

Date: 20070727

Docket: T-32-07

Citation: 2007 FC 770

Ottawa, Ontario, the 27th day of July 2007

PRESENT: THE HONOURABLE MR. JUSTICE MAURICE E. LAGACÉ

BETWEEN:

MONIQUE HÉBERT

Applicant

and

THE MINISTER OF PUBLIC SAFETY CANADA

and

CANADA BORDER SERVICES AGENCY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, in accordance with section 129.2 of the *Customs Act*, of the decision dated October 6, 2006, made by the Canada Border Services Agency (CBSA) on behalf of the Minister of Public Safety regarding file CS-42034-4560-05-0236, dismissing the application for an extension of time submitted by the applicant on January 10, 2006, under section 129.1 of the *Customs Act* (the Act), regarding a request for a refund of \$31,968.75, which was retained by the Canada Border Services Agency following a seizure on April 29, 2005.

[2] The applicant seeks to set aside the decision of the Minister dismissing the application for an extension of time pursuant to section 129.1 of the Act and to extend the time for requesting a refund pursuant to section 129 of the Act.

[3] Although the applicant has submitted an application for judicial review, a closer reading of the Act would suggest, as will be seen later, that this is actually an appeal to the Court, where the Court reviews the relevant statutory conditions within the factual context of this case, without having to apply standards of judicial review.

Facts

[4] On April 29, 2005, Normand Daigle arrived in Canada, as a visitor, in his recreational vehicle, purchased in the United States in 2003 and registered in Florida, behind which he towed a boat. He had been a resident of Freeport, Bahamas since January 2002. On that day, Mr. Daigle was accompanied by his brother and his nephew.

[5] He stated to the CBSA officers that he was a resident of the Bahamas, and the two passengers stated that they were Canadian residents.

[6] Doubting the purpose of the trip to Canada and Mr. Daigle's non-resident status, and without waiting for the evidence of his non-resident status in Canada that Mr. Daigle was promising

and was awaiting from the attorney whom he had contacted, the CBSA officers seized the recreational vehicle, its contents and its trailer on April 30, 2005.

[7] Wanting to recover his seized property, Mr. Daigle paid \$31,718.75 to the CBSA that same day in exchange for the following receipt:

[TRANSLATION]

On April 30, 2005, Officer Demers personally delivered a Customs Seizure Receipt to Mr. Daigle, indicating the condition for return of the seized goods, namely, payment of C\$31,968.75 as an administrative penalty. Mr. Daigle paid this amount during the night of April 29 to April 30, 2005.

A penalty of \$250 for undeclared currency was also paid to the CBSA.

[8] The CBSA also filed criminal charges against Mr. Daigle in accordance with the Act for failing to report goods (bottles of alcohol, US\$28,900, etc.) that he was attempting to bring into Canada.

[9] While laying the criminal charges and seizing the goods, the CBSA was operating under the impression that Mr. Daigle, contrary to what he had told the CBSA officers, was a resident of Canada.

[10] Mr. Daigle appeared in court on the charges on June 17, and his trial was set for August 26, 2005, but never took place. Mr. Daigle returned to the United States with his

recreational vehicle, which he parked at a campground in Florida before returning to his home in the Bahamas. He died on October 17 in Florida.

[11] In the meantime, and after three postponements, the trial was finally scheduled for November 4, 2005, while the charges against Mr. Daigle were withdrawn on the basis of submissions from Mr. Daigle's counsel, without anyone being informed at that time of Mr. Daigle's death.

[12] In this case, the applicant, Monique Hébert, is acting in her capacity as liquidator of Mr. Daigle's succession. Her brother is Mr. Hébert, the person whom Mr. Daigle contacted during the seizure of his property by the CBSA.

[13] The applicant was also Mr. Daigle's friend. Following his death, she asked her brother to help her carry out the liquidation of the succession. Together they had to go to the Bahamas and oversee the sale of all the property left by Mr. Daigle. They also had to go to Florida to retrieve the personal effects he had there, sell his recreational vehicle and cancel the lease for the campsite where the recreational vehicle was parked.

[14] As part of the settlement of the succession, the applicant also appointed Mr. Hébert to challenge the seizure by the CBSA as soon as possible and to request a refund of the money paid to the CBSA by Mr. Daigle to retrieve his seized property.

