

Federal Court



Cour fédérale

Date: 20100521

Docket: T-1238-02

Citation: 2010 FC 218

BETWEEN:

ESEMUEDE HENRY IDADA

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

AMENDED PUBLIC REASONS FOR JUDGMENT
(Confidential Reasons for Judgment released February 24, 2010)

ZINN J.

[1] On March 3, 2002 the plaintiff's flight from Nigeria via Milan landed at Terminal 1, Pearson International Airport in Toronto. He was required to clear immigration and customs. This process was not as uneventful for Mr. Idada as it is for most of the thousands of travellers who pass through the airport every day. His luggage and personal effects were searched and he was required to undergo a strip search and a loo search, as it is euphemistically called by the customs authorities. During the course of his entry into Canada, and while undergoing these searches, Mr. Idada claims

that he suffered physical and emotional harm as a result of the actions of customs officers, who are employees of Canada Customs and Revenue Agency (CCRA).¹

The Action

[2] Mr. Idada claims damages from the defendant arising from his alleged illegal detention and search, his alleged assault and battery, and the alleged slander of him by customs officers.

[3] The parties agreed at a Pre-Trial conference that there were five issues to be determined at the trial of this action which I re-phrase, as the following:

- a. Whether there were reasonable grounds for the customs officers to detain and search Mr. Idada's person and luggage on March 3, 2002;
- b. Whether the search was conducted improperly;
- c. Whether, in the course of the search, the customs officers used reasonable force;
- d. Whether the plaintiff suffered any injury, loss or damage as a result of the search or detention and if so, the extent of the injury and the quantum of the loss or damage;
and
- e. Whether the defendant slandered the plaintiff and, if so, the damages that flow from that slander.

[4] At the commencement of trial, counsel for Mr. Idada advised the Court that the plaintiff would not be proceeding with his claim for damages for slander because the person to whom the

¹ At the time of the incident giving rise to this action customs officers were employees of Canada Customs and Revenue Agency. These officers' duties were subsequently transferred to the Canada Border Services Agency (CBSA) which was created on December 12, 2003. As a result of this transfer some of the evidence describes the department as CBSA

alleged slanderous remarks were made, Mr. Idada's former spouse, would not attend at Court in Canada to give evidence.

[5] By Order dated October 8, 2009, the trial of the action was bifurcated. Accordingly these reasons are limited to the issue of liability.

Credibility of Witnesses

[6] Mr. Idada was the only witness called for the plaintiff. The defence called eight witnesses, all employees of CCRA: William Kelly, Dennis Chin-Sang, Nick Kostovski, Dan Tangney, Ken Kirkpatrick, Mary Parente, Jerry Jesso and Paul Brady.

[7] There was some inconsistency in the evidence of the witnesses as to the critical events that occurred at the customs area of Terminal 1 on March 3, 2002, and accordingly, a credibility finding is necessary. My findings on credibility are based on hearing all of the evidence, the consistency and rationality of the evidence, and the demeanour of the witnesses.

[8] I found Mr. Idada to be a credible witness. He did his best to be responsive to questions put to him under oath and he did not exaggerate his evidence. He did not try to minimize prior statements he made that were not consistent with his evidence at trial. His initial letter of complaint sent in 2002 to the defendant concerning his treatment by its customs officers exaggerated the conduct of those officers. Any discrepancy between his evidence at trial and his earlier written

and the officers involved as CBSA officers. Whether referred to as CCRA or CBSA, the reference is to the Canadian

statements were not fundamental to his claim. His somewhat exaggerated version of events as set out in his letter of complaint is explained by the intense situation and the acute embarrassment he experienced in being searched personally and in having to comply with the demand that he produce stool samples for inspection.

[9] Officer Tangney when giving his evidence heavily relied on notes made that day in his notebook. These notes were made from other notes that he made on foolscap that were contemporaneous with the events, but which he had subsequently destroyed. I accept the suggestion made by counsel that the Court has no way of knowing whether the original notes contained information that was helpful to the plaintiff or whether the notes in the notebook were tailored to obtain the permission sought to conduct a personal search.

[10] Although Officer Tangney admitted that he had little present recollection of the events aside from these notes, his evidence at trial was significantly more detailed than his notes and in some instances was inconsistent with his notes. I find that he tailored his evidence at trial on the key events to minimize his own conduct. I also found him to be evasive on key points during cross-examination. As an example, he refused to accept that Mr. Idada moved his hand and briefcase away in order to keep it from Officer Tangney as he was reaching for it until the response he gave on his examination for discovery was read to him.

[11] I found Officer Kirkpatrick generally to be a credible witness; however, his evidence at trial was occasionally in conflict with the notes he had made at the time, or shortly thereafter, of the events at issue. His testimony at trial was often more helpful in exonerating the conduct of Officer Tangney than the notes he took at the time. I accept without hesitation his contemporaneous notes; however, to the extent that his evidence at trial was contradictory or inconsistent with his notes, I reject his evidence at trial.

[12] As with most cases, the truth as to the events that occurred is to be found among the stories provided by the witnesses; the evidence of none is entirely accepted. The following sets out the facts as I have found them.

The Facts

[13] Mr. Idada was born in Nigeria in 1959. He moved to the United States of America in 1989 and became a citizen of the U.S.A. in 2002. He lives in Boston, Massachusetts.

[14] After arriving in the U.S.A., Mr. Idada first worked at a number of jobs ranging from security to being in the “transportation business” and eventually he became an owner in the transportation business. When asked in chief and cross-examination he clarified that by “transportation business” he meant the taxi business and testified that that he was an owner of a taxi and limo business in Boston. Much was made by Officer Tangney in 2002, and at the trial, of Mr. Idada’s description of his business activity as being the transportation business. In my view, Officer Tangney’s suspicion was misplaced. First, while it is probably the case that a native Canadian or

American would be unlikely to describe an independent cab driver as someone in the transportation business, Mr. Idada is not native to either country; English is his learned language. Secondly, it is neither false nor misleading to say that a self-employed cab driver is in the transportation business.

[15] Mr. Idada testified that in 2002 he was expanding his business into an import export business. Again, the defendant made much of the fact that this business was only incorporated later. Mr. Idada explained that incorporation and the business licences required take time and that he initially conducted his import and export business under the corporate name of his transportation business.

[16] In early 2002 he travelled from Boston to Nigeria. He entered Nigeria on January 18, 2002. He had shipped two containers of frozen turkey from the U.S.A. to Nigeria and was travelling there to sell the consignment of frozen turkey. He testified that this was the beginning of his new import export business and that this was a successful transaction.

[17] He remained in Nigeria until March 2, 2002, when he boarded a flight from Lagos, Nigeria to Milan, Italy and from there to Toronto, Canada. He decided to return to North America as he had completed his business in Nigeria. Although he had travelled to Nigeria on a round-trip ticket from Boston, he did not use it to return to Boston. He had decided to travel back to Canada. He says that he did so because while in Nigeria he learned that there were turkey products available in Canada that would be less expensive than those he had purchased in the U.S.A. His Nigerian customer had

shown him samples of turkey shipped from Canada and had asked him to enquire about the company and the possibility of shipping turkeys from Canada.

[18] He asked his company manager in Nigeria, Mr. Solomon Worghiren, to purchase an airline ticket for him to Toronto. Mr. Idada explained that he trusts Mr. Worghiren to sell product that he ships to Nigeria when he does not personally travel there and to remit the money to him. Mr. Idada asked Mr. Worghiren to purchase the necessary tickets, which he did, in cash. Mr. Idada testified that all financial transactions at that time in Nigeria, even those that are very expensive, were cash transactions and that credit cards were not used. His evidence was not contradicted.

[19] International travel restrictions on flights leaving Nigeria required that an airline leaving Nigeria must first land in its home country. As a consequence, Mr. Idada flew Al Italia to Milan, Italy, and then Air Canada to Toronto.

