Federal Court  Cour fédérale

Date: 20110510

Docket: T-927-10

Citation: 2011 FC 526

Ottawa, Ontario, May 10, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

JOSEPH DOBROVOLNY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application for judicial review was filed by the Applicant, Mr. Dobrovolny, a self-represented litigant before the Court. Mr. Dobrovolny takes issue with the actions of an agent of the Canadian Border Services Agency (CBSA), as a result of which the Applicant was fined $250 for carrying and not declaring currency of a value above $10,000. This is in contravention of section 12(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Act). The Applicant requested a review of the decision to the Minister (the "adjudicator") applying section 12 of the Act and the fine imposed and upon Ministerial review, the contravention of section 12 was

maintained and the adjudicator declined to exercise his decision to remit the $250.00 penalty. This decision was made under section 27 of the Act. The applicant, as it is seen within the present application, served and filed an application for judicial review of the decision to maintain the $250.00 fine. No action was filed to appeal the section 27 decision, as required by section 30 of the Act.

I. THE FACTS OF THE CASE

[2] As many travelers often are, Mr. Dobrovolny's time was constrained prior to his departure on a flight to Vienna and then Russia on March 31, 2009. Upon rushing to the departure gate, he was stopped by a CBSA agent in order for the habitual verifications to take place. The Applicant was asked whether he was carrying currency above the amount of $10,000. His response was "do I look like I have $10,000.00?" A small portion of these funds ($180) was found to be owed to a friend and was indeed in a separate folder. The Applicant, with the CBSA officer, went over his belongings and his behaviour was not reproached by CBSA. A considerable portion of the funds was in Euros (6,000€). The balance was in American dollars (USD). Conversion was required to establish the total amount in Canadian dollars.

[3] The Applicant's recounting of the story and the agent's vary as to how the verifications and inquiries took place. It is clear that the Applicant had no intention to hide the amount and he said that he did not know the law. The Applicant did not fill out the required form for him to declare the currency he was travelling with since he did not know about it. Whether he was given the opportunity to do so is also contested.

[4] Based on the cash rates of the Bank of Canada for that day, the Applicant was carrying $10,207.33 in currency. The initial calculations had established that the Applicant was carrying $10,546.25 in Euros and American dollars.

[5] The Applicant was fined $250, the lowest amount provided by the Regulations. The Applicant paid the amount and boarded his flight. He then contested the measures taken by CBSA in accordance with section 25 of the Act.

[6] After lengthy correspondence with CBSA, a decision was rendered by an adjudicator whereby the penalty was upheld, as the Applicant was confirmed to be in possession of over $10,000. The foundation of the contravention itself was upheld under section 27 of the Act. The penalty was confirmed under section 29 of the Act.

II. THE APPLICABLE LAW

[7] Travelling with an excess amount of $10,000 is not forbidden by Canadian law. Rather, a person or "entity" travelling with over $10,000 in currency must declare it to CBSA in the manner prescribed by the applicable regulations (section 12 of the Act). The $10,000 limit is provided by section 2 of the *Cross-border Currency and Monetary Instruments Reporting Regulations*, SOR/2002-412.

[8] Whether the money belongs to the traveller or not is not a factor to be considered, as "possession" of the funds is the applicable standard to which all travellers are held to (subsection 12(3)(a) of the Act). The obligation is upon the traveller to declare the excess funds in his or her

possession, as seen from section 11 of the *Cross-border Currency and Monetary Instruments Reporting Regulations*:

11. A report with respect to currency or monetary instruments transported by a person departing from Canada shall be submitted without delay by the person at the customs office located at the place of exportation or, if it is not open for business at the time of exportation, at the nearest customs office that is open for business at that time.	11. La déclaration relative à des espèces ou effets transportés par une personne quittant le Canada doit être présentée sans délai par cette personne au bureau de douane situé au lieu de l'exportation ou, si ce bureau est fermé au moment de l'exportation, au bureau de douane le plus proche qui est ouvert.

[9] Whether the amount of currency is above $10,000 is established by the official conversion rate established by the Bank of Canada, as it is on the date of the "exportation" of the currency. If no rate is established, the rate normally used during the course of business day can be used (subsection 2(2) of the *Cross-border Currency and Monetary Instruments Reporting Regulations*). Official rates are established for the Euro and the United States dollar.

III. THE POSITION OF THE PARTIES

[10] The Applicant's main ground for review was that he was unaware of the fact that he was travelling with an amount above $10,000. He has argued that he was unaware he was in possession of a portion of the funds ($180). The Applicant contends not being knowledgeable of the applicable law in regards to exporting currency. Mr. Dobrovolny also argues that he was never given the opportunity to fill out the currency reporting form, something which would have absolved him of any responsibility. The Applicant also questions the use of the Bank of Canada conversion rates. He

adds that it should be the cash rate rather than the nominal one. In this case, whichever conversion rates used does not change the fact that the final calculations show that it was above $10,000. More generally, the Applicant takes issue with the fact that these events have led to him being checked automatically at any border crossing. If given the opportunity, the Applicant contends he would have filled out the requisite form.

