Federal Court  Cour fédérale

Date: 20101217

Docket: T-2024-10

Ottawa, Ontario, December 17, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

ADRIANA ZERAFA

Applicant

and

CANADIAN FOOD INSPECTION AGENCY,
BRIAN DOYLE AND DOYLE AIR CARGO INC.

Respondents

ORDER

UPON Motion dated December 2, 2010, on behalf of the Applicant, for an Order extending the interim injunction granted by an Order of Justice Bédard, dated December 1, 2010, and providing certain related relief;

AND UPON considering the Order of Justice Bédard, dated December 3, 2010, extending the interim injunction until the hearing before me, which took place on December 13, 2010;

AND UPON considering the oral Order that I issued at the end of the above-mentioned hearing, extending the interim injunction until I issued my decision in respect of this Motion;

AND UPON considering the Applicant's request, made during the above-mentioned hearing, to convert her request from the seeking of an extension of an interim Order, pursuant to Rule 374 of the *Federal Courts Rules*, SOR/98-106, to the seeking of an interlocutory Order, pursuant to Rule 373 of the Rules, preventing the removal from Canada of the two horses that are the subject of these proceedings (the "Horses") and providing certain related relief;

AND UPON considering that the Applicant has conceded that she never had any intention to import the Horses solely for a temporary stay in Canada, and that she knowingly worked with the Respondents Brian Doyle and Doyle Air Cargo Inc. (collectively, "Doyle") to import the Horses into Canada by way of a "temporary stay" permit, in the hope that they might subsequently be granted a permit allowing the Horses to remain in Canada on a permanent basis, after the Horses had arrived in Canada;

AND UPON considering that the course of action adopted by the Applicant and Doyle was in contravention of the *Health of Animals Act*, R.S.C. 1990, c. 21 (the "Act"), and that the Applicant appears to have relied on advice from Doyle;

AND UPON considering that there is evidence to suggest that Doyle, who has not come to this Court with "clean hands," may have provided similar advice in the past that led to a similar

decision by the Respondent Canadian Food Inspection Agency ("CFIA") in respect of an attempted importation of a horse for a third party;

AND UPON considering that the Respondent CFIA has confirmed that the revised Notice to Remove, dated December 7, 2010, is not a "new" decision under the Act;

AND UPON reading the written submissions and hearing the oral submissions of the parties;

AND UPON considering the conjunctive tri-partite test, set forth in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), that must be satisfied before a stay of removal of the Horses from Canada can be granted;

AND UPON concluding that the above-mentioned test has not been satisfied for the reasons set forth in the Endorsement below;

AND UPON considering that the health of the Horses appears to have deteriorated, possibly quite significantly, in their current location and that their welfare may be significantly adversely impacted, pending their removal from Canada, by (i) the conditions in which they currently are being kept in quarantine; and (ii) the deteriorating relationship between the Applicant and Doyle;

AND UPON considering the undertaking of the Respondent CFIA to (i) not remove the Horses from Canada prior to December 23, 2010, as currently scheduled; (ii) not proceed with the removal of the Horses from Canada until Dr. Hurley or another CFIA veterinarian certifies that the Horses are sufficiently fit to be removed; and (iii) provide at least 7 days notice to the Applicant prior to removing the Horses from Canada;

THIS COURT ORDERS that:

1. The Applicant's request for a further stay of removal of the Horses from Canada is denied.

2. Pending their removal from Canada and subject to the consent of the Applicant, the Horses shall be moved, at the cost of the Applicant, to another quarantine that is mutually acceptable to the Applicant and the CFIA.

3. Pending the transfer of the Horses to another quarantine as set forth in the preceding paragraph immediately above, or, if the Applicant fails to consent to such transfer, pending the removal of the Horses from Canada, Doyle shall:

    i. care for, exercise, and maintain the horses in a safe and reasonable manner; and

    ii. provide reasonable access to the Horses by the Applicant and up to two other persons between the hours of 10:00 a.m. and noon each day to, among other things, enable the Applicant and such other persons to examine, care for and generally attend to the Horses as they see fit.

4. For greater certainty, the Horses shall not be removed from their current location except in accordance with this Order.

5. Doyle shall not take any action to prevent or to otherwise impede the transfer or removal of the Horses in accordance with this Order.

6. The CFIA and Doyle shall immediately copy the Applicant on any correspondence that they may have between each other in connection with the Horses.

7. The CFIA shall provide to the Applicant, at least seven days prior to effecting the removal of the Horses from Canada, the details of any airline flight or other transportation that has been booked in connection with such removal, together with the details of any stabling or maintenance of the Horses that the CFIA may arrange at the destination end, in connection with such removal.

ENDORSEMENT

The decision that is the subject of the underlying Application for Leave and for Judicial Review is the CFIA's Notice To Remove From Canada, dated November 22, 2010 (the "Notice"). That Notice advised that the Horses must be removed from Canada prior to December 3, 2010, because they had been imported in contravention of the Act. However, rather than referring to paragraph 18(1)(a) of the Act, the Notice referred to paragraph 18(1)(b) of the Act.

Paragraph 18(1)(a) of the Act allows a CFIA inspector to order the removal of an imported animal from Canada where the inspector believes on reasonable grounds that the animal has been imported in contravention of the Act. Paragraph 18(1)(b) allows a similar order to be made, but only where the inspector believes on reasonable grounds that the animal "is or could be affected or contaminated by a disease or toxic substance."

It is clear that the CFIA has reasonable grounds to believe that the Horses were imported in contravention of the Act, as contemplated by paragraph 18(1)(a) of the Act. This fact is not contested by the Applicant. However, the Respondent did not invoke paragraph 18(1)(a) and has not suggested that an inadvertent or other error was made when it referred to paragraph 18(1)(b) of the Act in the Notice.

(i) Serious issue to be tried

The test for the first prong of the tri-partite test applicable to this motion is a low one. I simply have to be satisfied that the Applicant has raised at least one issue that is serious, in the sense of being "neither vexatious, nor frivolous" (*RJR-MacDonald*, above, at para. 55).

The Applicant submits that the Respondent has not disclosed any reasonable grounds in support of its position that the Horses "are or could be affected or contaminated by a disease or toxic substance," as contemplated by paragraph 18(1)(b). This issue concerns the adequacy of the CFIA's reasons, and is a question of procedural fairness.

It is unclear whether the Applicant was entitled to any procedural fairness in respect of the CFIA's decision to remove the Horses. The CFIA takes the position that the Applicant was not entitled to any procedural fairness, for two reasons. First, it states that Doyle, not the Applicant, was the importer of record and the party who applied to the CFIA for the import permit for the Horses. Second, it relies on a trilogy of cases in which the applicant's procedural fairness rights under the Act were found to be extremely limited (*Kohl v. Canada (Department of Agriculture)*, [1995] F.C.J. No. 1076, at paras. 18 - 20 (C.A.); *Bédard v. Canada (Minister of Agriculture)*, [1997] F.C.J. No. 163, at paras. 14 – 15 (T.D.); *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] F.C.J. No. 314, at para. 53 (T.D., rev'd on other grounds, [1994] 2 F.C. 625 (C.A.)).

It is not immediately apparent to me that the CFIA was relieved from any duty that it may have had to identify the reasonable grounds contemplated by paragraph 18(1)(b), simply because the Applicant was not the importer of record. In my view, the Applicant has raised a serious issue in this regard.

As to the cases relied upon by the CFIA, they involved paragraph 48(1)(a) of the Act, which allows the Minister to dispose of any animal that is merely suspected of being affected or contaminated by a disease or toxic substance. This is very different from 18(1)(b), which requires an inspector or officer of the CFIA to believe on reasonable grounds that an animal is or could be affected or contaminated by a disease or toxic substance.

In *Archer (c.o.b. Fairburn Farm) v. Canada (Canadian Food Inspection Agency*), [2001] F.C.J. No. 46, at para. 39 (T.D.), Justice Pelletier, as he then was, determined that the applicants in that case "were entitled to be given a copy of the risk assessments upon which the Minister's delegate relied, and to have an opportunity to respond to the risk assessment before the decision was made" under paragraph 18(1)(b). However, that finding may be distinguishable on the basis of the particular facts in the case. Among other things, the applicants in that case paid for a risk assessment performed by the CFIA which found no unacceptable risk associated with importing the applicants' herd of water buffalo into Canada. After receiving that assessment, the applicants mortgaged their farm to pay for the animals and for the costs associated with bringing them to Canada. Unfortunately, within weeks of the water buffalo arriving in Canada, the CFIA learned that a cow in Denmark had died of Bovine Spongiform Encephalopathy. This led it to conduct a new risk assessment, which turned out to be adverse for the applicants. In assessing the nature of the procedural fairness rights to which the applicants were entitled, Justice Pelletier noted, among other

things, that the consequences of the decision would be "catastrophic" for the applicants. The same would not be true for the Applicant in the case at bar.

Nevertheless, I am satisfied that the Applicant has raised a serious issue as to whether she was entitled to at least some procedural fairness in respect of the decision to remove the Horses from Canada, and if so, whether those procedural fairness rights were breached. If she was entitled to adequate reasons for the CFIA's decision, those reasons should have (i) focused on the factors that must be considered in the decision-making process; (ii) enabled the Applicant to exercise her right to judicial review; and (iii) enabled me to conduct a meaningful review of the CFIA's decision (*Canada (Minister of Citizenship and Immigration) v. Ragupathy*, 2006 FCA 151, at para. 14). Stated differently, the reasons should have adequately explained "what" was decided and "why" the decision was made (*Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, at para. 61; *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670, at para. 40). At the very least, the evidence adduced by the parties raises a serious issue as to (i) whether the CFIA ever explained to Doyle or the Applicant, prior to filing various affidavits in this proceeding, "why" it made its decision pursuant to paragraph 18(1)(b), and (ii) whether those reasons enable me to conduct a meaningful review of the CFIA's decision. There is no doubt that the Applicant was repeatedly informed that the Horses had been imported in contravention of the Act, as contemplated by paragraph 18(1)(a). However, as noted above, the CFIA did not invoke that provision.

(ii) Irreparable Harm

Irreparable harm "refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald*, above, at para. 64).

The most readily identifiable irreparable harm that will be suffered if the decision to remove the Horses is permitted to stand is the suffering that the Horses will experience. Indeed, there is evidence to suggest that they are already suffering. However, relying on Justice Zinn's decision in *Zoocheck Canada Inc. v. Canada (Parks Canada Agency)*, 2008 FC 540, at para. 49, the CFIA states that the Applicant must demonstrate harm to her, rather than to the Horses. The Applicant has not referred to any authority in which *Zoocheck* has been distinguished or in which a contrary position has been adopted. Accordingly, the principal of judicial comity obliges me to follow Justice Zinn's ruling on this issue.

The Applicant is a professional equestrian rider and certified equestrian instructor, who has been competing at a national level of dressage in France. In the oral hearing earlier this week, she stated that she would suffer two types of irreparable harm if the Horses are removed from Canada. First, she stated that she would suffer emotionally, as she has developed an emotional bond with the Horses. The CFIA replied that it would be open to the Applicant to seek to re-import the Horses, pursuant to the appropriate protocol for permanent entry. The CFIA added that the Applicant only purchased the Horses earlier this year. Second, the Applicant stated that she and the Horses are part of an inseparable athletic team, and that if the Horses were removed from Canada she would suffer as a member of that team. She also stated that she moved to Canada with the Horses as part of her career plan.

The CFIA submitted that the interim injunction that has prevented it from removing the Horses since December 1, 2010 is preventing it from carrying out its mandate to prevent irreparable harm to the public interest. It asserts that if the stay sought by the Applicant is granted, the public interest will suffer further irreparable harm. However, this harm "is more appropriately dealt with in the third part of the analysis," which is addressed below (*RJR-MacDonald*, above, at para. 62).

Keeping in mind that the focus in assessing this prong of the tri-partite test for a stay of removal must be upon the nature, rather than upon the magnitude, of the irreparable harm, I am satisfied that the Applicant has demonstrated that she would face such harm if the Horses are removed from Canada.

(iii) Balance of Convenience

The focus of this prong of the test for a stay of removal is upon "which of the two parties will suffer the greater harm from the granting or refusal of … [the] injunction" (*RJR-MacDonald*, above, at para. 67). In addition, other factors may be taken into consideration in determining where the balance lies (*RJR-MacDonald*, above, at para. 68).

When a public authority alleges that the public interest is at risk of harm if that authority is prevented from exercising its statutory powers, "the courts should in most cases assume that irreparable harm to the public interest would result" once it has been demonstrated that "the authority is charged with the duty of promoting or protecting the public interest" and that the action sought to be restrained was undertaken pursuant to that responsibility (*RJR-MacDonald*, above, at para. 76). In this regard, "[a] court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought" (*RJR-MacDonald*, above, at para. 77) (emphasis added).

The Applicant submitted that the balance of convenience lies with her because she will suffer irreparable harm if the Horses are removed, whereas there will be no risk to the Canadian public if the *status quo* is maintained. In this latter regard, she notes that (i) the Horses are now alone in a barn at Doyle's quarantine facilities and cannot come into contact with other animals; (ii) she has followed all veterinary procedures and protocols required by the CFIA to import the Horses on a permanent basis to Canada; (iii) she has provided to the CFIA appropriate documentation confirming that the Horses tested negatively in France for Contagious Equine Metritis ("CEM"), following all Canadian protocols; (iv) the Horses have never been breeding stallions and so the risk of them having contracted CEM is slight; (v) she has offered to have the Horses further tested pursuant to all Canadian protocols; and (vi) she has offered to geld (castrate) the younger Horse, thereby eliminating all threat of CEM without the need for further testing, in respect of that Horse.

As noted above, the CFIA's position is that granting the stay sought by the Applicant would cause irreparable harm to the public interest. In short, it claims that if the Horses have CEM, the disease may spread to other horses in Canada, and that the continued presence of the Horses in Canada risks compromising Canada's international status as a CEM free country. In turn, the CFIA claims that this would have a significant adverse impact upon the trade of horses, particularly between Canada and the U.S., and on the persons who benefit from such trade.

In support of its position, the CFIA submitted an affidavit from Dr. John Devendish, a microbiologist employed by the CFIA, who has a PhD in Veterinary Microbiology and Immunology. Among other things, Dr. Devendish stated in his affidavit that (i) the taking of swabs from horses to obtain samples for culture of CEM must be done by veterinary personnel who are CFIA employed or accredited; (ii) since 2006 there have been no cases of CEM detected in imported horses in quarantine in Canada; (iii) the economic impact on Canada if it were discovered to be a non-CEM free country would be severe; (iv) the United States has taken a strong position that it is imperative to keep CEM out of the country; and (v) if Canada were to be considered not CEM free, it would detrimentally affect our ability to export horses to the U.S.

In addition, the CFIA submitted an affidavit by Dr. Samira Belaissaoui, Veterinary Import Specialist at the CFIA. In her affidavit, Dr. Belaissaoui stated, among other things, that (i) CEM is a highly contagious venereal disease that has been reported in various horse populations around the world, including continental Europe; (ii) CEM is spread primarily through the venereal route from stallion to mare or mare to stallion, but can also be spread by veterinary instruments, equipment, or human hands that have come in contact with the bacteria; (iii) countries suspected or known to be affected by the disease include France; (iv) there are documented cases of stallions testing negative for CEM during pre-export testing in the country of origin, yet testing positive in the importing country; (v) for this reason, a negative culture result taken in the country of origin is not adequate assurance that a stallion is in fact free from CEM; (vi) if CEM were to become established in Canada, the adverse effects of the disease on equine reproductive efficiency would create significant losses for the horse industry; (vii) the CEM testing samples that were taken in France do not reflect the anatomical sites that the CFIA would have required be tested if the Applicant had applied to bring the Horses to Canada on a permanent basis; (viii) specifically, the fossa glandis of the Horses has not been sampled; and (ix) the Export Certificate issued in France did not demonstrate that the test cultures were incubated for the requisite 14 days.

With respect to the latter point, the report from the laboratory in France where the testing of the Horses was conducted appears to indicate that the test cultures were in fact incubated for the requisite 14 days. Regarding the testing of the fossa glandis, the Applicant provided correspondence from the laboratory that the fossa urétrale, which was tested in France, is the same part of the anatomy as the fossa glandis. The CFIA maintains that this is not the case.

Based on all of the foregoing, I am satisfied that the Applicant has not demonstrated that the balance of convenience lies in her favour. For the reasons discussed above, she will suffer some irreparable harm if the Horses are removed from Canada. However, that harm will be limited if she follows the protocol applicable to the importation of horses on a permanent basis.

The reason why the Applicant sought to avoid that protocol is that this would have required the Horses to “cover” two mares. The Applicant was “concerned that to require the Horses to cover mares would result in adverse consequences physically and behaviourally that would undermine their suitability as performance horses, especially the 18 year old Carl Der Dritte.”

The Applicant has acknowledged that if the Horses remain in Canada to follow the protocol applicable to the permanent importation of horses into Canada, it may take months before the Horses are able to “cover” a mare.

In my view, the potential inconvenience and harm that the Applicant would suffer if the Horses were removed from Canada and she then followed the applicable protocol to reimport the Horses on a permanent basis would be less than the potential harm to the Canadian public if the Horses were to remain in Canada. I acknowledge that the probability of the Horses having CEM and spreading CEM to other horses in Canada appears to be small, particularly given that they currently are alone in a barn and do not have access to other horses. However, as noted by Dr. Belaissaoui, separating horses with CEM from other horses is not sufficient to stop the spread of CEM. Moreover, there is credible evidence that the consequences of CEM spreading in Canada, and of international perception of Canada as a CEM free country being compromised, would be severe. Even if one considers, on the Applicant's side of the ledger, the inconvenience or suffering that that the Horses will experience if they are removed from Canada, the balance of convenience still favours the CFIA.

My conclusion on this prong of the tri-partite test is reinforced by the circumstances that gave rise to this motion. As acknowledged in the Applicant's affidavit, dated December 9, 2010, she was very aware, well before the Horses were imported to Canada, of the CFIA's concern with respect to CEM. However, as she apparently explained to Dr. Hurley, the veterinarian who signed the Notice, she proceeded to import the Horses without following the protocol applicable to the permanent importation of horses, in the hope that she would be able to obtain a derogation from that protocol. I acknowledge that she may have relied on the advice of Doyle in pursuing her "two-stage" strategy. Nevertheless, she knew very well that she was not following the applicable protocol.

It follows from the foregoing that the Applicant has not met the test for obtaining a stay of the removal of the Horses from Canada.

"Paul S. Crampton"

Judge