[20] Mr. Idada candidly admitted that other than his Nigerian customer showing him samples of Canadian turkey he had done no research regarding the Canadian turkey market prior to travelling to Canada. He testified that “I had the name in my head and I thought if I could get here, I will be able to Google it, and then make calls, and then travel out to see, like I do in the US.” He expected to conduct this internet research and to make his telephone calls from a hotel room in Toronto. He had booked no hotel reservation prior to his arrival at Pearson Airport. This was his first visit to Canada.

[21] While in the air, he ate and drank. He says he had two meals during the flight from Lagos to Milan and another two meals and a snack on the flight from Milan to Toronto.

[22] He arrived in Canada at Terminal 1 on March 3, 2002, at approximately 14:30 hours. Like most travellers, he met with several immigration and customs officials as he passed through the clearance process. His recollection as to the number he met that day was in error; however, nothing turns on this. He did clearly recall his dealings with the most significant officials.

[23] Each traveller arriving at customs primary is asked to present his customs declaration card, his E311 Card and passport to the customs officer. The primary customs line is the first contact travellers have with a customs officer when they enter Canada. If the customs officer on the primary line has concerns about a passenger from an immigration standpoint the officer can refer the traveller to the immigration secondary area by making a mark on the passenger's E311 Card, otherwise the officer can admit the traveller to Canada. If the officer has concerns from a customs standpoint he puts a notation on the E311 Card alerting officers to refer the passenger to the customs secondary area.

[24] From the primary customs line the traveller will approach an officer at the immigration point who will direct the passenger to the appropriate location. The immigration point officer is looking for a notation on the E311 Card. If there is one, then the passenger will be directed to immigration for processing by an immigration officer. If there is none, the traveller will be directed to the baggage hall to pick up his baggage.

[25] If there is a referral to customs secondary, the secondary customs officer will likely do a search of the traveller's luggage and, as in this case, may require that further searches be done.

[26] William Kelly was a student customs officer working on the primary customs line at Pearson Airport on March 3, 2002. He testified that he had no present recollection of his dealings with Mr. Idada on March 3, 2002. He was shown an email he sent on March 24, 2002, to Edna Soifer in response to Mr. Idada's complaint made to the customs authorities shortly after the events giving rise to this action. That email reads as follows:

I looked through my notebook and didn't make any entry for the passenger in question. What I do remember is based on pure memory recall.

From what i [*sic*] remember Mr. Idada handed me an American passport and said he was in Nigeria visiting his family. He stated he was in transit to get home to Boston where he said he owned a taxi company. He presented me a card of the taxi company. I asked him how he was getting home and he stated he didn't know at this time and hoped to get a flight to Boston. He then stated that he knew no one here in Canada and didn't know where he would stay in the meantime.

This is all I can remember. I hope this helps.

[27] Officer Kelly has no recollection of how he marked Mr. Idada's E311 Card from either an immigration or customs standpoint and the card was not found by the defendant. After leaving Officer Kelly, Mr. Idada placed his E311 Card inside his passport.

[28] Officer Kelly made no notes of his encounter with the plaintiff. He testified that he would only make a note when he thought that there was something that might come of his interaction with the traveller. He said, as an example, that if the traveller was extremely hostile or if he strongly suspected the person of narcotics smuggling, he would make a note.

[29] Dennis Chin-Sang was working as an immigration officer at Terminal One on March 3, 2002. He testified that he had no recollection of having had any dealings with the plaintiff. When shown Mr. Idada's passport he identified that the Canadian Immigration stamp therein that admitted Mr. Idada to Canada on March 3, 2002, as having been made by his stamp and also identified his initials on the stamp mark.

[30] The stamp mark also contained his notation that read as follows: "VH – 05MR2002" which he testified meant that the person was in transit and permitted to be in Canada until March 5, 2002. With this authorization, there was nothing that prevented Mr. Idada from staying in a hotel in Canada until March 5, 2002.

[31] Mr. Idada recalls first going through immigration where he was asked why he was coming into Canada and what he was going to do in Toronto. He recalls having his winter jacket, his briefcase, and his wallet with him. Much was made by the defence about the wallet and, in particular, whether it was a "wallet" or a "bi-fold." Mr. Idada called it his wallet or purse and testified that it contained his passport, credit cards, business cards and cash. I will refer to it throughout as a wallet. It was entered as an exhibit at trial and it is a man's wallet, typical of those

carried by many men. Nothing turns on its description and there was no evidence to suggest that it did not contain exactly what Mr. Idada said.

[32] Mr. Idada says that he was treated professionally and he has no complaint with the process he experienced up to this point. After passing through immigration he went to pick up his luggage and recalls that he then joined a line and was directed to go through customs. He testified that he was asked much the same questions by the customs officer as the immigration officer had asked and that he gave “almost the same answer”. This customs officer was Nick Kostovski.

[33] Officer Kostovski had some recollection of his dealings with Mr. Idada on March 3, 2002. He made no notes of their interaction at that time; however, he sent an email on March 23, 2002 in response to the investigation of Mr. Idada’s complaint setting out his recollection of their interaction. He used that document at trial to refresh his memory.

[34] When Officer Kostovski called Mr. Idada to his counter he asked for his E311 Card and passport and possibly his airline ticket. He was standing on one side of the counter facing Mr. Idada. He asked Mr. Idada where he was coming from and he was told that he was coming from Nigeria. He was asked to clarify as Officer Kostovski knew that there were no direct flights to Toronto from Nigeria. Mr. Idada told him he flew from Nigeria to Milan, Italy, and then to Canada.

[35] Officer Kostovski recalls that the E311 Card indicated that Mr. Idada had been referred to customs secondary by the primary officer as he had some doubt as to the accuracy of his

declaration. He testified that Mr. Idada “had his passport in a wallet that was sticking out of his coat” and he recalled that the wallet contained the passport and other papers. It also contained US \$1300.00.

[36] Officer Kostovski says that he asked Mr. Idada why he had not flown directly to the U.S. but he has no recollection of the response. When he was asked what Mr. Idada did when he asked him for his passport he testified:

He had taken it [i.e. his wallet] out of his coat and he was just fidgeting through as if he was going through it, and it just took a long time. I’m like, ‘I need your passport.’ And then what I did is, as he was holding it, like, ‘Just give me that, the whole thing’.

During this testimony as he said “and then what I did is,” Officer Kostovski demonstrated his action of grabbing the wallet from Mr. Idada’s hand. Both Mr. Idada and Officer Kostovski demonstrated this during trial and it is fair to say that the wallet was jerked from Mr. Idada’s hand with some force by Officer Kostovski. Mr. Idada complained to Officer Kostovski that he had taken his wallet and not just his passport to which Officer Kostovski responded that he had the right to return him back to where he came from and the right to search him.

[37] On cross-examination Officer Kostovski admitted that it was after he took the wallet from Mr. Idada that he began to get upset and began to speak loudly and that got Officer Kostovski “agitated”. In short, they were both loud and agitated. The difference is that Mr. Idada had cause to be agitated and Officer Kostovski did not; he was the cause of Mr. Idada’s agitation.

[38] Officer Kostovski's evidence at trial differs from the email he wrote responding to Mr. Idada's complaint. In it he says that Mr. Idada got agitated when he was asked to hand over for inspection his wallet that contained the passport and papers. In my assessment, Officer Kostovski knew then that he had acted inappropriately and was trying to minimize his actions to his superiors.

[39] Mr. Idada reacted angrily to the taking of his wallet. He became loud. Officer Kostovski testified that he kept saying that he was an American citizen and that he "didn't need to do this" which, when pressed he said meant that "he didn't need to hand me his passport over. I don't remember exactly what he said, but he got agitated, he got loud and told me that, 'Oh, I don't have to. I'm an American.'" I accept that Mr. Idada became loud and he may well have said that he was an American citizen. I do not accept that by this he meant that he did not have to hand over his passport for inspection. First, he had already done so to Officer Kelly and Officer Chin-Sang, without incident or objection. Second, he had travelled frequently and knew that an examination of one's passport is the usual protocol when entering a foreign country. Third, he was trying to hand over his passport when his wallet and passport were grabbed from his hand.

[40] I find that the reference to his citizenship was more probably said in reference to how he was being treated, rather than any objection he had in complying with the officer's request.