[11] The Respondent's first argument goes to the jurisdiction of the Court in the present application. The Applicant filed an application for judicial review of the decision. The Act provides for two (2) different "reviews" of the decision: 1) the section 27(1) decision itself is to be appealed by way of an action before the Court (section 30 of the Act); and 2) the section 29 penalty decision is to be reviewed by way of a judicial review application.

[12] In this light, the Respondent argues that, as this application proceeded as an application for judicial review, the Court should only assess the reasonableness of the levied penalty, and has no jurisdiction to assess the decision made under section 12(1) of the Act. In this respect, the penalty assessed is the lowest one under section 18 of the *Cross-border Currency and Monetary Instruments Reporting Regulations*. The assessment of the penalty is discretionary under section 29(1) of the Act (*Sellathurai v Canada (Minister of Public Safety and Emergency Preparedness*, 2008 FCA 255). The Respondent argues that the discretion was exercised reasonably and that there are no grounds for review.

IV. THE JURISDICTIONAL ISSUE AND THE RELIEF SOUGHT

[13] There are differences between the recourses underlying sections 27 and 29 of the Act. These distinctions are certainly confusing for a self-litigant and some may say that the Act itself does not facilitate the appeal on review process. It is basically not user-friendly. While technical, even "legalese" in appearance, the differences are actually essential to the exercise of the Court's powers, and in terms of what remedies are available to the reviewing Court.

[14] To contest a sanction itself taken under section 27, an Applicant institutes a proceeding under section 30, which reads as follows:

Appeal to Federal Court 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.	*Cour fédérale* 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.
Ordinary action (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 rules made in respect of such actions.	*Action ordinaire* (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 paragraphe (1), avec les adaptations nécessaires occasionnées par les règles propres à ces actions.
Delivery after final order (3) The Minister of Public Works and Government Services shall give effect to the decision of the Court on being informed of it.	*Restitution au requérant* (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.
Limit on amount paid (4) If the currency or monetary instruments were sold or otherwise disposed of under the Seized	*Limitation du montant versé* (4) En cas de vente ou autre forme d'aliénation des espèces ou effets en vertu de la Loi sur

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.	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.

[15] A close reading of the Applicant's Record and submissions and having heard his oral submissions, it is evident that the Applicant takes issue with the section 27(1) of the Act decision which determines that there has been a contravention of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. However, the proper procedural way to approach such a decision is by way of action. The Plaintiff has initiated a judicial review proceeding.

[16] Upon receiving the Notice of Application, counsel for the Respondent explained the situation clearly in a lengthy letter to the Applicant dated June 21, 2010. Except for amending his notice of application for other reasons, the Applicant kept his procedural vehicle and did not issue an action.

[17] The jurisprudence of this Court is explicit, a section 27 and 29 decision are discrete decisions, the penalty decision (section 29) being the only one that can be reviewed by way of an application for judicial review. In *Zeid v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2008 FC 539, Justice De Montigny made this distinction clearly at paragraphs 35 and 36:

> 35. Section 30 of the *PCMLTFA* allows the person who requested a decision of the Minister pursuant to section 25 to appeal that decision by way of an action in the Federal Court.

> 36. The scope of a statutory appeal brought pursuant to section 30 of the *PCMLTFA* is, however, limited to a review of the Section 27 Decision with respect to whether subsection 12(1) of the *PCMLTFA* was contravened. A person who wishes to challenge a Section 29 Decision must do so by means of a judicial review application pursuant to section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: see *Tourki v. Canada* (*Minister of Public Safety & Emergency Preparedness*), 2007 FCA 186 (F.C.A.) at para. 18; aff'g 2006 FC 50 (F.C.) at para. 38.

[18] In *Dokaj v Canada* (*Minister of National Revenue*) 2005 FC 1437 at paragraph 37, Madam Justice Layden-Stevenson (as she then was) reviewed the procedural aspects of the Act and concluded that there was no ambiguity:

> 37. There is no ambiguity in the language. The Act authorizes an appeal in relation to a decision of the Minister under section 25. Section 25 relates to a decision as to whether subsection 12(1) was contravened (the provision that imposes the obligation to report). It necessarily follows that the references to "a decision" and "the decision" in subsection 30(1) refer to the Minister's determination under section 27 of the Act. In my view, it cannot reasonably be construed in any other way. Consequently, the Federal Court's jurisdiction, pursuant to section 30 of the Act, is limited to reviewing the decision under section 27 of the Act. That decision is with respect to whether or not there was a contravention of the Act under subsection 12(1).

[19] Therefore, the 27(1) section decision is not under appeal. Only the section 29 penalty decision of $250 is under review through the Application for Judicial Review.

V. THE STANDARD OF REVIEW

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

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

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.

Limit on amount paid

(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.

2000, c. 17, s. 29; 2006, c. 12, s. 15.

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 du chef du Canada, sous réserve de toute ordonnance rendue en application des articles 33 ou 34.

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*).

Limitation du montant versé

(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.

2000, ch. 17, art. 29; 2006, ch. 12, art. 15.

[21] To decide on such matters, the Minister must exercise its jurisdiction in such a way as to reflect the objects of the statute. As the jurisprudence has recognized, it must disclose that the exercise was done in good faith while respecting the principles of natural justice and dealing with pertinent matters in line with the objectives of the statutes:

> The nature of the discretion to be exercised by the Minister under section 29 is whether to relieve an applicant, whose breach of section he has just confirmed, from the consequences of that breach. The Minister's discretion must be exercised within the framework of the Act and the objectives which Parliament sought to achieve by that legislation. Within that framework, there may be various approaches to the exercise of the Minister's discretion but so long as the discretion is exercised reasonably, the Courts will not interfere (See *Sellathurai v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2008 FCA 255, para. 53 and also *Dag v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2008 FCA 95 at para 4)

[22] How was the discretion exercised by the Minister?

[23] As a reminder, the Applicant was travelling through the Toronto Pearson International Airport, en route to Russia. Near the gate area, the Applicant met a CBSA officer who asked him whether or not he was travelling with money in excess of $10,000. As seen earlier, it is not illegal to travel with over $10,000 in currency, however, having such an amount must be declared. The Applicant responded: "Do I look like I have $10,000?".

[24] In collaboration with the Applicant, the CBSA officer proceeded to search the luggage and wallet of the Applicant and found that he was travelling with 6,030€, 173$ in American currency and $350 in Canadian money. Applying the Bank of Canada rates for conversion purposes, (6,030€ @ 1,6548 = 9,978.44$, 173 USD @ 1,2602 = 218.01, plus the 350$). It was determined that the

Applicant was travelling with approximately $10,546.25. Through correspondence with CBSA, it was established after the fact that even if the more favourable “cash rates” used by the Bank of Canada were employed, the Applicant was still over 10,000$ (6,030€ @ 1,60 = 9,648$, 173 USD @ 1,21 = 209.33, plus the 350$, for a total of 10,207.33).

[25] In accordance with section 12(1) of the Act, a person travelling with $10,000 and more who does not declare it, a penalty must be imposed. The CBSA officer does not have any discretion (see section 18 of the *Cross-border Currency and Monetary Investments Reporting Regulations*).

[26] Having heard the explanation given by the Applicant (that he did not think that the cash he was travelling with was $10,000 and more and that he had forgotten that he had $189 in Canadian currency), the CBSA officer believed the Applicant and came to the conclusion that he did not have an intent to conceal the money and was honest when explaining the facts surrounding the currency. Therefore, the money was given back and the minimal penalty was imposed in accordance with section 18 of the *Cross-border Currency and Monetary Investments Reporting Regulations*.

[27] This $250 penalty is applied to situations where a person has not concealed the money, has made full disclosure of the facts on its discovery and has no prior seizures under the Act.

[28] The Applicant having applied for Ministerial Review was told by letter dated April 30, 2010, signed by an adjudicator that the findings of the CBSA officer were upheld pursuant to section 27(1) of the Act and declined to cancel the $250 penalty pursuant to section 29(1) of the Act. This last decision is being judicially reviewed.

[29] The Tribunal's record reveals that the Applicant fully explained his reasons, had an exchange of correspondence that shows he was given full opportunity to be heard. It also shows that the adjudicator did consider the Applicant's story, but at the end decided to maintain the initial decision and the minimal penalty. This decision was reasonable.

[30] Having heard orally the Applicant, the Court dialogued with him and explained that his submission that he did not know the law that requires a declaration for anybody travelling with $10,000 and more was not acceptable. It was also clearly mentioned that he had said to the CBSA that: "Do I look like somebody having $10,000?" as per his written admission and that the search resulted in the Applicant being found with more than 10,000$. This was in contravention of the Act. The applicant argued that the Bank of Canada conversion rates were unknown to him and that there should be a sign indicating such rates. This argument does not erase the fact that after conversions, even using the more favourable rates, he was leaving the country with more than $10,000 which is against the Act.

[31] In addition, the Applicant views the situation as labelling him as a terrorist or a criminal and that as his recent travelling experiences show, he was sidetracked by CBSA officers because of these past events.

[32] In response to this, the Court notes that as the imposition of the lesser penalty and the remittance of the money show he was not concealing the money and the explanation given by him

as to the purposes of the currency were satisfying. The Applicant should not draw from this sad experience that he is labelled a terrorist or a criminal.

[33] In addition as *obiter* to these reasons, the Court wishes that the future travels of the Applicant should not automatically trigger CBSA to treat him differently than from the general public travelling. After all, the events have shown that on the part of the Applicant, there was no intent to conceal the money nor were there any hidden motives for such behaviour. Having paid the minimal penalty, the Applicant has paid his dues for this unfortunate event.

[34] The Respondent is not seeking costs therefore none will be granted.

JUDGMENT

THE COURT ORDERS AND ADJUGES that:

- The judicial review of the decision to impose a penalty of $250 is dismissed without costs.

"Simon Noël"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-927-10
STYLE OF CAUSE:	JOSEPH DOBROVOLNY V THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	May 3, 2011
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