

Federal Court



Cour fédérale

Date: 20171212

Docket: T-589-16

Citation: 2017 FC 1133

Ottawa, Ontario, December 12, 2017

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MUOI HOANG

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Hoang, the applicant, was born in Vietnam and is now a Canadian citizen. On October 27, 2015, while driving alone from Ontario to British Columbia, she inadvertently crossed the Canada – United States border between Pigeon River, Ontario and Grand Portage, Minnesota. At the United States border crossing she advised American officials that she was in possession of more than \$40,000 in Canadian currency. She immediately returned to Canada.

[2] While at the Canadian border crossing she failed, when asked, to report the full amount of currency in her possession. Ms. Hoang was referred for further inspection. The unreported currency was found in a plastic Walmart shopping bag on the passenger seat of her car. She was found to be in possession of approximately \$42,000 in cash. The failure to report was a violation of subsection 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [the Act] and all currency in her possession was seized as forfeit pursuant to subsection 18(1) of the Act. After further investigation at the border crossing the responsible Canada Border Services Agency [CBSA] officer concluded he had reasonable grounds to suspect the currency was proceeds of crime. The seized funds were retained pursuant to subsection 18(2) of the Act.

[3] Ms. Hoang, relying on section 25 of the Act, subsequently sought a decision from the Minister of Public Safety and Emergency Preparedness concerning the seizure. The Minister's delegate found that there was a failure to report the importation of currency and, pursuant to section 29 of the Act, confirmed the forfeiture.

[4] Ms. Hoang has not initiated proceedings challenging the finding that there was a failure to report, but has brought this application raising a single issue: that the decision to maintain forfeit of the funds was unreasonable.

[5] For the reasons set out below, this application is dismissed. Ms. Hoang has failed to demonstrate that the Minister's delegate erred in confirming the forfeiture or the decision was otherwise unreasonable. In processing Ms. Hoang's review request the Minister's delegate

invited submissions and provided detailed instructions as to the type and nature of documents and information that might demonstrate the funds originated from a legitimate source. No additional documentation was provided, nor were any submissions made. In the circumstances, the conclusion that Ms. Hoang had failed to demonstrate the funds came from a legitimate source was reasonably available to the Minister's delegate.

II. The Legislation

[6] The Act requires that the import or export of currency over a prescribed amount be reported (section 12); the prescribed amount is currently set at \$10,000 (*Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412, subsection 2(1)). Where an Officer believes on reasonable grounds that this reporting obligation has been contravened the currency may be seized (Act, subsection 18(1)). Seized currency will normally be returned upon payment of a penalty, unless the Officer has reasonable grounds to suspect the money is the proceeds of crime (subsection 18(2)).

[7] Where currency has been seized, the individual from whom it has been seized or the owner may, within 90 days of the seizure, ask the Minister to decide whether the Act was contravened (section 25). The CBSA then serves a notice of circumstances of the seizure (section 26) and the individual is afforded 30 days to furnish evidence (section 27). The Minister will then render a decision within 90 days (section 27). Where the Minister concludes the Act was contravened the Minister must then decide what penalty, if any, to apply (section 29).

[8] This legislative framework creates two reviewable decisions, which must be challenged in separate proceedings. A challenge to the Minister's decision that the Act was contravened proceeds by way of action (section 30). Challenges to the penalty applied for that contravention proceed by way of judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 (*Guillaume v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 143 [*Guillaume*] at para 37). The applicant has chosen the second path: this proceeding is a judicial review of the penalty decision confirming forfeiture of the currency seized.

[9] Relevant extracts from the Act are reproduced in the Annex to this Judgment and Reasons for ease of reference.

