenged only by way of an application for judicial review in accordance with s. 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.
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> (emphasis in original)

(Also see: *Hamod v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 937 at paras 16-17; *Pounall v Canada (Border Services Agency)*, 2013 FC 1260 at para 15; *Mohawk Council of Akwesasne v Toews*, 2012 FC 1442 at para 21; *Akinwande v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 963 at paras 10-11).

[17] I would note that the Decision stated the appeal process for both the s 131 and the s 133 decisions. This is not to say, however, that the choice of two appeal processes for the same decision, albeit pertaining to two separate provisions, is not confusing for self-represented parties (*Nguyen* at para 21).

[18] Regardless, the Respondent raises a valid argument that in this application for judicial review this Court does not have jurisdiction to consider the aspect of the Decision as it relates to s 131, that is, whether the *Customs Act* or regulations were contravened. However, I cannot conclude that the essential nature of the Applicant's claim is solely a challenge to the s 131 decision which would warrant the dismissal of the application as requested by the Respondent.

[19] In *Nguyen*, all of the applicant's evidence and argument was directed solely towards showing that the applicant had not contravened the Act and no evidence or argument was tendered or made in response to the Minister's determination, pursuant to s 133, regarding the release of the seized goods. In this matter, in her initial appeal to the CBSA the Applicant asked that she be returned the $220.00 she had been required to pay to obtain the release of the conveyance, the vehicle that she entered Canada in, and that the record of the matter be removed from her CBSA file. In support of her request she provided a copy of her July 9, 2015 prescription which included lorazepam, her doctor's repeats authorization form and her prescription refill history from a pharmacy. In her application for judicial review, the Applicant states that she seeks review of the February 16, 2016 Decision of the Recourse Directorate to "hold" her 6 pills of lorazepam and the amount of $220.00 for the return of her vehicle as forfeit. She states the relief sought being the return of the 6 pills and the $220.00, and removal of the record of the incident from her CBSA file. She attached as exhibits to her supporting affidavit the same documents as she submitted with her original appeal and her affidavit emphasised the failure to return the pills and $220.00 as requested in her original appeal. The Applicant's memorandum of fact and law is comprised of only two paragraphs but again focuses on the penalty stating "I have sent my all documents to Ottawa to get back my money and pills but

Unfortunately Ottawa (Recourse Directorate CBSA) didn't accpet [*sic*] my documents and they made a decision to hold my 6 pills and $ 220.00. they informed me that I have right to appeal to this decision in Canada Federal Court".

[20] As noted above, the Applicant is self-represented. English is also not her first language. However, while her submissions are limited and advance little argument, she is clearly highlighting the penalty imposed. From this it is apparent that the penalty imposed is an essential aspect of her application before this Court and the s 133 decision of the Recourse Directorate. Thus, to the extent that the Applicant is contesting the appropriateness of the decision to hold as forfeit the 6 seized lorazepam pills and the $220.00 received for the return of the seized vehicle, this Court has jurisdiction to consider her claim.

[21] I would also note that the Applicant has provided little basis for challenging the s 131 decision, which found that she had contravened the *Customs Act*, other than the fact that the standard form declaration makes no reference to the need to declare prescribed controlled drugs, which is an accurate observation, and that she was not asked about this by CBSA when they initially questioned her during the primary inspection or when they detained her during the secondary inspection, rather they conducted their searches and then confronted her with the pills.

[22] However, even if the Applicant wished to challenge the s 131 decision, on that or any other basis, she is now statutorily barred from doing so because the 90 days from the date of the Decision, within which she was required to bring an action, has lapsed and she has not sought relief from that requirement.

Was the s 133 decision reasonable?

[23] The Respondent submits that the only issue to be decided on this application for judicial review is whether the Recourse Directorate's decision made pursuant to s 133 of the *Customs Act* is reasonable. I agree that a decision rendered under s 133 is discretionary and fact-dependent. It is therefore reviewable on a standard of reasonableness (*Shin v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1106 at para 47 [*Shin*]; *United Parcel Service Canada Ltd v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 204 at paras 40-43).

[24] In reviewing the 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 facts and the law (*Shin* at para 48; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[25] The Respondent submits that the Applicant provided no evidence or argument as to why the Decision could be considered unlawful or unreasonable. The Applicant was provided with detailed reasons and the terms of release of the conveyance was set at $220.00 which was the minimum amount set out in the Customs Enforcement Manual for an individual who had contravened the *Customs Act* by smuggling a controlled drug, in a quantity of less than 10 pills, in the circumstance where the individual is known to have a previous history of drug smuggling. The 6 seized pills were also forfeit.

[26] In my view the Recourse Directorate's Decision was reasonable. The Decision provided intelligible reasons that explained the legal basis upon which the Applicant was found to have contravened the *Customs Act* and for the assessment of the penalty. It explained that the 6 lorazepam pills, a controlled substance, were seized and were forfeit as they had not been declared as required. The $220.00 conveyance penalty was determined to be appropriate given the circumstances of the enforcement action and was consistent with other enforcement actions involving similar circumstances.

[27] As noted by the Respondent, the $220.00 penalty is consistent with the Terms of Release for Conveyances Used in Smuggling Personal Use Quantities of Drugs found in the CBSA's Customs Enforcement Manual, a copy of which is found in the record. Pursuant to these guidelines, the fine imposed is appropriate in instances of importation of less than 10 pills of a controlled drug where an individual is known to have a previous history of drug smuggling.

[28] In the case of the Applicant, the report of BSO Cormier states that the Applicant had a previous narcotics seizure in 2011, however, the source of that statement is not provided. In fact, the CBSA provided no records to substantiate a prior seizure in 2011 or otherwise. Rather, it sent a written examination to the Applicant containing 6 questions asking, in effect, if it was true that in February 2012, when returning from a trip to Nicaragua, she was subject to an enforcement action by the CBSA at Toronto Pearson International Airport in relation to the importation of prescription medications. Specifically, 20 undeclared pills of prescription medication believed to be chlordiazepoxide in an improperly marked container, unaccompanied by a valid prescription, which were accordingly seized.

[29] In response, the Applicant denied that she was importing prescription medications, stating that she had her own prescribed medication. She also denied that she failed to declare her prescription drugs, pointing out that the standard declaration form, copy attached, makes no reference to this requirement and that she had not been asked about her medication. She conceded that she did not have her prescription with her when she was returning in 2012 but later provided a copy. She stated that she did not understand that this incident would be recorded in her CBSA file, did not understand the meaning of "seizure" and its consequences, or that it required follow up to clear her CBSA file, until the second incident in August 2015 when her boyfriend, who was accompanying her, explained what was happening. In short, while the Applicant's answers are not entirely straight forward, ultimately she does concede that pills were taken from her in 2012 and at that time she was not carrying a prescription for them.

[30] While she explained that she did not understand the significance of the prior seizure or its future consequences, her answers are sufficient to confirm the event. Therefore, in my view, the application of the $220.00 term of release for the conveyance, based on the 6 undeclared lorazepam pills and the prior seizure history, was reasonable as was the forfeiture of the pills and that sum.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is denied.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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