Date: 20071030

Docket: T-1852-06

Citation: 2007 FC 1117

Ottawa, Ontario, October 30, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HAIYAN LYEW

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant was travelling from Jamaica with Feiyan Chen (Chen) when both encountered problems under the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act* (the Act). Both have sought judicial review of a decision by the Minister's delegate under which the amount of money declared at the time of entry into Canada was returned ($15,000.00) and the

balance of the money then held was forfeited to the Crown. That decision is dated September 18, 2006. In Lyew's case she received the declared amount back from the Government. In Chen's case, she received back the declared amount plus three cheques of $20,000 (U.S.) each. The balance of the funds was then forfeited in each case.

The reasons in this judicial review apply to that of Feiyan Chen in T-1853-06.

II. FACTUAL BACKGROUND

[2] Ms. Lyew and Ms. Chen arrived at Toronto's Pearson International Airport on May 10, 2005 from Jamaica. Both are Jamaican citizens. The two ladies were processed through a primary inspection where they each declared that they were carrying $15,000.00 (Canadian). They were referred to secondary inspection.

[3] At the secondary inspection, the officer suspected that the two ladies were carrying more than the declared amounts. The currency produced was wrapped in separate envelopes with names on the front of each. The ladies were then taken to the currency counting room.

[4] There, the Applicant produced $15,000.00 (U.S.), $4,900.00 (Jamaican dollars) and $5,140.00 (Canadian). Chen also emptied her fanny pack and coat pockets which produced more currency. The Applicant was frisked and three currency bundles in black bags totalling $30,000.00 (U.S.) were discovered. Chen was frisked and more currency was found in her pant pockets as well

as from her bra, although no personal physical search had yet been conducted. Both ladies denied that they had any more currency with them.

[5] Following this inspection, officers conducted a “strip search” where a $28,000.00 (U.S.) bank draft payable to the Applicant was discovered in her bra. The total amount of currency found on the Applicant was $28,000.00 (U.S.) bank draft, $45,000 (U.S.) cash, $4,900.00 (Jamaican dollars) cash and $5,140.00 (Canadian) cash. This money was then seized by CBSA officials for forfeiture under ss. 12 and 18 of the Act. For ease of reference, the cash and negotiable or other instruments are referred to here as the “funds”.

[6] Lyew’s original explanation of the purpose of her visit to Canada was to visit a casino and to buy Asian groceries for her family.

[7] Later, through her first counsel, in asking for the return of her funds, Lyew denied any involvement in illegal activities and claimed that the funds was earned from her family’s wholesale and retail food business in Jamaica. The funds were to be deposited in Canada because she hoped to move here with her family. She claimed that she wanted to avoid the 5% service charge levied on bank drafts and that her failure to report was due to her paranoia arising from her ignorance of the Canadian system.

[8] Through her second counsel, counsel on this judicial review, Lyew submitted further materials to support her contention that the funds were not proceeds of crime. The documents

included evidence of family circumstance, business and financial information on the retail and wholesale business, banking information concerning the bank draft, account records and a statement from the Jamaican police that the Applicant did not appear in their criminal records.

[9] The Minister's delegate (Adjudicator), charged under ss. 25 and 29 of the Act with making decisions (a decision as to whether the currency reporting requirements had been contravened (s. 25) and what is to happen to the seized funds (s. 29)), rendered his decision that $15,000.00 (Canadian) would be returned to the Applicant with the balance being forfeited to the Crown.

[10] In the Adjudicator's opinion, because only $15,000.00 was declared and a substantial amount of excess funds was discovered after two denials of any additional funds, by virtue of ss. 12 and 18 of the Act, the funds were lawfully subject to seizure and forfeiture.

[11] The Adjudicator held that, pursuant to s. 18(2) of the Act, there were "reasonable grounds to suspect" that the seized funds were the proceeds of crime within the meaning of s. 462.3(1) of the *Criminal Code* (there was no suggestion that the funds would be used to finance terrorism).

