Date: 20090316

Docket: T-1117-08

Citation: 2009 FC 264

BETWEEN:

ZAKER AYOBIE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

GIBSON D. J.

Introduction

[1] There reasons follow the hearing at Toronto on the 11th of March, 2009 of an application for judicial review of a decision of a Minister's Delegate, pursuant to sections 27 and 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* [1](The "*Act*"). The substance of the decision, which was supported by reasons, is in the following terms:

> After considering all of the circumstances, I have decided, under the provisions of section 27 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, that there has been a contravention of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* or the Regulations with respect to the currency or monetary instruments which were seized.

[1] S.C.2000, c.17.

> Under the provisions of section 29 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, the seized currency shall be held as forfeit.

In sum, the decision under review confirmed the seizure of substantial funds from the Applicant that had taken place at Vancouver International Airport on the 2nd of September, 2007 and confirmed the forfeiture of those funds without reduction pursuant to the discretion granted by section 29 of the *Act*.

Background

[2] The Applicant was born and brought up in Afghanistan. He fled Afghanistan in 1993. He affirmed:

> My upbringing in Afghanistan where I was born was harsh to say the least. I was taught to be suspicious and careful of authority particularly Government Officials and local police. My country is very corrupt. My father lost his life savings when [his] money was "frozen" in a bank account which was then seized by Taliban authority when they came to power in Afghanistan. Therefore as a matter of necessity and to avoid losing everything when travelling we would often conceal valuables and money about ourselves and in our belongings. This was common practice and a hard habit to break. I continue to be suspicious of authority and banks despite having not lived in Afghanistan for nearly 14 years. I use banks but will never forget what happened to my father…

[3] The Applicant lived in Russia for approximately 2 years after leaving Afghanistan. He then moved on to Germany where he lived and worked for some 5 years. On leaving Germany, he claims to have left significant savings in the care of a former employer and respected member of the Afghan community in Germany.

[4] On leaving Germany in 2000, the Applicant travelled to New Zealand where he has lived and worked at all times relevant to this matter. He is a citizen of New Zealand and is married with at least one child.

[5] The Applicant has a brother and two sisters who live with their families in Canada. The Applicant claims that, at his request, his brother flew from Canada to Germany to collect the funds that the Applicant had left there. The Applicant further claims that his brother returned to Canada with those funds, without declaring them on re-entering Canada, and that, by the summer of 2007, those funds amounted to some 7000 Euros. The Applicant further claims that, additionally, by the summer of 2007, his brother was indebted to him in the amount of some $9000 in U. S. funds.

[6] In August of 2007, the Applicant travelled from New Zealand to Canada, carrying with him some $43,000 in U.S. funds which he did not declare on entering Canada. His declared purposes in coming to Canada were to research the possibility of buying a home and obtaining employment here, visiting his family members and obtaining the funds being held here for him by his brother together with the proceeds of his loan to his brother.

[7] The Applicant determined not to purchase a home in Canada.

[8] On the 2nd of September, 2007, the Applicant found himself at Vancouver International Airport on his way back to New Zealand via Hawaii. On being asked by American customs authorities whether he was carrying funds or monetary instruments to a value in excess of $10,000.00, the Applicant responded that he was not. He and his baggage were closely examined

by American and Canadian customs authorities. He was found to have secreted in his baggage and on his person monies amounting to some $70,000.00 Canadian. Canada customs seized the monies as forfeited.

The Legislative Scheme

[9] Section 3 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* sets out the object of the *Act*. It reads as follows:

Object of Act	Objet de la Loi
3. The object of this Act is	3. La présente loi a pour objet :
(*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 terrorist activity financing offences, including	*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 relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :
(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,	(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) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and	(ii) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,
(iii) establishing an agency that is responsible for dealing with reported and other information;	(iii) constituer un organisme chargé de l'examen de renseignements, notamment ceux portés à son attention en application du sous-alinéa (ii);
(*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	*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*) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.	*c*) d'aider le Canada à remplir ses engagements internationaux dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes.

[10] Section 12 of the *Act* provides that persons or entities, including persons such as the Applicant, shall report to a Customs Officer the importation or exportation of currencies or monetary instruments of a value equal to or greater than a prescribed amount which, at the 2nd of September, 2007, was $10,000.00. It was not in dispute before the Court that the Applicant contravened section 12 of the *Act*.

[11] Pursuant to subsection 18 (2) the Customs Official determined that there were reasonable grounds to suspect that the currency seized was proceeds of crime or funds for terrorist financing and thus, the seized currency remained forfeited.

[12] Section 25 of the *Act* provides for a review of the forfeiture by the Minister or his or her delegate where a request for a review is made within a specified delay period. Such a request was made by the Applicant within the time provided. That request led to the decision here under review.

The Issues

[13] In the Memorandum of Fact and Law filed on behalf of the Applicant in this matter, the issues are stated in the following terms:

19. What is the standard of review?
20. What is the appropriate test for confirming forfeiture?
21. What is the burden on the Applicant under this test?
22. Did the Minister fail to exercise his discretion to consider returning some or all of the money?

> 23. Was there a breach of natural justice because Mr. Ayobie does not speak English well and did not have an interpreter when the money was seized?

[14] The "natural justice" issue was not pursued before the Court.

