

Federal Court



Cour fédérale

Date: 20130429

Docket: T-1565-12

Citation: 2013 FC 443

Ottawa, Ontario, April 29, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

MAKSIM DHAMO

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision by a delegate of the Minister of Public Safety and Emergency Preparedness to retain seized currency pursuant to paragraph 29(1)(c) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000 c 17. For the reasons that follow the application is dismissed.

Facts

[2] On June 3, 2010, the applicant was to fly from Pearson International Airport in Toronto to Albania. The applicant states that he was returning to Albania for work after visiting his family in Canada.

[3] A Canada Border Services Officer (the Officer) stopped the applicant and asked if he was aware of the requirement to report currency of \$10,000 or greater. The applicant stated that he was aware of the requirement but denied having more than \$10,000 in his possession. A search revealed that he was carrying five envelopes containing Canadian dollars, US dollars and Euros totalling \$11,818.28 Canadian.

[4] The Officer questioned the applicant regarding the source of the funds. The applicant stated that the funds belonged to other people who were sending money to Albania. The applicant stated that he owned an import and export company for goods such as wine and food. He stated that he earned \$5,000 per year from that business and that he also had part-time work in Albania from which he earned an additional \$5,000 per year. However, he was unable to provide details regarding either source of income when asked.

[5] The Officer seized the currency pursuant to subsection 18(1) of the *Act* which provides that an Officer may do so if he believes on reasonable grounds that a person has failed to report it. The Officer held the money with no terms of release pursuant to subsection 18(2) of the *Act* because the Officer suspected that the currency may be proceeds of crime.

[6] The applicant elected not to continue on the flight and instead remained at the airport. The Officer provided the applicant with a seizure report and then drafted a narrative report which was later given to the applicant.

[7] The narrative report provides the Officer's basis for suspecting that the currency was the proceeds of crime:

- a. The applicant stated he was aware of the requirement to report the currency but did not do so and instead made false statements.
- b. He was traveling to a drug source country.
- c. He was travelling with funds in excess of his stated yearly income.
- d. He stated that the funds belonged to third parties, including Mr. Ciraku, an Albanian national. However, he could not explain his relationship to Mr. Ciraku, Mr. Ciraku's source of income, why he left the money in Canada and why he did not carry the money himself.
- e. He had difficulty explaining his employment in Albania and the nature of his import/export business.
- f. He had made 14 trips since 2004, which was considered excessive for someone living on his stated income.

[8] The applicant requested Ministerial review of the Officer's decision and provided written submissions and evidence through a number of letters.

[9] The applicant claimed that the seized currency belonged to three people. Mr. and Mrs. Zaka were said to be sending \$3,000 Canadian to Mrs. Zaka's sister in Albania. Mrs. Sulejmani was said to be sending 1,000 Euros to her mother. Mr. Ciraku was said to have closed his Canadian bank account and asked the applicant to bring the funds (\$2,360 Canadian and \$4,987 American) to him.

[10] The applicant explained that he thought he did not have to report the currency because he had only "a bit" more than \$10,000.

[11] The Minister's delegate decided that there had been a contravention of the *Act* and that the currency would be forfeited because the applicant had not demonstrated a legitimate source for all of the currency.

Statutory Framework

[12] Subsection 12(1) of the *Act* provides that one must report to an officer the importation or exportation of currency or monetary instruments equal to or greater than the prescribed amount. Section 2 of the *Cross-Border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 provides that the prescribed amount is \$10,000.

[13] Subsection 18(1) of the *Act* permits an officer to seize as forfeit the currency or monetary instrument if the officer believes on reasonable grounds that there has been a contravention of subsection 12(1).

[14] Subsection 18(2) requires the officer to return the seized currency or monetary instruments upon payment of a prescribed amount unless the officer has reasonable grounds to suspect that it is proceeds of crime or funds for the use in financing terrorist activities.

[15] Section 25 allows a person from whom the currency or monetary instruments were seized to request a Minister's decision as to whether there was a contravention.

[16] Under section 29, if the Minister decides that subsection 12(1) was contravened, the Minister may return the currency or monetary instruments or confirm that it be forfeited. Notably, it is not possible for the Minister to grant partial relief from forfeiture.

Analysis

Procedural Fairness

[17] The applicant argues that there were three breaches of procedural fairness. In my view, these arguments are without merit.

[18] First, the applicant submits that he should have been provided with an interpreter at the time of the seizure. The argument has no foundation in the evidence.

[19] The narrative report demonstrates that the applicant was able to communicate in English. He explained why he did not report the currency and provided an explanation as to the source. He did not request an interpreter or otherwise indicate that he had difficulty expressing himself.

[20] Moreover, the applicant had ample opportunity to provide clarifications in his submissions to the Minister.

[21] Second, the applicant submits that the Minister breached procedural fairness by failing to give notice to the affected third parties pursuant to paragraph 18(3)(c) of the *Act*. The third parties provided evidence in support of his request for a Ministerial decision. Therefore, any failure to provide notice did not create unfairness for the applicant. If the third parties had any rights in the proceeding, the applicant may not assert those rights on their behalf.