[12] The following factors were said to be the basis for the "reasonable suspicion":

- it was not realistic to travel with the equivalent of $95,000.00 (Canadian) when there are more secure and safer means of transporting currency across international borders;
- it is not usual to store currency and monetary instruments in undergarments;

- the evidence did not show adequate funding since the running bank account balances were less than the funds transported and the business financial statements only showed a net profit of $58.000.00;
- there was insufficient evidence as to the source of the currency; and
- the currency originated in Jamaica, a place known to have substantial money laundering activity by organized crime and to be a major trans-shipment point for cocaine from South America to North America and Europe.

[13] The Adjudicator, having concluded that the seized funds, which included the declared amounts, were proceeds of crime, he went on to state that since $15,000.00 was declared, that amount would be returned to the Applicant and the balance would be forfeited to the Crown.

[14] It subsequently developed that the Government was somehow able to cash the bank draft of $28,000.00 (U.S.) which was payable to the Applicant. How this was accomplished is not known. Its importance is only in respect of the comparison with Chen who had three cheques payable to herself in the amount of $20,000.00 (U.S.) each returned to her along with the declared $15,000.00. The fact of cashing the bank draft is part of the basis of the claim of “reasonable apprehension of bias”.

III. ANALYSIS

[15] The Applicant raises two issues:

- whether the Respondent imposed the wrong evidentiary test of requiring the Applicant to establish "beyond a reasonable doubt" that the funds were not proceeds of crime; and
- whether the Respondent's conduct raises a reasonable apprehension of bias.

A. *Standard of Review*

[16] The Applicant does not address this issue whereas the Respondent argues that it is "patent unreasonableness" with respect to the decision to maintain the forfeiture of the funds. The standard of review depends on the question at issue in the context of a functional and pragmatic analysis.

[17] There are several recent decisions of this Court which have arrived at different conclusions regarding the standard of review in respect of forfeiture decisions. In *Thérancé c. Canada (Ministre de la Sécurité publique)*, 2007 CF 136, *Ondre v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 454, *Yusofov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 453 and *Hamam v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 691, the Court held the standard to be patent unreasonableness. However, in *Dag v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 427, and *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 208, the Court found the standard generally to be reasonableness *simpliciter*. The distinction in the cases turns on the facts and issues in each case and particularly whether the Adjudicator was using his/her expertise.

[18] With respect to any privative clauses in the Act, there are none in respect of a decision made under s. 29.

[19] Section 29 is predicated on a failure to report currency under s. 12(1). Section 29 gives the Minister the power to:

(a) return the funds seized after payment of a penalty;

(b) return the penalty paid; the funds seized having been released upon payment of the penalty under s. 18(2) unless there are grounds to support that the funds are proceeds of crime or to be used for terrorism; and

(c) confirm, subject to third party rights, that the funds are forfeited.

[20] Section 29 reads in full:

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,	29. (1) S'il décide qu'il y a eu contravention au paragraphe 12(1), le ministre peut, aux conditions qu'il fixe :
(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;	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) decide that any penalty or portion of any penalty that was paid under subsection 18(2) be remitted; or	b) soit restituer tout ou partie de la pénalité versée en application du paragraphe 18(2);
(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.	c) soit confirmer la confiscation des espèces ou 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).
(2) The total amount paid under paragraph (1)(a) shall, if the currency or monetary instruments were sold or otherwise disposed of under the Seized Property Management Act, not exceed the proceeds of the sale or disposition, if any, less any costs incurred by Her Majesty in respect of the currency or monetary instruments.	(2) En cas de vente ou autre forme d'aliénation des espèces ou effets en vertu de la Loi sur l'administration des biens saisis, le montant de la somme versée en vertu de l'alinéa (1)a) ne peut être supérieur au produit éventuel de la vente ou de l'aliénation, duquel sont soustraits les frais afférents exposés par Sa Majesté; à défaut de produit de l'aliénation, aucun paiement n'est effectué.

[21] By virtue of ss. 25 and 30, a party who wishes to contest the Minister's decision that there was a breach of the requirements of s. 12(1) must appeal that decision by way of an action. However, a challenge to a s. 29 decision to confirm forfeiture is subject to the usual procedure of

judicial review. There is no suggestion of the operation of a privative provision in respect of the judicial review. Therefore, there is no indication of greater deference to the Adjudicator.