[41] I accept Mr. Idada's evidence that Officer Kostovski then said that he did not have time to deal with this "nonsense" and that he directed Mr. Idada to step aside, which he did, while Officer Kostovski retained his wallet, its contents, and his passport.

[42] Mr. Idada took a seat on the bench behind. When Officer Tangney entered the secondary customs area at 16:00 hours, he saw Officer Kostovski and Mr. Idada having what he described as an “argument” at the counter. I accept the evidence of the plaintiff and Officer Tangney that Officer Kostovski approached Officer Tangney and asked him to take over the inspection as he was going off duty. I reject the evidence of Officer Kostovski that Officer Tangney asked him if he wanted him to take over processing Mr. Idada.

[43] Officer Tangney took over and Officer Kostovski had no further dealings with the plaintiff as his shift had ended. All that Officer Tangney knew at this point was that there had been some dispute between Mr. Idada and Officer Kostovski but he did not know, and never asked what the cause of that dispute had been. It may be that, if he had, the events that were to follow would have occurred differently.

[44] Mr. Idada says that he was humiliated by the conduct of Officer Kostovski. He described himself as an experienced traveller who understood and accepted the usual immigration and customs procedures but that he felt embarrassed by how he had been treated and, in particular, by the statement made that he could be sent back from where he came. When asked whether he got upset at this, he candidly admitted that he did.

[45] Officer Tangney came over to Mr. Idada and told him to follow him with his luggage, which he did. Officer Tangney opened up his bags and briefcase and searched their contents thoroughly.

As part of his search, Officer Tangney removed the lining from the edges of the briefcase, causing some damage to it. I do not find that he caused damage to Mr. Idada's luggage during his search as has been claimed. If the luggage was damaged so that it could not be closed then it is reasonable to expect that Mr. Idada would have raised it at the time. He did not. I also do not accept the evidence of Mr. Idada that he was asked at this time to remove his shoes, coat and belt. Such a request at this point in the process would be usual in the extreme and if it had occurred then Ms. Parente would surely have observed it when she spoke to the plaintiff.

[46] Mr. Idada testified that Officer Tangney asked him much the same questions as he had previously been asked, but in greater detail. Officer Tangney testified as to their conversation in much more detail.

[47] Officer Tangney recalls that the airline ticket showed that it had been purchased in cash one day prior to the flight and was for a flight from Nigeria, through Milan, to Toronto. He says that he found it strange that a business traveller would purchase a ticket in cash. He also found it odd that it had been purchased one day before travel as this was the most expensive way to fly. He testified that drug smugglers often travel on tickets paid for with cash so that it is not traceable.

[48] He asked Mr. Idada why he was travelling to Toronto and was told it was for the turkey business. When asked to expand, Mr. Idada told him that he had a company that exports turkey products from the U.S. to Nigeria and that he was in Toronto to work on that business. Mr. Idada told him that he knew no-one in Toronto, that he did not have a hotel reservation but would find

one, that he had no arrangements made to meet anyone but that after checking in he would use the internet to “make contacts or do research”. He said that he came to Toronto because when in Nigeria he was in a large walk-in freezer where he saw a box that said “Toronto Turkey” on it and based on this and his customer’s information, he decided to come to Toronto.

[49] When he asked Mr. Idada to describe his business in Boston, Officer Tangney testified that he “described it as being very large, a number of trucks on the road, a number of – you know, a number of overseas movements. And he made it out to be a very large business.” He also stated that when he asked Mr. Idada what he meant by the transportation business he told him that he had a number of limousines on the road. I reject this evidence. It is not consistent with the notes Officer Tangney copied into his notebook on March 3, 2002, which read as follows: “Employed as a cab owner w/ two cabs.” There is no mention of having trucks on the road or of having a “number of limousines”. I further reject Officer Tangney’s testimony that Mr. Idada made out that his import export business was highly successful. Again, the officer’s notes read that Mr. Idada told him that he “is trying to start business exporting turkey from US to Nigeria.”

[50] Mr. Tangney testified that Mr. Idada could not tell him the cost of sending a container from Boston to Nigeria. When asked what size container he used and the use of refrigerated containers, he testified that Mr. Idada had little or no knowledge of such facts. Even if true, it is hardly surprising since Mr. Idada had made only one shipment at that time, he was not an experienced exporter. Further, there is no mention made of this line of inquiry in his notes.

[51] Officer Tangney testified that as he was asking questions regarding his business, Mr. Idada became agitated and aggressive with his answers, asking him why he was being asked these things and stating that he was an American citizen. He described Mr. Idada's mood as going up and down. When asked questions about his business he became agitated and provided vague answers but when asked general questions about his flight he was calm. When asked who had purchased the airline ticket, Mr. Idada told him that it was his manager in Nigeria. When asked the cost and why it was purchased the day prior to flight he responded that he had no knowledge of it as that was his manager's decision.

[52] Officer Tangney testified that when he asked Mr. Idada for his original ticket from Boston to Nigeria, Mr. Idada told him that he did not have the ticket. When asked if it was one way or return, he says that Mr. Idada told him that he did not know as his Boston manager had purchased it. When asked for information concerning the Boston Manager, Mr. Idada was unable to provide any information.

[53] Officer Tangney testified that Mr. Idada told him he would be returning to Boston by bus or train, which Officer Tangney found odd for someone who claimed to be a successful businessman. This evidence is inconsistent with Officer Tangney's own notes from March 3, 2002. He wrote: "Subject decided on aircraft that he misses his children – has decided not to stay in Toronto but will take train or plane home to Boston immediately – is also feeling sick (common cold)."

[54] Officer Tangney searched Mr. Idada's briefcase but found nothing that "related to Mr. Idada's purpose to come to Canada in regards to his turkey business." Mr. Idada gave him his business card but he testified that he believes that it merely indicated his name and address. In his notes he writes: "Has business card for this venture [i.e. the export business] but has not started it yet." Officer Kelly in his email dated March 24, 2002, wrote that from his recollection Mr. Idada said he owned a taxi company and presented him with a card of the taxi company. I find that it is more probable that Mr. Idada provided Officer Tangney with his business card from his taxi business.

[55] Officer Tangney testified that he found the return portion of the round trip ticket from Boston to Nigeria in the briefcase. This is reflected in Officer Tangney's notes where he writes: "Return airline ticket found in subject's briefcase shows return date from Lagos to JFK as 14 March. Subject originally stated his Mgr. in Boston had bought this ticket. Now says he bought it himself." Mr. Idada testified that he never told Officer Tangney that he had a Manager in Boston. I accept his version of this part of their conversation. There was simply no reason why Mr. Idada would tell the officer he had a manager in Boston. At best, there was miscommunication between Officer Tangney and Mr. Idada – Mr. Idada was most likely referring to his most recent trip from Nigeria and Officer Tangney was referring to the earlier trip to Nigeria.

[56] Officer Tangney emptied both the briefcase and suitcase and x-rayed both but found no contraband.

[57] Officer Tangney testified that he then went to see Officer Kelly to ask why he referred Mr. Idada to secondary and says that he was told three things: (1) that Mr. Idada said that he had changed his mind while flying to Toronto about staying in Toronto because he missed his children and that he would be transiting on to Boston; (2) that he would be doing this immediately, either by train or plane, and (3) that the ticket to Toronto was the only ticket he could get. This evidence is not consistent with Officer Tangney's notes wherein he writes: "Check w/Primary Officer Kelly he states he asked subject why he is coming to Canada. Subject replied it is the only ticket he could get." Officer Kelly, in his email dated March 24, 2002 makes no mention of it being the only ticket he could get; rather, he wrote that Mr. Idada told him he was in transit to get home to Boston, that he hoped to get a flight to Boston, and that he knew no one in Canada and did not know where he would stay in the meantime.

[58] Officer Tangney says that he then sought out the immigration officer who had admitted Mr. Idada, Officer Chin-Sang, and asked him what he recalled of their conversation. He testified that the immigration officer had admitted him on the basis that it had "something to do with the turkey business." There is nothing in Officer Tangney's notebook indicating that he spoke to Officer Chin-Sang.

[59] Officer Tangney says that he then returned to the secondary area where he had a further discussion with Mr. Idada concerning his wife and family. He asked when Mr. Idada had last spoken with them and he said that he had spoken to his wife after receiving his ticket to Toronto, which would have been the night before. Officer Tangney says that he then obtained his home

phone number and placed a call to Mrs. Idada in Boston. He identified himself as a customs officer calling from Toronto, Canada and says that he indicated that that this was a routine call relating to a person arriving in Canada. He asked whether she could tell him why her husband was in Toronto. He says that she responded that she believed her husband was in Nigeria. When asked what Mr. Idada did for a living she said that he was a taxi driver. He testified that she further said that he was not involved in any other business. There is nothing in Officer Tangney's notes that reflects any such conversation.

[60] Officer Tangney says that he then returned to Mr. Idada and asked him further questions concerning his "turkey business" including how successful it was. He asked what sort of money Mr. Idada was making and says that he responded that he was making about \$75,000 a year. Officer Tangney says that he then excused himself and came back a few minutes later and falsely reported that he had called the IRS and the IRS had not given him the same answer as he about his income. Officer Tangney says that Mr. Idada then told him that he had actually taken a \$7,000 loss last year. Again, this is not reflected in Officer Tangney's notes, and I accept the evidence of Mr. Idada that there was no such conversation concerning his declared income, although there may well have been some conversation concerning the filing of tax returns.

[61] Officer Tangney then told Mr. Idada that he didn't believe his story and asked whether there was anything he wanted to tell him at this point as to the real reason for his trip to Canada. He testified that the plaintiff maintained his explanation for his trip to Toronto. Officer Tangney says he then raised with Mr. Idada the concerns he had with his explanation.

[62] He said that he was concerned that Mr. Idada had changed his story from what he had told the primary officer, that he had told a different story to the immigration officer, that he was unable to provide them with a contact number for his business manager in Nigeria, that he had told him that he had no knowledge of the return ticket from Boston to Nigeria because his Boston manager had purchased it when Mr. Idada now said that he had bought the ticket himself, and lastly that his explanation of the turkey business seemed unbelievable. Further, he told the plaintiff that his wife had been called and described him as a taxi driver and did not know he was in Toronto. Officer Tangney says that he also noted that Mr. Idada had a "pasty mouth" but when offered a drink, Mr. Idada said that he was fine. When asked, Mr. Idada said that he was thirsty and hungry, but when offered food, he declined. At this point Officer Tangney testified that he told the plaintiff that he suspected that he may have ingested narcotics or be carrying narcotics or contraband.

[63] Officer Tangney testified that he based his decision to seek authorization from the Superintendent to do a personal search of Mr. Idada, because he suspected that he had ingested a narcotic. He testified that he based that suspicion on the following observations:

- i. Mr. Idada had a pasty mouth, which is an indication of thirst, but he refused water. People who have ingested narcotics do not want to take on food or liquid because it may cause them to go to the bathroom.
- ii. Mr. Idada told the primary officer things that differed or were omitted when he spoke to Officer Tangney. Specifically, (a) he told the primary officer but not Officer Tangney that although he had a purpose in visiting Toronto, he had changed

his mind while on the aircraft, (b) told the primary officer that it was the only airline ticket he could get, which Officer Tangney thought was unlikely as March was not peak travel season, and (c) he told the primary officer that he would be going back to Boston immediately but told Officer Tangney that he would be staying in Canada to explore the turkey business.

- iii. While Officer Tangney attests that he discounted the argument between Officer Kostovski he found his demeanour was very up and down and when he was asked pointed, direct questions he'd become agitated in angry.
- iv. He constantly asked why he was being asked certain questions and kept saying that he was an American citizen, but when asked why that was relevant he had no response.
- v. He originally made himself out to be a successful business person with an ongoing business that was very viable with a number of trucks on the road, but later changed his story and said that it was a start-up business.
- vi. The airline ticket to Canada had been purchased in cash which is common for smugglers of contraband because it cannot be traced.
- vii. The ticket had been purchased one day before travel which is commonplace among drug smugglers because they often travel on short notice when drugs are available to them.
- viii. The ticket had been purchased by a third party, which is also common for drug smugglers who say that someone else made the travel arrangements for them

and the fact that Mr. Idada's manager in Nigeria was unreachable for confirmation of his story.

- ix. The travel originated in Nigeria, which is a source country for narcotics.
- x. He first said that his ticket from Boston to Nigeria had been purchased by his Boston manager, but subsequently changed saying that he had purchased it himself.
- xi. He had not changed his return ticket, but rather purchased a new ticket to Canada.
- xii. He told Officer Kelly that he was in transit that night to Boston but told Officer Tangney that he was staying in Toronto to conduct research on the turkey business.
- xiii. Mr. Idada's wife said that she was unaware that he was in Toronto whereas he had indicated that they had spoken the night before and had made her aware of where he was and that he was traveling to Toronto.
- xiv. His wife said that he was a taxi driver and had no other business interests, whereas he had indicated that he had a successful business transportation business operating many limousines.
- xv. He had initially said that he made \$75,000 the previous year but after Officer Tangney pretended to call the IRS to check that fact, he changed to say he had taken a loss.
- xvi. He had no documents that could provide proof of his business.
- xvii. He knew so little about the costs associated with exporting turkeys and Officer Tangney considered his story that he came to Toronto on the basis of seeing

a crate of turkey parts in Nigeria and without any knowledge of any contact in the Toronto area to be implausible.

xviii. He said that he'd eaten on board the plane a number of times which is a common statement drugs smugglers are coached to say to suggest that it is unlikely that they have swallowed drugs.

xix. He said that he had a bowel movement on the plane. Drug smugglers are often coached to say this to suggest that it is unlikely that they have swallowed drugs.

[64] Officer Tangney testified that after noting “some” of those grounds in his notebook, he then approached his superintendent, Mary Parente, presented his arguments and requested authorization to perform a personal search, including a loo search of Mr. Idada.

[65] Officer Tangney testified that the first notation in his notebook shows a time of 15:58 hours as the time that he commenced his discussions with Mr. Idada. His notebook further indicates that he approached Ms. Parente at 17:20 hours and she gave her approval to the search after their discussion and indicated it by initialling and dating his notebook. The notebook indicates “okay” and the time is written 17:20 hours and the date is provided. Accordingly, the record shows, at most, a one-minute discussion with Ms. Parente.

[66] It is reasonable to assume that this brief conversation was based on the items noted in the notebook, as the one-minute discussion could not possibly cover all of the 19 items mentioned by Officer Tangney in his evidence at trial.

[67] Ms. Parente testified that she has no specific recollection of their discussion prior to approving the strip and loo search. She says that her usual process involves a “somewhat lengthy discussion” with the officer and that she may send the officer back to obtain clarification of the grounds alleged for the search request. In cross-examination she testified that she approves only 30% to 50% of the search requests officers ask her to approve. As she put it: “I believe there needs to be strong reasonable grounds to take someone in for a search. It is just not something you just do. It’s a very serious – I view it as a very serious matter.” She also testified that approximately 80% of the personal searches result in no contraband being found on the person searched.

[68] In spite of her evidence that she takes requests to conduct personal searches very seriously and that she approves less than half of such requests, there is no evidence to support that in this particular case she exercised the diligence she says that she usually does. In fact, the very brief time she spent with Officer Tangney before authorizing the search indicates that there was a lack of diligence on her part in this particular case.

[69] Ms. Parente corroborates Mr. Idada’s evidence that at his request he spoke to a supervisor before he was placed in detention. In her memo dated March 31, 2002, sent in response to the complaint, she says that she saw Mr. Idada sitting on the bench in the secondary area “making

notes” and that he wanted to see a supervisor. She went to see Mr. Idada. He requested her name, but she refused to provide it but gave him her badge number. Mr. Idada told her that he wished to speak to legal counsel. She writes in her memo that “I informed him that he was not under detention or arrest at this time and if this were to happen he would be offered legal counsel.” On cross-examination, she admitted that she was in error, as the policies of the CCRA stipulate that a traveller is entitled to legal counsel whenever requested.

[70] After Ms. Parente approved the personal search of Mr. Idada, she assigned Officer Kirkpatrick to assist with that search. Officer Tangney returned to Mr. Idada who was seated in the customs area and read him his detention rights and caution from his customs notebook as follows:

I am detaining you for suspicion of smuggling or attempting to smuggle into Canada, goods the implication of which is prohibited, controlled or regulated by or pursuant to the *Customs Act* or any Act of Parliament.

I have reasonable grounds to believe you are carrying goods (or suspected drugs) on or about your person and I am detaining you for the purposes of a personal search as authorized by section 98 of the *Customs Act*.

Do you understand the reason for the detention?

[Mr. Idada indicated that he did understand the reasons for the detention.]

You are not obliged to say anything. You have nothing to hope for any promise of favour and nothing to fear from any threat, whether or not you say anything. Anything you do say may be used as evidence.

You have the right to retain counsel without delay.

You have the right to obtain legal advice without charge from duty counsel. Duty counsel is available at 1-800-265-0451 during the following hours, 24 hours, seven days a week.

You have the right to apply for legal assistance without charge through the provincial legal aid program. The legal aid telephone number in this area is 905-453-1723. Their office is located at 200 -- 205 County Court Boulevard, in the City of Brampton, and office hours are from 8:30 to 4:30.

Do you understand what has been said to you? Do you wish to call a lawyer now?

[Mr. Idada responded "Yes, a free one."]

[71] Officer Tangney described Mr. Idada's demeanour following the reading of these passages as being "very, very calm". Officer Kirkpatrick approached and was told that Mr. Idada had been detained. Officer Kirkpatrick read the secondary warning to Mr. Idada as follows:

If you have spoken to any police officer or to anyone, or if any such person has spoken to you in connection with this case, I want it clearly understood that I do not want it to influence you in making any statement.

[72] After reading the detention, rights and caution, Officer Tangney says that he explained that Mr. Idada would be allowed to call a lawyer before the search was conducted. He says that he explained that they would enter the search room and then call a lawyer. He says he would have explained that he would have an opportunity to speak to counsel in private. He says that he also informed Mr. Idada that he could have access to the US Consulate if he chose. He testified that he explained that once these calls were completed it would be followed by a personal search of the person, meaning a strip search, followed by the use of the customs' loo which could require up to

three bowel movements to satisfy the officers as to whether he had any contraband within his body. Officer Tangney testified that Mr. Idada appeared to understand the process as it was explained to him and says that Mr. Idada would also have been frisked prior to entering the search room.

[73] Mr. Idada's recollection was only that he was told that he would have the right to call legal counsel and the U.S. Consulate prior to the search proceeding. I find his recollection to be more likely than that offered by Officer Tangney.

[74] The search room is approximately 8' x 8' and contains a metal bench across one wall approximately 18 inches off the floor. There is a telephone mounted on the wall. Also on that wall is a poster with the information found in section 98 of the *Customs Act*. The phone number for Legal Aid is also posted. That room has two doors, one leading from the secondary customs area and the other leading into the loo facility which is in a room of the same size. The general practice is that the detained person enters the room first followed by the officers. Mr. Idada was described by the officers as being very calm and cooperative as they entered the room. Mr. Idada entered first carrying his briefcase in his right hand and had his coat draped over the other arm.

[75] When Officer Tangney realized that Mr. Idada had his briefcase with him he asked Mr. Idada to give him the briefcase "so that it could be placed outside the room." Mr. Idada responded by saying that they had already searched the briefcase. Officer Tangney testified he replied that while they had searched it, luggage doesn't come into the room. In cross-examination, Officer Tangney was asked why the briefcase had to be removed from the room before Mr. Idada could

speak to counsel. He responded that it was "because I gave him that instruction." When asked what the harm would have been in permitting Mr. Idada to keep it while he called his counsel, Officer Tangney responded that it "could have been used as a weapon" and that he could have opened the briefcase and destroyed some of its contents. Officer Tangney admitted that he had searched and x-rayed the briefcase and had already examined its contents. There was nothing found in it, the destruction of which could have caused any concern on the part of Officer Tangney.

[76] Mr. Idada stood in the center of the room facing Officer Tangney with Officer Kirkpatrick to their side. Officer Tangney is 6 foot 2 and approximately 210 to 220 pounds and Mr. Idada is 5 foot 10 and 290 pounds.

[77] Officer Tangney's evidence on the events that followed was:

Q. Please tell me what happens next?

A. We started bantering back and forth. I kept asking Mr. Idada for the briefcase, just to hand it over to me. He kept replying that I had already searched it to which I would reply, "I know that," and just giving him the same reasons again, luggage does not come into the room. And then I give Mr. Idada the option -- you know, I agreed with him. I had already searched it. That's not a problem. "Okay. You put it outside of the room." That didn't work. Then I said, "Okay". Why don't you put it in the corner over there." And it just escalated from there, just bantering back and forth, at which point, Mr. Idada became more agitated.

Q. But he's refusing to give you the suitcase (*sic*) at this stage?

A. That's correct.

Q. Roughly how many times did you ask him to hand over the briefcase?

A. Six, seven, eight times with different scenarios, starting with, "I'll take the briefcase. Okay. You put the briefcase outside." And then ending up with, just to get it out of his hand, to put it down on the floor.

Q. Does he tell you why he doesn't want to put it down on the floor?

A. He just keeps repeating that we had already searched it.

...

Q. What did you do next?

A. As this bantering progressed, at a certain point, Mr. Idada -- - the briefcase was going behind his back, in his right hand. He was holding it as if he was holding it away from me, as we progressed with the bantering. And then it raised into a position that was above his shoulder with the briefcase. And fearing an assault, that I would be hit with the briefcase, I took Mr. Idada to the bench.

...

Q. Did you feel threatened when Mr. Idada raised his briefcase?

A. Yes, I did.

[78] On cross-examination, Officer Tangney admitted that Mr. Idada's movement of the briefcase from being held in his hand was as a direct response to him reaching out for it.

Q. So it wasn't, from your perspective it wasn't as if you were reaching for it and Mr. Idada was simply withdrawing his hand? Lifting the briefcase up?

A. The briefcase was going back, like his arm behind his back and then up.

Q. He was trying to keep it away from you. Is that fair to say?

A. Yes.

[79] Officer Tangney placed his forearm across Mr. Idada's upper chest and pushed him backwards into a sitting position on the bench. He says that "due to the fact that he continued to struggle, I decided to take him down to the floor for handcuffs." He says that "due to his weight, he actually slid off the bench and lay on the floor on his back." While he may have slid off the bench, the evidence indicates that Officer Tangney put his arm in a wrist lock and took him to the floor.

[80] He asked Officer Kirkpatrick to push the silent alarm panic button to summon the police. Officer Tangney described Mr. Idada as then being calm and cooperative. The police arrived within 30 seconds to a minute as they had been in the area. When the two uniformed officers arrived Officer Tangney says that he released Mr. Idada's wrist.

[81] The evidence of Officer Kirkpatrick was as follows. When asked to describe what happened after their entry into the room, he testified:

Upon entering the search room, Mr. Idada was asked to hand over his briefcase that he had in his hand by Inspector Tangney. The passenger, Mr. Idada, refused to hand over the briefcase. He was asked repeatedly to hand over the briefcase, and as Inspector Tangney went to take the briefcase from Mr. Idada, he raised it in the air towards Inspector Tangney. [emphasis added]

[82] I accept the evidence of Officer Kirkpatrick and Mr. Idada over that of Officer Tangney. I find that the only instruction Officer Tangney gave to Mr. Idada was to hand over his briefcase. Specifically, I find that he did not offer Mr. Idada the options and alternatives he testified to in his evidence in chief.

[83] Officer Kirkpatrick testified that when Officer Tangney reached over to take the briefcase from Mr. Idada “he raised the briefcase above his head, and behind, with his arm fully extended.” He testified that he thought that Mr. Idada was going to hit Officer Tangney with the briefcase, although he admitted that he never moved it forward towards Officer Tangney. He testified that after being taken to the bench, Mr. Idada was still in a “resisting state” by which he said he meant

“he would not release the briefcase.” He says that Officer Tangney then grabbed Mr. Idada’s right hand and “pulled” Mr. Idada to the floor.