III. Standard of Review

[10] Decisions made pursuant to section 29 of the Act are to be reviewed against a standard of reasonableness (*Guillaume* at para 37). A reviewing court will defer to the exercise of the Minister's delegate's discretion and only intervene where the decision-making process lacks the elements of justification, transparency and intelligibility or the outcome falls outside the range of possible acceptable outcomes based on the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Fresh Evidence

[11] The parties have placed fresh evidence before the Court which consists of the following:

- A. a May 19, 2016 affidavit sworn by Ms. Hoang in which she asserts that: (1) her ability to speak and to understand English is limited; (2) she understood the CBSA officer was asking how much money was in her purse, not in the car; (3) on this basis she advised she was in possession of between \$2000 and \$5000; (4) she was not given adequate opportunity to report the amount of cash in her car; and (5) the cash in her car came from the recent sale of her nail salon business to a Mr. Tommy Pham;
- B. a May 14, 2016 affidavit sworn by Mr. Tommy Pham confirming that Mr. Pham purchased Ms. Hoang's business, and that \$65,000 of the agreed upon purchase price was paid in cash in August, 2015;
- C. a June 17, 2016 affidavit sworn by Mr. Pierre Dastous, a lawyer at CBSA, responding to Ms. Hoang's May 19, 2016 affidavit evidence that: (1) she thought the Officer was asking how much money was in her purse; and (2) she had difficulty understanding and communicating in English.
- D. a transcript of the cross-examination of Mr. Dastous on his June 17, 2016 affidavit;
- E. a transcript of the cross-examination of Ms. Hoang on her May 19, 2016 affidavit;
- F. a January 6, 2017 affidavit sworn by Mr. Chris Sdao, the CBSA Officer who posed primary inspection questions to Ms. Hoang upon her return to Canada; and

- G. a one page document purporting to contain submissions that Ms. Hoang's counsel submitted were prepared and provided to the respondent electronically in advance of the decision for consideration by the Minister's delegate.

[12] The principles governing the use of fresh evidence in judicial review proceedings were canvassed by Justice Stratas in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paragraphs 13 to 28. The principles enumerated in *Bernard* may be summarized as follows:

- A. as a general rule evidence that was available to be placed before a decision-maker is not admissible before a reviewing court (*Bernard* para 13);
- B. the rationale for this general rule is twofold: (1) judicial efficiency; and, more fundamentally, (2) the need to recognize the differing roles of administrative decision makers and reviewing courts (*Bernard* paras 16, 18). The administrative decision-maker has been given jurisdiction by Parliament to make findings of fact, apply the law to the facts and decide the merits; the reviewing court's role is to review overall legality, not to re-decide the merits of the decision reached. (*Bernard* para 17, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 paras 17-19 [*Access Copyright*]);
- C. a reviewing court is not a forum for fact-finding on the merits of a matter before it for review (*Bernard* para 17; *Access Copyright* para 19);
- D. the general rule is subject to three recognized exceptions; (1) background information aimed at assisting the reviewing court to understand the record; (2)

information highlighting the complete absence of evidence on the record; and (3) evidence relating to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the decision-maker – in other words evidence pointing to an unfairness in the process – but unrelated to the merits of the decision under review (*Bernard* paras 20-25);

- E. the exceptions are not a closed list and there may be other instances where the reception of fresh evidence is entirely consistent with the general rule and its underlying rationale (*Bernard* para 28).

[13] Ms. Hoang has not made any argument in her written submissions in relation to the consideration of the fresh evidence. In oral submissions, her counsel advanced the view that the Court should consider the fresh evidence but did not identify any basis for an exception to the general rule. The respondent on the other hand submits that Ms. Hoang was invited to provide evidence and make submissions in advance of a decision being made and did not do so. The respondent further submits that Ms. Hoang has not shown that the fresh evidence was unavailable to be put before the Minister's delegate. The respondent submits the fresh evidence should not be considered. I agree.

[14] All of the evidence the parties seek to now place before the Court is advanced for the purposes of fact-finding and reconsideration of the merits of the decision. Having failed to make submissions to the decision-maker Ms. Hoang cannot now place evidence and representations before this Court that should have been before the decision-maker. The facts and information contained in the fresh evidence do not fall within the scope of any of the exceptions identified

above nor would its consideration be consistent with the general rule that judicial review is to be conducted on the basis of the record that was before the decision-maker.

[15] In reaching this conclusion I recognize that the one page document Ms. Hoang's counsel placed before the Court in the course of oral submissions may be viewed differently than the remainder of the fresh evidence in this matter. Ms. Hoang's counsel advised the Court that this one page document reflected submissions made in an electronic form that had been completed on the respondent's website and submitted electronically for consideration in advance of the decision. This information is not contained in the Certified Tribunal Record.

