

Federal Court



Cour fédérale

Date: 20120202

Docket: T-1896-10

Citation: 2012 FC 130

Ottawa, Ontario, February 2, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

DAVID ALAN CHAPLIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2008, while at the Vancouver International Airport on his way to Mexico, Mr. David Alan Chaplin failed to disclose to an officer with the Canadian Border Services Agency [CBSA] that he was carrying currency valued at more than \$10,000 contrary to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17. The officer seized the money,

finding there were reasonable grounds to believe that the money was derived from proceeds of crime.

[2] Mr. Chaplin asked for a Ministerial Review of the seizure. The Minister's delegate found that there had been a contravention of the Act and that the money should remain seized.

[3] Mr. Chaplin argues that the delegate's decision was unreasonable on the evidence, and was arrived at unfairly. He asks me to order that the seized currency be returned to him. In the alternative, he asks that the decision be remitted to another delegate for reconsideration.

[4] There are two issues:

1. Was the delegate's decision reasonable?
2. Did the delegate breach the duty of fairness?

[5] I can find no grounds for concluding that the delegate's decision was unreasonable or that Mr. Chaplin was treated unfairly. Accordingly, I must dismiss this application for judicial review.

II. Factual Background

[6] On December 10, 2008, CBSA officials stopped Mr. Chaplin while he was waiting to board a flight to Mexico. An officer asked him about the amount of currency he was carrying and explained the statutory reporting requirements to him. He stated that he did not need to make a report. The officer examined him and found that he was carrying \$8,000 (US) and \$2,580

(Canadian), the equivalent of about \$12,500 in Canadian dollars. Because Mr. Chaplin had not reported the money as required by s 12(1) of the Act (see Annex for statutory references), the officer seized it.

[7] The officer found that there were reasonable grounds to believe that the currency was the proceeds of crime because of the following factors:

- Mr. Chaplin made a false report, despite being given an opportunity to declare the currency;
- He was fidgety, nervous and refrained from eye contact;
- He made several contradictory statements about the origin of the funds (he said he was wealthy; that the money was from the bank; that he had kept it in a safe; and that it was from a friend);
- He was travelling across an international border with a large amount of money;
- He made contradictory statements about owning two companies (Denco's New Frontier Auction and Pro-One Motorcycles), stating first that he owned the businesses, then stating that he was an agent for them;
- He had no legitimate source of income and could not explain travelling beyond his means;
- He admitted to being a previous offender;
- The bills were not wrapped to banking standards; and
- His plane ticket was paid for in cash by a third party, possibly indicating an attempt to avoid law enforcement agencies.

[8] After he requested a Ministerial Review, the CBSA asked Mr. Chaplin to forward credible documentary proof to establish the origin of the funds. In a letter, Mr. Chaplin stated that the money was withdrawn from a Canadian bank by Mr. Paul Deneau, Mr. Chaplin's business partner and employer. Mr. Deneau then gave the cash to Mr. Chaplin for future use. Mr. Chaplin and Mr. Deneau carry on a business known as Denco's New Frontier Auction, and Mr. Chaplin states he is a silent partner and is paid in cash due to prior tax problems. The trip to Mexico was for a period of six months, and Mr. Chaplin planned to use the currency for his living expenses. He further stated that his plane ticket was purchased with a credit card and not cash, and that the RCMP had not laid any proceeds of crime charges in respect of the currency.

[9] The CBSA acknowledged Mr. Chaplin's representations and again asked him to provide documentary evidence to establish the legitimate origin of the currency.

[10] Mr. Chaplin made further written representations, including copies of bank statements showing withdrawals from TD Bank. Mr. Chaplin contended this money was the currency in his possession at the airport.

[11] In reply, the CBSA stated that the bank transactions did not provide a link to the currency that was seized. Furthermore, the transactions occurred up to 10 months before the seizure. Therefore, the evidence did not establish that the currency had a legitimate origin.

[12] Mr. Chaplin then restated his previous submissions and requested 30 days to provide additional information to the CBSA. He was advised that he had until March 19, 2010 to file additional information.

[13] On March 15, 2010, Mr. Chaplin submitted a sworn affidavit from Mr. Deneau describing their business relationship and financial arrangements. Mr. Deneau stated that he is the President of Denco's New Frontier Auction, which is an import/export business working in China, the US and Mexico; that Mr. Chaplin is his employee, whom he pays \$1,850 in cash per month; and that he would often give Mr. Chaplin money for business trips. In support of the affidavit were bank and Visa statements, CRA Notices of Assessment for Mr. Deneau for 2006 and 2007, and copies of company cheques indicating payments to Mr. Deneau.

[14] The CBSA replied to Mr. Chaplin on March 30, 2010, explaining that travelers must report currency and/or monetary instruments equivalent to \$10,000 or more. Lack of knowledge or intent is not considered a mitigating circumstance, as the onus is on the importer to be aware of the contents of his or her luggage and of the reporting requirements. Because Mr. Chaplin had stated that Mr. Deneau paid him for his services in cash (by writing a cheque from the business to himself, then cashing the cheque and paying Mr. Chaplin), the CBSA asked Mr. Chaplin to provide any documentary evidence showing his receipt of the money from Mr. Deneau.

