

Federal Court



Cour fédérale

Date: 20210316

Docket: T-530-20

Citation: 2021 FC 223

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 16, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

JEFFSON JUNIOR CELESTIN

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Jeffson Junior Célestin is seeking judicial review of the decision rendered on February 24, 2020, by the Senior Program Advisor of the Recourse Directorate, “for the Minister of Public Safety and Emergency Preparedness” [the Minister’s Delegate]. The Minister’s Delegate then

dismissed Mr. Célestin's request for a decision of the Minister regarding the enforcement action and seizure under the *Customs Act* (RSC 1985, c 1 (2nd Supp)).

[2] For the reasons set out below, the Court must conclude that it does not have jurisdiction to hear Mr. Célestin's application for judicial review.

II. Background

[3] On August 7, 2019, Mr. Célestin, a Canadian citizen, entered Canada by car through the Lansdowne land border crossing in Ontario, accompanied by a friend, an American citizen.

[4] Mr. Célestin told a Canada Border Services Agency [CBSA] officer that he had nothing to declare, other than two bottles of wine, and was referred to the secondary area for verification of his declaration. An officer found prescription drugs from the U.S. in the car:

15 Cyclobenzaprine tablets and 21 Amitriptyline tablets. The name on the package did not match the names of the occupants of the car. Mr. Célestin then explained that the medication belonged to his girlfriend, who sometimes used the car and had forgotten it. Mr. Célestin says that he did not know that the prescription drugs were in his car. CBSA officers seized the goods, in this case the prescription drugs, under section 110 of the *Customs Act*.

[5] CBSA officers did not cite any legislation in their reports, and one report refers to prescription drugs found in the car. The seizure receipt given to Mr. Célestin confirms that the goods were seized because they were imported illegally since they were not declared under section 12 of the *Customs Act*.

[6] On October 7, 2019, Mr. Célestin requested a decision of the Minister (appeal) regarding the CBSA officers' decision at the land border crossing. In his letter to the authorities, Mr. Célestin states (1) that he did not like the treatment he received at the border because the officers treated him like an animal, kept him waiting for almost eight hours, and refused to allow him to use the washroom several times; (2) that he wrote the letter because the CBSA officer said that he had recorded in his file that he was returning to Canada with undeclared drugs; (3) that his girlfriend also uses the car and that the drugs, prescribed by a doctor, belong to her; (4) that he was unaware that the drugs were in the car; (5) that he has never had any problems with the authorities, although the entry will remain on his file for five years; and (6) that an affidavit is attached to his letter. Mr. Célestin then attached to his letter an insurance document listing his girlfriend as a driver of his car, an affidavit from his girlfriend essentially confirming that the drugs belonged to her and that Mr. Célestin was unaware that they were in the car, a copy of his girlfriend's driver's licence, and a copy of the seizure receipt.

[7] On November 21, 2019, the Senior Appeals Officer, on behalf of the President of the CBSA, sent Mr. Célestin the Notice of Reasons for Action required by section 130 of the *Customs Act*. The Senior Officer then confirmed that he had accepted Mr. Célestin's letter requesting a decision of the Minister (appeal) and summarized the evidence on file and the legislative provisions at issue. The Senior Officer attached to the Notice a copy of the evidence on file, including a copy of the report and the border officer's notes relating to the August 9, 2019 enforcement action. The Senior Officer confirmed that the goods were seized because they had been imported illegally since they were not declared under section 12 of the *Customs Act*.

[8] The Senior Officer then erroneously cited the *Controlled Drugs and Substances Act*, SC 1996, c 19 rather than the *Food and Drugs Act*, RSC 1985, c F-27, which lists the two aforementioned drugs, the importation of which is controlled under the *Food and Drug Regulations*, CRC, c 870.

[9] The Senior Officer offered Mr. Célestin the opportunity to provide any additional information or documentation within 30 days. Mr. Célestin did not respond to this invitation and did not provide any additional documentation.

[10] The Senior Officer also pointed out to Mr. Célestin that the Appeals Division of the Recourse Directorate is only responsible for reviewing the enforcement action. As such, and since Mr. Célestin's appeal appeared to include a complaint related to the service he had received at the border, the Senior Officer confirmed that he had forwarded a copy of the appeal to the appropriate area within the CBSA for review.

