Federal Court  Cour fédérale

Date: 20130211

Docket: T-652-12

Citation: 2013 FC 148

Ottawa, Ontario, February 11, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ZAFAR IQBAL MOHAMMAD

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Zafar Iqbal Mohammad, was at Pearson International Airport, Toronto, on October 15, 2010, waiting in the departure area to board his flight to Lima, Peru, when he was singled out and approached by a Canada Border Services Agency [CBSA] officer conducting currency export checks.

[2] Subsection 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [Act] establishes a requirement to report, in accordance with the regulations, the

importation or exportation of currency instruments with a value equal to or greater than the prescribed amount. That amount is $10,000 Canadian Dollars [CAD].

[3] The applicant told the officer that he was aware of the regulations and that he had less than $10,000 CAD in his possession. Besides having $65 CAD in his rear pant pocket (2 x $20 CAD, 2 x $10 CAD, and 1 x $5 CAD), there was 30 x $100 United States Dollars [USD] bills ($3,000 USD) in his wallet, as well as 69 x $100 USD bills ($6,900 USD) in his right cargo pant pocket. Based on the Bank of Canada's rate of exchange for USD currency (1.0108) on that date, the applicant had in his possession the equivalent sum of $10,006.92 CAD ($9,900 USD), plus the sum of $65 CAD, for a total amount of $10,071.92 CAD.

[4] After interrogating the applicant to ascertain whether the currencies carried came from a legitimate source, the 99 USD bills (9,900 USD) were seized by the CBSA as proceeds of crime [the enforcement action], while the $65 CAD was returned to the applicant for travel or humanitarian purposes. The enforcement action was taken by the officer under the authority of sections 18 and 20 of the Act. At the request of the applicant, the matter was administratively reviewed, and on February 28, 2012, the Minister of Public Safety and Emergency Preparedness [Minister] refused to return the currency seized, leading to the present judicial review application.

[5] The facts leading to the impugned decision are not in dispute. On October 25, 2010, the applicant appealed the enforcement action and requested under section 25 of the Act that the Minister decide whether subsection 12(1) of the Act was contravened. The review of the enforcement action was done by the Recourse Direction of the CBSA. Throughout the process, the

applicant was represented by counsel. An adjudicator was charged with preparing a "case synopsis and reasons for decision", which listed the evidence collected during the process as well as a non-binding recommendation for the Minister's delegate. The applicant was advised by letter, dated February 28, 2012, of the reasons that the Minister decided: (1) under section 27 of the Act, that there has been a contravention of subsection 12(1) of the Act; and, (2) under section 29 of the Act, that the seized currency shall be held as forfeit.

[6] The applicant has not challenged the finding of contravention of section 12 of the Act; otherwise, an action before the Federal Court against the decision made by the Minister under section 27 should have been instituted by the applicant under section 30 of the Act.

[7] The impugned decision has been made under the authority of subsection 29(1) of the Act, which provides:

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,	29. (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu'il fixe :
(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;	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) decide that any penalty or	b) soit restituer tout ou partie de

portion of any penalty that was paid under subsection 18(2) be remitted; or	la pénalité versée en application du paragraphe 18(2);
(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.	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.
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.	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).

[8] In his application for judicial review, the applicant does not raise a breach of procedural fairness, but states that the Minister's delegate acted in a capricious manner and without regard for the material before him, or otherwise erred in law by concluding without any credible evidence that the currency is the proceeds of crime and by not returning the seized money after imposing the penalty in the prescribed amount. Indeed, the applicant seeks to set aside the impugned decision "because [he] provided all the necessary explanations to demonstrate the legitimate origin of the funds," and asks this Court to order that the currency seized be returned to him without delay.

[9] According to the case law, the impugned decision is reviewable under the standard of reasonableness. It has already been decided by the Federal Court of Appeal that the nature of discretion to be exercised by the Minister under section 29 is whether to relieve an applicant, whose breach of section 12 he has just confirmed, from the consequences of that breach. The Minister's discretion must be exercised within the framework of the Act and the objectives which Parliament

sought to achieve by that legislation. Within that framework there may be various approaches to the exercise of the Minister's discretion but, so long as the discretion is exercised reasonably, the courts will not interfere. See *Sellathurai v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para 53, 297 DLR (4th) 651 [*Sellathurai*].

[10] Having heard the parties, I have concluded that the Minister's confirmation of the enforcement action taken by the CBSA, which is allowed by section 29 of the Act, constitutes a reasonable outcome in light of the facts and the law. Accordingly, the Court should not intervene, nor order the Minister to return the seized currency to the applicant. The ministerial decision upholding the seizure is transparent and reasoned. The reasons must be read as a whole and not microscopically.

[11] There has been no serious attack against the grounds raising the suspicion that led to the taking of the enforcement action. In the impugned decision, the Minister has given the following reasons for the original seizure of the money as proceeds of crime:

- The applicant did not report currency as per section 12 of the Act;
- The applicant was crossing an international border with a large sum of money;
- The applicant was aware of the reporting requirements;
- The applicant stated that he purposely kept the amount "under $10,000" as he did not want it all to be taken;
- The applicant was travelling with an amount he thought was just under the reporting threshold in an apparent attempt to avoid reporting requirements;
- The applicant was the subject of a K9 indication;

- The applicant had travelled to USA, Pakistan, and Cuba within the last few year;
- The applicant was travelling alone to a drug-source country;
- The applicant was unaware of what he would be doing or where he would be staying in Peru – he had no hotel reservations;
- The applicant's purpose of travel was suspect;
- The applicant had the name of a person in Peru who he did not know written on a piece of paper that someone in Montreal had given him;
- The applicant's employment income did not equate to the amount of funds he travelled with;
- The applicant claimed to make at most $20,000 that year (2010) and had $10,000 with him;
- The applicant lives in low-income housing and has a wife and four children to support;
- The applicant's living expenses do not equate the amount of income and cash that he travelled with;
- The applicant claimed he may use some of the money to buy photocopiers for a friend's business;
- The applicant does not work for that company;
- The applicant claimed to own his own business but was unable to provide the business's name;
- The applicant claimed to be paid via cash and cheques for buying and selling fruits and vegetables;
- The applicant was unsure of income filed in the preceding year;

- The applicant claims to have kept a part of the money at home and exchanged portions at a time from CAD into USD funds;
- The applicant claimed that the money in his wallet (USD $3,000) was from a bank withdrawal from his account and that he had withdrawn an additional CAD $1,500 that he subsequently exchanged in a friend's account in order to obtain the equivalent American currency;
- The applicant's withdrawal of the $4,500 from the bank the day before seemed to be inconsistent with the passenger's apparent financial standing;
- Purpose stamps "GME" were on the back of the bank notes that comprised the USD $3,000 in the applicant's wallet;
- The fact that the applicant was travelling with so much cash when he obviously uses banks and had bank cards in his possession as well as credit cards;
- That fact that the applicant did not use a business account to pay for a friend's possible business ventures, but instead used his own money out of pocket;
- The observation that the applicant was not upset and did not overreact when he was informed of the seizure of his money.

[12] At the hearing before this Court, the applicant's counsel suggested that some of the contradictory or confused statements reported by the CBSA officers in their narrative reports (made on October 15 and 16, 2010) can be explained by the fact that the applicant has difficulty expressing himself in the English language. However, the applicant makes no such allegation in his affidavit dated June 18, 2012, while it is specifically mentioned in one of the narrative reports prepared on October 15, 2010 by the CBSA officer that "there were no language barriers."

[13] Be that as it may, during the review process, the adjudicator proceeded by asking the applicant if the seized currency came from a legitimate source and noted all the information given by the applicant. There were numerous exchanges of correspondence which do not need to be reviewed in detail for the purpose of this judicial review application.

[14] Again, the applicant argued that he had not declared the seized currency because he believed that it was under the $10,000 CAD threshold, based on the TD Canada Trust exchange rate. The applicant also explained that the seized currency came from a legitimate source and submitted evidence intended to satisfy the Minister that the money came from a loan from a friend, Farid Mian Masroor.

[15] Surprisingly, the applicant did not speak of this loan when the currency was seized. He then explained, in a letter dated October 25, 2010 that "[i]t all comes from my account and the US dollars comes from his account [*sic*]." Later on, the applicant would refer to a loan of $13,000 USD. Apparently, he kept the US funds at his home and used his line of credit to repay his friend in CAD. Indeed, on September 30, 2010, the applicant opened a US currency bank account and deposited $5,020 USD. On October 14, 2010, the day before the applicant's planned departure for Peru, the applicant withdrew $3,000 USD from his US bank account.

[16] The Minister has considered the totality of the evidence, including the new evidence submitted by the applicant and his explanations with respect to the source of the seized currency.

The Minister's delegate specifically notes in the impugned decision that the evidence provided by the applicant is not conclusive:

> You submitted that, on September 15, 2010, you borrowed $13,000.00 USD from your friend as you did not want to incur any banking fees to obtain United States currency. You then submitted that you repaid this friend a total of $15,000.00 CAD ($13,000.00 CAD repayment of the original loan and $2,000.00 CAD as part of a loan from you to this friend) shortly thereafter through your use of lines of credit. You further explained that, on September 30, 2010, you opened a United States currency banking account and a deposit of $5,020.00 USD was made into this account. You then withdrew $3,000.00 USD from this United States currency banking account on the day before the date of the infraction. To support this contention, banking records (for you and your friend), income tax records, credit card statements, proof of business for your friend and an affidavit from this friend were provided – previously acknowledged by the Agency.
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> However, the evidence provided does not establish the legitimate origin of the currency. It does ascertain that the entire amount of the seized currency originated from the $13,000.00 USD loaned to you by your friend. Although an affidavit from this friend was supplied attesting to this loan, you have been unable to demonstrate that the $13,000.00 USD withdrawn from your friend's business bank account on September 15, 2010 was destined to you. The documentation supplied from your friend's business banking records does not show you were the receiver of the $13,000.00 USD as the amount was withdrawn in cash. As well, these banking records [*sic*] do not show from where the $13,000.00 USD was obtained by your friend prior to these funds being withdrawn on September 15, 2010.
>
> Furthermore, the documentation you provided would appear to suggest that you utilized credit available to you to repay your friend for the United States currency lent to you. Such actions contradict your reasoning for borrowing the money from your friend in the first place, as you would have incurred interest or other banking related fees in the repayment of the credit loan. Your ability to repay your friend in such an immediate fashion also brings into question as to why you required a loan from this person when the credit used for the repayment could have been used to obtain United States currency.
>
> Your opening a United States currency banking account on September 30, 2010 appears to support your contention that you

> were the beneficiary of loan from your friend in the amount of $13,000.00 USD on September 15, 2010. However, your subsequent deposit of only $5,020.00 USD into this particular bank account brings into question whether this United States currency stemmed from the amount loaned to you by your friend. Such actions also suggest that the remainder of the seized funds were kept outside any form of banking institution for a period time leading up their seizure by the CBSA. Therefore, a documentary void was generated between your suggested origin of the currency to that of the seized funds.

[17] In reaching the conclusion that the present application must fail, I have duly considered the grounds of attack made by the applicant against the impugned decision and find them unconvincing. Under the circumstances of this case, I do not believe that the Minister has imposed an impossible burden of proof on the applicant.

[18] With respect to the quality of the evidence in matters coming before the Minister, the Federal Court of Appeal has clearly indicated in *Sellathurai* at para 51 that "[i]t is neither necessary nor useful to attempt to define in advance the nature and kind of proof which the applicant must put before the Minister." By the same token, as also indicated at para 50:

> The issue is not whether the Minister can show reasonable grounds to suspect that the seized funds are proceeds of crime. The only issue is whether the applicant can persuade the Minister to exercise his discretion to grant relief from forfeiture by satisfying him that the seized funds are not proceeds of crime. Without precluding the possibility that the Minister can be satisfied on this issue and other ways, the obvious approach is to show that the funds come from a legitimate source.

[19] In the case at bar, it remains that the concurrent banking transactions in the days prior to the departure do not account for the totality of the sums allegedly received and paid back by the applicant to the lender. Moreover, I find that the factual errors, if any, made by the CBSA's officers,

the adjudicator, or the Minister are not determinative and do not affect the overall result. The return of the money seized, which legally belongs to the Crown, is discretionary. The inferences made and the conclusions reached by the Minister flow from a reasonable interpretation of the object of the Act and its provisions.

[20] At the hearing before the Court, the applicant's counsel suggested that at least a part of the seized currency should be returned by the Minister.

[21] In my opinion, the fact that the adjudicator seems to accept that the withdrawal of $3,000 USD from the applicant's bank account the day before his departure would be of "legitimate origin" does not bind the Minister. In its analysis of the legality of the impugned decision, the Court must examine the reasons provided by the Minister's delegate. The issue was whether the applicant had discharged himself of his burden to establish, by credible and reliable evidence, the legitimate origin of the entire amount seized (which was clearly understood by the adjudicator).

[22] In *Admasu v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 451 at para 12-13, 215 ACWS (3d) 107, the Court has indicated that while paragraph 29(1)(b) of the Act provides for partial relief in respect of a penalty, paragraph 29(1)(a) of the Act does not provide for partial relief in respect of seized currency. To summarize, my colleague Justice Rennie writes at para 13: "The Minister's decision is, therefore, an all or nothing proposition. There is no middle ground of partial relief from forfeiture. The reasonableness of the decision must be considered in light of this statutory constraint."

[23] In conclusion, the applicant was duly informed of the Minister's concerns. The Minister duly considered the evidence and explanations submitted by the applicant, which were inconclusive. In light of the particular facts of the case, it was open for the Minister to conclude that "the suspicion regarding the legitimate origin of the particular seized funds remains." Accordingly, it was not unreasonable to determine that "discretion cannot be granted with respect to the forfeiture of the currency and, as such, it will remain forfeited."

[24] For these reasons, the present application shall be dismissed with costs in favour of the respondent.

JUDGMENT

THIS COURT ADJUGES AND ORDERS that the present judicial review application be dismissed with costs in favour of the respondent.

"Luc Martineau"

Judge

SOLICITORS OF RECORD

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