[84] In cross-examination, counsel put to Officer Kirkpatrick the written report he had prepared on March 20, 2003, in response to the plaintiff’s complaint. Specifically, he put the following passage to him:

Mr. Idada was then asked, while in the search room, to hand over his briefcase to Inspector Tangney which he had in his hand. Mr. Idada repeatedly said that he would not give the briefcase to Inspector Tangney. As Inspector Tangney approached Mr. Idada to retrieve the briefcase he raised it in the air towards Inspector Tangney in a careless manner.

Officer Kirkpatrick agreed with counsel that his recollection was better in March 2002 than it was at trial and that the statement he wrote then was accurate. Moreover, he agreed that his statement that the briefcase was raised in a “careless manner” is not equivalent to saying that it was raised in a threatening manner.

[85] I find as a fact that Mr. Idada moved the briefcase behind his body and moved it upwards in an effort to keep it away from Officer Tangney. He had no intention to use it as a weapon and I do not accept the evidence of Officer Tangney that he felt threatened by this action.

[86] I also reject Officer Kirkpatrick’s evidence at trial that he thought that Mr. Idada was going to strike Officer Tangney with the briefcase. Had he thought so, one would have expected it to be in his notes from that day or in his later report. It was in neither. I find that in this respect Officer Kirkpatrick was providing evidence to support his fellow officer and justify his actions.

[87] Although the room is small and they were at close quarters, it is most likely that if Officer Tangney had moved his hand back from Mr. Idada or stepped back from him, Mr. Idada would have responded in kind. There was evidence that customs officers are trained to use alternatives to physical contact. In this instance Officer Tangney used none of these alternatives. At a minimum he could have informed Mr. Idada that if he did not let go of the briefcase he could be charged with obstructing the officer in the performance of his duty. There was no credible evidence to explain why it was necessary that Mr. Idada hand over his briefcase prior to contacting legal counsel and the U.S. Consulate. I accept Mr. Idada's explanation that he wanted to keep his briefcase with him as he was concerned that drugs or something else might be planted in it.

[88] I find that Officer Tangney made physical contact with Mr. Idada for the sole purpose of removing the briefcase from him because he failed to comply with the order given to hand it over. I further find that in all of the circumstances, the order to hand over the briefcase with no explanation given as to why this was required was unreasonable. Mr. Idada interpreted this order to mean that the strip search was to take place without him having an opportunity to speak to legal counsel or his Consulate.

[89] When the police entered, they were informed as to what had happened. Mr. Idada told them that he had an agreement that he could call legal counsel and his Consulate before the strip search began. The police officers said something to the effect of "let's do that" and then asked if Mr. Idada was willing to cooperate and he said that he was. The evidence of Officer Tangney at trial supports

the plaintiff's position that his concern all along was his right to counsel before the search commenced. Officer Tangney testified that "Mr. Idada expressed [to the officers] some concern on the reason for being in the room, which we addressed. I believe it was in regards to counsel."

[90] The police left, Mr. Idada raised himself up to sit on the bench and a call was placed to duty counsel and to the U.S. Consulate. Officer Tangney read him the provisions of section 98 of the *Customs Act* from the wall poster and then the search began. It was of interest that there was no evidence in any of the notes made by the officers or in their oral evidence that the briefcase, which Officer Tangney claimed had to be removed from the room, was in fact ever removed from the search room.

[91] At 18:30 hours Mr. Idada begins to remove his clothing and he was asked to bend over and to spread his buttocks, in order that the officers could look for signs of an anal plug or Vaseline smearing that would show that something had been inserted into his rectum. Nothing was found.

[92] Mr. Idada then got dressed and was asked to provide a stool sample. Officer Tangney's notes indicate that he provided the first stool sample at 18:40 hours. At 19:00 hours he provides his second bowel movement and at 19:42 hours he provided a third sample. It should be noted that while there is a minimal amount of privacy provided in that the traveller is not in full view, the traveller is required to produce these stool samples in the presence of the officers.

[93] Having found nothing, Mr. Idada was advised that he could leave.

[94] Mr. Idada asserts that during the strip search the officers “started cracking jokes”. He recalls them saying that they would put him in the x-ray machine but that he was too fat. He says that this was after they looked down at his penis and laughed because it had shrunk into his body due to the cold temperature in the room.

[95] Officer Tangney testified that during the personal search procedure, there was some discussion concerning the x-ray machine. He testified that he didn't know what started the talk on the x-ray machine but that Mr. Idada suggested it be used on him and he testified that “It's something we laughed at. It's something we all laughed at. You know, it was – would a person go through an x-ray machine?”

[96] Whether the x-ray machine was raised by the plaintiff or one of the officers, any humour in what is clearly a humiliating situation should have been avoided. The reasons for the laughter can be misinterpreted by the traveller, as it likely was in this case. The policies of CCRA say as much. Nonetheless, I find that the laughter was not made with any intention to further embarrass Mr. Idada or inflict mental suffering on him. At best it shows some insensitivity on the part of the officers involved.

[97] After leaving the customs area, Mr. Idada was watched by Officer Tangney. Mr. Idada says that he found some elastic or rubber bands to wrap around his luggage as it would no longer close properly. He tried to catch a flight back to Boston but was told that the last flight had departed at

18:45 hours. It was then 19:00 or 19:30 hours. He checked into the Fairmont Hotel overnight and returned to Boston the following morning.

Other Evidence for the Defendant

[98] Paul Brady is the National Use of Force Coordinator for CBSA. He was called by the defendant to provide his opinion as to whether the force used by Officer Tangney was in keeping with the use of force guidelines in place at the time. After a *voir dire* I ruled that the proposed opinion evidence did not meet the test to be admissible. The witness's opinion was to be based on the pleadings, the documents produced prior to trial and the examinations for discovery and not the evidence actually offered at trial. The witness had not been present at trial. The opinion of an expert is admissible to assist the Court. In this case, the Court was in at least as good a position, and in all likelihood a better position having heard the evidence, than the proposed witness, to make the necessary determination as to whether the force used was reasonable.

[99] The evidence of Mr. Brady was therefore restricted to factual evidence concerning the relevant use of force policies in place at the time and the training that Mr. Tangney received prior to the event at issue.

[100] Mr. Brady identified and spoke to the 'Policy on the Use of Force by Customs Officers' that was entered as an exhibit. The policy and the evidence of Mr. Brady is that the "reasonable use of force" by officers in the execution of their duties is justified under sections 25-27, 34 and 37 of the *Criminal Code*, as well as under the *Customs Act*.

[101] He described the training customs officers receive. He also testified and described the benefits and options technique that officers are trained to use which is a verbal technique for dealing with travellers to get compliance. The witness accepted the proposition put to him that simply repeating a command to an obstinate or uncooperative person is unlikely to secure compliance; however, if the command is put in the context of “do this, or else this will be the consequence” the person may comply. Specifically, counsel for the plaintiff put to the witness that it was an option that officers were trained on that they tell the non-compliant traveller that if they did not comply, then they could be arrested. Mr. Brady agreed that was one of the options available to officers. He did however, also state that it would depend on the exigency of the situation and if the person was about to assault the officer, then all talking ends and physical control is required to be achieved.

[102] Jerry Jesso is Chief of Intelligence Operations for CBSA and has been since 2005. He has been employed by the defendant since 1992. He was called to give evidence as to indicators used by CCRA, to explain the types and categories of indicators within the parameters of this action, and to provide an opinion as to the validity of the indicators noted by Officer Tangney in his notes and in his reports. His evidence was given *in camera*.

[103] He described indicators as tools used by front-line officers that, if not negated, would lead to a level of suspicion that there may be grounds for a further examination of the traveller. Indicators have been used by CCRA since the early 1970s.

[104] He testified that although the presence of a single indicator might lead to a reasonable suspicion concerning the traveller, it was more usual that a number of indicators would be present that would lead to the reasonable suspicion. He described that there are two categories of indicators: objective indicators and subjective indicators.