[16] Applicant's counsel has essentially advanced the position that the record before the decision-maker was incomplete. If I were to accept this to be the case then an issue of fairness arises and the information contained in the document may be considered on the basis of the third recognized exception set out in *Bernard*. However, I am not satisfied that Ms. Hoang's counsel has established that this information was provided to the decision-maker in advance of the decision or that an issue of fairness arises.

[17] In rendering the decision to confirm forfeiture the Minister's delegate expressly notes the absence of any submissions from Ms. Hoang. The information contained in the one page document mirrors much of the information contained in her May 19, 2016 affidavit but the affidavit makes no reference to any submissions having been made through the respondent's website by either Ms. Hoang, or her counsel. In addition, Ms. Hoang's counsel cross-examined Mr. Pierre Dastous, a lawyer for CBSA. In the cross-examination Ms. Hoang's counsel does not

raise concerns with the content of the Certified Tribunal Record or take issue with the fact that the decision reflects the absence of any submissions from Ms. Hoang. The exclusion or non-consideration of relevant information by the decision-maker was also not pursued in written submissions or as a basis for the application.

[18] Ms. Hoang's counsel gave no advance notice of his intent to place this information before the Court in oral submissions, effectively depriving respondent's counsel of the opportunity to investigate the claim now being advanced. Similarly, counsel has not placed any evidence before the Court detailing who provided the information, where they did so, or when this information was allegedly provided to the respondent. Finally, there is no indication on the document's face to support the contention that it was submitted over the internet to the Minister's delegate.

[19] In the circumstances I am not satisfied that this information was provided to the respondent in advance of the decision being rendered and as such no issue of fairness arises.

[20] Accordingly, I have not considered any of the fresh evidence in deciding this application.

V. Analysis

[21] The sole issue is whether the Minister's delegate's decision under section 29 to refuse discretionary relief from forfeiture of funds was reasonable.

[22] The parties do not dispute that Ms. Hoang had the burden of satisfying the Minister's delegate that the funds in issue were not proceeds of crime (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para 50; *Guillaume* at para 39). Where a Minister's delegate is not satisfied that this burden has been met then the Minister's delegate will be "entitled to decline to exercise his discretion to grant relief from forfeiture" (*Sellathurai* at para 50).

[23] In rendering the decision the Minister's delegate enumerated the seven grounds cited by the CBSA Officer in support of his reasonable grounds to suspect the funds were proceeds of crime, and also noted Ms. Hoang provided no documentation at the time of seizure to support the explanation that the funds originated from the sale of a business. The Officer then proceeded to note that in the course of the review process Ms. Hoang had been provided with an explanation as to what information was required to reduce the "level of enforcement action". She was advised in a letter dated January 19, 2016 that a copy of a sales agreement that had been received by the respondent was "far from being enough to prove the legitimacy of the funds" and suggestions were then made as to what other documentation she might provide to support a finding in favour of mitigating the level of enforcement action. The decision then notes "no submissions were ever provided to demonstrate the legitimacy of the seized currency". The origin of the funds could not be determined and forfeiture was maintained.

[24] Ms. Hoang essentially argues that the seven grounds cited by the CBSA Officer in support of his reasonable grounds to suspect the funds were proceeds of crime were baseless and that there was sufficient evidence before the Officer to demonstrate a legitimate source for the

funds. The grounds cited in support of the forfeiture decision by the Officer and relied upon by the Minister's delegate were not baseless, but rather factors and circumstances that were considered in the broader context of the failure to report. These factors however were not determinative of the Minister's delegate's decision in this case.

[25] The determinative factor in maintaining the forfeiture was the absence of sufficient information to satisfy the Minister's delegate that the funds were from a legitimate source. Ms. Hoang takes the position that the sales agreement was sufficient to demonstrate the legitimacy of the funds. This is simply a disagreement with weight given to the document. It is not for a reviewing court to re-weigh the evidence. This is particularly true where, as in this case, Ms. Hoang was advised in advance of a decision being rendered that this evidence was insufficient to meet her burden and guidance was provided on what information would be of assistance.

[26] The decision reflects the elements of transparency, intelligibility and justifiability in the decision-making process and the outcome is well within the range of reasonable possible outcomes based on the facts and the law.

[27] The parties advised in the course of oral submissions that they had agreed costs to the successful party in the amount of \$2000 inclusive of all disbursements would be appropriate. Having considered Tariff B of Column II of the *Federal Courts Rules*, SOR/98-106 and the complexity of the issues in relation to this application I am satisfied that \$2000 is an appropriate award.

JUDGMENT IN T-589-16

THIS COURT'S JUDGMENT is that:

1. The application is denied; and
2. The respondent shall have costs in the amount of \$2000 inclusive of all disbursements.

"Patrick Gleeson"

Judge

ANNEX*Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17*

[...]

Currency and monetary instruments

12 (1) Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.

Limitation

(2) A person or entity is not required to make a report under subsection (1) in respect of an activity if the prescribed conditions are met in respect of the person, entity or activity, and if the person or entity satisfies an officer that those conditions have been met.

Who must report

(3) Currency or monetary instruments shall be reported under subsection (1)

(a) in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their baggage are being carried on

[...]

Déclaration

12 (1) Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements, l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.

Exception

(2) Une personne ou une entité n'est pas tenue de faire une déclaration en vertu du paragraphe (1) à l'égard d'une importation ou d'une exportation si les conditions réglementaires sont réunies à l'égard de la personne, de l'entité, de l'importation ou de l'exportation et si la personne ou l'entité convainc un agent de ce fait.

Déclarant

(3) Le déclarant est, selon le cas :

a) la personne ayant en sa possession effective ou parmi ses bagages les espèces ou effets se trouvant à bord du moyen de transport par lequel elle arrive au Canada ou quitte le pays ou la personne qui,

board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;

[...]

Seizure and forfeiture

18 (1) If an officer believes on reasonable grounds that subsection 12(1) has been contravened, the officer may seize as forfeit the currency or monetary instruments.

Return of seized currency or monetary instruments

(2) The officer shall, on payment of a penalty in the prescribed amount, return the seized currency or monetary instruments to the individual from whom they were seized or to the lawful owner unless the officer has reasonable grounds to suspect that the currency or monetary instruments are proceeds of crime within the meaning of subsection 462.3(1) of the Criminal Code or funds for use in the financing of terrorist activities.

[...]

Request for Minister's decision

25 A person from whom currency or monetary instruments were seized under section 18, or the lawful owner of the currency or monetary instruments, may, within 90 days after the date of the seizure, request a decision of

dans les circonstances réglementaires, est responsable du moyen de transport;

[...]

Saisie et confiscation

18 (1) S'il a des motifs raisonnables de croire qu'il y a eu contravention au paragraphe 12(1), l'agent peut saisir à titre de confiscation les espèces ou effets.

Mainlevée

(2) Sur réception du paiement de la pénalité réglementaire, l'agent restitue au saisi ou au propriétaire légitime les espèces ou effets saisis sauf s'il soupçonne, pour des motifs raisonnables, qu'il s'agit de produits de la criminalité au sens du paragraphe 462.3(1) du Code criminel ou de fonds destinés au financement des activités terroristes.

[...]

Demande de révision

25 La personne entre les mains de qui ont été saisis des espèces ou effets en vertu de l'article 18 ou leur propriétaire légitime peut, dans les quatre-vingt-dix jours suivant la saisie, demander au ministre au moyen d'un avis écrit ou de

the Minister as to whether subsection 12(1) was contravened, by giving notice to the Minister in writing or by any other means satisfactory to the Minister.

[...]

Notice of President

26 (1) If a decision of the Minister is requested under section 25, the President shall without delay serve on the person who requested it written notice of the circumstances of the seizure in respect of which the decision is requested.

Evidence

(2) The person on whom a notice is served under subsection (1) may, within 30 days after the notice is served, furnish any evidence in the matter that they desire to furnish.

Decision of the Minister

27 (1) Within 90 days after the expiry of the period referred to in subsection 26(2), the Minister shall decide whether subsection 12(1) was contravened.

[...]

If there is a contravention

29 (1) If the Minister decides that subsection 12(1) was contravened, the Minister may, subject to the terms and conditions that the Minister

toute autre manière que celui-ci juge indiquée de décider s'il y a eu contravention au paragraphe 12(1).

[...]

Signification du président

26 (1) Le président signifie sans délai par écrit à la personne qui a présenté la demande visée à l'article 25 un avis exposant les circonstances de la saisie à l'origine de la demande.

Moyens de preuve

(2) Le demandeur dispose de trente jours à compter de la signification de l'avis pour produire tous moyens de preuve à l'appui de ses prétentions.

Décision du ministre

27 (1) Dans les quatre-vingt-dix jours qui suivent l'expiration du délai mentionné au paragraphe 26(2), le ministre décide s'il y a eu contravention au paragraphe 12(1).

[...]

Cas de contravention

29 (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu'il fixe :

- a) soit restituer les espèces ou

may determine,

(a) decide that the currency or monetary instruments or, subject to subsection (2), an amount of money equal to their value on the day the Minister of Public Works and Government Services is informed of the decision, be returned, on payment of a penalty in the prescribed amount or without penalty;

(b) decide that any penalty or portion of any penalty that was paid under subsection 18(2) be remitted; or

(c) subject to any order made under section 33 or 34, confirm that the currency or monetary instruments are forfeited to Her Majesty in right of Canada. The Minister of Public Works and Government Services shall give effect to a decision of the Minister under paragraph (a) or (b) on being informed of it.

[...]

Appeal to Federal Court

30 (1) A person who makes a request under section 25 for a decision of the Minister may, within 90 days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which the person is the plaintiff and the Minister is the defendant.

effets ou,

sous réserve du paragraphe (2), la valeur de ceux-ci à la date où le ministre des Travaux publics et des Services gouvernementaux est informé de la décision, sur réception de la pénalité réglementaire ou sans pénalité;

b) soit restituer tout ou partie de la pénalité versée en application du paragraphe 18(2);

c) soit confirmer la confiscation des espèces ou effets au profit de Sa Majesté du chef du Canada, sous réserve de toute ordonnance rendue en application des articles 33 ou 34. Le ministre des Travaux publics et des Services gouvernementaux, dès qu'il en est informé, prend les mesures nécessaires à l'application des alinéas a) ou b).

[...]

Cour fédérale

30 (1) La personne qui a demandé, en vertu de l'article 25, que soit rendue une décision peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action à la Cour fédérale à titre de demandeur, le ministre étant le défendeur.

Cross-border Currency and Monetary Instruments Reporting Regulations, SOR/2002-412

Minimum Value of Currency or Monetary Instruments

2 (1) For the purposes of reporting the importation or exportation of currency or monetary instruments of a certain value under subsection 12(1) of the Act, the prescribed amount is \$10,000.

(2) The prescribed amount is in Canadian dollars or its equivalent in a foreign currency, based on

(a) the official conversion rate of the Bank of Canada as published in the Bank of Canada's Daily Memorandum of Exchange Rates that is in effect at the time of importation or exportation; or

(b) if no official conversion rate is set out in that publication for that currency, the conversion rate that the person or entity would use for that currency in the normal course of business at the time of the importation or exportation.

Valeur minimale des espèces ou effets

2 (1) Pour l'application du paragraphe 12(1) de la Loi, les espèces ou effets dont l'importation ou l'exportation doit être déclarée doivent avoir une valeur égale ou supérieure à 10 000 \$

(2) La valeur de 10 000 \$ est exprimée en dollars canadiens ou en son équivalent en devises selon :

a) le taux de conversion officiel de la Banque du Canada publié dans son Bulletin quotidien des taux de change en vigueur à la date de l'importation ou de l'exportation;

b) dans le cas où la devise ne figure pas dans ce bulletin, le taux de conversion que le déclarant utiliserait dans le cours normal de ses activités à cette date.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-589-16

STYLE OF CAUSE: MUOI HOANG v MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

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