Federal Court  Cour fédérale

Date: 20130628

Docket: T-1219-12

Citation: 2013 FC 729

Ottawa, Ontario, June 28, 2013

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

ROBERT BO DA HUANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Robert Bo Da Huang [the Applicant] is self-represented and appeared with the assistance of an interpreter. He applies for judicial review of a decision made by a delegate of the Minister of Public Safety and Emergency Preparedness, dated May 24, 2012 [the Decision], in which she decided that: i) there had a been a contravention of s. 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [the Act], and ii) that the currency which had been seized from the Applicant would be held as forfeit pursuant to paragraph 29(1)(c) of the Act.

The Facts

[2] On January 5, 2011, the Applicant was scheduled to fly from Vancouver to Hong Kong. When approached in the departures area of the Vancouver International Airport by a Canada Border Services Agency customs officer [the Officer], the Applicant admitted to carrying more than $10,000.00 in currency which he had not reported. A total of $15,760.00 in cash was found in the Applicant's bag. It was not concealed but was organized into three bundles: one wrapped in elastic bands, one wrapped in a thin piece of paper and one loose bundle.

[3] Following an interview with the Applicant, the Officer decided to hold the seized currency as suspected proceeds of crime. The fact that the Applicant had previously been convicted of drug smuggling, had been unemployed since 2007 and had no other source of income since then were among the reasons provided by the Officer for his suspicions. The sum of $15,760.00 will be described as the "Seized Funds".

[4] The Applicant contested the seizure to the Recourse Directorate and requested a Ministerial review pursuant to s. 25 of the Act. He provided the following explanation for the Seized Funds: (1) $ 6,700.00 was from the sale of his car; (2) $ 2,000.00 was "lucky money" given to him by his mother; and (3) the balance was his personal savings. He submitted a purchase agreement for the car, dated January 4, 2010 and a TD bank receipt indicating that the same amount had been deposited into his bank account.

[5] An exchange with the adjudicator at the Recourse Directorate followed in which the Applicant was told that, although the $6,700.00 would be accepted as legitimate [the Legitimate Funds], he had failed to provide evidence to demonstrate an identifiable link between his savings and the "lucky money" and legitimate origins. This meant that the adjudicator still suspected that $9,060.00 of the Seized Funds was proceeds of crime. This amount will be described as the "Illicit Funds".

The Decision

[6] On May 24, 2012, the Minister's delegate informed the Applicant that all of the Seized Funds (i.e. $15,760.00) would be held as forfeit notwithstanding that only $9,060.00 was considered to be the Illicit Funds.

[7] The reasons provide as follows: "Although there was evidence to support you received $6,700 from the sale of the vehicle, no additional corroborating evidence was provided to substantiate the legitimate origin of the remainder of the seized currency".

[8] At the hearing, held in Vancouver on May 21, 2013, counsel for the Minister conceded that the Respondent was satisfied that the Applicant had demonstrated that $6,700.00 of the Seized Funds was money earned from the sale of his car and did not represent proceeds of crime or funds used in the financing of terrorist activity.

Jurisdiction

[9] The Applicant's Notice of Application challenges not only the Minister's decision to hold the currency forfeit under s. 29 but also the decision confirming the contravention of the Act pursuant to s. 27. However, s. 30 of the Act makes it clear that the question of whether the Act was contravened may only be challenged by way of an action in the Federal Court (*Tourki v Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FCA 186 at paras 16-18; *Kang v Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FC 798 paras 29-30). Thus, it is only the Minister's decision to hold the Seized Funds forfeit pursuant to s. 29 that is open to challenge in this proceeding.

The Issue

[10] It became clear at the hearing that I considered the determinative issue to be whether s. 29 of the Act permits the Minister to hold forfeit only the Illicit Funds.

[11] Since the Respondent had no notice of the Court's concern about this issue, the parties were asked to provide supplementary submissions.

The Act

[12] The following provisions of the Act are relevant:

3. The object of this Act is (a) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and	**3.** La présente loi a pour objet : a) de mettre en oeuvre des mesures visant à détecter et décourager le recyclage des produits de la criminalité et le financement des activités terroristes et à faciliter les enquêtes et les poursuites

terrorist activity financing offences, including

(i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and

(iii) establishing an agency that is responsible for dealing with reported and other information;

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

(c) to assist in fulfilling Canada's international

relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :

(i) imposer des obligations de tenue de documents et d'identification des clients aux fournisseurs de services financiers et autres personnes ou entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'activités susceptibles d'être utilisées pour le recyclage des produits de la criminalité ou pour le financement des activités terroristes,

(ii) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,

(iii) constituer un organisme chargé de l'examen de renseignements, notamment ceux portés à son attention en application du sous-alinéa (ii);

b) de combattre le crime organisé en fournissant aux responsables de l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;

c) d'aider le Canada à remplir ses engagements internationaux

commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.

dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes.

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.

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.

[…]

[…]

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.

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.

(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.

(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.

[…]

[…]

25. A person from whom currency or monetary instruments were seized under

25. La personne entre les mains de qui ont été saisis des espèces ou effets en vertu de l'article 18

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 in writing to the officer who seized the currency or monetary instruments or to an officer at the customs office closest to the place where the seizure took place.

ou leur propriétaire légitime peut, dans les quatre-vingt-dix jours suivant la saisie, demander au ministre de décider s'il y a eu contravention au paragraphe 12(1) en donnant un avis écrit à l'agent qui les a saisis ou à un agent du bureau de douane le plus proche du lieu de la saisie.

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

b) soit restituer tout ou partie de 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).
(2) The total amount paid under paragraph (1)(a) shall, if the currency or monetary instruments were sold or otherwise disposed of under the Seized Property Management Act, not exceed the proceeds of the sale or disposition, if any, less any costs incurred by Her Majesty in respect of the currency or monetary instruments.	(2) En cas de vente ou autre forme d'aliénation des espèces ou effets en vertu de la Loi sur l'administration des biens saisis, le montant de la somme versée en vertu de l'alinéa (1)a) ne peut être supérieur au produit éventuel de la vente ou de l'aliénation, duquel sont soustraits les frais afférents exposés par Sa Majesté; à défaut de produit de l'aliénation, aucun paiement n'est effectué.

The Statutory Context

[13] Subsection 12(1) of the Act requires individuals to report the importation or exportation of currency or monetary instruments equal to or greater than the prescribed amount. *The Cross-Border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 [the Regulations] sets the prescribed amount at $10,000.00.

[14] Subsection 18(1) of the Act permits an officer to seize as forfeit currency or monetary instruments if there are reasonable grounds to believe that there has been a contravention of s. 12(1). However, the seized currency "shall" be returned to an individual upon payment of the penalty prescribed in the Regulations unless the officer has reasonable grounds to suspect that the funds are proceeds of crime or used for financing terrorist activity (together, the Suspicions). If the officer does hold such Suspicions, then the funds remain forfeit.

[15] In my view, this section provides the foundation for seizure and it clearly sets out Parliament's intention: if there is a failure to report, a penalty is payable but Canada will only seize for forfeit funds which are subject to the Suspicions. It is noteworthy that there is nothing in this section which precludes the retention of a portion of the seized currency or monetary instruments if an officer is satisfied that only a portion is suspicious.

[16] Section 25 permits a person from whom funds were seized to request a Minister's decision about whether there was a contravention of s. 12(1), i.e. a failure to report. Under s. 29, if the Minister decides that such a contravention occurred, the Minister may return the currency or monetary instruments or confirm that they are forfeited. It is of note that s. 29 does not expressly preclude the return of a portion of seized funds once their legitimate origins have been established.