[22] Sections 25 and 30 read:

25. 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.	25. 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.
30. (1) A person who requests a decision of the Minister under section 27 may, within 90 days after being notified of the 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.	30. (1) La personne qui a demandé que soit rendue une décision en vertu de l'article 27 peut, dans les quatre-vingt-dix jours suivant la communication de cette décision, en appeler par voie d'action à la Cour fédérale à titre de demandeur, le ministre étant le défendeur.
(2) The Federal Courts Act and the rules made under that Act that apply to ordinary actions apply to actions instituted under subsection (1) except as varied by special	(2) La Loi sur les Cours fédérales et les règles prises aux termes de cette loi applicables aux actions ordinaires s'appliquent aux actions intentées en vertu du

rules made in respect of such actions.	paragraphe (1), avec les adaptations nécessaires occasionnées par les règles propres à ces actions.
(3) The Minister of Public Works and Government Services shall give effect to the decision of the Court on being informed of it.	(3) Le ministre des Travaux publics et des Services gouvernementaux, dès qu'il en a été informé, prend les mesures nécessaires pour donner effet à la décision de la Cour.
(4) If the currency or monetary instruments were sold or otherwise disposed of under the Seized Property Management Act, the total amount that can be paid under subsection (3) shall not exceed the proceeds of the sale or disposition, if any, less any costs incurred by Her Majesty in respect of the currency or monetary instruments.	(4) En cas de vente ou autre forme d'aliénation des espèces ou effets en vertu de la Loi sur l'administration des biens saisis, le montant de la somme qui peut être versée en vertu du paragraphe (3) ne peut être supérieur au produit éventuel de la vente ou de l'aliénation, duquel sont soustraits les frais afférents exposés par Sa Majesté; à défaut de produit de l'aliénation, aucun paiement n'est effectué.

[23] Regarding expertise, the Adjudicator presumably has some training or experience in the area of international currency smuggling although this is not mandated. A large part of the evidence before the Adjudicator is written submissions and financial records. However, since the grounds are those of "reasonable suspicion" and the Adjudicator would have some greater experience than the Court, there is some, but no great, deference owed to determining the existence of "reasonable suspicion" but none in determining the meaning of "reasonable grounds to suspect".

[24] With respect to the nature of the question, the standard of proof is strictly a legal matter for which no deference is owed. The forfeiture decision itself as a whole is one of mixed fact and law to which some deference is owed.

[25] Lastly, as to the purpose of the legislation, it is not a polycentric social policy statute. More specifically, the issues raised are ones of the right of an individual in respect of seized property. There is nothing to suggest a high level of deference.

[26] Therefore, I would conclude that in respect of legal matters, more specifically the legal test or "standard of proof", it is a matter of law and must be decided on the basis of correctness. As to the overall conclusion of what the Minister may determine as to remedy, in this case it is a discretion founded upon an earlier conclusion that there were "reasonable grounds to suspect", it must be based on reasonableness. As to the constituent elements of that conclusion, where inferences are drawn from records, e.g. bank statements, these must be reasonable. Where the element is one requiring some knowledge/expertise (e.g. that Jamaica is a source of drugs and smuggling), that aspect is subject to deference at the patent unreasonableness level.

B. *Standard of Proof*

[27] In order for the Applicant to make out its case that the wrong test was applied - that of "beyond a reasonable doubt" - the Applicant firstly has to show that this was the test actually applied in the final decision of September 18, 2006.

[28] The Applicant relies on comments made by an earlier adjudicator written in respect of the various submissions and evidence filed. The comments are made in the context of the sufficiency of the filed materials to rebut the “reasonable grounds to suspect”. These comments were made in the course of the process leading to a decision which was made by a different adjudicator.

