

Federal Court



Cour fédérale

Date: 20180904

Docket: T-1301-15

Citation: 2018 FC 883

Ottawa, Ontario, September 4, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MATTHEW FRANCIS WALSH

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] In July 2014, Matthew Francis Walsh was travelling to Johannesburg from the Vancouver International Airport. He failed to declare to customs that he had \$9,850 CAD and \$415 USD in cash in his possession, in contravention of subsection 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [Act]. The currency was seized as forfeit by a Canada Border Services Agency [CBSA] officer for being suspected

proceeds of crime, pursuant to section 18 of the Act. Mr. Walsh made an application to the Minister of Public Safety and Emergency Preparedness to review whether he truly contravened subsection 12(1) of the Act. On behalf of the minister, the manager of the Appeals Division of the CBSA's Recourse Directorate confirmed Mr. Walsh's contravention of the Act and specified that the seized currency would be held as forfeit. Mr. Walsh seeks judicial review of this decision.

II. Preliminary Matter

[2] Counsel for the Respondent rightfully requests that the record be amended to correctly identify the Respondent as the Minister of Public Safety and Emergency Preparedness, instead of Her Majesty the Queen. The style of cause is so amended.

III. Facts

[3] On July 24, 2014, Mr. Walsh was at the Vancouver International Airport, waiting at the gate for his flight to London (with a final destination of Johannesburg), when a CBSA officer approached him and explained to him that he was conducting outbound currency verifications. Mr. Walsh told the CBSA officer that he was travelling to Johannesburg to visit his brother, that he was aware that the currency reporting threshold was \$10,000 CAD and that he did not make a declaration since he was in possession of \$9,000 CAD. These answers to the CBSA officer's preliminary questions led the officer to select Mr. Walsh to undergo full currency verification.

[4] On the way to the currency office, Mr. Walsh told the CBSA officer that he was actually in possession of \$9,400 CAD. In counting the currency that Mr. Walsh had in his carry-on bag and on his person, the CBSA officers found \$9,750 CAD (\$100 CAD x 97, \$20 CAD x 2, \$10 CAD x 1). However, additional currency was found in the front pocket of Mr. Walsh's bag in the amount of \$100 CAD and \$415 USD (\$100 CAD x 1, \$100 USD x 2, \$20 USD x 10, \$5 USD x 3). This additional currency put him over the \$10,000 CAD reporting threshold, with a total of \$10,295.79 CAD, after taking into account the exchange rate at the time.

[5] The CBSA officers sought to establish the legitimacy of Mr. Walsh's currency, but were unable to do so. Consequently, Mr. Walsh's currency was seized as forfeit for being suspected proceeds of crime with no terms of release. A CBSA officer notified Mr. Walsh of his right to appeal.

[6] The reasons given in his narrative report to justify this seizure were the following:

1. Currency was not declared. WALSH clearly stated he was in possession of \$9,000.00, and made numerous statements that he was under \$10,000.00.
2. While walking towards the currency office for verification, WALSH spontaneously changed his currency declaration to \$9,400.00.
3. Claimed the currency was withdrawn from VanCity bank, but the currency was not bank wrapped.
4. WALSH was not in possession of bank envelopes or receipts. Unable to provide any documentary proof as to origin and legitimacy of currency in his possession.
5. WALSH has \$10,000.00 in credit card debt.
6. Did not pay \$10,000.00 credit card debt with the currency, but rather travel.

7. Third party paid tickets. Subject stated he was not computer savvy and required friend to assist him to purchase tickets. Subject would not provide name of person who purchased tickets.
8. Indices positive for narcotic related offenses.
9. Admitted to multiple dealings with law enforcement.
10. Refused to answer questions on multiple occasions related to his currency.
11. Dismissive when approached, initially refused to cooperate and have currency verified in currency office.
12. Did not display overt emotion when advised currency could be seized as suspected profits of crime.
13. Stores \$5,000-\$15,000 in bedside table and cannot explain why he does not keep the currency within the bank. Bedside table is an unsecure and abnormal place to store large amounts of currency.
14. WALSH is a self-admitted frequent traveller and is aware of the currency or monetary instrument reporting requirements.
15. Attempted to account for being over \$10,000.00 CAD by stated [*sic*] he forgot about the USD.
16. Cellular phone contained image of marijuana within zip-lock bag – a method of transport used by narcotic traffickers.
17. Minimally employed for the past 5 years. Made contradictory statements about income.
18. Claimed to be involved with investment companies but unable to provide details of his position or day to day duties.
19. Stated investments are “all lies and bullshit” and it’s about “scamming people”.
20. Claimed to earn large amount [*sic*] of money but cannot provide details of yearly earnings.
21. Admitted to frequent marijuana use.
22. Ion swabs were positive for cocaine contamination on multiple personal items.

23. Claims to be wealthy but stated he requires his mother to co-sign for vehicle lease.
24. Has message on phone alluding to drug dealing.
25. Travelling with a large amount of unreported currency across international boundaries.
26. Bulk cash smuggling is a common form of money laundering and distances the money from the illicit source.

[7] On October 22, 2014, Mr. Walsh's representative wrote to the minister, asking for a review of whether he had contravened subsection 12(1) of the Act. She argued that Mr. Walsh was minimally over the currency reporting threshold and simply unaware of the American currency in the pocket of his carry-on bag. She further explained that Mr. Walsh cashed out several investment dividends just prior to the seizure at the Vancouver International Airport. She provided copies of three Global Securities financial statements dated between April 29, 2014 and July 21, 2014, indicating that Mr. Walsh cashed out a total of \$11,069.59 over the course of this time period.

[8] On November 27, 2014, an adjudicator at the CBSA's Recourse Directorate replied, acknowledging Mr. Walsh's letter as a request for a review of the seizure. The adjudicator also explained that this review would require Mr. Walsh to provide evidence of lawful origin of the currency found in his possession at the time of the seizure. He specified that the evidence provided had to demonstrate an identifiable link between the seized currency and a legitimate origin of the currency and must accurately account for the seized currency in its entirety.

[9] The adjudicator further noted that, while Mr. Walsh's representative did provide three financial statements indicating cash payouts to him during the summer of 2014, Mr. Walsh would have to explain where the currency was kept between the time of withdrawal and the date of the seizure. He would also have to provide documentation to account for the origin of the American currency that was seized. Finally, the adjudicator noted that at the time of the seizure, Mr. Walsh told CBSA officers that the currency was withdrawn from Vancity Bank two weeks prior to his date of travel. Since this narrative contradicted the subsequent one set out by his representative, Mr. Walsh would need to explain the discrepancy.

[10] Mr. Walsh's representative replied on December 28, 2014. She explained that Mr. Walsh suffers from a learning disability and that on the evening of the seizure, he was under the influence of alcohol, sleeping pills and prescription drugs, in the hope of falling asleep right away upon boarding his flight. She further explained that the American currency in Mr. Walsh's bag was left over, unbeknownst to him, from his trip to South Africa in March 2014. The representative noted that the seized currency came from a mix of cashed investment income, as indicated from his Global Securities financial statements, and casino winnings. In support of this statement, Mr. Walsh's representative attached several photographs of casino chips.

[11] On March 20, 2015, the adjudicator replied to Mr. Walsh. She explained that there remained problems with his narrative. For example, the last letter stated that the seized currency was a mix of cashed investment income and casino winnings – a new narrative that differed from the two previously given. The adjudicator also explained that the latest narrative, supported by documents and photographs, did not meet the requisite burden of proof to confirm the currency's

legitimacy. The supporting material failed to confirm the deposit of the alleged sources of funding into Mr. Walsh's bank account and his subsequent withdrawal of those funds just prior to his July 2014 trip. Regarding the American currency, the adjudicator asked whether Mr. Walsh could provide a receipt establishing the exchange of Canadian to American dollars. Mr. Walsh was given fifteen days to provide any additional material, following which the minister would render a final decision on the currency seizure review.

[12] Mr. Walsh's representative submitted a brief letter in reply and attached a Notice of Assessment from the Canadian Revenue Agency, with the taxpayer's name redacted. The adjudicator replied and stated that the Notice of Assessment failed to refer to Mr. Walsh and thus was not helpful to him in meeting the burden of proof required to establish the currency's legitimacy. She explained that all of Mr. Walsh's submissions thus far were insufficient and that reasonable suspicion that the seized currency was proceeds of crime persisted. He was provided with another fifteen days to submit any additional material.

[13] On June 23, 2015, the minister's decision was sent to Mr. Walsh via a letter, confirming that he had contravened subsection 12(1) of the Act and that the seized currency would be held as forfeit.

IV. Impugned Decision

[14] The minister confirmed Mr. Walsh's contravention of subsection 12(1) of the Act and indicated that he would not be exercising his discretion (as provided for in section 29 of the Act) to return the seized currency, which would be held as forfeit.

[15] The minister itemized the documentation submitted by Mr. Walsh as evidence to establish the legitimate origins of the currency and decided that it failed to meet the burden of establishing the currency's legitimacy. The Notice of Assessment did not include Mr. Walsh's name, and thus had no probative value. The photographs of casino chips did not identify to whom the chips belonged – the chips could have belonged to anyone. The Global Securities financial statements had no supporting documentation to specify how Mr. Walsh generated this investment income.

[16] Furthermore, there was no documentation provided to account for the origin of the American currency, or to establish the location where the seized Canadian funds were kept from the time they were withdrawn from a banking institution to the time of the seizure.

[17] Given the above, the minister found that suspicion regarding the legitimate origin of the seized currency remained and that he would not be exercising his discretion in this case, confirming the currency's forfeiture.

V. Issues and Standard of Review

[18] This application for judicial review raises the following single issue:

Did the minister err in refusing to exercise his discretion to return the seized currency?

[19] The minister's decision under section 29 of the Act is reviewable on the standard of reasonableness (*Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA

255 at para 25). The reasonableness standard requires that this Court determine whether the minister's decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

[20] For ease of reference, the relevant provisions of the Act and of the *Cross-border Currency and Monetary Instruments Reporting Regulations* are attached to these reasons.

[21] The Applicant argues that (i) the minister's credibility analysis was manifestly flawed; and that (ii) the minister imposed too great a burden on the Applicant, requiring him to prove with absolute certainty the legitimate origins of every dollar seized. He submits that the minister ignored much of the evidence he provided to establish the legitimacy of the seized currency. In contrast, the minister seemed to easily accept the reasons provided in the CBSA officer's narrative report, without seeking to reconcile contradictions between the facts as set out in the narrative report and his own accounting of the facts. He adds that the minister's decision set an unreasonably high bar for him to meet to prove the legitimacy of the seized currency.

[22] I do not agree with the Applicant. In my view, the minister did not err in refusing to exercise his discretion to return the Applicant's seized currency. His decision was justified, transparent and intelligible and does not warrant interference by this Court.

[23] I agree with the Respondent that the minister did not engage in a credibility analysis. This case is not a challenge of the minister's decision under section 27 of the Act. There is no debate

regarding the fact that the Applicant failed to report his possession of currency in an amount exceeding the reporting threshold. Rather, it is a judicial review of the minister's decision under section 29 of the Act – a decision not to exercise his discretion to return the seized currency to the Applicant. The minister's decision in this regard was not based on a credibility analysis, but on the insufficiency of evidence provided by the Applicant to establish the legitimacy of the seized currency.

[24] It was the Applicant's burden to convince the minister of the lawful origin of his seized currency. The Applicant argues that the documentation that he submitted as evidence made clear that he had "access to more than enough money to cover the seized funds." Whether or not this is true, that was not the burden that the Applicant had to meet. His burden was to provide sufficient evidence of the legitimate origin of the seized currency in order to remove suspicion that it was derived from crime – a much more specific burden that he failed to meet.

[25] The minister concluded that there was a lack of sufficient evidence to establish that the seized currency in the amount of approximately \$10,295.79 CAD came from a legitimate source and nothing in the record suggests that this conclusion is unreasonable. There was no evidence that the Notice of Assessment was addressed to the Applicant, and the photographs of casino chips could not establish that the seized currency was derived therefrom. Furthermore, while the Global Securities financial statements indicate three specific sums to be paid out, there is no evidence regarding the Applicant's deposit or withdrawal of these sums into and out of his bank account during the relevant timeframe (as there is for a deposit and withdrawal of \$2,800 from Global Securities in February 2014).

[26] The Applicant provided receipts from two deposits made to his Vancity bank account in March 2014. However, I agree with the Respondent and the case law cited on this point that two March 2014 deposits do not serve to establish a connection with the seized currency from July 2014, particularly when the deposits were made months before the seizure (*Tourki v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 746 at para 38; *Ukaj v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1047 at para 16).

[27] The same can be said of the Applicant's seized American currency. A copy of the Applicant's bank statement dated March 2014 indicates a \$2,800 deposit from Global Securities in February 2014, and a withdrawal of the same sum via cheque the following day. In a December 2014 letter from the Applicant's representative, she writes that part of this \$2,800 was converted into American currency for his March 2014 trip to Johannesburg and that the seized American currency found in the pocket of the Applicant's carry-on bag was left over from his March 2014 trip. However, the minister concluded that there was simply not enough documentation to bear out that statement and to account for the origin of the American currency.

[28] In *Docherty v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 89, the Federal Court of Appeal stated:

[19] ... In the context of the issues sought to be addressed by the Act - money laundering and the financing of terrorism - the government is entitled to ask for a reasonable explanation of the source of currency in excess of the prescribed limit found on persons leaving Canada. In this case, Mr. Docherty's explanations were unverifiable and, as such, amounted to no explanation at all. In my view, the Federal Court was entitled to find that the Minister's Delegate's decision was reasonable.

[29] I believe that this statement is equally applicable to the Applicant's unverifiable explanations in this case. The jurisprudence on ministerial decisions under section 29 of the Act quite clearly establishes that reasonable explanations must be supported by verifiable evidence (*Sellathurai*, above at paras 52-53; *Guillaume v. Canada (Public Safety and Emergency Preparedness)*, 2013 FC 143 at para 45; *Hoang v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1133 at para 25). The minister decided not to exercise his discretion to return the seized currency because the Applicant failed to demonstrate that the seized currency came from a legitimate source. In other words, the Applicant failed to provide a reasonable explanation, supported by verifiable evidence, of the source of the seized currency. In my opinion, the minister's decision was a reasonable one.

VII. Conclusion

[30] For the above reasons, this application for judicial review is dismissed and costs in the amount of \$500, all-inclusive, are granted to the Respondent.

JUDGMENT in T-1301-15

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. The style of cause is modified to replace "Her Majesty the Queen" by "Minister of Public Safety and Emergency Preparedness" as the Respondent;
3. Costs in the amount of \$500 all-inclusive are granted in favour of the Respondent.

"Jocelyne Gagné"

Judge

APPENDIX A

Sections 12(1), 18, 25, 27, 29(1) and 30(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 read:

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.

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

18 (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.

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.

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

18 (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.

Notice of seizure

18 (3) An officer who seizes currency or monetary instruments under subsection (1) shall

(a) if they were not imported or exported as mail, give the person from whom they were seized written notice of the seizure and of the right to review and appeal set out in sections 25 and 30;

(b) if they were imported or exported as mail and the address of the exporter is known, give the exporter written notice of the seizure and of the right to review and appeal set out in sections 25 and 30; and

(c) take the measures that are reasonable in the circumstances to give notice of the seizure to any person whom the officer believes on reasonable grounds is entitled to make an application under section 32 in respect of the currency or monetary instruments.

Service of notice

18 (4) The service of a notice under paragraph (3)(b) is sufficient if it is sent by registered mail addressed to the exporter.

Request for Minister's decision

25 A person from whom currency or monetary

Avis de la saisie

18 (3) L'agent qui procède à la saisie-confiscation prévue au paragraphe (1) :

a) donne au saisi, dans le cas où les espèces ou effets sont importés ou exportés autrement que par courrier, un avis écrit de la saisie et du droit de révision et d'appel établi aux articles 25 et 30;

b) donne à l'exportateur, dans le cas où les espèces ou effets sont importés ou exportés par courrier et son adresse est connue, un avis écrit de la saisie et du droit de révision et d'appel établi aux articles 25 et 30;

c) prend les mesures convenables, eu égard aux circonstances, pour aviser de la saisie toute personne dont il croit, pour des motifs raisonnables, qu'elle est recevable à présenter, à l'égard des espèces ou effets saisis, la requête visée à l'article 32.

Signification de l'avis

18 (4) Il suffit, pour que l'avis visé à l'alinéa (3)b) soit considéré comme signifié, qu'il soit envoyé en recommandé à l'exportateur.

Demande de révision

25 La personne entre les mains de qui ont été saisis des

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 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.

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.

Deferral of decision

27 (2) If charges are laid with respect to a money laundering offence or a terrorist activity financing offence in respect of the currency or monetary instruments seized, the Minister may defer making a decision but shall make it in any case no later than 30 days after the conclusion of all court proceedings in respect of those charges.

Notice of decision

27 (3) The Minister shall, without delay after making a decision, serve on the person who requested it a written notice of the decision together with the reasons for it.

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

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).

Report de la décision

27 (2) Dans le cas où des poursuites pour infraction de recyclage des produits de la criminalité ou pour infraction de financement des activités terroristes ont été intentées relativement aux espèces ou effets saisis, le ministre peut reporter la décision, mais celle-ci doit être prise dans les trente jours suivant l'issue des poursuites.

Avis de la décision

27 (3) Le ministre signifie sans délai par écrit à la personne qui a fait la demande un avis de la décision, motifs à l'appui.

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 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

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 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

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.

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.

Subsection 2(1) of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 reads:

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.

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 \$.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1301-15

STYLE OF CAUSE: MATTHEW FRANCIS WALSH v MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 31, 2018

JUDGMENT AND REASONS: GAGNÉ J.

DATED: SEPTEMBER 4, 2018

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