Discussion

[17] The Applicant argued that the Decision was unreasonable because it ignored the additional corroborating evidence provided to substantiate the legitimacy of the Illicit Funds. However, having reviewed the evidence submitted by the Applicant and the record before the Minister, it is my view that it was reasonable for the Minister to hold forfeit the amount said to be the Applicant's personal savings and the money he received from his mother.

[18] Regarding the Legitimate Funds, the Respondent submits in supplementary submissions, dated June 11, 2013, that the principles of statutory interpretation, namely the modern approach to statutory interpretation and the "implied exclusion" principle, lead to the conclusion that s. 29 does

not grant the Minister discretion to return a portion of the Seized Funds to the Applicant. The Applicant also filed supplementary submissions, dated June 19, 2013, in which he disagreed with the Respondent's position saying that it was unfair. He now asks that only the Legitimate Funds be returned to him.

[19] The Respondent says that in *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 26-27 (SCC), the Supreme Court of Canada confirmed that the modern approach to interpreting statutes requires that the words in legislation be read in their entire context and in their grammatical and ordinary sense harmoniously with the legislation's scheme and object and the intention of Parliament. The Respondent argues that because there is no reference in either s. 29 or elsewhere in the Act to the partial return of seized currency, it is apparent that the Parliament did not authorize a partial return of seized unreported funds.

[20] The Respondent also relies on the Supreme Court's statements in *Bell ExpressVu* regarding the applicability of other statutory principles when there is ambiguity about the meaning of a provision. If s. 29 is deemed ambiguous, the Respondent submits that the "implied exclusion" principle applies. It stipulates that where legislation expressly provides for something in one provision, it is to be assumed that the same meaning does not apply where it is not mentioned in another provision. In this case, the Respondent says that Parliament's intention not to provide for a return of a portion of seized funds in paragraph 29(1)(a) is manifest when contrasted with paragraph 29(1)(b) which allows the Minister to remit "any penalty or portion of any penalty…" [emphasis added] to an individual. The Respondent argues that the differential treatment of these proximate

concepts, found mere subparagraphs apart, is a strong indication that Parliament had in fact turned its mind to the issue of partial relief for seized funds but decided against such a measure.

[21] Counsel for the Respondent further submits that this Court has specifically addressed this issue and determined that s. 29 does not permit partial relief from forfeiture. The issue was directly addressed by Mr. Justice Rennie in *Admasu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 451. The applicant in that case had failed to report just over $14,000.00 as he was boarding a flight for Ethiopia via Amsterdam. The Recourse Directorate accepted that $5,000.00 of the seized currency had a legitimate origin but refused to return that amount because the applicant had failed to identify a legitimate source for all of the seized currency. Mr. Justice Rennie noted the difference in language between paragraph 29(1)(a) and paragraph 29(1)(b) and concluded that the Act does not permit partial forfeiture of seized funds. He repeated this conclusion in *Dhamo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 443 at paras 16 and 33 where he said that it is not possible for the Minister to grant partial relief from forfeiture.

[22] In *Mohammad v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 148, Mr. Justice Martineau reached the same conclusion and Madam Justice Gleason has quoted Mr. Justice Rennie's conclusion with approval although she did not find it necessary to decide the issue on the facts of her case, see *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 600.

[23] The Respondent stresses the importance of judicial comity and urges me to follow these decisions. As noted by Mr. Justice Marc Noël in *Allegran Inc. v Canada (Minister of Health)*, 2012 FCA 308, the doctrine of comity seeks to promote certainty in the law by preventing the same issue from being decided differently by different judges of the same court.

[24] The Respondent submits that it is only where there are "strong reasons to the contrary" that decisions of judicial colleagues should not be followed (*Apotex Inc. v Pfizer Canada Inc.*, [2013] FCJ No 562 at paras 13-14 (FC); *Altana Pharma Inc. v Novopharm Ltd.*, 2007 FC 1095 at para 36). According to the Respondent, this has been interpreted to meant the presence of one of the following factors:

> -Subsequent decisions have affected the validity of the impugned judgment;
>
> -It is considered that some binding authority in case law or some relevant statute was not considered;
>
> -The judgment was unconsidered, *a nisi prius* judgment given in circumstances familiar with all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[25] The Respondent submits that none of these factors are present in the current case and thus there is no reason to depart from the four recent judgments of this Court.

[26] However, in *Allegran Inc., supra* at paragraph 48, the Federal Court of Appeal indicated that a judge of this Court may depart from conclusions of law by another judge of the Court where he or she is convinced that a departure is necessary and can articulate cogent reasons for doing so. This

Court has also acknowledged an exception to the principle of judicial comity where a judge is of the view that, if a previous decision of the Court were followed, it would create an injustice (*Almrei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1025 at para 62).

[27] With great respect to my colleagues, I am unable to agree with their conclusion that, because the Act specifies in paragraph 29(1)(b) that a portion of the penalty may be returned, it follows that a portion of the seized funds which is legitimate may not be returned under paragraph 29(1))(a) because that paragraph does not refer to a "portion".

[28] My inability to agree is based on the following points which, in my view, constitute "strong reasons to the contrary". I note that none of these points were referred to in the earlier Federal Court decisions:

i. The objectives of Act are set out in s. 3 and confiscating legitimate funds does not further those objectives. In *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, the Federal Court of Appeal considered the Minister's exercise of discretion under s. 29 of the Act. In that regard, it said at paragraph 53 that "The Minister's discretion must be exercised within the parameters of the Act and the objectives which Parliament sought to achieve by that legislation". In my view, it would not be reasonable for the Minister to exercise his discretion in favour of holding the Legitimate Funds forfeit;

ii. The penalty for this Applicant's failure to report the Legitimate Funds is $250.00 according to s. 18(a) of the Regulations. Confiscation of

$6,700.00 effectively imposes a draconian penalty not mandated by the Act;

iii. In my view, if Parliament had intended to confiscate the Legitimate Funds it would have stated that fact in unequivocal terms. Although counsel for the Respondent was given the opportunity to make submissions on this issue, the Court was not provided with any legislative history showing that Parliament intended to appropriate such funds;

iv. If the Applicant had had the documents about the sale of his car at the airport, the Officer would have been required by s. 18(2) of the Act to return the Legitimate Funds at that time subject to payment of the prescribed penalty. Accordingly, it makes no sense that it is open to the Minister to confirm the forfeiture of those funds at a later date.

v. The interpretation advanced by the Respondent could lead to absurdly punitive results. For example, if $100,000.00 was seized and $99,000.00 was later shown to be legitimate, the Respondent would nevertheless say that the Minister has no discretion to return the $99,000.00 under paragraph 29(1)(c) of the Act. In *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27 (SCC) at paragraph 27, the Supreme Court of Canada noted that "It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences." Absurdity is defined in the decision to include interpretations that lead to

inequitable consequences and those which are incompatible with the objects of the legislation.

vi. Lastly, although the word "portion" appears in paragraph 29(1)(b), it is used in reference to the penalty which, according to the Regulations, cannot be more than $5,000.00. In my view, the interpretation of paragraph 29(1)(a), which could determine the fate of large sums of money, should not be based solely on the language used in a penalty provision. In other words, contrary to the Respondent's submissions, I do not find that the penalty for failing to report and the forfeiture of suspicious funds are "proximate concepts". This being so, I am not persuaded that the implied exclusion principle of statutory interpretation is applicable.

Conclusion

[29] For all these reasons, it is my conclusion that the Decision to confirm forfeiture of the Seized Funds including the Legitimate Funds was an unreasonable exercise of discretion.

ORDER

THIS COURT ORDERS that

The Decision is hereby set aside and the Applicant's request for the return of the Legitimate Funds is to be reconsidered by the Minister in accordance with these reasons.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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