Federal Court Cour fédérale

Date: 20180504

Docket: T-15-17

Citation: 2018 FC 477

Ottawa, Ontario, May 4, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

WEN-TONG CHEN
CHIN YUN HUANG CHEN

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Wen-Tong Chen and his wife, Chin Yun Huang Chen, failed to declare two rings to the Canada Border Services Agency [CBSA] at the Montréal–Pierre Elliott Trudeau International Airport [Montréal Airport] when they arrived aboard a flight from the United States [US]. The two rings were seized as forfeit and subsequently released upon payment of 30 percent

of their assessed value. On appeal to the Respondent, the Minister of Public Safety and Emergency Preparedness [Minister], the seizure of the first ring was cancelled by his delegate. However, forfeiture of the amount of $692.62 in exchange for the return of the second ring was upheld.

[2] The Applicants did not appeal the delegate's finding that a contravention had occurred, as they were entitled to, pursuant to section 135 of the *Customs Act*, RSC 1985, c 1 (2nd Supp). They instead applied for judicial review of the delegate's decision maintaining the terms of release for the seized item [Decision]. The Applicants seek an order quashing the Decision and referring the matter back for reconsideration with directions that the forfeiture amount be returned and that the notes in the Applicants' records subjecting them to more frequent referrals for secondary inspection upon each re-entry to Canada be expunged.

[3] For the reasons that follow, I find that the Decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law. The application is accordingly dismissed.

II. Facts

[4] The following facts are gleaned from the tribunal record.

[5] The Applicants were born in Taiwan and are now Canadian citizens residing in Montréal. They often travel abroad for both professional and personal reasons. On March 26, 2016, the Applicants returned home from a trip to the United States via the Montréal Airport. At customs,

they 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 Applicants' joint customs declaration card.

[6] The CBSA officer asked Mrs. Chen when and where the rings had been purchased and how much she had paid for them. Mrs. Chen initially claimed that she had purchased the rings in New York City "a few years ago" for more than $1,000. When pressed, Mrs. Chen stated that she had paid more than $1,000 each. She then indicated that she had bought the rings "five years ago" but couldn't remember the price. Mrs. Chen admitted that she had not declared or paid any taxes for the rings when she returned to Canada and that she had no receipts for them. Mr. Chen interjected to confirm that his wife had bought the rings, but that he was not aware of the price. After further questioning about the value of the rings, Mr. Chen ultimately volunteered that he was the one who bought the rings and that he had never declared them.

[7] The CBSA secondary-screening officer's interrogation of the Chens is set out in more detail in a narrative report. I consider the report reliable since it was made contemporaneously or immediately thereafter the interaction between the Applicants and the CBSA officer, therefore less prone to fabrication or forgetfulness. Pertinent portions of the report are reproduced below:

> I asked her [Mrs. Chen] when did she buy the rings and she answered a few years ago. I asked her where did she buy them and she answered in New York City. I asked her how much were they and she answered that she thinks it's more than 1000$. I asked her if it's more than 1000$ for both! And she answered it was more than 1000$ each. She said that she bought them five years ago and can't remember the price. I asked her if she declared it when she returned with it and she answered no. She appeared hesitant about her answer so I asked her if she remembered paying taxes for the rings when returning from a trip and she answered no. She then

> said that she never declared them. I asked her if she has the receipts and she answered no. Mr. Chen said that his wife bought the ring and us [*sic*] not aware of the price. She then said that the company or brand name is Pommelato [*sic*].
>
> I went to the Pommelato website specifically for the United States and found the style of ring she had. I showed the screen to Mrs. Huang Chen and Mr. Chen and asked them to confirm if this is the same ring. The page that I showed them had a similar ring and the value was 2350.$ USD. Mrs. Huang Chen said that they have different sizes and she had the smaller version. Mrs. Huang Chen was unable to confirm the price when I showed it to her. Mr. Chen then jumps in and said that he was the one who bought it for her. He said to me to charge any amount I wanted for the ring. I took Mrs. Huang Chens [*sic*] word that she had the smaller version of the same ring and indeed there was a smaller version which was 1750 USD each. I showed then [*sic*] the page with the smaller versions and on it had the same color stones Mrs. Huang Chen was wearing. We all agreed on the price of 1750 USD$ for each ring.
>
> […]
>
> I ask Mr. Chen if he declared the rings he bought and he answered no. I asked him why and he was not answering. I asked when did he buy them and he also answered five years ago, I asked him if he bought both at the same time and he answered no. He said that one of them was for Christmas and the other was for her birthday. I was unable to get anything more precise on the dates of purchase.
>
> At 19:42 I advise Mr. Chen and Mrs. Huang Chen about the seizure.