[29] The Applicant says that these comments on the standard of proof reflect the approach of the Minister, his department and therefore the Adjudicator, to this issue. Two specific comments are relied upon:

The first is in a letter by another official dated September 19, 2005:

> Having broken the law and failed to declare, one can’t regain currency seized as forfeit on a reasonable suspicion under the Act by simply telling a story that could be true - an innocent explanation as to the ultimate origin of the funds must be proven in sufficient detail and with enough credible, reliable and independent evidence to establish that no other reasonable explanation is possible. Otherwise, the reasonable doubts remain and the forfeiture stands.
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> Certified Tribunal Record, p. 213

The second, a letter dated February 14, 2006 from the same official:

> Where a reasonable suspicion exists that funds are proceeds of crime, reasonable suspicion will not be displaced unless an appellant establishes on reliable evidence something akin to proof beyond a reasonable doubt that funds do not have their origin in crime. Where there is a failure to report, the appellant must establish by reliable proof that the reasons for suspicion are groundless, namely that the suspicion of proceeds of crime is without reason. So long as any reasonable possibility remains that the funds may be proceeds of crime, the reasonable suspicion and the forfeiture remain in place.
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> Certified Tribunal Record, p. 284

[30] As indicated, these comments were made by an official who was handling the matter and who ultimately made a recommendation as to what should be done. In making the recommendation this official lists slightly different grounds forming the “reasonable suspicion” than are ultimately relied upon by the Adjudicator.

[31] However, in the decision under review, the Adjudicator makes no reference to the standard of proof or even hints that proof beyond a reasonable doubt is necessary to counter “reasonable grounds to suspect”. The Adjudicator simply outlined the factors (see para. 12 of these Reasons) upon which reasonable suspicion existed at the time of the seizure and concluded that on the basis of these factors, reasonable suspicion still exists and therefore the currency was to be forfeited.

[32] Therefore, I cannot find that the Adjudicator held the Applicant to the criminal standard of proof – indeed, the issue was never discussed in the final decision. The decisions of this Court which refer to something approximating the criminal standard do so as a form of legal shorthand to underscore from a practical perspective the nature of the proof necessary to overcome or displace “reasonable grounds to suspect”. The use of criminal law terminology may not always be helpful from a theoretical standpoint since there is no suggestion in the legislation that each element must be proven beyond a reasonable doubt. However, in practice, looking at the matter overall, removing all reasonable grounds to suspect may have the same effect.

[33] Therefore, the Applicant has not made out its assertion that an incorrect standard of proof was applied in this case.

C. *Reasonable Apprehension of Bias*

[34] The Applicant bases the claim of reasonable apprehension of bias on two facts. The first is that a bank draft in the amount of $28,000.00 (U.S.) payable to the Applicant was cashed by the Minister of Public Works and Government Services. The second is that this Applicant was treated differently from Chen who had, in addition to the $15,000.00 (Canadian), three cheques of $20,000.00 (U.S.) each returned to her which would have been immediately negotiable.

[35] With respect to the first fact, it is unusual (and somewhat questionable under the *Bills of Exchange Act*, R.S.C. 1985, c. B-4) to have a bank draft payable to a specific person cashed without any endorsement. However, there is no evidence to suggest that there was any bias toward the Applicant. It would appear to be, at worst, an administrative error.

[36] With respect to the second fact, it is problematic but not for the reasons suggested by the Applicant. The differential treatment is an issue because of its inconsistency with the decision to seize and forfeit the funds on the basis of reasonable grounds to suspect that they were the proceeds of crime.

[37] However, there is no basis for concluding that what was behind this differential treatment and contradictory actions was a reasonable apprehension of bias.

D. *Inconsistency/Contradiction*

[38] The problem posed by the Respondent's conduct is that having reasonable grounds to suspect that the Applicant and Chen attempted to bring into Canada proceeds of crime, the Respondent then released some of the same funds (sometimes referred to as "dirty money"). On the facts of this case there is no difference between the source and other circumstances related to the funds declared and the funds not declared. There is no basis to suggest that the declared funds were not proceeds of crime and the undeclared funds were. The Respondent never apparently turned his mind to this matter.

[39] It is evident that the overall purpose of the legislation is to prevent money laundering and terrorism financing to occur in Canada. The interpretation of the legislation must be consistent with this purpose in accordance with s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21.

[40] Section 12(1) of the Act requires every person importing (or exporting) currency or monetary instruments greater than $10,000.00 (Canadian) to report the amount. In this case, the Applicant and Chen reported $15,000.00 each. Section 12(1) requires reporting the full amount imported not just the amount in excess of the prescribed limitation, at that time $10,000.00 (Canadian).