[11] On February 24, 2020, the Minister's Delegate decided Mr. Célestin's request for a Minister's decision. The Minister's Delegate reviewed the facts and set out the relevant legislative provisions. In particular, she referred to section 12 of the *Customs Act*, which provides that all goods imported into Canada must be reported in accordance with the regulations, and section 110 of the *Customs Act*, which provides that an officer may seize goods if the officer believes on reasonable grounds that there has been a contravention of the *Customs Act* or the regulations.

[12] Ultimately, the Minister's Delegate then decided (1) that under section 131 of the *Customs Act*, the Act or its regulations had been contravened in respect of the goods that were seized, namely 15 Cyclobenzaprine tablets and 21 Amitriptyline tablets; and (2) that under section 133 of the *Customs Act*, the seized goods are forfeited.

[13] In closing her decision, the Minister's Delegate explained to Mr. Célestin the two possible recourses before the Federal Court, either (1) an action if he challenged the decision rendered under section 131 of the *Customs Act* (contravention under section 12 of the *Customs Act*); or (2) an application for judicial review if he challenged the decision rendered under section 133 of the *Customs Act* (seizure of the drugs under section 110 of the *Customs Act*).

[14] The Minister's Delegate also erroneously cited the *Controlled Drugs and Substances Act* rather than the *Food and Drugs Act*, which lists the two drugs mentioned above as being controlled for importation under the *Food and Drug Regulations*. The applicants belatedly argued that this error rendered the Minister's Delegate's decision and the entire prior process fatally flawed. However, the Court was not convinced that this nomenclature error is fatal, and finds that it is not at issue that the applicant contravened section 12 of the *Customs Act*.

[15] On May 7, 2020, Mr. Célestin filed his application for judicial review.

[16] Before the Court, Mr. Célestin filed, among other things, an affidavit and additional documents, documents that are not in the Certified Tribunal Record [CTR] and some of which are dated after the date of the Minister's Delegate's decision. Mr. Célestin has not convinced the

Court that these documents are missing from the CTR or that the conditions have been met to allow the filing of documents that were not before the decision maker. The Court will therefore not consider them.

III. Court's jurisdiction

[17] It is appropriate to consider first, as raised by the respondent, whether or not the Court has jurisdiction to hear Mr. Célestin's application for judicial review.

[18] Indeed, it is open to the applicants to apply for judicial review of the decision rendered under section 133 of the *Customs Act*, that is, the decision relating to the seizure of drugs under section 110 of the *Customs Act*.

[19] However, it is not open to the applicant to apply for judicial review of the decision made under section 131 of the *Customs Act* confirming the contravention under section 12 of the *Customs Act* for failing to declare the drugs subsequently found in his car. Subsection 131(3) of the *Customs Act* provides that decisions made under section 131 may be appealed only as provided in subsection 135(1). That subsection provides that “[a] person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant” [emphasis added].

[20] Recently, the Federal Court of Appeal confirmed in *Chen v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 170 at para 9, and Justice Martineau noted in *Leslie v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 119 [*Leslie*] as follows:

[16] Although the findings made by the delegate with respect to the contravention committed by the applicant and the penalty imposed on the applicant are closely linked, legally speaking, they must be treated as separate decisions. Moreover, both follow a very different procedural path in case of contestation.

[17] Subsections 131(1) and (3), which must read with section 135 of the Customs Act, govern the contravention decision:

131(1) After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide

(a) in the case of goods or a conveyance seized or with respect to which a notice was served under section 124 on the ground that this Act or the regulations were contravened in respect of the goods or the conveyance, whether the Act or the regulations were so contravened;

...

(3) The Minister's decision under subsection (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 subsection 135(1).

131(1) Après l'expiration des trente jours visés au paragraphe 130(2), le ministre étudie, dans les meilleurs délais possibles en l'espèce, les circonstances de l'affaire et décide si c'est valablement qu'a été retenu, selon le cas :

a) le motif d'infraction à la présente loi ou à ses règlements pour justifier soit la saisie des marchandises ou des moyens de transport en cause, soit la signification à leur sujet de l'avis prévu à l'article 124;

...

(3) La décision rendue par le ministre en vertu du paragraphe (1) n'est susceptible d'appel, de restriction, d'interdiction, d'annulation, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues au paragraphe 135(1).

...

135(1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which that person is the plaintiff and the Minister is the defendant.

(2) The Federal Courts Act and the rules made under that Act applicable to ordinary actions apply in respect of actions instituted under subsection (1) except as varied by special rules made in respect of such actions.

[Emphasis added]

[18] On the other hand, subsection 133(1) of the Customs Act governs the penalty decision:

133(1) Where the Minister decides, under paragraph 131(1)(a) or (b), that there has been a contravention of this Act or the regulations in respect of the goods or conveyance referred to in that paragraph, and, in the case of a conveyance referred to in paragraph 131(1)(b), that it was used in the manner described in that paragraph, the Minister may, subject to such terms and conditions as the Minister may determine,

(a) return the goods or conveyance on receipt of an amount of money of a value equal to an amount

...

135(1) Toute personne qui a demandé que soit rendue une décision en vertu de l'article 131 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action devant la Cour fédérale, à titre de demandeur, le ministre étant le défendeur.

(2) La Loi sur les Cours fédérales et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du paragraphe (1), sous réserve des adaptations occasionnées par les règles particulières à ces actions.

[Je souligne]

133(1) Le ministre, s'il décide, en vertu des alinéas 131(1)a) ou b), que les motifs d'infraction et, dans le cas des moyens de transport visés à l'alinéa 131(1)b), que les motifs d'utilisation ont été valablement retenus, peut, aux conditions qu'il fixe :

a) restituer les marchandises ou les moyens de transport sur réception du montant déterminé

determined under subsection (2) or (3), as the case may be; 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, not exceeding an amount determined under subsection (4) or (5), as the case may be. 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, à concurrence de celui déterminé conformément au paragraphe (4) ou (5), selon le cas.

[Emphasis added]

[Je souligne]

[19] The case law has clearly established that the contravention and the penalty decisions are distinct and must be challenged separately by way of an action and/or an application, as the case may be (*Pounall v Canada (Border Services Agency)*, 2013 FC 1260, [2013] FCJ No 1390 at para 15; *Mohawk Council of Akwesasne v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1442, [2012] FCJ No 1685 at para 21; *Akinwande v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 963, [2012] FCJ No 1025 at paras 10-11; *Nguyen v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 72, [2009] FCJ No 8844 at paras 19-22 [Nguyen]; *Hamod v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 937, [2015] FCJ No 952 at paras 16-19).

[20] Although the letter of May 26, 2016 could have provided further details, it remains that it minimally informs the applicant that the decision rendered under section 131 of the *Customs Act* may be appealed within 90 days by way of an action before the Federal Court, while the decision regarding the penalty under section 133 of the *Customs Act* may in turn be appealed within 30 days through an application for judicial review before the same Court.

[21] If an applicant's challenge is to the contravention decision, the application must be dismissed because he or she has failed to bring an action in this Court, as required (*Pounall v Canada (Border Services Agency)*, 2013 FC 1260 at paras 16 and 17). An action in the Federal Court is the only recourse available to challenge the Minister's decision that someone has contravened the *Customs Act*. The only recourse available against the conditions of release of seized goods is an application for judicial review to the Federal Court (*Germain v Canada (Attorney General)*, 2011 FC 539 at paras 9–12; *United Parcel Service Canada Ltd v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 204 at paras 34–39; *Akinwande v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 963 at para 8).

[22] The respondent submits that the application for judicial review in this case is essentially a challenge to the contravention decision issued by the Recourse Directorate under section 12 of the *Customs Act*, and must therefore be dismissed for lack of jurisdiction.

[23] As the respondent points out, in determining whether the Court has the jurisdiction to entertain a claim, the Court must consider the essential nature of the dispute based on a realistic appreciation of the practical result sought by the applicant (*Canada v Domtar Inc*, 2009 FCA 218 at paras 28–31). A careful reading of the Notice of Application, the affidavit and the applicant's memorandum reveals that the application for judicial review in this case is indeed on the validity of the contravention and not the validity of the seizure.

[24] The first paragraph of the Notice of Application confirms that the application for judicial review is for a decision [TRANSLATION] “finding the applicant guilty of a contravention under

section 131 of the *Customs Act*". In the letter accompanying his Notice of Application, Mr. Célestin states that he is writing about the [TRANSLATION] "seizure", but confirms that he is challenging the entry in his file that he returned to Canada [TRANSLATION] "with undeclared drugs", and that it was his girlfriend who had left her medication in the car. In the affidavit he signed in support of his application for judicial review, Mr. Célestin states, [TRANSLATION] "I submit this affidavit for the proper purpose of being cleared of any suspicion or false guilt held against me, that I imported prohibited substances or failed to properly declare any controlled goods or products" (page 13, Applicant's Record). The applicant's memorandum does not address the nature of the drug seizure. Instead, it addresses the CBSA's decision to reject its documentary evidence and [TRANSLATION] "confirm the listing of enforcement actions for a period of 6 years, creating unfair suspicion and turmoil at the expense of the applicant, who must travel often" (page 35, Applicant's Record).

[25] The Court is satisfied, based on a realistic assessment of the practical result sought by the applicant, that the essential nature of the dispute is to challenge the ground of contravention, namely the decision that states Mr. Célestin contravened section 12 of the *Customs Act*, rendered pursuant to section 131 of the *Customs Act*.

[26] At the hearing, counsel for the applicant confirmed that the offence under section 131 of the *Customs Act* should be challenged with an action. However, citing section 18 of the *Federal Courts Act*, RSC 1985, c F-7, and the Court's decision in *Dhillon v Canada (Attorney General)*, 2016 FC 456, he argued that the provision of the *Customs Act* directing that proceedings be

brought as an action should give way to an application for judicial review in this case, since allegations of a breach of procedural fairness and natural justice are at stake.

[27] The Court notes that the cited decision does not support this argument, which is contrary to a clear provision of the *Customs Act* and the jurisprudence of the Court. The Court therefore cannot accept this argument.

[28] The Court further notes that Mr. Célestin was informed of these procedural distinctions in the Minister's Delegate's decision of February 24, 2020.

[29] Therefore, considering that Mr. Célestin's application for judicial review seeks to challenge the ground of contravention, namely the decision finding that he contravened section 12 of the *Customs Act*, rendered pursuant to section 131 of the *Customs Act*, and considering that he initiated his recourse with an application for judicial review and not an action, the Court must decline jurisdiction and dismiss the application.

IV. Procedural fairness

[30] The Court notes that, in his affidavit and memorandum filed with the Court, Mr. Célestin alleges that he was subjected to systemic racism by CBSA officers at the port of entry. In this regard, the Court notes that the evidence on the record reveals, among other things, that (1) the Minister's Delegate forwarded the quality of service complaint to the appropriate department within the CBSA; (2) on October 24, 2019, the superintendent at the border crossing presented her version of the events that occurred on August 9, 2019 at the port of entry; (3) on

November 30, 2019, Mr. Célestin contacted a CBSA superintendent in response to the superintendent's email to him about this complaint. Mr. Célestin then confirmed to the superintendent that he had two concerns, namely (i) the impact the seizure will have on his record and future border crossings and (ii) the border officers' refusal to provide him with access to the toilet when he requested it. The report prepared by the superintendent states that explanations were provided and that Mr. Célestin was satisfied and confirmed that no follow-up was required. Mr. Célestin does not address these items in his court record.

[31] In any event, the assessment of the CBSA officers' conduct is not within the jurisdiction of the Minister's Delegate under review, nor is it within the jurisdiction of the Court. The Minister's Delegate is exclusively responsible for validating or denying the contravention and the seizure order. I agree with Justice Martineau's words in *Leslie*:

[23] . . . Under section 131 of the *Customs Act*, the delegate did not have the jurisdiction to review the customs officers conduct, nor does this Court in the present application. Besides, the adjudicator and the delegate have both informed the applicant that their mandate did not allow them to review the behavior of the customs agents but merely to review the enforcement of the seizure according to the circumstances of the case. . . .

V. Conclusion

[32] The Court has no jurisdiction to hear this application for judicial review. Having considered the submissions of the parties, the Court fixes costs at \$2,000.

JUDGMENT in T-530-20

THIS COURT'S JUDGEMENT is as follows:

1. The application for judicial review is dismissed.
2. Costs in the amount of \$2,000 are awarded to the respondent.
3. The style of cause is amended to name the Minister of Public Safety and Emergency Preparedness as the respondent.

“Martine St-Louis”

Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-530-20

STYLE OF CAUSE: JEFFSON JUNIOR CÉLESTIN v THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: MONTRÉAL (VIA TELECONFERENCE – ZOOM)

DATE OF HEARING: MARCH 3, 2021

JUDGMENT AND REASONS: ST-LOUIS J.

DATED: MARCH 16, 2021

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