[8] After consulting with her supervisor, the CBSA officer concluded that a seizure was warranted and the Applicants were so informed. Mr. Chen asked whether they could simply pay the duties and taxes and leave given that they had been upfront. The officer responded that she would do a "level one seizure" and that they could always appeal the decision. The lowest level, Level 1, is recommended for violations of lesser culpability or offences of omission, rather than commission. The officer also decided to list Mrs. Chen as an associate because she was wearing the rings and had made statements about them.

[9] After reviewing the seizure notice, Mr. Chen asked the officer to remove his name and simply allow him to pay regular duties and taxes. The officer declined to do so given that Mr. Chen had admitted to buying the rings and not declaring them. Mr. Chen then asked whether this meant that both he and his wife would be searched in the future. The officer answered affirmatively “for a few years”. Mr. Chen then asked whether anything could be done because he travels often for business and does not want to be stopped all the time. The officer replied that he could appeal the decision. The two rings were returned to the Applicants pursuant to subsection 117(1) and section 121 of the *Customs Act* upon receipt of an amount of $1,393.45 as terms of release of the two rings.

[10] A CBSA Seizure Synopsis dated March 26, 2016 reflects three observations under the heading “intelligence information” concerning the verbal responses given by the Applicants:

(1) “Contradicts Previous Statements”;

(2) “Evades Answering Questions”; and

(3) “Spontaneous Admission”.

[11] By letter dated June 9, 2016, Mr. Chen made a request to the CBSA’s Recourse Directorate under section 129 of the *Customs Act* for ministerial review of the seizure of the two rings. Mr. Chen explains in his letter that the first ring was acquired by Mrs. Chen during a visit to the US on November 23, 2009 for $1,915 USD. He also clarifies that the second ring was in fact purchased in the US on April 26, 2011 by his daughter, a permanent resident of the US, for $2,100 USD. According to Mr. Chen, while their daughter was visiting Montréal in June 2011, he offered his wife the ring as a birthday gift and reimbursed his daughter for the cost.

[12] Mr. Chen writes that the Applicants were not aware of any CBSA requirement for them to pay duties on the second ring at the time of the gift or to report the ring upon each of their re-entries into Canada. Mr. Chen submits that he and his wife have always attempted to comply with the requirements of the law, but that their level of sophistication in these matters is limited. He claims that this difficulty is compounded by the fact that, as English is not their native language, they do not appreciate all its subtleties. Mr. Chen concludes his letter by requesting that the decision to seize and forfeit the rings be reviewed and reversed and that, at a minimum, the notes in the Applicants' respective files that subject them to questioning and searches each time they enter Canada be removed.

[13] On July 11, 2016, Danielle Lacroix, a senior appeals officer of the CBSA Recourse Directorate [Officer Lacroix], served upon Mr. Chen a Notice of Reasons for Action proposing to uphold the secondary-screening officer's decision. In response to the Applicants' request that information regarding the contravention be removed from their file, Officer Lacroix explains that customs officials may use information concerning previous border violations to determine the appropriate level of examination for travellers entering Canada. Thus, travellers with a recent customs infraction may be subject to more frequent secondary examinations. However, over time, and if no further violations occur, the rate of secondary examination decreases and after six years, the enforcement record is deleted from Agency records. Officer Lacroix notes that if it is determined on appeal that no contravention occurred, the Applicants' names would be removed.

[14] On August 9, 2016, Mr. Chen, through counsel, made further submissions to the Recourse Directorate, largely repeating the arguments contained in Mr. Chen's letter dated June

9, 2016. Counsel submits that there was no obligation to pay any duties or taxes at the time of the importation of the second ring since it was the property of a US resident who had no intention, at the time of entry, of giving it to a Canadian resident. He further questions how the Applicants could have reasonably believed that they had any obligation to declare the ring or pay the duties and taxes upon it being gifted. Counsel also submits that the Applicants' extensive travel history and the fact that they know how to properly declare should have led the CBSA officer to conclude that any misstatement was a good faith error that did not warrant a seizure. He submits that language was likely a barrier in the stressful circumstances and that the CBSA agents did not give his clients a reasonable opportunity to be heard.

[15] In her case synopsis and recommendation dated November 3, 3016, Officer Lacroix summarizes the Applicant's submissions and recommends that the portion of the seizure relating to the first ring be cancelled and that the seizure action for the second ring be maintained. She notes that based on the information of file, including the CBSA officer's narrative report, the Applicants did not appear to have any language barrier since they had no difficulty understanding the questions asked during the examination and did not request the service of an interpreter.

