Date: 20071019

Docket: T-1994-06

Citation: 2007 FC 1075

BETWEEN:

ANTONIO CIAVAGLIA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] On May 20, 2005, on his return to Canada from Venezuela, the applicant failed to declare the importation of currency equivalent to US$17,271.00, thereby contravening section 12 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 (hereinafter the Act).

[2] Pursuant to the Act a customs officer, considering he had reasonable grounds to suspect that the currency was the proceeds of crime, seized the currency not declared by the applicant as

forfeit without release. In a decision dated November 2, 2006 the respondent (the Minister) confirmed the forfeiture of the amounts. The applicant is now seeking judicial review of that decision pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[3] The legislative and regulatory framework applicable here was fully described by counsel for the respondent and is not really in dispute:

(A) The purposes of the Act are clearly set out in section 3 and, *inter alia*, require the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments. To achieve these objectives, Part 2 of the Act provides for a system of currency reporting by which an importer or exporter must report to a customs officer any importation or exportation of currency of a value equal to or greater than an amount prescribed by regulation.

(B) The currency reporting requirement is set out in subsections 12(1) and (3) of the Act and sections 2, 3 and 11 of the *Cross-border Movements of Currency and Monetary Instruments Regulations*, SOR/2002-412 (the Regulations). Those provisions require anyone importing or exporting currency or monetary instruments worth Can$10,000 or more to declare such importation or exportation to a customs officer forthwith. The report must be made in writing.

(C) If a person fails to comply with the reporting requirement, the unreported currency will then be subject to seizure as forfeit by an officer pursuant to subsection 18(1) if

the latter believes on reasonable grounds that subsection 12(1) of the Act has been contravened.

(D) Under subsection 18(2) of the Act, the officer must then decide whether he suspects on reasonable grounds that the unreported currency is the proceeds of crime or funds used to finance terrorist activities. If the officer concludes that he has such suspicions, the seized currency cannot be returned. If the officer concludes that there are no such suspicions, he will return the currency seized subject to a penalty in accordance with section 18 of the Regulations (between $250 and $5,000, as the case may be).

(E) Under section 23 of the Act, currency seized pursuant to subsection 18(1) of the Act will be forfeit to Her Majesty in right of Canada from the time of the contravention of subsection 12(1) of the Act. No act or proceeding after the forfeiture is necessary to effect the forfeiture.

(F) Under section 24 of the Act, the forfeiture of currency seized under Part 2 of the Act 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 25 to 30 of the Act.

(G) Section 25 of the Act allows the person from whom currency has been seized under section 18 (or its lawful owner), within 90 days after the date of the seizure, to request a decision of the Minister as to whether subsection 12(1) of the Act was contravened, by giving notice in writing to the officer who seized the currency or to an officer at the customs office closest to the place where the seizure took place.

(H) Under subsection 26(1) of the Act, the President of the Canada Border Services Agency shall without delay serve on the person who has made a request under section 25 notice of the circumstances of the seizure in respect of which the decision is requested. Under subsection 26(2) of the Act, that person has 30 days after the notice is served to furnish any evidence in the matter that they desire to furnish. Under section 27 of the Act, within 90 days after expiry of the period referred to in subsection 26(2), the Minister shall decide whether subsection 12(1) was contravened.

(I) If the Minister decides that the reporting requirement contained in subsection 12(1) of the Act was not contravened, the currency will be returned pursuant to section 28 of the Act.

(J) On the other hand, if the Minister decides that the reporting requirement was contravened, he must then make a second decision pursuant to section 29 of the Act as to the appropriate administrative penalty.

(K) This second decision by the Minister involves a review of the administrative penalty imposed by the officer, pursuant to subsection 18(2) of the Act (that is, forfeiture or penalty between $250 and $5,000). Section 29 of the Act requires the Minister to confirm the forfeiture of the currency seized or reduce the penalty, as for example by requiring payment of a penalty.

(L) Under section 30 of the Act, a person who makes a request under section 25 of the Act may, within 90 days after being notified of the Minister’s decision, appeal the

decision by way of an action in the Federal Court in which the person is the plaintiff and the Minister is the defendant.

(M) However, the Federal Court's jurisdiction under subsection 30(1) of the Act is limited to determining the validity of the decision made pursuant to subsection 27(1) in response to the application for review made pursuant to section 25, namely whether section 12 of the Act was contravened.

(N) Any person wishing to challenge the Minister's decision made pursuant to section 29 of the Act must proceed by an application for judicial review in accordance with section 18.1 of the *Federal Courts Act*. (See *Dokaj v. Minister of National Revenue*, 2005 FC 1437, [2005] F.C.J. No. 1783 (QL), *Tourki v. Minister of Public Safety and Emergency Preparedness*, 2006 FC 50, [2006] F.C.J. No. 52 (QL), and *Ha v. Minister of Public Safety and Emergency Preparedness*, 2006 FC 594, [2006] F.C.J. No. 1123 (QL)).

[4] Moreover, it is not in dispute that the standard of review applicable to a decision under section 29 of the Act is the patently unreasonable standard, as confirmed by the following pragmatic and functional analysis.

(A) Whereas section 24 of the Act provides for a right of appeal by action to the Federal Court from a decision made pursuant to section 27, it makes no provision for a right of appeal from a decision made pursuant to section 29. In my opinion, this shows that Parliament intended to give the Minister quasi-complete deference on the

review of appropriate administrative penalties for failure to comply with the requirement that currency imported or exported be reported.

(B) Administration of Part 2 of the Act has essentially devolved on institutions responsible for the administration of the *Customs Act* for several decades. In *Dokaj, supra*, this Court compared the appeal machinery contained in the Act with that set out in the *Customs Act* and concluded that those responsible for implementing the Act had developed special expertise, expertise which was applied in the case at bar, so that greater restraint should be exercised in reviewing the ministerial decision made pursuant to section 29 of the Act.

(C) In administering section 29 of the Act, the Minister must weigh the interests of a person from whom currency has been seized against the interests of the Canadian public. In my view, this factor does not indicate great restraint.

(D) In general, greater deference is shown to an administrative decision-maker on a question of fact. The question of whether the factual record before the Minister disclosed reasonable grounds to suspect that the unreported currency was the proceeds of crime is a mixed question of law and fact, although the facts assume decisive importance in the outcome of the decision. In my opinion, this factor requires a high degree of deference.

[5] Accordingly, analysis of the four factors mentioned requires that this Court show a decision by the Minister pursuant to section 29 of the Act the highest level of deference. I therefore

agree with counsel for the parties that unless the Minister has made a patently unreasonable error, this Court must refrain from intervening.

[6] It is worth setting out the following passage from the decision contained in the letter of November 2, 2006 from the Minister's delegate to the applicant, the decision which is the subject of the application for judicial review at bar:

> [TRANSLATION]
>
> You may be sure that all documentation was taken into account before a decision was made in this matter. This review was made on the basis of documents which you provided as well as the Agency's official reports.
>
> . . . . .
>
> You appealed the seizure and were asked to provide credible, reliable and independent evidence regarding the origin of the currency so as to remove the reasonable grounds for believing that it was the proceeds of crime. Your explanations as to the origin of the currency were not able to clarify the legitimate origin of the currency. You mentioned in your letter of June 27, 2005 that you reported $27,000 in currency when you entered Mexico; however, you failed to report the currency to the Canada Border Services Agency at the time of export from Canada and you then tried to prevent the detection of currency on your return to Canada by asking your companion to carry part of it.
>
> Finally, you did not disclose the actual amount of currency in your possession to the customs officer in the secondary examination. The e-mails which you provided as indication of an intention to purchase a condo in Venezuela are not acceptable as credible and verifiable evidence as to the origin of the currency. You submitted affidavits from persons who you said had given you the currency; however, this is contrary to the statement you made to the officer who made the seizure. You have made several inconsistent statements as to the source of the funds. You initially alleged that the funds were withdrawn from your personal account in a single operation; you then altered your statement to say that you withdrew the funds from a