[15] After having seen to the most urgent matters in the settlement of the succession (transportation of the remains back to Canada, burial, cancellation of the lease, sale of the property in the Bahamas, sale of the recreational vehicle in the United States, etc.), the applicant filed, on January 10, 2006, a challenge of the seizure and a request for a refund of the money paid to the CBSA, along with an application for an extension of time. The application to the Minister for an extension of time in accordance with section 129.1 of the Act was dismissed on October 6, 2006.

[16] This decision was supported by the following reasons:

[TRANSLATION]

[The applicant's application] for an extension of time is not allowed because neither you [counsel for the applicant, Michel Hébert] nor Mr. Daigle [owner of the seized property] met the criteria for granting an extension of time set out in subsection 129.1(5) of the *Customs Act*. Mr. Daigle could have requested a decision within 90 days after the date of the offence, as provided by section 129. According to the documents submitted to us, it appears that you and Mr. Daigle were well aware of the seizure on the date of the offence, April 30, 2005. In addition, according to the report from the officer who seized the goods, Mr. Daigle contacted you [Mr. Hébert] personally by telephone from the office that seized the goods on the same day as the offence. Since this date, no appeal was made until reception of your letter dated January 10, 2006. Accordingly, I cannot allow your application for an extension of time.

[17] Notwithstanding this decision by the Minister, can the Court allow the applicant's application for an extension of time under section 129.2 of the Act so that the request for a refund sought under section 129 of this Act can be heard on its merits by the CBSA?

[18] The relevant statutory provisions in this case state the following:

*Customs Act**Loi sur les douanes***Forfeitures****Confiscation**

Review of Seizure, Ascertained
Forfeiture or Penalty
Assessment

Procédures en cas de saisie, de
Confiscation compensatoire ou
de pénalité

Request for Minister's decisionDemande de révision

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

(d) any person on whom a

notice is served under section 109.3 or 124.

en vertu de la présente loi;

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

Burden of proof

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

Charge de la preuve

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

Extension of time by Minister

129.1 (1) If no request for a decision of the Minister is made under section 129 within the time provided in that section, a person may apply in writing to the Minister for an extension of the time for making the request and the Minister may grant the application.

Prorogation du délai par le ministre

129.1 (1) La personne qui n'a pas présenté la demande visée à l'article 129 dans le délai qui y est prévu peut demander par écrit au ministre de proroger ce délai, le ministre étant autorisé à faire droit à la demande.

Reasons

(2) An application must set out the reasons why the request was not made on time.

Contenu de la demande

(2) La demande de prorogation énonce les raisons pour lesquelles la demande visée à l'article 129 n'a pas été présentée dans le délai prévu.

Burden of proof of application

(3) The burden of proof that an application has been made under subsection (1) lies on the person claiming to have made it.

Fardeau de la preuve

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

Notice of decision

(4) The Minister must, without

Décision du ministre

(4) dès qu'il a rendu sa

delay after making a decision in respect of an application, notify the applicant in writing of the decision.

décision, le ministre en avise par écrit la personne qui a demandé la prorogation.

Conditions for granting application

Conditions d'acceptation de la demande

(5) The application may not be granted unless

(5) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

(a) it is made within one year after the expiration of the time provided in section 129; and

a) la demande est présentée dans l'année suivant l'expiration du délai prévu à l'article 129;

(b) the applicant demonstrates that

b) l'auteur de la demande établit ce qui suit:

(i) within the time provided in section 129, the applicant was unable to request a decision or to instruct another person to request a decision on the applicant's behalf or the applicant had a *bona fide* intention to request a decision,

(i) au cours du délai prévu à l'article 129, il n'a pu ni agir ni mandater quelqu'un pour agir en son nom, ou il avait véritablement l'intention de demander une décision,

(ii) it would be just and equitable to grant the application, and

(ii) il serait juste et équitable de faire droit à la demande,

(iii) the application was made as soon as circumstances permitted.

(iii) la demande a été présentée dès que possible.

Extension of time by Federal Court

Prorogation du délai par la Cour fédérale

129.2 (1) A person may apply to the Federal Court to have their application under section 129.1 granted if

129.2 (1) La personne qui a présenté une demande de prorogation en vertu de l'article 129.1 peut demander à la Cour fédérale d'y faire droit :

(a) the Minister dismisses that

application; or

(b) ninety days have expired after the application was made and the Minister has not notified the person of a decision made in respect of it.

a) soit après le rejet de la demande par le ministre;

b) soit à l'expiration d'un délai de quatre-vingt-dix jours suivant la présentation de la demande, si le ministre ne l'a pas avisée de sa décision.

If paragraph (a) applies, the application under this subsection must be made within ninety days after the application is dismissed.

La demande fondée sur l'alinéa a) doit être présentée dans les quatre-vingt-dix jours suivant le rejet de la demande.

Application process

(2) The application must be made by filing a copy of the application made under section 129.1, and any notice given in respect of it, with the Minister and the Administrator of the Court.

Modalités

(2) La demande se fait par dépôt auprès du ministre et de l'administrateur de la Cour d'une copie de la demande de prorogation présentée en vertu de l'article 129.1 et de tout avis donné à son égard.

Powers of the Court

(3) The Court may grant or dismiss the application and, if it grants the application, may impose any terms that it considers just or order that the request under section 129 be deemed to have been made on the date the order was made.

Pouvoirs de la Cour fédérale

(3) La Cour peut rejeter la demande ou y faire droit. Dans ce dernier cas, elle peut imposer les conditions qu'elle estime justes ou ordonner que la demande soit réputée avoir été présentée à la date de l'ordonnance.

Conditions for granting application

(4) The application may not be granted unless

Conditions d'acceptation de la demande

(4) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

(a) the application under subsection 129.1(1) was made within one year after the expiration of the time provided in section 129; and	a) la demande est présentée dans l'année suivant l'expiration du délai prévu à l'article 129;
(b) the person making the application demonstrates that	b) l'auteur de la demande établit ce qui suit :
(i) within the time provided in section 129 for making a request for a decision of the Minister, the person was unable to act or to instruct another person to act in the person's name or had a <i>bona fide</i> intention to request a decision,	(i) au cours du délai prévu à l'article 129, il n'a pu ni agir ni mandater quelqu'un pour agir en son nom, ou il avait véritablement l'intention de demander une décision,
(ii) it would be just and equitable to grant the application, and	(ii) il serait juste et équitable de faire droit à la demande,
(iii) the application was made as soon as circumstances permitted.	(iii) la demande a été présentée dès que possible.

[19] Under these provisions, an application for an extension of time, regarding a request for review under section 129 of the Act, can be granted in two ways: initially, by the Minister under section 129.1 of the Act, and then, if this application is dismissed by the Minister, by the Federal Court under section 129.2 of the Act.

[20] The application to the Court is not for judicial review but, rather, it is an appeal where the Court conducts its own review of the relevant conditions required by the Act while considering the

facts, without having to apply standards of review before ruling on the application for an extension, which would give rise to a review of the request on its merits by the CBSA. Consequently, the powers of the Court are not limited to carrying out a judicial review of the Minister's decision that has the effect of extending the time.

[21] In their review of the application for an extension of time, both the Minister and the Court must, before deciding, consider the same statutory conditions concerning the application, which are conjunctive:

By the Federal Court

129.2 (4) The application may not be granted unless

(a) the application under subsection 129.1(1) was made within one year after the expiration of the time provided in section 129; and

(b) the person making the application demonstrates that

(i) within the time provided in section 129 for making a request for a decision of the Minister, the person was unable to act or to instruct another person to act in the person's name or had a *bona fide* intention to request a decision,

(ii) it would be just and equitable to grant the application, and

(iii) the application was made as soon as circumstances permitted.

By the Minister

129.1 (5) The application may not be granted unless

(a) it is made within one year after the expiration of the time provided in section 129; and

(b) the applicant demonstrates that

(i) within the time provided in section 129, the applicant was unable to request a decision or to instruct another person to request a decision on the applicant's behalf or the applicant had a *bona fide* intention to request a decision,

(ii) it would be just and equitable to grant the application, and

(iii) the application was made as soon as circumstances permitted.

[22] Section 129.2 of the Act therefore applies to the application before the Court.

[23] As the parties maintain in their factums, subparagraph 129.2(4)(b)(i) of the Act is disjunctive, meaning that only one of the enacted conditions needs to be met. In addition, it must be noted that the first statutory condition, paragraph 129.2(4)(a) of the Act, which concerns the amount of time for submission, is not disputed. After the Minister dismissed the application for an extension of time, the applicant appealed to the Court within the legislated time, namely, before 90 days had passed since the Minister's dismissal of the application.

[24] Only the conditions in paragraph 129.2(4)(b) of the Act are disputed in this case.

Respondents' Submissions

[25] The respondents argue that the three statutory conditions in paragraph 129.2(4)(b) of the Act have not been met, and, therefore, the application must be dismissed. They believe that each condition in this section must be satisfied without exception and that failure to meet any one of them will result in dismissal of the application.

[26] Therefore, and since the application to the Minister was not, according to the respondents, made "as soon as circumstances permitted", and since the Customs Seizure Receipt stated in black and white what must be done from that moment on to challenge the seizure, the respondents argue that the incorrect advice allegedly given to the applicant by counsel regarding when she should act must not be taken into account and is not a valid excuse: "ignorance of the law cannot serve as an

excuse” (*Melekin v. Canada (Canadian Human Rights Commission)*, [2004] F.C.J. No.1815 (QL).

Briefly stated, they are of the opinion that the applicant could have acted and did not and that, furthermore, she did not show a *bona fide* intention to do so, and it must be remembered that this burden is on the applicant. On this basis, the respondents submit that it is not necessary to review the conditions under subparagraphs 129.2(4)(b)(i) and (ii) of the Act.

[27] Since the applicant did not in the beginning act as soon as circumstances permitted, the respondents argue that it would be unjust and inequitable to grant the applicant the extension now, considering the negligence shown by Mr. Daigle and his counsel and Mr. Daigle’s conduct during the seizure, without taking into account the likelihood of success on its merits.

[28] The respondents argue that [TRANSLATION] “the nature of the law cited in this case, essentially pecuniary, prompts a greater respect for the deadline provided by the Act”, because it does not involve any fundamental rights and does not place a social or professional stigma on anyone. Put another way, if the application for an extension were dismissed, any pecuniary loss could be recovered through an action for damages against the person(s) responsible for the delay.

Applicant's Submissions

[29] The applicant correctly argues in her application to the Federal Court that she has met the three conditions in the Act:

1. She has always shown an intention to make a request under section 129 of the Act, and, therefore, she has met the requirement in subparagraph 129.2(4)(b)(i). In fact, once the goods had been seized, on April 30, 2005, she appointed counsel to act on this matter. But, because a criminal charge had been brought against Mr. Daigle by the CBSA, it was decided to wait for the resolution of this matter, in the belief that proceeding with a request under section 129 of the Act, without waiting for the outcome of the criminal case, would be premature.
2. It would be just and equitable, as required by subparagraph 129.2(4)(b)(ii) of the Act, to grant the application for extension in order to enable the applicant to show cause on the facts and the law without prejudicing the CBSA in any way.
3. She duly appointed counsel to challenge the seizure and request a refund of the money seized as soon as the seizure had occurred, but, on the advice of counsel, they agreed to wait for a ruling on the criminal charges against Mr. Daigle before formally challenging the seizure. Although counsel's advice was wrong, it was nevertheless logical and reasonable to believe that the CBSA would not decide to refund the money paid to retrieve the seized goods until a decision on the criminal charges had been delivered. Moreover, considering the settlement of the succession and the property that Mr. Daigle owned outside the country, the request to the Minister had been made "as soon as the circumstances permitted". Therefore, the condition under subparagraph 129.2(4)(b)(iii) has also been met.

[30] The Court agrees with the applicant, without taking into account the fact that only one of the three criteria listed in subparagraphs 129.1(5)(b)(i) (ii) and (iii) needs to be met and the fact that she applied to the Court, as required, within the time provided by subsection 129.2(1), namely, within 90 days after the dismissal of the application by the Minister.

JUDGMENT

THE COURT ORDERS that the applicant be granted an extension of time to enable her to make her request in accordance with section 129 of the *Customs Act*, that this request be considered validly filed as of this date under section 129 of the Act, and that the CBSA review the request and make a decision as though it had been filed within the legislated deadlines, with costs in the cause.

“M.E. Lagacé”

Deputy Judge

Certified true translation
Gwendolyn May, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-32-07

STYLE OF CAUSE: MONIQUE HÉBERT v. THE MINISTER OF
PUBLIC SAFETY CANADA AND CANADA
BORDER SERVICES AGENCY

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 11, 2007

REASONS FOR JUDGMENT BY: The Honourable Mr. Justice Lagacé

DATED: July 27, 2007

APPEARANCES:

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