[105] Objective indicators include the result of a canine examination or x-ray. These are indicators that are reproducible and do not depend on any analysis by the individual officer. There were no objective indicators in Mr. Idada's case.

[106] There are a number of categories of subjective indicators, including verbal, non-verbal behaviour, routing, physical indicators, documentation and situational indicators.

[107] **[Omitted]**

[108] **[Omitted]**

[109] **[Omitted]**

[110] Mr. Jesso examined each of the 19 indicators he found in the materials produced by Officer Tangney and concluded “that the indicators provided by Customs Officer Tangney were valid and support the examination level of search provided.”

[111] On cross-examination Mr. Jesso acknowledged that his opinion as to the appropriateness of Officer Tangney’s personal search might be different if the Court were to find that some of the 19 indicators he had considered were found not to have existed. He also was candid in admitting that in this case there were no objective indicators, they were all subjective indicators.

[112] He admitted that most of the drug swallows coming into Pearson Airport come from the Caribbean and only “a very few” come from Nigeria. This was consistent with the evidence of Officer Tangney that in his 12 years he had only a “couple” of previous situations involving Nigeria.

[113] He agreed with counsel that in order to proceed with a strip search and a lavatory search of a traveller there would have to be “clear indicators” and “strong grounds.”

Analysis

a) Detention and Search

[114] Whether the detention and search of Mr. Idada was lawful depends on whether there was legal justification for it.

[115] The *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) provides statutory legal authority to search individuals entering Canada. Section 98 of the Act provides as follows:

- | | |
|---|---|
| <p>98. (1) An officer may search</p> | <p>98. (1) S'il la soupçonne, pour des motifs raisonnables, de dissimuler sur elle ou près d'elle tout objet d'infraction, effective ou éventuelle, à la présente loi, tout objet permettant d'établir une pareille infraction ou toute marchandise d'importation ou d'exportation prohibée, contrôlée ou réglementée en vertu de la présente loi ou de toute autre loi fédérale, l'agent peut fouiller :</p> |
| <p>(a) any person who has arrived in Canada, within a reasonable time after his arrival in Canada,</p> | <p>a) toute personne arrivée au Canada, dans un délai justifiable suivant son arrivée;</p> |
| <p>(b) any person who is about to leave Canada, at any time prior to his departure, or</p> | <p>b) toute personne sur le point de sortir du Canada, à tout moment avant son départ;</p> |
| <p>(c) any person who has had access to an area designated for use by persons about to leave Canada and who leaves the area but does not leave Canada, within a reasonable time after he leaves the area,</p> | <p>c) toute personne qui a eu accès à une zone affectée aux personnes sur le point de sortir du Canada et qui quitte cette zone sans sortir du Canada, dans un délai justifiable après son départ de la zone.</p> |
| <p>if the officer suspects on reasonable grounds that the person has secreted on or about his person anything in respect of which this Act has been or might be contravened, anything that would afford evidence with respect to a contravention of</p> | |

this Act or any goods the importation or exportation of which is prohibited, controlled or regulated under this or any other Act of Parliament.

(2) An officer who is about to search a person under this section shall, on the request of that person, forthwith take him before the senior officer at the place where the search is to take place.

(3) A senior officer before whom a person is taken pursuant to subsection (2) shall, if he sees no reasonable grounds for the search, discharge the person or, if he believes otherwise, direct that the person be searched.

(4) No person shall be searched under this section by a person who is not of the same sex, and if there is no officer of the same sex at the place at which the search is to take place, an officer may authorize any suitable person of the same sex to perform the search.

(2) Dès que la personne qu'il va fouiller, en application du présent article, lui en fait la demande, l'agent la conduit devant l'agent principal du lieu de la fouille.

(3) L'agent principal, selon qu'il estime qu'il y a ou non des motifs raisonnables pour procéder à la fouille, fait fouiller ou relâcher la personne conduite devant lui en application du paragraphe (2).

(4) L'agent ne peut fouiller une personne de sexe opposé. Faute de collègue du même sexe que celle-ci sur le lieu de la fouille, il peut autoriser toute personne de ce sexe présentant les qualités voulues à y procéder.

[116] Section 98 of the Act gives customs officials the legal authority to search a person entering Canada whom they suspect is carrying a controlled substance. Whether there were reasonable grounds to conduct the personal search of Mr. Idada is a factual determination.

[117] The defendant relies on the expert opinion of Jerry Jesso, a veteran CBSA employee, for the proposition that sufficient indicators existed to warrant a search. The plaintiff relies on CBSA historical search data to show that where a traveller is not selected based on a canine hit or other objective intelligence, the prospect for a positive search, based on the application of indicators, is minimal. In my view, neither is correct.

[118] Mr. Jesso's opinion as to the reasonableness of the search was based on a number of indicators that he believed existed but which I have found did not exist, as such his opinion, as he readily admitted, might well have been different.

[119] Contrary to the position of the plaintiff, this is not a trial about the reasonableness of the indicators used by customs authorities. Each case must be examined on its own facts. The task here is to examine the facts as found and ask whether a reasonable customs officer would believe, based on those facts, that Mr. Idada could be a drug smuggler.

[120] It may well be the case that facts sufficient to warrant a search of a traveller's luggage will be insufficient to warrant a search of his person. The intrusiveness of the search proposed is a relevant consideration. This was noted by the Supreme Court of Canada in *R. v. Simmons*, [1988] 2 S.C.R. 495 at para. 49-51, a case under the former Act that dealt with a traveller who was referred to secondary screening upon entering Canada. The officer concluded that a search was warranted based on the initial officer's observation that the traveller was nervous, as well as the traveller's identification issues and apparent bulge around her waste. A strip search revealed narcotics

bandaged around the woman's waist. The majority of the court held that the search did not infringe the *Charter*. They stated:

I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.

In my view, routine questioning by customs officers, searches of luggage, frisk or pat searches, and the requirement to remove in private such articles of clothing as will permit investigation of suspicious bodily bulges permitted by the framers of ss. 143 and 144 of the *Customs Act*, are not unreasonable within the meaning of s. 8. Under the *Customs Act* searches of the person are not routine but are performed only after customs officers have formed reasonable grounds for supposing that a person has contraband secreted about his or her body. The decision to search is subject to review at the request of the person to be searched. Though in some senses personal searches may be embarrassing, they are conducted in private search rooms by officers of the same sex. In these conditions, requiring a person to remove pieces of clothing until such time as the presence or absence of concealed goods can be ascertained is not so highly invasive of an individual's bodily integrity to be considered unreasonable under s. 8 of the *Charter*.

[121] The majority made clear that it was not addressing the constitutionality of more invasive body cavity searches that “may raise entirely different constitutional issues for it is obvious that the greater the intrusion, the greater must be the justification and the greater the degree of constitutional protection”: *Simmons*, at paras. 27-28.

[122] In *R. v. Monney*, [1999] 1 S.C.R. 652, a case that dealt with the current search provision in section 98 of the Act, a more invasive search was conducted. The officer became suspicious of the traveller because he had paid by cheque for his ticket on the date of departure, had transited via Switzerland from a narcotics source country, and initially denied that he had visited Ghana. The traveller was subjected to a loo search after being informed of his right to counsel. A urine sample was provided after the traveller spoke with counsel. This sample confirmed the presence of heroin. The traveller then admitted to ingesting heroin, and he was charged. The traveller was convicted, but a majority of the Court of Appeal held that his rights under s. 8 of the *Charter* were infringed and ordered that evidence concerning the narcotics should have been excluded.

[123] The issue before the Supreme Court was whether this type of search was authorized by section 98 of the Act. A unanimous court, citing *Simmons*, concluded that the search was authorized. The Court held that:

a passive ‘bedpan vigil’ is not as invasive as a body cavity search or medical procedures such as the administration of emetics. In this sense, the right to bodily integrity is not to be confused with feelings of modesty, notwithstanding their legitimacy. Accordingly, a passive ‘bedpan vigil’ is more appropriately analogous to a category two strip search on the basis that a suspect is detained and placed in an embarrassing situation, but is not subjected to an intentional

application of force against his or her will: *Monney, supra* at para. 47.