> business account with your company X-Cargo. When you were asked to provide a transaction statement, you again altered your statement to indicate that you had withdrawn small amounts over an extended period. At no time in the secondary examination did you report receiving currency from other persons. At the same time no document, such as a financial transaction statement, was submitted in support of the truth of the affidavits.
>
> The reports of the agency which made the seizure clearly indicate that you initially stated you were travelling on business and that you altered the purpose of your trip when it was discovered that you were travelling with a companion who was in possession of currency which you had apparently given that individual to carry, according to the person's statement. I can only conclude that you did this in order to avoid the currency reporting requirements. It is even more strange that you alleged you were travelling on business and then altered the purpose of your trip to indicate that it was the purchase of a condo when it was found you were travelling with a companion. It is strange that if the currency was intended for a legitimate real estate transaction you tried to avoid reporting it and did not disclose the actual purpose of your trip to the customs officer (the purchase of a condo) before it was found that you were in fact not travelling alone. Further, it is strange that when this fact was brought to your attention you denied that the currency in the possession of your companion belonged to you.
>
> Additionally, it was noted that the officer who made the seizure discovered in your briefcase (which you did not want the officer to look at) financial transaction statements by electronic transfer to South America for your company (in your name) dated May 12, 2005, about a week before the seizure took place, which further supports the reasonable grounds for believing that the currency was the proceeds of crime. These transactions indicated that you were aware of these services: it is therefore strange for you to have carried such a large sum to a country such as Venezuela, where the risk of loss or theft is high, when for a real estate transaction you could have used a safer method through financial institutions.
>
> Nevertheless, the equivalent of US$7,000 which was in Mr. Garcia's possession at the time of the offence will be reimbursed . . .

[7] The applicant's arguments were essentially related to the assessment of facts made by the Minister's delegate. In such a matter, especially with regard to a decision made under section 29

of the Act, a person in the applicant's position must show that the decision is "clearly irrational" or "not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941). The burden of proof imposed on the applicant is a very heavy one. Tremblay-Lamer J. described it in her own way in *Tourki v. Minister of Public Safety and Emergency Preparedness*, 2007 FC 746, [2007] F.C.J. No. 995 (QL), at paragraph 28:

> In short, in order to challenge the Minister's decision to the effect that the seized currency is proceeds of crime, the applicant has the burden of proof and must adduce evidence beyond a reasonable doubt that there are no reasonable grounds to suspect that it is proceeds of crime.

[8] In the case at bar, the decision of the Minister's delegate seems to the Court to be based on significant evidence emerging from the record, in particular the statements and omissions of the applicant himself and reports by the Agency which seized the currency. The assessment made of the e-mails and affidavits filed by the applicant seems to the Court to be reasonable, in view of the many inconsistent statements made by the applicant as to the source of the funds. I do not see anything arbitrary in the decision at bar, which *prima facie* is fully supported.

[9] In the circumstances, it is not this Court's function to substitute its own assessment of the facts for that made by the administrative decision-maker. We are not concerned here with a criminal charge. It will suffice if the evidence before the Minister's delegate reasonably allows him or her to conclude that reasonable grounds exist to suspect that the currency seized is the proceeds of crime.

[10] As the applicant was unable to show in this regard that the decision at bar was patently unreasonable, this Court's intervention is not justified and the application for judicial review is dismissed with costs.

"Yvon Pinard"

Judge

Ottawa, Ontario
October 19, 2007

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Sylvain Downs	FOR THE APPLICANT
Jacques Mimar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sébastien, Downs, Astell, Lachance Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT