

Federal Court



Cour fédérale

Date: 20170914

Docket: T-348-17

Citation: 2017 FC 830

Ottawa, Ontario, September 14, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ISTVAN PESTI

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA, AS REPRESENTED BY THE
CANADA BORDER SERVICES AGENCY
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] of a decision by a delegate of the Minister of Public Safety and Emergency Preparedness, the Appeals Division of the Recourse Directorate of the

Canada Border Services Agency (the “Delegate”), to fine the Applicant \$2,500 pursuant to section 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [*PCMLTFA*], for failing to declare currency over \$10,000 in his possession when departing from Canada, contrary to section 12 of the *PCMLTFA*.

II. Background

[2] The Applicant, Istvan Pesti, is 74 years old and immigrated to Canada from Hungary and Switzerland 46 years ago. He carried on a furniture and interior design business in Vancouver before retiring to Kelowna about 16 years ago. The Applicant and his wife were born in Hungary, and regularly travel there to visit family and friends.

[3] On June 14, 2016, the Applicant was approached by a Border Services Officer (the “Border Officer”) at the Calgary International Airport as he was preparing to board a flight to Amsterdam. The Border Officer asked the Applicant how much currency he was carrying, to which the Applicant responded “\$8,000”. The Applicant subsequently presented an envelope to the Border Officer and stated that it contained \$10,000 and that he did not have any more currency.

[4] The Applicant’s baggage was searched, revealing seven envelopes containing currency. The total amount found in the Applicant’s possession was \$17,651.20 CAD and \$1,070.00 USD.

[5] The Border Officer found that the Applicant had contravened section 12 of the *PCMLTFA* by failing to declare currency in his possession over \$10,000. The Border Officer

seized the currency pursuant to subsection 18(1) of the *PCMLTFA*, and refused to return the currency on the basis that he had reasonable grounds to suspect that it was proceeds of crime, pursuant to subsection 18(2) of the *PCMLTFA*.

[6] On September 12, 2016, the Applicant appealed the Border Officer's seizure to the Delegate, requesting that the currency be returned without penalty. He argued that it was part of his retirement savings and was for a down-payment on a residence near Budapest. Furthermore, he stated that this trip started in Kelowna, where security personnel saw and commented on the currency in his luggage, and were told of his intention to purchase a home in Hungary. He assumed these comments amounted to a disclosure to the authorities. Finally, the Applicant stated that he is somewhat intimidated by authority given his cultural background, as well as an innocent misunderstanding with border officers two years prior.

[7] In a further letter dated November 4, 2016, the Applicant explained that he had never been questioned about currency on previous departures from Canada. In his mind, the currency issue always related to arriving in Canada. He was shocked and confused when the Border Officer began asking him questions, and was scared that being honest with the Border Officer might result in him not being able to board the plane.

[8] The Delegate reviewed the Applicant's appeal and requested further financial information. Upon receipt and review of the Applicant's documents, the Delegate was satisfied that the currency was legitimately acquired.

[9] On February 8, 2017, the Delegate ordered the return of the seized funds less a penalty of \$2,500, pursuant to section 29 and 12(1) of the *PCMLTFA*. The Delegate concluded that notwithstanding the legitimate source of the funds, the Applicant had contravened section 12 of the *PCMLTFA*, by failing to report currency in his possession greater than \$10,000 CAD.

[10] In its reasons, the Delegate noted the Applicant's assumption that he had disclosed the currency to security personnel at the Kelowna airport. It does not mention the Applicant having felt intimidated and confused when confronted by the Border Officer. The Delegate concluded:

In view of the foregoing, although the currency seizure has been maintained, the level of infraction has been reduced to Level 2, as a false statement was made with respect to the currency. During the review, it was noted that you did not report the currency and declared having \$8,000 when questioned by the officer. When requested by the officer to show the currency, you presented one envelope stating that it contained \$10,000.00 and having no further currency. However, the examination of your baggage revealed seven envelopes containing further currency. Accordingly, you were offered more than one opportunity to report the entire amount of currency in your possession, failed to do so and were found to be in possession of further currency.

[11] On March 9, 2017, pursuant to section 18.1 of the *Federal Courts Act*, the Applicant submitted an application for judicial review of Delegate's decision.

A. *Preliminary matters*

[12] While it is unclear from the Applicant's submissions what issues he seeks to have resolved, it appears that he takes issue with the amount of the penalty and the decision that there was a failure to report currency in contravention of the *PCMLTFA*.

[13] The Applicant submits that the penalty should be reduced to zero dollars (\$0.00), on the grounds that the Border Officer and the Delegate failed to consider all the relevant facts relating to the seizure of currency.

[14] The Applicant's affidavit states that he is seeking an order to set aside the decision of the Delegate and to refer it back for determination in accordance with the Court's directions, as well as other relief as counsel may advise and the Court permit. In this regard, the Applicant states that the grounds for the application are:

- a. I lost over \$5,000 this small mistake!
- b. This is too strong of a penalty, I don't commit any crime!
- c. The report that the CBS officer sent to Ottawa, was fabricated information!
- d. The CBS officer ignored my request, to phone my BANK in West Kelowna, where the funds were legitimate!
- e. I was under the belief that, when in Kelowna airport, the security personnel commented, I have too much cash in my baggage, they report me to Calgary airport, to inspect my funds. This is upsetting to me what happened in Calgary airport, CBS officer was abusing his "authority"!
- f. I am asking the court, to waive the penalty, I have a penalty from the airline, what also doesn't fear penalty.
- g. I did not know the rule, I regret what happened, and I deeply apologize for it, I hope the Court accepts my excuse.

[sic]

[15] The Respondent argues that, to the extent the Applicant takes issue with the Delegate's finding that section 12 of the *PCMLTFA* was contravened, the application should be dismissed.

[16] I agree with the Respondent. If a person wishes to challenge a finding that section 12 of the *PCMLTFA* was contravened, section 25 provides an appeal to the Minister and section 27 requires the Minister to make a decision. If a person wishes to appeal the Minister's decision under section 27, he or she must apply to the Federal Court for judicial review pursuant to section 30 of the *PCMLTFA*, not section 18.1 of the *Federal Courts Act* (*Dobrovlny v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 526 at paras 17-19).

[17] I also agree with the Respondent that a decision made under section 29 of the *PCMLTFA*, involving or penalty imposed by the Minister once a contravention of section 12 has been found, is appealable by way of judicial review under section 18.1 of the *Federal Courts Act* (*Tourki v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FCA 186 [*Tourki*] at para 18).

[18] As this is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, only the section 29 penalty decision of \$2,500 is properly before the Court for review.

III. Standard of Review

[19] The standard of review is reasonableness for decisions made under section 29 of the *PCMLTFA* (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255 at para 25; *Dag v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 95 at para 4).

IV. Issue

[20] The issue is whether the decision of the Delegate to fine the Applicant \$2,500 for a contravention of section 12 of the *PCMLTFA* was reasonable.

V. Analysis

[21] While the Applicant's submissions do not clearly set out the grounds on which the Court should find the Delegate's decision was unreasonable, he appears to argue that the penalty was too harsh and he did not know the rule. In his submissions to the Delegate, the Applicant argued that he was scared and confused, intimidated by authority and assumed he had disclosed the currency to security personnel at the Kelowna airport.

[22] In his affidavit, the Applicant also takes issue with facts contained in the Border Officer's report. This issue was not raised in the Applicant's submissions to the Delegate and therefore is not properly before the Court.

[23] The Respondent submits that the Applicant was in blatant contravention of section 12 of the *PCMLTFA* and was fined the amount prescribed by the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412 [*Regulations*]; therefore, the Delegate reasonably exercised its discretion to impose this penalty.

[24] Section 29 of the *PCMLTFA* gives the Minister discretion to impose penalties for failing to comply with section 12. The Applicant does not dispute that he failed to comply with section

12. The Minister refused to waive or lower the corresponding penalty in the basis that there are compelling policy reasons not to do so.

[25] In *Canada (Public Safety and Emergency Preparedness) v Huang*, 2014 FCA 228 [*Huang*] at paragraphs 55 and 56, the Federal Court of Appeal summarized several principles regarding the Minister's exercise of discretion pursuant to section 29 of the *PCMLTFA*. Since a contravention of section 12 is a precondition for review under section 29, the starting point is that the forfeited currency is already property of the Crown. The only issue is whether an applicant can persuade the Minister to exercise his discretion to grant relief from forfeiture. An applicant does this by showing that the funds are not proceeds of crime.

[26] Upon finding that the funds are not proceeds of crime, the Minister has discretion to retain a portion of the funds as a penalty for contravening section 12 (*Huang*, at para 64):

Where an individual contravenes subsection 12(1), the Minister may well not want to remit the penalty in full to the individual because a penalty is intended to punish and deter individuals from failing to fulfill their duty to report. However, there may well be circumstances in which the Minister may want to remit a portion of the penalty. Section 18 of the Regulations provides that the applicable penalty may vary between \$250 and \$5000. By expressly stipulating that a portion of the penalty may be returned, Parliament is ensuring that the Minister will have the discretion to return some of the penalty, where it is decided that the original penalty paid was too high in light of the circumstances.

[27] In its decision, the Delegate reasonably found that the Applicant had made a false statement with respect to the currency.

[28] As well, in a letter dated November 4, 2016, to the CBSA, the Applicant's lawyer states that the Applicant knew that his answer that he had \$8000 was false, but was scared to admit he had \$15,000-\$20,000 as it might result in him not being able to leave on the plane.

[29] Moreover, it was reasonable for the Delegate, in exercising the discretion under section 29, to retain \$2,500 as a penalty pursuant to the prescribed amount in subparagraph 18(b)(i) of the *Regulations*, despite the Applicant's fear of authority, confusion when confronted by the Border Officer, and assumption that his comments to security personnel at the Kelowna constituted a disclosure.

[30] One of the objectives of the *PCMLTFA* is to detect and deter money laundering and financing of terrorist activities by requiring the reporting of cross-border movements of currency (*PCMLTFA*, at 3(a)(ii)). The reporting requirement under section 12 is the cornerstone of the system established for monitoring cross-border movements (*Tourki*, at para 23).

[31] As well, strict liability attaches to those who fail to report (*Zeid v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 539 at para 55):

The reporting regime is a key tool to combat money laundering and the financing of terrorist activities. Lack of knowledge would not only be difficult to verify, but it could easily undermine the policy underlying the *PCMLTFA*. If the *PCMLTFA* is to be effective, severe sanctions must be visited upon all those who fail to report in accordance with section 12, irrespective of their circumstances.

[32] The penalty imposed on the Applicant was not "too harsh"; it was the minimum amount prescribed under the *Regulations*, and reasonable given the Applicant's clear contravention of

the *PCMLTFA* and knowingly-made false statements. The Minister's exercise of discretion was reasonable.

[33] For those reasons, it was open to the Delegate to reject the Applicant's request to lower the penalty, and to impose the prescribed penalty for making a false statement. While I have some sympathy for the Applicant concerning the amount of the penalty, it is not unreasonable.

[34] This application is dismissed.

JUDGMENT in T-348-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-348-17

STYLE OF CAUSE: PESTI V HMTQ ET AL

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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FOR THE RESPONDENTS