[15] In the Memorandum of Fact and Law filed on behalf of the Respondent, the issues raised on behalf of the Applicant, leaving aside the "natural justice" issue, are summarized as follows:

> Was the decision of the Minister's Delegate to confirm the forfeiture of the currency seized from the Applicant reasonable?

Analysis

[16] In *Yang v. The Minister of Public Safety*[2], Justice Décary, writing for the majority and after noting that the appeal there before the Court was "…yet another appeal in recent months pertaining to the interpretation of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*…", wrote at paragraph 9 of his reasons:

> Very recently, this Court has held that the standard of review with respect to the exercise of the Ministerial discretion under section 29 of the Act was that of reasonableness…The Court also had the occasion, a few days ago, to examine the nature of a section 29 decision and the basis upon which the Minister exercises his discretion… [citations omitted]

[17] For the foregoing, Justice Décary cited, in addition to *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)*[3] and *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*[4].

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[2] 2008 F.C.A 281, September 23, 2008.

[3] 2008 F.C.A. 95, March 10, 2008.

[4] 2008 F.C.A. 255, September 9, 2008.

[18] Justice Décary then went on to quote paragraphs 25, 36 and 49, 51 of the Reasons of Justice Pelletier, for the Court, in *Sellathurai*. I repeat those paragraphs here:

> 25. The question of the standard of review of the Minister's decision under section 29 was settled by this Court in *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 95, 70 Admin. L.R. (4th) 214, at paragraph 4 (*Dag*), where it was held that the standard of review of the Minister's decision under section 29 was reasonableness. Consideration of the issue of the standard of review of the decision as to the standard of proof to be met by the applicant will, for reasons which will become apparent, be deferred to a later point in these reasons.
> …
>
> 36. It seems to me to follow from this that the effect of the customs officer's conclusion that he or she had reasonable grounds to suspect that the seized currency was proceeds of crime is spent once the breach of section 12 is confirmed by the Minister. The forfeiture is complete and the currency is property of the Crown. The only question remaining for determination under section 29 is whether the Minister will exercise his discretion to grant relief from forfeiture, either by returning the funds themselves or by returning the statutory penalty paid to secure the release of the funds.
> …
>
> 49. Where the Minister repeatedly asks for proof that the seized currency has a legitimate source, as he did in this case, it is a fair conclusion that he made his decision on the basis of the applicant's evidence on that issue. The underlying logic is unassailable. If the currency can be shown to have a legitimate source, then it cannot be proceeds of crime.
>
> 50. If, on the other hand, the Minister is not satisfied that the seized currency comes from a legitimate source, it does not mean that the funds are proceeds of crime. It simply means that the Minister has not been satisfied that they are not proceeds of crime. The distinction is important because it goes directly to the nature of the decision which the Minister is asked to make under section 29 which, as noted earlier in these reasons, is an application for relief from forfeiture. 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 in other ways, the obvious approach is to show that the funds come from a legitimate source. That is what the Minister requested in this case, and when Mr. Sellathurai was unable to satisfy him on the issue, the Minister was entitled to decline to exercise his discretion to grant relief from forfeiture.
>
> 51. This leads to the question which was argued at length before us. What standard of proof must the applicant meet in order to satisfy the Minister that the seized funds are not proceeds of crime? In my view, this question is resolved by the issue of standard of review. The Minister's decision under section 29 is reviewable on a standard of reasonableness. It follows that if the Minister's conclusion as to the legitimacy of the source of the funds is reasonable, having regard to the evidence in the record before him, then his decision is not reviewable. Similarly, if the Minister's conclusion is unreasonable, then the decision is reviewable and the Court should intervene. It 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.

[19] Justice Décary then concluded with respect to the issues that were before him, and that are all of the issues here before the Court, in the following terms:

> The Minister, quite properly, sought to obtain from the Appellant [here the Applicant] additional information respecting the legitimacy of the funds. He was not satisfied that any credible one had been presented. He came to the conclusion that the Appellant had "failed to provide any legitimate documentary evidence or information to demonstrate that the funds were legitimately obtained" and that "Reasonable suspicion still stands"….The Minister not having been satisfied, to use the words of Pelletier J.A. at para. 50, "that the seized funds are not proceeds of crime", it was reasonably open to him to confirm the forfeiture. [one citation omitted]

[20] Precisely the same must be said here.

[21] Justice Ryer, in Reasons concurring with the result arrived at by Justice Décary, added:

> I wish to add that, in my view, the Minister, in exercising his discretion under subsection 29 (1), was not required to consider the factors put forward by the appellant; namely:
>
> (a) whether confirming the forfeiture of the funds in issue would serve the public interest or the purposes of the *Act*;

(b) the likely reason that the individual contravened subsection 12 (1) of the Act;
(c) the impact of the confirmation of the forfeiture on the individual.

[22] Once again, precisely the same must be said here.

Conclusion

[23] For the foregoing very brief reasons, and particularly in light of the recent authorities from the Federal Court of Appeal, cited, this application for judicial review was dismissed by Order dated the 11th of March, 2009. In the exercise of my discretion, I provided no Order as to costs.

"Frederick E. Gibson"
Deputy Judge

Ottawa, Ontario
March 16, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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