[16] On December 5, 2016, Jonathan Ledoux-Cloutier, manager of the Appeals Division of the CBSA's Recourse Directorate and the Minister's delegate [Delegate Ledoux-Cloutier], issued decisions in respect of both seized items. Regarding the first ring, Delegate Ledoux-Cloutier determined that there was no contravention since it had been purchased in 2009, outside the limitation period provided in section 113 of the *Customs Act*, and that the forfeiture amount

in respect of the ring should accordingly be remitted to Mr. Chen. Regarding the second ring, Delegate Ledoux-Cloutier concluded that there had been a contravention of section 12 of *Customs Act* [Contravention Finding] and upheld the seizure of the ring and the forfeiture of $692.62 as terms of release for the seized item [Enforcement Action].

[17] Mr. Chen was notified of his right to appeal the Contravention Finding rendered pursuant to section 131 of the *Customs Act* by filing an action in the Federal Court within 90 days in accordance with section 135 and to challenge the Enforcement Action rendered pursuant to section 133 by way of an application for judicial review made under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

III. Issues to Determined

[18] The Respondent questioned Mrs. Chen's standing to bring the application as the Enforcement Action was taken solely against Mr. Chen, but did not pursue the objection at the hearing. As the Applicants did not raise any issues with respect to procedural fairness, the only issue to be determined in this application for judicial review is whether the Enforcement Action establishing the terms of the release of the ring is unreasonable.

IV. Standard of Review

[19] Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57). The parties submit, and I agree, that decisions under

section 133 of the *Customs Act* are subject to review on a standard of reasonableness for their outcome (see *United Parcel Service Canada Ltd v Canada (MPSEP)*, 2011 FC 204 at paras 40-43; *Dhillon v Canada*, 2016 FC 456 at paras 35-26 [*Dhillon*]).

V. Analysis

[20] The Applicants submit that the Enforcement Action must be set aside on three grounds. First, the Decision is unreasoned. Second, Delegate Ledoux-Cloutier wrongfully equated contravention and seizure, and treated the Enforcement Action and the flagging for secondary examination as automatic. Third, Delegate Ledoux-Cloutier failed to consider all the circumstances and, in particular, mitigating factors identified by the Applicants. I will deal with the three grounds together as they are interrelated.

[21] The Applicants submit that the Decision is not justified or transparent as neither Delegate Ledoux-Cloutier nor Officer Lacroix provided particulars of any act or omission by the Applicants that would have involved a contravention of the *Customs Act* for which a sanction could be imposed by way of punishment, including the monetary penalty, and the notes on file. According to the Applicants, the omission prevents them from knowing what facts and reasoning they must advance or challenge. This argument is without merit.

[22] Delegate Ledoux-Cloutier concluded that there was a contravention of section 12 of the *Customs Act*. The Applicants did not challenge this separate and distinct decision by way of action and cannot, by way of judicial review of the Enforcement Action, collaterally attack the Contravention Finding.

[23] Where there is a failure to declare, a lack of intention on the part of the importer to evade duty and taxes is irrelevant to determining whether a contravention of subsection 12(1) has occurred (see *Zeid v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 539 at paras 36, 55). The obligation to report is not dependent on any questioning or prompting by a CBSA officer as to whether any goods are being brought into Canada (see *Saad v Canada (Border Services Agency)*, 2016 FC 1382 at para 23). Both Officer Lacroix and Delegate Ledoux-Cloutier state in their correspondence to Mr. Chen that he failed to declare the ring in question in contravention of the *Customs Act*. Any question concerning the merits of the determination made by Delegate Ledoux-Cloutier under section 131 is outside the scope of this judicial review.

[24] It is common ground between the parties that CBSA maintains and monitors enforcement information. When a traveller enters the country, identity documents are scanned and the traveller's name is queried against CBSA's records. Where a traveller has a record of contravention, there is a possibility that a direction will be generated to the primary CBSA officer or by the Primary Inspection Kiosk to refer the traveller for a secondary examination.

[25] In *Dhillon*, Mr. Justice Patrick Gleeson held that referral to secondary examination does not constitute an additional sanction, penalty, or legal consequence. Noting that CBSA's risk management policy does not create a right or expectation that any traveller will avoid a full examination upon entry into Canada, Justice Gleeson concluded as follows at paragraph 30:

> A process that results in an individual's mandatory referral to secondary examination upon entry into Canada, based on a prior contravention by that individual of program legislation which

> CBSA administers, does not trigger procedural fairness obligations on the part of CBSA.

[26] It follows that the Applicants are precluded from seeking relief in this proceeding from what they describe as "fichage" or being flagged for enhanced scrutiny, which is an administrative and automatic consequence of having contravened section 12 of the *Customs Act*.

[27] The Applicants' main concern throughout has been being the subject of "fichage". No substantive argument has been advanced that the level established for the purposes of determining the appropriate terms of release and forfeiture amount was unreasonable, other than that Delegate Ledoux-Cloutier fettered his discretion and completely disregarded CBSA's own policy.

[28] The *CBSA Enforcement Manual* dated June 9, 2016 [Manual] explicitly acknowledges and allows for flexibility in cases of negligence, carelessness, and lack of knowledge on the part of the importer. It also recognizes that a benefit of the doubt should be granted when it appears evident that the traveller was not aware of CBSA requirements. The Applicants have failed to establish mitigating circumstances, to the extent they existed, 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 them.

[29] The Applicants were at best evasive and at worst simply untruthful when questioned by the CBSA officer at secondary inspection. Based on the Applicants' own admissions at the time, they failed to declare a ring for which taxes had not been paid. Although the Applicants

eventually provided a different version of the importation, which was accepted on appeal, it remains that the Applicants' earlier evasive and contradictory answers could not be ignored.

[30] The Applicants submit that Delegate Ledoux-Cloutier's disbelief, on an implausible basis, of the Chens' limited command of the English language was unreasonable. At paragraph 19 of his affidavit filed in support of the application, Mr. Chen states that he encountered communication difficulties at the time of seizure of the ring on March 26, 2016 and that he was unable to understand everything that was being explained to him by the CBSA office. A review of the detailed narrative report prepared by the CBSA secondary-screening officer would suggest otherwise. The Applicants appear to have no difficulty answering the questions posed by the officer. Nor is there any mention of language issues or a request for interpretation. More importantly, Mr. Chen does not identify any errors, misstatements, or omissions in the report. In the circumstances, Delegate Ledoux-Cloutier's conclusion that there was no language issue appears eminently reasonable.

[31] The Applicants were given the benefit of the doubt by the secondary-screening officer, Officer Lacroix, and Delegate Ledoux-Cloutier, who were prepared to accept as true the version of facts as submitted by the Applicants concerning the purchase, size and importation of the ring in question. Moreover, the terms of release were set below the minimum amount recommended for a Level 1 seizure by the Manual for an individual who had contravened the *Customs Act* by failing to report a jewellery item.

[32] The Manual states that different levels are established for the purposes of determining the appropriate terms of release applicable to a range of violations based on the culpability of the individual. The lowest level, Level 1, is recommended for “violations of lesser culpability” or “offences of omission, rather than commission”. In cases of non-report, Level 1 is generally applied when goods are not reported, but are not concealed and a full disclosure of the true facts concerning the goods is made at the time of discovery.

[33] The Applicants were assessed the lowest level despite their contradictory statements. Mr. Chen’s submissions subsequently revealed that the value of the item was higher than the value determined by the secondary-screening officer at the time of seizure, and yet the terms of release were not amended to the prejudice of Mr. Chen.

[34] Taking into account the record as a whole, I am not satisfied that Delegate Ledoux-Cloutier failed to pay due regard to the CBSA’s policy or fettered his discretion in any way. While the Applicants may disagree with the reasons and Decision, I do not find that the conclusion of Delegate Ledoux-Cloutier concerning the imposition of a forfeiture amount was unreasonable or falls outside of the realm of possible, acceptable outcomes defensible in view of the facts and the law.

[35] Finally, I wish to address an allegation in the Notice of Application that Delegate Ledoux-Cloutier failed to consider that there was no discernible reason to single out the Applicants for inspection and that the CBSA agent’s decision to do so may have been motivated by their ethnic origin. There is simply no evidentiary basis supporting the insinuation that any

CBSA officers conducted themselves improperly or that they acted other than impartially and professionally.

VI. Conclusion

[36] Overall, the decision-making process was both thorough and clear. The Decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law. Moreover, the Decision is consistent with the purposes of the legislation and policies applicable to customs enforcement. For the above reasons, the application is dismissed, with costs.

[37] The parties agreed at the conclusion of the hearing that costs should be awarded to the successful party and be fixed in the amount of $3,000.00, inclusive of disbursements and taxes.

JUDGMENT IN T-15-17

THIS COURT'S JUDGMENT is that:

1. The Applicants' motion for leave to amend the Notice of Application is dismissed.
2. The application for judicial review is dismissed.
3. Costs of the application, hereby fixed in the amount of $3000.00, inclusive of disbursements and taxes, shall be paid by the Applicants to the Respondent.

"Roger R. Lafrenière"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-15-17
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