[41] Under s. 18(1), where an officer believes on reasonable grounds that the reporting requirements of s. 12(1) have been contravened, he/she may seize as forfeit "the currency and

monetary instruments". The currency and monetary instruments refer to the funds imported – the full amount and all instruments including the declared amounts. This is what occurred here.

[42] Moreover, having seized the funds including the declared funds, the officer is to return those funds upon payment of a penalty 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 for use in the financing of terrorist activities".

[43] Pursuant to s. 22(2), the funds seized are to be, as was done in this case, sent to the Minister of Public Works and Government Services. Pursuant to s. 23, the funds seized are forfeited to the Crown from the moment of the contravention of the reporting requirements in s. 12(1). The person from whom the funds were seized then has a number of rights of redress from the seizure.

[44] Under s. 29, where the Minister decides that the reporting requirements are contravened, the Minister can either (a) impose a penalty and return all that was seized; (b) return the penalty or (c) confirm the forfeiture of the "currency or monetary instruments" to the Crown.

[45] In this case, following the steps set forth in the Act, the Respondent seized all of the funds brought in by the Applicant and Chen. The Adjudicator outlined cogent reasons why there were reasonable grounds to suspect that the funds were proceeds of crime. In so doing the Adjudicator drew no distinction between declared and undeclared funds.

[46] Despite this reasoning, the decision in respect of the Applicant was to return the $15,000.00 declared and with respect to Chen, return the $15,000.00 declared and three undeclared negotiable instruments worth $60,000.00 (U.S.). Given the Adjudicator's reasons, these actions are inconsistent with the scheme of the legislation and the suspicion held by the Adjudicator. Either the Adjudicator's reasons are unreasonable and only some of the funds were "dirty" or the remedy was unreasonable in returning "dirty" money. Even at the higher standard pf review, this aspect of the decision is patently unreasonable.

[47] The effect of the decision, particularly as regards to Chen, is to impose a penalty, the value of which is the difference between the undeclared funds and the $60,000.00 (U.S.) in negotiable instruments. However, there is no indication that the Adjudicator concluded that a penalty was the appropriate remedy, as it might be if the real issue was failure to report rather than importation of proceeds of crime.

[48] If the Minister concluded that only the undeclared funds were subject to forfeiture, then in that regard he was in error. It is more consistent with the purpose of the Act, the plain wording and use of the term "currency and monetary instruments" in the context in which it appears that the amounts declared and undeclared are subject to seizure and forfeiture. This interpretation is consistent with the Minister's actions.

[49] This is an unusual case. Something similar seems to have happened in *Sellathurai*, *supra*, However, in dealing with the issue of the return of declared funds, the Court commented:

> 79. However, the Respondent points out that, under section 28 of the Act, the Minister's Delegate was obliged to return the Declared Currency once he concluded that it had been reported. This was so whether or not he still had reasonable grounds to suspect that it was proceeds of crime. In light of this submission, I have concluded that the return of the Declared Currency does not undermine the Decision.

[50] With respect, s. 28 referred to above, refers to returning funds where the Minister decides that the s. 12(1) reporting requirements had not been contravened. In the present case before the Court, there is no issue that s. 12 has been contravened – the Applicant admits it.

[51] Even if there is a typographical error in paragraph 79 of *Sellathurai*, *supra*, and the reference should have been to section 29, that section only authorizes the return of funds upon payment of a penalty. There is no reference to the issue of a penalty in that decision. Therefore, s. 29 does not appear to be addressed in that case.

[52] The Court in *Sellathurai*, *supra*, accepted the assurance of the Minister's counsel that the Minister was content to return the declared funds. Counsel offered no explanation for the return of the declared funds or for the return of a part of the undeclared funds. Therefore, the Court was not called upon to address the type of situation which arose in this case.

IV. CONCLUSION

[53] Given this inconsistency or contradiction, the Minister's decision cannot stand. The judicial review is granted and the Adjudicator's decision is quashed.

[54] The matter is remitted to the Minister to be reviewed *de novo* by a different official. The Minister is not required to remit the balance of the seized funds until and unless the final determination of the new review of this matter makes it necessary.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted and the Adjudicator's decision is quashed. The matter is to be remitted to the Minister to be reviewed *de novo* by a different official. The Minister is not required to remit the balance of the seized funds until and unless the final determination of the new review of this matter so requires.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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