

Date: 20070703

Docket: T-656-06

Citation: 2007 FC 691

OTTAWA, Ontario, July 3, 2007

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

AHMAD HAMAM

Applicant

and

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
As represented by the Canada Customs and Revenue Agency**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a delegate of the Minister of Public Safety and Emergency Preparedness (the Minister's Delegate) confirming the forfeiture of \$22,000.00 CAD and \$7400.00 US taken pursuant to the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*, S.C. 2000, c. 17, (the *Act*).

BACKGROUND

[2] On July 14, 2003, Ahmad Hamam, the applicant, was booked on a flight from Pearson International Airport in Toronto to London, England with a final destination of Beirut in Lebanon.

The applicant failed to declare \$22,000.00 CAD and \$7400.00 US (the Seized Currency) and a customs officer (the “Officer”) seized the currency pursuant to subsection 18(1) of the *Act* which provides that if an officer believes on reasonable grounds that a person has failed to report currency equal or above the prescribed amount then the currency may be seized as forfeit. Under subsection 18(2) of the *Act*, an officer must, on payment of a penalty in the prescribed amount, return the seized currency 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. In the present case, the Officer believed there were reasonable grounds to suspect that the currency was proceeds of crime and, consequently, the Seized Currency was not returned to the applicant.

[3] Subsections 18(1) and 18(2) of the *Act* provide:

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 who they were seized or to the lawful owner unless the officer has reasonable grounds to suspect that the currency or

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

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.

sens du paragraphe 462.3(1) du *Code criminel* ou de fonds destinés au financement des activités terroristes

[4] The applicant requested a review of the seizure pursuant to section 25 of the *Act*. Section 25 provides:

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

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

[5] Section 12(1) of the *Act* provides that:

Every person or entity referred to in subsection (3) shall report to an officer, in accordance with the regulations, the importation

Les personnes ou entités visées au paragraphe (3) sont tenues de déclarer à l'agent, conformément aux règlements,

or exportation of currency or monetary instruments of a value equal to or greater than the prescribed amount.	l'importation ou l'exportation des espèces ou effets d'une valeur égale ou supérieure au montant réglementaire.
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[6] Subsection 2(1) of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412, provides that the prescribed amount is \$10,000.

[7] Once a Minister's decision has been requested under section 25 of the *Act* then the *Act* requires that the person requesting the decision be given written notice of the circumstances of the seizure. It also provides that the person requesting the review may submit evidence. The applicant submitted evidence to prove that the Seized Currency was money given to him by family members in Canada to be given to their family members in Lebanon. He provided evidence to the effect that the money belonged to the following people in the following amounts:

The applicant:	\$600 USD
Nizar Hamam, the applicant's cousin:	\$3400 USD
Yehia Ghamloush, the applicant's cousin's friend:	\$3000 USD
Marwan Hamam, the applicant's cousin:	\$400 CAD
Ali Zayour, the applicant's uncle:	\$20,000 CAD
Ahmad Charif Hamam, the applicant's cousin:	\$2000 CAD

[8] The applicant submitted letters from all of the above persons confirming the amounts which they sent with the applicant and to whom they were sending the money to in Lebanon. In addition to

his letter, the applicant provided five credit card transaction slips that showed that he had taken cash disbursements totalling \$20,000 between June 27, 2003 and July 3, 2003. Ahmad Charif Hamam provided a bank document showing a withdrawal of \$2000 on July 15, 2003 with a handwritten note on top stating that the original transaction took place on July 12, 2003. Yehia Ghamloush provided a copy of a cheque for \$3500 that was made out to her on June 5, 2003.

[9] The Minister's Delegate considered this evidence in making the decision pursuant to section 29. Section 29 of the *Act* reads as follows:

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

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

(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.

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).

[10] In making the section 29 decision, the Minister's Delegate benefited from the recommendation of an adjudicator with the Adjudications Division of the Recourse Directorate of the Admissibility Branch of the Canada Border Services Agency (the "Adjudicator"). On March 17, 2004, the Adjudicator produced a report entitled "Case Synopsis and Reasons for Decision" which recommended that the Minister's Delegate decide that there has been a contravention of the *Act* in that the applicant has failed to report the Seized Currency and that the Seized Currency be held as forfeit under section 29 of the Act because there were reasonable grounds to suspect that the Seized Currency was proceeds of crime. The Adjudicator stated that she made an inference that the funds were criminally tainted based on the cumulative effect of the following factors:

- Mr. Hamam is unemployed
- Not a legitimate business practice to carry large sums of money
- Was unaware of exact amount of currency in his possession
- Statements made at the time of the enforcement actions differ from the allegations that appear in the appeal

- At the time of the enforcement action, Mr. Hamam was unable to identify the individuals who he claims entrusted him with the money
- The money was bundled in a suspicious manner
- No acceptable evidence submitted of explanation of the origin and transport of cash

[11] With respect to the evidence submitted by the applicant, the Adjudicator held that the transaction record submitted by Ahmad Cherif Hamam is dated after the seizure was affected. She also notes that Mr. Zayour, the applicant's uncle, suggests that the cash advances were obtained from a single credit card but the documents on file list at least four different VISA and MasterCard numbers and that the handwriting and pen appear to be the same in both documents originating from the Bank of Montreal yet are dated 3 days apart. She concluded that these factors, in conjunction with the high interest rate charged on credit card cash advances rather than loans, the multiple advances obtained from four different banks all located on the same street and seemingly spread out over 5 days cast serious doubts on the authenticity of the documents as well as on the allegations made.

[12] In a decision dated March 25, 2004, the Minister's Delegate accepted the Adjudicator's recommendation and confirmed the seizure pursuant to section 29 of the *Act*.

ISSUES

[13] The only issue in this case is whether the Minister erred in concluding that the Seized Currency was forfeit because there were reasonable grounds to suspect that the funds are the proceeds of crime.

ANALYSIS

Standard of review

[14] The applicable standard of review must be determined by a pragmatic and functional analysis. A number of recent cases of this Court have addressed the question of the appropriate standard of review for a decision of the Minister's delegate pursuant to section 29 of the Act. In several cases, the Court has applied the standard of reasonableness *simpliciter* (see *Dag v. Minister of Public Safety and Emergency Preparedness*, 2007 FC 427 and *Sellathurai v. Minister of Public Safety and Emergency Preparedness*, 2007 FC 208 (in that case Madam Justice Simpson noted that the standard for the question of the burden of proof faced by an applicant who wishes to dispel "reasonable grounds to suspect" must be reviewed on a different standard)).

[15] In other cases, the standard of patent unreasonableness has been applied (*Thérancé c. Ministre de la Sécurité publique*, 2007 CF 136, *Yusufov v. Minister of Public Safety and Emergency Preparedness*, 2007 FC 453 and *Ondre v. Attorney General and Minister of Public Safety and Emergency Preparedness*, 2007 FC 454).

[16] The Federal Court of Appeal in *Sketchley v. Attorney General*, 2005 FCA 404, emphasized that a pragmatic and functional analysis should be done anew in every case. The pragmatic and functional approach involves a consideration of four factors: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purpose of the legislation in question, as well as the purpose of the particular provision in question; and the nature of the question (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19).

[17] Section 24 of the *Act* is a strong privative clause and, consequently, this factor suggests a high degree of deference be afforded to the decision. It reads as follows:

<p>24. The forfeiture of currency or monetary instruments seized under this Part is final and is not subject to review or to be set aside or otherwise dealt with except to the extent and in the manner provided by sections 24.1 and 25.</p>	<p>24. La saisie-confiscation d'espèces ou d'effets effectuée en vertu de la présente partie est définitive et n'est susceptible de révision, de rejet ou de toute autre forme d'intervention que dans la mesure et selon les modalités prévues aux articles 24.1 et 25.</p>
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[18] The Minister's Delegate in the present case held the position of Manager of the Eastern Section of the Customs Appeal Directorate. Her decision was based on the recommendation of an adjudicator from the Adjudications Division of the Recourse Directorate of the Admissibility Branch of the Canada Border Services Agency. In her affidavit, the Adjudicator stated that between January 2003 and December 2005 there were 363 requests for ministerial reviews in cases where a

forfeiture penalty was imposed by the seizing officer and that 307 section 29 decisions were made. These numbers suggest that Minister's delegates have significant expertise in making section 29 decisions and that adjudicators have expertise in analyzing requests for ministerial decisions and making recommendations to section 29 decision makers.

[19] In *Sellathurai*, Madam Justice Simpson recognized that the Minister's delegates had significant expertise in making decisions under section 29 but held that this factor did not suggest a high degree of deference in that case because the Minister's delegate was not required to use any of the special expertise in reaching the decision. In *Ondre*, Madam Justice Snider held that this factor suggested deference because the Minister's delegate had relative expertise in that she was required to assess the strength or credibility of the evidence on both sides of the issue.

[20] In the present case, I find that the Minister's Delegate and the Adjudicator were required to use their expertise. For example, the Adjudicator was required to assess the authenticity of the bank documents provided by the applicant. Moreover, the Adjudicator's reasons indicate that she engaged her expertise with respect to common practices about exporting large sums of money. Therefore, I find that this factor suggests deference to the decision of the Minister's Delegate.

[21] The third factor is the purpose of the *Act*. Subsection 3(a) of the *Act* sets out the objectives of the Act, one of which is to implement specific measures to detect and deter money laundering and the financing of terrorist activities. The reporting scheme is one such specific measure. The respondent submits that in carrying out his duty under section 29 the Minister is not simply

establishing rights between parties but is engaged in a balancing of the interests of the person from whom the currency was seized with those of the Canadian public on whose behalf the Minister is ensuring that the cross-border currency reporting regime functions in a manner that protects society from the mischief of money laundering and terrorist financing. In *Seelathurai*, Simpson J. at paragraph 58 held that section 29 was not a polycentric provision as it does not require the Minister's delegate to balance competing interests but simply requires the Minister's delegate to confirm a forfeiture. I agree with Simpson J. and consequently this factor suggests that little deference be afforded to the decision.

[22] The final factor is the nature of the question. In *Seelathurai, Ondre and Yusufov*, the Court held that once the Minister applies the correct burden of proof that the analysis is entirely fact driven and thus is entitled to a high degree of deference.

[23] Weighing these factors I conclude that the applicable standard of review is the standard of patent unreasonableness.

Minister's delegate's decision

[24] The question before the Court is whether the Minister's Delegate's decision that there were reasonable grounds to suspect that the money was proceeds of crime is patently unreasonable. It is important to recall that the issue before the Court is not whether there are reasonable grounds to suspect that the person who failed to declare the currency has committed a crime but it is whether

there are reasonable grounds to suspect that the currency itself is proceeds of crime (*Tourki v. Minister of Public Safety and Emergency Preparedness*, 2006 FC 50 aff'd 2007 CAF 186).

[25] The Supreme Court of Canada in *R. v. Monney*, [1999] 1 S.C.R. 652, considered section 78 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd supp.), and held that “reasonable grounds to suspect” is a lesser but included standard in the threshold of “reasonable and probable to believe”. Simpson J. addressed what this lesser standard is in *Seelathurai* at paragraphs 70 and 71 and held that:

In my view, even reasonable grounds to suspect must involve more than a “mere” or subjective suspicion or a hunch. The suspicion must be supported by credible objective evidence.

[...]

If credible objective evidence is required to support a suspicion, the question becomes where does the lesser standard appear. To this point, both reasonable grounds to believe and suspect have been treated identically. In my view, the difference must appear in the characterization of the evidence. In *Mugasera*, *supra*, the Court said that “compelling” evidence was needed to support reason to believe. In my view, this is where the distinction is made. Evidence to support a suspicion need not be compelling, it must simply be credible and objective.

[26] According to the Narrative Report prepared by the Officer who seized the Seized Currency, the following evidence was before him:

- the applicant was currently unemployed and had not filed a tax return in two years and his last tax return was about \$70,000 for the applicant and his wife combined
- the applicant was in possession of three unendorsed bank drafts made out to someone unknown to him and given to him by someone unknown to him
- money was suspiciously bundled

- at the time of the enforcement action the applicant would not tell the officer who the money belonged to except to say that it belonged to 6 or 7 people

[27] In making her recommendation, the Adjudicator also considered the fact that it is not a legitimate business practice to carry large sums of money, as well as the fact that the applicant was unaware of the exact amount of currency in his possession.

[28] I am satisfied that this evidence is both objective and credible and can support reasonable grounds to suspect. In order to displace the suspicion raised by this evidence, the onus is on the applicant to adduce evidence which proves beyond a reasonable doubt that there are no reasonable grounds for suspicion (*Sellathurai* at paras. 72-73). The evidence brought forward by the applicant consisted of letters from five relatives claiming that some of the Seized Currency belonged to them, as well as some bank documents indicating that those persons withdrew the amounts they claimed to have given the applicant from their own accounts. The applicant did not explain why the Seized Currency was bundled in a suspicious manner, why he refused to tell the Officer whose money he was carrying, why he was carrying someone else's bank drafts, and how he had any money of his own if he was unemployed.

[29] In her recommendation, the Adjudicator reviewed the evidence submitted by the applicant and held that there was no acceptable evidence submitted of explanation of the origin and transport of the cash. She held that there were some factors relating to the evidence submitted by the applicant which cast serious doubt on the authenticity of the bank documents provided by the applicant. In

particular, she noted that the transaction record submitted by to Ahmad Charif Hamam is dated after the seizure was affected and the cash advance slips submitted by Ali Zayour were from at least four different credit cards although Mr. Zayour claimed they were from a single credit card. The Adjudicator also noted that the high rate of interest charged on credit card cash advances compared to loans makes it implausible that some would take that much money in cash advances.

[30] In *Sellathurai* at paragraph 44, Simpson J. held that it was appropriate for the adjudicator to focus on proof of the actual source of the forfeited currency and stated that “It was not enough to merely show through bank statements and bald statements in affidavits that the Applicant and his business associates had sufficient means to have provided the Forfeited Currency.”

[31] In the present case, the persons whom the applicant claims the money belongs to did not provide affidavits as to the source of the funds, but provided simple written statements. Moreover, only three of the six persons submitted bank documents to prove where they allegedly got the money from and the Adjudicator concluded that the documents from Ali Zayour and Ahmad Charif Hamam were suspect. The actual source of the Seized Currency was the focus of the Adjudicator’s reasons and I do not find her conclusion that the applicant had not adduced sufficient evidence to be patently unreasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

"Max M. Teitelbaum"

Deputy Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-656-06

STYLE OF CAUSE: AHMAD HAMAM
v.
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

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REASONS FOR : TEITELBAUM D.J.

DATED: July 3, 2007

APPEARANCES:

Robert Watt FOR THE APPLICANT

Maria Crowley FOR THE RESPONDENT

SOLICITORS OF RECORD:

HOHOTS & ASSOCIATES FOR THE APPLICANT
Barristers & Solicitors
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Ottawa, Ontario