The Court also concluded that the indicators in that case were sufficient to establish reasonable grounds for the search.

[124] A more recent decision involving searches such as those conducted of Mr. Idada is from the Ontario Court of Appeal in *Kelly v. Palazzo*, 2008 ONCA 82. The plaintiff was a traveller returning from Jamaica who was randomly selected for secondary inspection. The customs officer determined that there were reasonable grounds for a more invasive search based on the fact that the traveller was returning from Jamaica, that he was evasive and nervous, and that he caused a disturbance by shouting at the officer. The traveller was subjected to a strip search and loo search that were both negative. The traveller then brought an action alleging that he had been illegally detained and searched and that he was racially profiled. The trial judge dismissed the action, holding that there were reasonable grounds for the search, and that the plaintiff had not proven that he was racially profiled.

[125] The Court dismissed the appeal, holding that there were reasonable grounds to warrant a search. The Court of Appeal made the following remarks with respect to the constitutional validity of the searches:

53 In *Simmons, supra*, the Supreme Court held that persons who were subject to routine questioning at the border, luggage searches, and even minimally intrusive personal searches were not detained for the purposes of s. 10 of the *Charter*. The Court further held that such routine activities did not infringe any reasonable expectation of privacy protected by s. 8. On the authority of *Simmons* and its progeny, Mr. Kelly was not detained for the purposes of s. 10 of the

Charter when he was initially questioned by Officer Demchyshyn, or when he was directed to the secondary area where he was further questioned, his luggage and wallet searched, and his jewellery scanned for evidence of drug residue. Nor did any of these activities interfere with Mr. Kelly's reasonable expectations of privacy. Consequently, these actions could not violate s. 8 of the *Charter*.

54 Even more intrusive searches conducted at the border, including strip-searches and "loo searches" that do engage ss. 8 and 10 of the Charter, are justified on a lower standard than the normally applicable reasonable and probable grounds standard: Simmons, supra, at 320-21; Monney, supra, at paras. 34-37. These more intrusive searches are conducted under the authority of s. 98 of the *Customs Act*, the statutory provision invoked by Officer Demchyshyn.

...

An officer may order a search on the basis of a reasonable suspicion that the individual has contraband such as illicit drugs on or in his person. The reasonable suspicion standard is akin to the standard required for an investigative detention. It combines a subjectively based suspicion with the objective requirement that the suspicion be reasonable in all of the circumstances: see R. v. Mann (2004), 185 C.C.C. (3d) 308 at 320-23 (S.C.C.).

[emphasis added]

[126] Accordingly, the Court must determine whether Officer Tangney had a reasonable suspicion that Mr. Idada had contraband on or in his person. In my view, the following facts cumulatively reasonably support such a suspicion:

- i. Mr. Idada was travelling from a country that was a narcotics source country.
- ii. His entry to the U.S.A. from Canada would less likely cause suspicion from U.S. authorities that he was smuggling drugs from Nigeria.
- iii. His explanation for travelling to Canada rather than returning directly to Boston was extremely unusual. He knew nothing of the Canadian turkey market,

knew no turkey producers, had nowhere booked to stay, and claimed he would be doing research that was as easily done from Boston.

- iv. The airline ticket had been purchased the day prior and in cash.
- v. He claimed to have eaten food and taken drink on the plane.
- vi. He appeared thirsty and had a pasty mouth but refused food and water when offered.

[127] While one may offer an explanation for each of these facts, as was done at trial by counsel, those explanations were not before Officer Tangney. I find that the detention and subsequent searches of Mr. Idada were reasonable and justified under the provisions of the *Customs Act*.

b) Acts of Officer Kostovski

[128] Battery is an intentional tort. In an action for battery the plaintiff succeeds if he shows that the defendant directly interfered with his person, and the defendant cannot prove that the action was without volition or intent or subject to some other affirmative defence.

[129] Battery requires a harmful or offensive contact with another person's body. This contact need not be direct, but everyday contact does not lead to liability in tort; the contact must be more than what one would normally be expected to tolerate in ordinary life. The requirement of "harmful or offensive" does not mean that the action must result in an injury or that the action is morally offensive.

[130] The taking of Mr. Idada's wallet by the Officer Kostovski did amount to the infliction of force on Mr. Idada, even if that force was indirectly transferred through the wallet. The application

of force by the officer was intentional. The question that remains is whether the use of force was unlawful within the meaning of the definition of a battery, or put another way, whether the conduct would be generally perceived as unacceptable by reasonable persons.

[131] I am of the opinion that Officer Kostovski's conduct would be perceived by reasonable persons to be offensive. After making a request for documents, an officer ought to give an individual that is being questioned time to comply with that request. Being pulled aside for secondary questioning, in a foreign airport, is undoubtedly a somewhat stressful experience. It is a normal response, under questioning from a person in authority, to be slow in one's response; perhaps even more so when English is not the traveller's first language. Travellers ought not to be expected to comply with an officer's request at lightning speed. What matters is whether the traveller is complying with the request to hand over the requested documentation. In this case, Mr. Idada was complying with the request; he had removed his wallet, which contained his passport, from his pocket and was going through it to find the passport. Before Mr. Idada had a chance to remove the passport and hand it over, Officer Kostovski grabbed his wallet from his hand. This action was an intentional infliction of force.

[132] It was not seriously submitted that Officer Kostovski had no alternative available to him but to grab the wallet from Mr. Idada. He had a number of alternatives, including the option of asking him to stand aside until he produced it. While the officer is entitled to request and examine a traveller's passport, he is not entitled to grab it from him in the circumstances that existed on March 3, 2002. It is apparent from the treatment that Mr. Idada received that some officers do think they

can act without repercussions. While it should go without saying that the *Customs Act* does not give them carte blanche, I think a reminder is warranted. I find that the defendant has no defence to the battery committed by Officer Kostovski on Mr. Idada.

c) Actions of Officer Tangney

[133] The actions of Officer Tangney in applying his arm to Mr. Idada, taking him to the bench and then to the floor and applying a wristlock, clearly were intentional inflictions of force. The sole question is whether the defence of legal justification is available to Officer Tangney.

[134] The only serious defence raised to these actions was that he felt threatened by the actions of Mr. Idada. The *Customs Act* does authorize the use of reasonable force in situations where officers feel threatened and there is no other less forceful alternative. However, I have found Officer Tangney's assertion of fear not to be credible. Officer Tangney was reacting to Mr. Idada's refusal to comply with his demand to hand over the briefcase and not to any fear of assault as was alleged. Mr. Idada was trying to prevent Officer Tangney from taking his briefcase from his hand and he was not raising it in a threatening manner. There were a number of other options available to Officer Tangney if his goal was to remove the briefcase from Mr. Idada. The force used was not justified and was not reasonable. I find that the defendant has no defence to the battery committed by Officer Tangney on Mr. Idada.

Conclusion

[135] Mr. Idada is entitled to damages for the batteries committed by Officer Kostovski and Officer Tangney. In all other respects his action fails. I remain seized of the issue as to costs.

[136] If the parties cannot come to an agreement on an appropriate award of damages for these torts within 30 days, they are to advise the Judicial Administrator of the Court who will schedule a continuation of the trial on the issue of damages.

“Russel W. Zinn”

Judge

Ottawa, Ontario
May 21, 2010

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1238-02

STYLE OF CAUSE: ESEMUEDE HENRY IDADA v.
HER MAJESTY THE QUEEN IN RIGHT OF CANADA

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: November 30, 2009; December 1, 2, 3, 4, and 7, 2009

AMENDED
PUBLIC REASONS
FOR JUDGMENT: ZINN J.

DATED: May 21, 2010

APPEARANCES:

John W. Bruggeman

FOR THE PLAINTIFF

P. Tamara Sugunasiri
Shahana Kar

FOR THE DEFENDANT

SOLICITORS OF RECORD:

KOSTYNIUK & BRUGGEMAN
Barristers & Solicitors
Mississauga, Ontario

FOR THE PLAINTIFF

JOHN H. SIMS, Q.C.
Deputy Attorney General of Canada

FOR THE DEFENDANT