[15] Mr. Chaplin replied on April 1, 2010, resubmitting the materials he had previously sent.

[16] A CBSA adjudicator found that the Act had been contravened, and that the currency should be held as forfeit (under sections 27 and 29). The Minister's delegate then reviewed the evidence and the adjudicator's recommendation and came to the same conclusion.

III. The Delegate's Decision

[17] The Ministerial delegate took account of Mr. Chaplin's assertion that he thought he was carrying less than \$10,000, but explained that travelers must report currency equivalent to \$10,000 or more to the CBSA. Mr. Chaplin had failed to report the currency he was carrying, and the delegate therefore concluded that he had contravened the Act.

[18] Although Mr. Chaplin had stated that he had earned the funds as part of his business partnership, he failed to submit evidence showing that the business had paid him a salary, dividends or other direct payments. Mr. Chaplin provided third-party cheques as evidence of the source of the currency; however, he had not provided any evidence that the third party named on the cheques had transferred the funds to him.

[19] Because Mr. Chaplin failed to provide satisfactory evidence to substantiate the legitimate origin of the currency, the delegate determined that the money could not be released and should be forfeited.

IV. Issue One – Was the Minister's decision reasonable?

[20] An officer who seizes currency based on reasonable grounds to believe that s 12(1) of the Act has been contravened must return the money upon the payment of a prescribed penalty unless “the officer has reasonable grounds to suspect that the currency or monetary instruments are proceeds of crime within the meaning of s 462.3(1) of the *Criminal Code* or funds for use in the financing of terrorist activities” (s 18(2)).

[21] Mr. Chaplin submits that the officer did not state at the time of seizure that he suspected the currency was the proceeds of crime or was for use in the financing of terrorist activities. He also maintains that the officer unreasonably relied on the following evidence:

- Mr. Chaplin voluntarily told the officer that he had problems with the CRA and had been deported from the US. The officer did not ask why Mr. Chaplin had been deported from the US. He could have been deported for any number of benign reasons.
- The officer stated that “checks were conducted and proved to be positive for a variety of offences”. The officer also reported that the “subject attested to being a previous offender”. Mr. Chaplin maintains that he did not make that statement. Rather, the officer had “tunnel vision” throughout the exchange with Mr. Chaplin. For example, the criminal records check was conducted before the officer sought any explanation from Mr. Chaplin.

- The officer stated that the “[s]ubject made several contradictory statements relating to the origin of the funds in his possession (funds acquired from being wealthy, bank, friend, safe)”. Mr. Chaplin submits that these statements are consistent, not contradictory. The currency came from a bank, through a friend, and was kept in Mr. Chaplin’s safe. Furthermore, Mr. Chaplin viewed himself as wealthy.
- The officer stated that the “[s]ubject made several contradictory statements relating to owning two companies before stating that he had been living underground based on money laundering charges”. Mr. Chaplin did not state that he was living underground “based on money laundering charges”. Further, he submits that it is implausible that he would tell an officer he was living underground for the very reason the officer was investigating him. In addition, Mr. Chaplin’s statement that he was an owner, and then that he was an agent, is consistent with his unofficial position as silent partner in the businesses.
- Mr. Chaplin submits that, given the mixture of US and Canadian currency, as well as the fact that the total amount (without considering the exchange rate) was only slightly over \$10,000, his error was an innocent mistake.
- The officer relied on Mr. Chaplin’s uneasy demeanour, but it is natural for a person under investigation to be nervous.

- The officer relied on the fact that the funds were not wrapped “in accordance with bank standards.” However, the officer was aware that the currency in Mr. Chaplin’s possession had been withdrawn from a bank by a third party, transferred to Mr. Chaplin, and intermingled with other funds received. He should not have expected those funds to have been wrapped in accordance with bank standards.
- Plane tickets are paid for in cash by a third party for many reasons, particularly where an employee is going on a business trip and the employer often deals in cash. The officer knew that this was Mr. Chaplin’s situation. In addition, Mr. Chaplin told the officer at the time of seizure that the ticket was purchased with a credit card, and raised this again through his counsel on July 29, 2009.

[22] Mr. Chaplin submits that, overall, the officer’s suspicions were unreasonable, and the officer was, therefore, bound to return the currency to him subject only to payment of the prescribed penalty.

[23] Mr. Chaplin concedes that he contravened the Act but argues that the Minister’s delegate had a duty to correct the officer’s errors and take corrective action. Since she failed to do so, her decision was unreasonable.

[24] The nature of a delegate’s decision was described by the Federal Court of Appeal in *Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255, at para 36:

[T]he 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.

[25] To persuade the delegate to exercise her discretion in his favour, the onus was on Mr. Chaplin to provide satisfactory evidence that the source of the currency was consistent with the explanation he provided. He did not do so. Accordingly, I cannot conclude that the delegate's decision not to exercise her discretion in his favour was unreasonable.

V. Issue Two – Did the delegate breach the duty of procedural fairness?

[26] Mr. Chaplin submits that the Minister's delegate did not consider the affidavit of Mr. Deneau as evidence of the source of the currency, which was an error in law. In the alternative, the delegate could reject the affidavit only if Mr. Deneau's credibility was impugned. Where credibility is at issue, an oral hearing is required: *Khan v University of Ottawa* (1997), 34 OR (3d) 535 (CA) [*Khan*]. Mr. Chaplin also maintains that the duty of fairness must be scrupulously protected in this context because he risks the stigma of being labelled as a possessor of proceeds of crime, something akin to being convicted of an offence.

[27] Mr. Chaplin submits that the Minister's delegate also ignored other evidence, which was a further breach of procedural fairness:

- In a letter dated July 29, 2009, Mr. Chaplin suggested that “the bank notes are very close to being sequentially numbered and would not be so if illegally obtained”.
- In the same letter, Mr. Chaplin advised that his plane ticket was purchased with a credit card, not cash.

[28] Mr. Chaplin is not charged with any criminal, quasi-criminal or regulatory offence. The fact that his conduct could give rise to a prosecution does not mean that the forfeiture procedure set out in the Act can be characterized as a penal proceeding. Still, the rules of fairness apply.

[29] With respect to the affidavit of Mr. Deneau, the CBSA adjudicator’s decision explicitly referred to it. The delegate stated in her decision that she had “reviewed the enforcement action, the evidence and the law as it applies to your case. I have fully considered the documentation you provided as well as the reports from the issuing office”. Later in her decision, she referred to the third party cheques that were attached as exhibits to Mr. Deneau’s affidavit. Clearly, the delegate relied on the adjudicator’s decision and had considered the affidavit.

[30] Further, the delegate was clearly aware of the July 29 letter. Although it might have been better if she had explicitly referred to it in her reasons, her failure to do so was not material to her decision.

[31] Regarding the plane ticket, the delegate explicitly referred to this issue in her decision. She clearly did not accept Mr. Chaplin’s assertion that the ticket had been purchased with a credit card.

In the absence of proof to substantiate that claim, the delegate was entitled to come to the contrary conclusion. The evidentiary burden was on Mr. Chaplin.

[32] I can see no grounds for Mr. Chaplin's claim to have been treated unfairly.

VI. Conclusion and Disposition

[33] The delegate's decision was transparent and intelligible, and represented a defensible outcome based on the facts and the statutory scheme set out in the Act. Her conclusion was not unreasonable; nor did she treat Mr. Chaplin unfairly in arriving at it. Accordingly, I must dismiss this application for judicial review, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed with costs.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17***Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, LC 2000, ch 17*****Reporting of Currency of Monetary Instruments**

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.

...

(3) Currency or monetary instruments shall be reported under subsection (1)

(a) in the case of currency or monetary instruments in the actual possession of a person arriving in or departing from Canada, or that form part of their baggage if they and their baggage are being carried on board the same conveyance, by that person or, in prescribed circumstances, by the person in charge of the conveyance;

Seizures

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.

(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

Déclaration des Espèces et Effets

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.

[...]

(3) Le déclarant est, selon le cas:

a) la personne ayant en sa possession effective ou parmi ses bagages les espèces ou effets se trouvant à bord du moyen de transport par lequel elle arrive au Canada ou quitte le pays ou la personne qui, dans les circonstances réglementaires, est responsable du moyen de transport;

Saisie

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) 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.

the *Criminal Code* or funds for use in the financing of terrorist activities.

Decision of the Minister

27. (1) Within 90 days after the expiry of the period referred to in subsection 26(2), the Minister shall decide whether subsection 12(1) was contravened.

(2) If charges are laid with respect to a money laundering offence or a terrorist activity financing offence in respect of the currency or monetary instruments seized, the Minister may defer making a decision but shall make it in any case no later than 30 days after the conclusion of all court proceedings in respect of those charges.

(3) The Minister shall, without delay after making a decision, serve on the person who requested it a written notice of the decision together with the reasons for it.

If there is a contravention

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,

(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;

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

(c) subject to any order made under section 33 or 34, confirm that the currency

Décision du ministre

27. (1) Dans les quatre-vingt-dix jours qui suivent l'expiration du délai mentionné au paragraphe 26(2), le ministre décide s'il y a eu contravention au paragraphe 12(1).

(2) Dans le cas où des poursuites pour infraction de recyclage des produits de la criminalité ou pour infraction de financement des activités terroristes ont été intentées relativement aux espèces ou effets saisis, le ministre peut reporter la décision, mais celle-ci doit être prise dans les trente jours suivant l'issue des poursuites.

(3) Le ministre signifie sans délai par écrit à la personne qui a fait la demande un avis de la décision, motifs à l'appui.

Cas de contravention

29. (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu'il fixe:

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) soit restituer tout ou partie de la pénalité versée en application du paragraphe 18(2);

c) soit confirmer la confiscation des espèces ou effets au profit de Sa Majesté

or monetary instruments are forfeited to Her Majesty in right of Canada.

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)*.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1896-10

STYLE OF CAUSE: DAVID ALAN CHAPLIN
v
MPSEP

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: November 15, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: February 2, 2012

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