[22] Third, the applicant submits it was a breach of procedural fairness for the Minister to fail to render a decision within the period of time stipulated in section 27 of the *Act*. It is true that there were substantial delays in this case. However, as this Court found in *Ha v Canada*, 2006 FC 594, the timeline provided in the *Act* is “directory only” and the Minister does not lose jurisdiction by reason of delay. Here, as the applicant has not demonstrated any prejudice resulting from the delay, there is no breach of procedural fairness.

Reasonableness

[23] The applicant submits that his evidence establishes a legitimate source for the seized currency and that the Minister set an impossibly high burden of proof.

[24] In these circumstances the burden on an applicant is substantial. He was required to persuade the Minister that the funds are not proceeds of crime. The Minister may ask for proof of a legitimate source for the funds and, if proof is not forthcoming, the Minister may decline to relieve

the applicant from forfeiture. Throughout the process the applicant bears the evidentiary burden and the Minister is not required to make inquiries or investigate: *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, paras 50-51. This burden was explained to the applicant in correspondence from the Recourse Directorate.

[25] The *Act* does not specify on what basis the Minister may relieve an applicant from forfeiture. Therefore, there may be various reasonable approaches, so long as the Minister's discretion is exercised within the broad framework of the legislation: *Sellathurai*, paras 38, 53. In this case, it was reasonable for the Minister to confirm that the funds would be forfeited.

[26] The Minister accepted that the 1,000 Euros received from Mrs. Sulejmani originated from a legitimate source, her employment income. However, the Minister was not satisfied with regards to the remaining funds.

[27] The applicant stated that Mr. Ciraku had earned the income in Albania prior to 1999 from his rental properties and electrical company. Mr. Ciraku is said to have travelled to Canada in 1999 and deposited cash into a Canadian bank account. He then returned to Albania and left the Canadian bank account dormant. Then, in 2010, pursuant to a power of attorney executed by Mr. Ciraku in favour of the applicant, the applicant transferred the funds to his bank account and withdrew the funds in cash. The applicant said that he was bringing the cash to Mr. Ciraku in Albania.

[28] The documentation established Mr. Ciraku's business activities in Albania, the transfer of funds from Mr. Ciraku's account to the applicant's account and the cash withdrawal. However, the paper trail does not begin until the transfer of funds between bank accounts; there was no documentary evidence that the money in Mr. Ciraku's account originated from legitimate business activities in Albania. Mr. Ciraku's bank could not provide statements more than 10 years old. The applicant submits that it is therefore impossible for him to demonstrate the initial deposit of the funds. It must be recalled that the applicant bears the evidentiary burden. If there are obstacles to obtaining documentation the applicant must bear the consequences.

[29] The applicant also claimed that \$3,000 belonged to Mr. and Mrs. Zaka from their income as caretakers of an apartment building, namely cash tips from tenants. The applicant explained that they exchanged their bills in miscellaneous denominations with a restaurant owner so that all the funds would be \$100 bills.

[30] As the money was said to have been received in cash there was no documentation to demonstrate a legitimate source. Once again, it is the applicant's burden to prove the source of the funds. Cash-only transactions present an inherent difficulty and such a large amount, on its face, gives rise to reasonable suspicion. This may be particularly so when the funds are said to be tips.

[31] The applicant submits that the Minister unreasonably requested and considered evidence regarding his own source of income. This is said to be irrelevant because he did not claim that the currency in question was his. In my view, the applicant's source of income is a relevant

consideration in determining whether there are reasonable grounds to suspect his involvement in criminal activity.

[32] The applicant also submits that the Minister should not have considered the Officer's supplementary narrative report, wherein the Officer detailed his concerns regarding the source of the currency. In my view, the supplementary report contained legitimate considerations, including questions regarding the applicant's income and living expenses. It was not unreasonable for the Minister to consider the Officer's position. There was no prejudice to the applicant and no public interest or legal reason has been articulated for limiting the amount of information that the Minister may receive in order to make an informed decision. This, it should be noted, works in favour of applicants as much as it does the Minister.

[33] Finally, the applicant states that the Minister fettered his discretion by stating that it was "not possible" to return the currency because the applicant had not shown a legitimate source for all of it. The *Act* does not permit partial forfeiture; rather, either all or none of the currency is forfeited.

[34] As a result, I have concluded that the decision was reasonable. Therefore, the application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1565-12

STYLE OF CAUSE: **MAKSIM DHAMO v MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS**

PLACE OF HEARING: Toronto, ON

DATE OF HEARING: March 13, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: April 29, 2013

APPEARANCES:

Mr. Gavin Magrath FOR THE APPLICANT
Ms. Meaghan Richardson

Ms. Sharon McGovern FOR THE RESPONDENT

SOLICITORS OF RECORD:

Magrath O'Connor FOR THE APPLICANT
Barristers Practicing in Association
Toronto, Ontario

William F. Pentney, FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario